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Comité Maritime International (CMI)  
38th International Conference: Vancouver, May/June 2004

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## EDITORIAL

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### Comité Maritime International (CMI) 38th International Conference: Vancouver, May/June 2004

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*'The sea with its winds, its storms and its dangers never changes and this demands a necessary uniformity of juridical regimes'*

Thus, Juris Mancini during the course of a lecture at the University of Turin in 1860. Today, we might say that in the world of maritime trade those involved need a level playing field if commerce is to thrive.

Since its foundation in 1897, the CMI has striven to fulfil its founders' ambitions '... to contribute by all appropriate means and activities to the unification of maritime law in all its aspects'.

An organisation which has produced the Hague and Hague-Visby Rules, three conventions on the limitation of liability for maritime claims, conventions on collision, salvage and arrest, not to mention a convention governing the carriage of passengers and their luggage by sea and numerous editions of the York-Antwerp Rules on General Average has much to be proud of. However, there is no room for complacency and there remain areas of maritime and maritime/commercial law which would benefit from harmonisation. With all the projects set up to address these areas there must be painstaking groundwork before the drafting process begins.

During my seven years as President of the CMI (a post I relinquish in June this year), the organisation has been active on a number of projects and this is reflected in the programme for our 38th International Conference which is due to take place between May 31 and June 4 in Vancouver. (Information regarding the Conference can be found on the Conference website at [www.cmi2004.org](http://www.cmi2004.org) – as of the end of March no less than 250 delegates have already registered for the Conference.)

Undoubtedly, the most ambitious project involves development of a new transport law instrument designed to replace (and extend the scope of) the Hague and Hague-Visby Rules relating to the carriage of goods by sea. The CMI produced its first draft transport law instrument in December 2001. This document was submitted to UNCITRAL and there have now been five sessions of the UNCITRAL International Working Group. In the summer of 2003 a revised draft instrument was produced and since then discussions have continued within UNCITRAL and the CMI on the difficult issues which the work to date has revealed.

This refining process will continue as the CMI devotes two days of its Vancouver Conference to further discussions on these vital issues.

Conference sessions will also be devoted to a revision of the York-Antwerp Rules on General Average. We will also be considering the problem of finding places of refuge for ships in distress. This is essentially a practical problem although the legal aspects are important and complex and consideration will be given to establishing some sort of international legal framework.

There will be a session looking at pollution of the marine environment with particular reference to the possible revision of CLC/Fund Conventions currently being undertaken by an Inter-sessional Working Group of the IOPC Funds.

With maritime security being a hot topic, two sessions will be devoted to the ISPS Code, the revised draft SUA Convention and the jurisdictional problems created by criminal acts committed on the high seas. The Conference will also see the culmination of the work of the CMI International Working Group on a modern approach to marine insurance.

We can look forward to a serious level of discussion and I anticipate that all the projects on which the CMI is currently engaged will make satisfactory progress.

On 4 June, I shall hand over the Presidential responsibilities to my successor with a certain degree of regret but satisfied that the CMI still has an important role to play in work towards harmonisation of international maritime law and in the knowledge that the team which I have led for the past seven years will continue the good work.

*Patrick Griggs*  
*President, Comité Maritime International*

# DIGEST OF CONTEMPORARY DEVELOPMENTS

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## CONTRACT

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*Normans Bay Ltd (formerly Illingworth Morris Ltd) v Coudert Brothers (a firm)* [2004] EWCA Civ 215, English Court of Appeal

### **Legal representation – breach of contract – damages for loss of chance**

ILM was legally represented by Coudert Bros in its dealings to acquire an investment in a Russian firm. Its tender offering was declared invalid by a Russian court because it related to a five-year investment period when a maximum three-year period had been decreed by the government. IML sued Coudert Bros for breach of contract and/or tort and claimed damages for loss of chance. The claim succeeded at first instance with the trial judge assessing the chance at 70 per cent. On appeal the assessment of the chance was reduced to 40 per cent.

Loss of chance is an established head of damages (*Hotson v East Berkshire Health Authority* [1987] AC 750; *Gregory v Scott* (*The Times*, 4 November 2002)) and a case based on the negligence of solicitors could result in damages being assessed on the basis of loss of chance (see *Allied Maples Group Ltd v Simmons & Simmons (a Firm)* [1995] 1 WLR 1602, 1609). On the facts of the case the negligence of the solicitors had clearly resulted in the loss of chance. In relation to the precise value of the chance Coudert Bros argued on appeal that the chance failed for a reason not pleaded in the case, namely its failure to seek anti-monopoly permission, which represented a negligent omission, and this broke the chain of causation. The Court of Appeal rejected the argument on the ground of public policy that a person is not allowed to benefit from his own wrong. Damages flowed from the first act of negligence and Coudert Bros were not permitted to rely on the second act of negligence to reduce those damages (cf *Bolitho v City and Hackney Health Authority* [1998] AC 232, 240, per Lord Browne-Wilkinson). It could not be said that the principle worked unfairly in the present case.

The appeal succeeded but only to the extent that the value of the chance was reduced, as already indicated.

## DEMISE CHARTERPARTY

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*Vitesse Yacht Charters SL and others v Spiers and another (The Deverne II)* [2003] EWHC 2426 (Admlty); [2004] 1 Lloyd's Rep 179

### **Demise charter – lessees entering into period charter with defendants – lessees obliged to ensure against all customary risks – claim by owners and lessees for loss of use**

The *Deverne II*, a Sunseeker Camargue 44 Motor Yacht 2000, was demise chartered for one year to Vitesse by her owners, on terms which contemplated that the vessel would be sub-leased and that the rental payable to the owners would be 80 per cent of the gross income obtained by Vitesse. The vessel was sub-leased by Vitesse for the period from 30 June to 6 July 2001 to A and B.

The agreement had been entered into by A over the telephone and subsequently B signed the charter form. Both were held to be parties to the charter. The rental was £4,000, inclusive of the vessel's jet ski, and a security deposit of £2,500 was taken by credit card. The reverse side of the form contained the 'Terms and Conditions'. Clause 7 required the charterer to be competent to handle the yacht in a safe and competent manner, otherwise the services of a professional captain were obligatory. A satisfied this condition. Clause 14 related to insurance and charterer's liability. Under its provisions Vitesse was required to insure the yacht

against 'all customary risks'. It was accepted that this alluded to insurance against physical damage to the yacht. Under normal circumstances the charterer was only liable for repair costs up to the limit of the deductible in the policy, but might be liable to a greater amount if the charterer or any guest acted in a manner so as to void or limit the cover under the policy. The charterer was required to carry independent insurance for personal effects, medical and accident expenses.

During the charter period the vessel grounded outside the well-buoyed entrance channel to the harbour of Port Mahon, Menorca, and sustained extensive damage. At the time B, not a competent person, was at the helm and A was not on board but riding on the vessel's jet ski. Prior to the trial A and B admitted negligence. Repairs to the vessel took until about 19 October 2001.

The cost of the repairs was met by the vessel's insurers and the security deposit. The owners and Vitesse claimed further for the loss of use of the vessel during the period of repairs, a sum agreed at £52,500. There was no obligation to insure against consequential losses under the charter, and the court rejected the argument of A and B that Vitesse had represented at the time of concluding the charter that the vessel would be 'fully insured' and that their individual or joint liability was restricted to the security deposit.

The court held that A and B were parties to the charter and governed by its terms. There were no terms of the charter which gave them protection or limited liability in respect of a loss of use claim and therefore they were liable to the claimants in the agreed amount in tort and/or bailment.

## FREEZING (MAREVA) ORDER

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*Great Future International Ltd and others v Sealand Housing Corporation and others*  
[2004] EWHC 124 (Ch),  
English High Court

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**Breach of freezing order – contempt proceedings – nature of – burden of proof – value of assets – restraint subject to minimum value**

The applicants brought an application for committal for contempt of court against the second and third defendants on the ground that they had breached a number of freezing orders and orders for disclosure made by the court in the main action between the parties. The

freezing order restrained dealings with assets below a specified financial minimum. In the context of the application for committal the question arose whether the burden of proving the existence of assets in excess of the minimum lay on the alleged contemnors and, if so, the nature of the burden. The court answered in the affirmative and held the burden of proof to be evidentiary and not legal.

There is uncertainty whether civil contempt is characterised as a criminal offence, but it is otherwise clear that the burden of proof is on the applicant and the standard of proof is proof beyond a reasonable doubt. Where the alleged contempt relates to the breach of a freezing order which restrains dealings with assets below a specified financial limit the burden of establishing the existence of other assets in excess of the limit lies with the alleged contemnor. This was held to be the case by the Court of Appeal in *Canadian Imperial Bank of Commerce v Batessa* (unreported 21 April 1993), which the court also appears to have characterised as a legal burden. Such a view might now be in breach of Article 6 of the European Convention on Human Rights in relation to which civil contempt proceedings were classified as criminal proceedings. That consequence was not inevitable for it was open to a court to consider a reverse burden of proof proportionate and justifiable. In the present case this potential difficulty did not arise, for the court considered that the alleged contemnors were under an evidential and not a legal burden as regards the value of the assets that were subject to the freezing order.

By analogy with criminal proceedings the court considered that in civil contempt proceedings it was not proper to take into account allegations of previous breaches of court orders by the defendants.

After considering the facts and circumstances of the case the court concluded that contempt was proved beyond a reasonable doubt against the defendants.

## INSURANCE

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*O'Connor and another v  
Bullimore Underwriting  
Agency Ltd*  
[2004] Scots CS 42

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**Proposal form – questions – construction – answers –  
whether honest – misrepresentation and non-disclosure**

The pursuers made a claim under their policy for fire damage to premises. Following enquiries, the insurers refused the claim and declared the policy void. The court refused to make a declaration in favour of the pursuers that they were entitled to recover under the

policy, for in relation to two questions in the proposal form there had been a non-disclosure of material facts.

Another question in the proposal form asked: 'Has any of the proposers ever been the subject of any action in bankruptcy or involuntary liquidation or had any convictions involving arson or dishonesty?' To this question the proposers had answered 'No'. On a number of occasions the pursuers, individually and jointly, had been cited in petitions for sequestration but neither of the pursuers had ever been actually sequestered. The insurers submitted that this represented a further entitlement to avoid the policy on the ground of material misrepresentation or non-disclosure. The court disagreed and held that on its proper construction the question had been honestly answered.

In the opinion of the court the question was ambiguous or there was no technical meaning to the words 'action in bankruptcy'. It could be an enquiry as to whether the proposers had ever been declared bankrupt or an enquiry whether the proposers had been involved in proceedings which sought to declare them bankrupt. In the circumstances the proper meaning of the question was to be assessed according to the way the question would be understood by a reasonable person in the position of and having the same knowledge as the proposers. Adopting this test, the question was an enquiry whether the proposers had ever been made bankrupt, and this question the proposers had answered honestly.

*Pilkington UK Ltd v  
CGU Insurance plc*  
[2004] EWCA Civ 23  
English Court of Appeal

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**Liability insurance – coverage – notice of claims –  
condition precedent – effect of breach**

The claim arose out of the installation of heat-soaked toughened glass panels manufactured by P and installed in the roof and vertical panelling of the Eurostar terminal at Waterloo station. The panels were supplied to T who installed them and thereafter a small number

fractured *in situ*. Eurostar alleged that the cause of the failure was a defect in the manufacturing process. After a technical investigation, Eurostar decided not to remove and replace the panels but instead to install various safety features to prevent any fractured glass falling into areas of the terminal frequently used by the public and staff.

Eurostar brought an action against the constructors of the terminal, T, the architects and overall conduct managers of the project. On 2 February 2000 T's solicitors notified P of their intention to claim indemnity in respect of any liability which T might have to Eurostar. Such third-party proceedings were served by T on P in May 2000. P notified their liability insurers, CGU, on 18 May 2000.

In February 2001, various parties involved in the Eurostar litigation took part in a mediation which resulted in a settlement of Eurostar's claims. Having contributed to the overall settlement, P claimed indemnity from CGU which had agreed to indemnify P against all sums for which it became legally liable to pay for compensation in respect of 'loss of or physical damage to property not belonging to the Insured'.

The policy, *inter alia*, contained the following clauses:

**Notice of Claims**

Any occurrence which might give rise to a claim under the Policy shall be reported in writing to [insurers] as soon as possible. The Insured shall give immediate notice of any impending civil proceedings in connection with the occurrence and shall send to [insurers] immediately every relevant document.

**Observance of Conditions**

The due observance and fulfilment of the terms and provisions and conditions insofar as they relate to anything to be done or complied with by the Insured shall be conditions precedent to any liability of the [insurers].

Approving the judgment at first instance, the Court of Appeal held that since the terminal was not physically damaged, the claim fell outside the cover provided by the policy. Also, by failing to notify CGU of an occurrence which might give rise to a claim under the policy or of impending civil proceedings until 18 May 2000 (three months after receipt of a letter before action from T's solicitors and two weeks after service of notice of third-party proceedings), P was in breach of the 'notice of claims' provision in the policy. This was regarded by the Court of Appeal as a breach of a condition precedent to the liability of the insurer (*Alfred McAlpine plc v BAI (Run-off) Ltd* [2001] 1 Lloyd's Rep 437 was distinguished). Therefore, even if the claim had been within the policy cover, it would have been lost on this ground.

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## OIL POLLUTION

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***The Prestige incident***

The International Oil Pollution Compensation Fund has been provided with estimates by representatives of the Spanish, French and Portuguese Governments of the extent of the loss suffered in their respective countries as a consequence of the *Prestige* incident.

The estimate for Spain was €834.8 million (£588 million); for France between €176.2 and €179.3 million (£124 million to £126 million); and for Portugal €3.25 million (£2.3 million). The total estimate amounts to €1,020 million (£718 million).

The level of the 1992 Fund's payments is to be maintained at 15 per cent of the loss or damage suffered, as assessed by the Fund.

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## PROCEDURE

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***Shirayama Shokusan Co Ltd v Danovo Ltd***  
[2004] EWHC 390 (Ch)  
English High Court

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**Alternative dispute resolution – mediation – jurisdiction of court – supporting orders – stay**

Claims and counterclaims were made by the claimant and defendant. The defendant suggested that the claims should be mediated but the claimant refused. Thereupon the defendant applied for a court order directing that the parties pursue alternative dispute resolution, namely mediation. The court in *Shirayama Shokusan (No 1)* (unreported [2003] EWHC 3006 Ch) made the order, at the same time confirming that the court had jurisdiction under Rule 1.1 of the Civil Procedure Rules to direct alternative dispute resolution notwithstanding the unwillingness of one of the parties.

Preparations for the mediation were halted when the defendant learnt that a particular representative of the claimants would not be present at the mediation and that others would attend in his place. The defendants considered the presence of the particular representative to be essential if the mediation was to be potentially effective and sought an order of the court directing that the particular representative attend and a stay of the principal proceedings until the conclusion of the adjourned mediation.

The court declined to make the order for lack of jurisdiction. Although the court could direct mediation and ensure that the mediation would be effective by ordering that the parties were adequately represented, nonetheless it had no jurisdiction to order that a particular person attend. The absence of jurisdiction was especially clear when the person in question was not a party to the principal proceedings.

Even if the court possessed jurisdiction it would not, having regard to the facts of the case, have exercised its discretion in favour of making an order. The order would have been inappropriate because of the existence of a degree of mistrust between the particular person in question and a leading representative of the defendants.

The application for a stay was also refused, the court commenting that where a stay is sought pending mediation there arises a conflict between the right of access to the courts and the public interest in the efficient use of court time. In the present case, to grant a stay might also have amounted to a breach of Article 6 of the European Convention on Human Rights, since it would have operated indefinitely and independently of the principal legal proceedings.

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## UK STATUTORY LAW

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*Marine Safety Act 2003*

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**Statutory instrument – merchant shipping – safety directions and power of fire authorities to charge for services rendered offshore – new schedule 3A to Merchant Shipping Act 1994 – ‘SOSREP’s Charter’**

The Merchant Shipping Act 1994 contains extensive powers in sections 137 to 141 for the Secretary of State (generally for Transport) to give directions to persons concerned in a marine casualty, and specifies criminal penalties for failure to comply with these directions. These powers were extended by s. 2(3) of the Merchant Shipping and Maritime Security Act 1997. Following the *Sea Empress* grounding off Milford Haven in 1996 Lord Donaldson’s Report on Salvage and Intervention and their Command and Control (HMSO Cm. 4193) recommended the appointment of an officer to co-ordinate the government response to a major marine casualty, to be known as the Secretary of State’s Representative (SOSREP). The powers exercised by SOSREP, which are very extensive, were derived from s. 137 of the Merchant Shipping Act 1994 and no new legislation was required at the time.

These powers originated in the 1969 International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties and the 1973 Convention extending the provisions of the intervention to cases of pollution by substances other than oil, which were enacted by s. 12 of the Prevention of Oil Pollution Act 1971 and s. 8(6) of the Merchant Shipping (Salvage and Pollution) Act 1994.

The main purpose of the Marine Safety Act 2003 has been to collect these powers in a codified form set out in sched. 1, and to insert them as a new sched. 3A to the Merchant Shipping Act 1994. The opportunity was taken to clarify the right of fire authorities to render fire-fighting and other services to ships on fire inside or outside the UK territorial sea, and to make a charge for doing so. Section 2 amends the Fire Services Act 1947 to this effect.



# ANALYSIS AND COMMENT

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LIMITATION OF LIABILITY – LONDON CONVENTION 1976 –  
DEFINITION OF CHARTERER – RIGHT TO LIMIT – LIMITABLE CLAIMS –  
ARTICLES 1(2) AND 2(1)(a)

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*CMA CGM SA v Classica Shipping Co Ltd*  
[2004] EWCA Civ 114

### Facts

The container ship *CMA Djakarta* (ex *Classica*) was chartered under the terms of the New York Produce Exchange form (NYPE). Bills of lading on receipt of containerised cargo were issued by the time charterers. An explosion occurred on board the chartered vessel causing substantial damage to the ship and other cargo and resulting in salvage being performed and General Average declared. Arbitrators concluded that the explosion had taken place in two containers containing bleaching powder and that the incident amounted to a breach of the obligation of the charterer under the NYPE to employ the vessel in carrying lawful containerised merchandise 'excluding any goods of a dangerous injurious flammable or corrosive nature'.

The arbitrators held that the charterers were liable to the owners in damages for the cost of repairs to the vessel in the sum of US\$26,624,022, a sum which included US\$4,702,441.80 paid for salvage services rendered to the vessel. The shipowner made additional claims for an indemnity for General Average contribution and liabilities to other cargo owners.

### Issues

The appeal raised the question whether the charterers were able to limit their liability in respect of the claims made against them by the shipowners under the provisions of the Convention on Limitation of Liability for Maritime Claims 1976. The Convention is given the force of law in the United Kingdom by the Merchant Shipping Act 1995, s. 185 and sched. 7, Part 1.

Article 1 of the Convention indicates that the right to limit is conferred on shipowners and salvors, and Article 1(2) defines 'shipowner' to mean 'the owner, charterer, manager or operator of a seagoing ship'.

Article 2 defines the claims subject to limitation. Article 2(1)(a) stipulates for

claims in respect of . . . loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation) occurring on board or in direct connection with the operation of the ship . . . and consequential loss resulting therefrom . . .

Article 3(a) excepts from limitation 'claims for salvage or contribution in general average'.

The core question in the appeal was the proper interpretation of the word 'charterer' in Article 1(2). Did the time charterer in the case come within the word in the context of the Convention?

### Decision

The Court of Appeal held that the word 'charterer' in Article 1(2) was to be given its ordinary and not a restricted meaning. As such it included a reference to the time charterers in the present case who consequently were entitled to limit liability according to the terms of the Convention but only in relation to limitable claims.

Having regard to the proper interpretation of Article 2(1)(a) the only claim the charterers had a right to limit was the claim by the shipowners for an indemnity for liabilities incurred by them to cargo owners. All the other claims were not limitable.

The Court of Appeal rejected the approach adopted by Thomas J (as he then was) in the *Aegean Sea* [1998] 2 Lloyd's Rep 39 and by David Steel J at first instance [2003] 2 Lloyd's Rep 50. Both judges had adopted a restricted definition of the word 'charterer', with charterers considered only able to limit liability *qua* owner, that is to the extent that the claim against the charterer arose out of an activity

'usually associated with ownership.' The Court of Appeal considered this gloss to the interpretation of the word 'charterer' to be unjustified.

## Comment

### Introduction

The history of maritime limitation is one of creeping expansion. Over the centuries the range of persons who may limit has increased, as also has the range of claims which qualify as limitable. The legal framework has reached out from national legislation to international conventions. Over the last century three international conventions came into effect, but with varying impact, the last being the Convention on Limitation of Maritime Claims 1976 (The London Convention 1976). In English law this Convention, subject to certain amendments and additions, is given the force of law by the Merchant Shipping Act 1995, s. 185 and sched. 7, parts 1 and 2.

### Article 1(2)

The crucial question in the case related to the proper interpretation of the word 'charterer' as used in Article 1(2). This raised a question of statutory interpretation of a particular kind, for the word derived from an international convention. The approach to be adopted in this situation has been considered on many occasions; see, for example, *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350; *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152; *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 272, 282 and 293; *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628, 656. The general approach is that the convention is to be interpreted having regard to its own language and structure, free of English law perceptions and principles. The Convention is to be interpreted by reference to broad and general principles of interpretation which may not always be easy to identify, but assistance may be given by such international instruments as the Vienna Convention on the Law of Treaties 1969, Articles 31 and 32.

The Court of Appeal considered that the upshot of this approach was that the court was obliged to ascertain the ordinary meaning of the words used in their context and also taking into account the object and purpose of the Convention. It was open to the court to have regard to the *travaux préparatoires* and the circumstances of the conclusion of the convention. The interpretation given to the same word in a previous international convention can only be referred to once the ordinary meaning has been ascertained. Such a reference may affirm the court in its conclusion as to the ordinary meaning of the word or cause it to reassess its conclusion, as where the adoption of the ordinary meaning renders the convention ambiguous or uncertain or leads to a manifestly absurd or unreasonable result.

As to the objects and purposes of the convention the parties agreed that (i) the general purpose of permitting shipowners, charterers and others to limit liability was to encourage the provision of international trade by way of sea-carriage; (ii) the main object of the 1976 Convention was to provide limits of liability which were higher than in the preceding 1957 Convention in return for making it more difficult to 'break' the right to limit; and (iii) for the first time it enabled salvors to limit liability.

Looking at the convention as a whole, the court concluded that the word 'charterer' was to be given its ordinary meaning, that is a charterer acting in his capacity as such. There was no justification for placing a gloss on the concept of charterer and restricting its interpretation to circumstances when the charterer acted *qua* owner, that is as if he were owner. The mere fact that the reference to charterer appeared in the definition of 'shipowner' did not of itself justify such an approach. Moreover the distinction would often be difficult to make for certain responsibilities, such as loading of cargo, are allocated variously by the terms of the charterparty. One method of ensuring certainty would be to confine the meaning of 'charterer' to demise or bareboat charterer, but there was absolutely no justification for adopting this approach. There was, however, the question whether charterer included a slot charterer or the charterer of part of a ship. In the context of ship arrest under the 1952 Arrest Convention, 'charterer' does include a slot charterer (see *The Tychy* [1999] 2

Lloyd's Rep II), but in the present context the Court of Appeal left the question open. The problem associated with the question is that if a slot charterer were included, the limit would be established by reference to the total tonnage of the vessel when the charterer had only contracted for the use of a part of that tonnage.

Limitation of liability had been extended for the first time to charterers by the Limitation Convention 1957, but there was nothing in this convention which suggested a departure from the adoption of the ordinary meaning of the word 'charterer' as used in the 1976 Convention.

### **Article 2(1)(a)**

Even though the 1976 Convention applied to charterers, the right to limit only extended to claims which were limitable under Article 2.

On its proper construction Article 2(1)(a) allows for several different categories of claim, but the losses envisaged do not include loss or damage to the ship itself, that is the ship the tonnage of which is to be used to calculate the limitation fund. The incidents giving rise to limitable claims must '[occur] on board or in direct connection with the operation of the ship . . .'. The liabilities must arise in relation to persons or property on board or in relation to third parties, such as collision liabilities. Loss or damage to the ship itself is not included.

It follows that this restriction on which claims are limitable applies equally to charterers and further provides a justification for the procedural processes by which limitation funds are established under Articles 9 to 11 of the Convention. In particular for Article 11.3, which provides in effect that a limitation fund established by either shipowner or charterer shall be deemed to be constituted by both. The fact of the restriction removes the potential anomaly of charterers claiming limitation under a fund established by the shipowner in respect of a claim brought by the shipowner against the charterers.

Accordingly the claim by the shipowners for the cost of repairing the ship as a result of damage caused by the charterers' breach of contract was not limitable under Article 2(1)(a), nor were the claims to be indemnified for salvage (which was held to be correctly included in the claim for damage repair) and General Average contribution (see Article 3(a)).

The only claim that was limitable was the shipowner's claim to be indemnified for liabilities incurred to other cargo interests. The bills of lading had been issued by the charterers and the shipowners had been sued in tort. The primary liability was that of the charterers and had they been sued directly they would have been able to limit liability for the claim as within Article 2(1)(a), the claim falling within the words 'loss of or damage to property . . . occurring . . . on board the ship'. The fact that the claim was being brought against the charterers indirectly, through the shipowner's claim for an indemnity, did not change the situation. The claim continued to be one within Article 2(1)(a) and the charterers were entitled to limit. The court made a declaration to that effect.

### **Conclusion**

The approach taken by the Court of Appeal means that the position of charterers under the London Convention 1976 is not governed by the question of status but by reference to the claim made. This, in all probability, simplifies the law and makes it more certain. The question of status may be a complex and elusive concept, capable of varying with the circumstances. Whether a claim is limitable raises a question of interpretation and although difficult and complicated questions may arise, the general approach to the question of interpretation is well appreciated.

The interpretation given to Article 2(1)(a) will also have the effect of limiting the occasions when charterers will be able to claim limitation of liability when sued by shipowners. In practice the right will arise most frequently, if not invariably, when charterers are sued by shipowners for an indemnity in respect of cargo liabilities.

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## PRIVATE INTERNATIONAL LAW – CHOICE OF LAW – ISLAMIC LAW

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### *Shamil Bank of Bahrain EC v Beximco and others*

[2004] EWCA Civ 19, English Court of Appeal

#### **The facts**

The claimant bank applied for summary judgment in its action against the defendants on the basis of certain financing agreements made between the bank and the defendants. The underlying agreement was described as a 'Morabaha' agreement, under Sharia law, the essential characteristics of which were that the bank as seller undertook to acquire possession of goods that it agreed to sell to the defendants as purchaser by instalments, with the addition of a pre-fixed profit. The agreement stated that 'subject to principles of Glorious Sharia' the English court shall have jurisdiction to resolve disputes under the contract. The bank (S) claimed amounts outstanding under the agreements when Beximco (B) failed to make payments.

B's defence was that, on the proper construction of the governing law clause, the agreements were only enforceable in so far as they were valid in accordance with Sharia law and in accordance with English law, and that the agreements were in fact contrary to Sharia law. B's case was that (1) the guarantors were discharged if the principal debtors were discharged; alternatively (2) the guarantees had been entered into on the basis of a common mistake as to the validity of the agreements under Sharia law and were therefore of no effect. It was also raised in argument that certain parts of the agreement were contrary to Islamic principles because they were in fact disguised loans with interest.

The trial judge held that English law was the governing law because there could not be two separate systems of law governing the contracts. The parties had not chosen Sharia law as the governing law because it was not the law of a country and they could not have intended the secular English court to resolve matters of religious controversy.

#### **The decision**

The Court of Appeal dismissed the appeal.

The court affirmed the view expressed by Morrison J that the commercial purpose of the contracts was that there should be certainty in the applicable law of the contract. A contract cannot have two competing governing laws in general.

The Rome Convention on the law applicable to contractual obligations scheduled to the Contracts (Applicable Law) Act 1990 only contemplated and sanctioned the choice of the law of a country. Sharia law does not refer to any particular country's laws; as such it falls outside the purview of the 1990 Act. The court went on to hold that although it was possible to incorporate provisions of foreign law as terms of a contract, it is important for the reference to principles of Sharia law in the contract to identify specific aspects of Sharia intended to be incorporated into the agreements.

The reference to Sharia law was thus repugnant to the choice of English law and could not sensibly be given effect to. The judge was right that the words were to be read as a reference to the fact that S held itself out as conducting its affairs according to Sharia principles. The Court of Appeal also ruled that a common mistake as to the legal consequences of the agreements (as a matter of fact because of foreign law) would not give rise to a defence to the claims on the guarantees, because B's sole interest was to obtain advances of funds and they were indifferent to the form of the agreements required by the bank or the impact of Sharia law on their validity. There was thus no operative mistake (of fact) that rendered 'the subject-matter of the contract essentially and radically different from the subject-matter which the parties believed to exist' (*per* Lord Steyn in *Associated Japanese Bank (International Ltd) v Crédit du Nord SA* [1989] 1 WLR 255 at 268) or that 'the thing [contracted for] essentially different from the thing [that] it was believed to be' (*per* Lord Atkin in *Bell v Lever Bros Ltd* [1932] AC 161, as adopted and confirmed by the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407).

### Comment

This case is significant in that the Court of Appeal has affirmed the general thinking of commentators that the applicable law of a contract, as provided for in the 1990 Act, must necessarily be that of a country. Whilst it is possible in arbitration to rely on *lex mercatoria*, general principles of fair trading etc, as far as judicial resolution of disputes is concerned, the applicable or governing law is that of a specific and identifiable country. Indeed, Article 3(3) specifically refers to the law of a 'country' as defined in Article 19(1). There is no provision in the Act for the choice or application of a non-national system of law such as Sharia law. In any event, the principles of Sharia are not simply principles of law but principles which apply to other aspects of life and behaviour. Even treating the principles of Sharia as principles of law, the application of such principles in relation to matters of commerce and banking would be subject to much controversy. In particular there is controversy as to the strictness with which principles of Sharia law will be interpreted or applied. In consequence it was highly improbable that the parties to the agreements could be said to have intended that Sharia was to operate beyond a guide as to conduct and behaviour.

B's argument was that although there was some controversy about the precise application and scope of the rules of Sharia in the present context, there was nothing to prevent an English court adjudicating on the advice of expert witnesses as to those aspects which were sufficiently clear to help resolve the issue of whether the agreements were valid under Sharia law. However, as it was not possible for the contract to adopt general principles of non-national law as the governing law, there was no scope to deal with the argument raised. That is a little regrettable but quite understandable – a little regrettable because the issue as to whether the agreements were disguised loans with interest under Sharia law would make for an interesting analysis.

It was also the position, not only under the common law but the Rome Convention, that a particular contractual provision cannot be governed by two separate legal systems. This is different from severance where different parts of the contract may be subject to different governing laws. Severance is valid but as far as the Giuliano-Lagarde Report (the official explanatory report accompanying the Rome Convention) is concerned, severance should be employed 'as seldom as possible' and only 'for part of a contract which is independent and separable, in terms of the contract and not of the dispute' (OJ 1980 C282/23).

The court was also quick to point out that B's conduct until the time of the claim was such that they did not seem to have any difficulty with the agreements on religious grounds or they intended to challenge them on the basis of Sharia law. That would support the contention that the presumed intention was that the agreements were for all intents and purposes to be legally enforceable under English law.

It is important for parties intending to deal on Islamic principles to incorporate the law of an Islamic country which most closely gives effect to those principles of Sharia that they are concerned with. It is neither enough to choose Sharia law *per se*, nor English law as guided by Sharia principles. It is preferable, although not always offering better certainty, to adopt a clause which subjects certain parts of the contract to, say, Saudi law and other parts to English law.

Another issue of some interest is the fact that many such financing agreements in the Middle East and elsewhere in the Islamic world, tend to require monitoring by an Islamic board (in the present case, it was the bank's own Religious Supervisory Board). It is clearly open to the parties to ensure that the decisions and recommendations made by the Board be taken seriously by contractually providing for appropriate sanctions; where Sharia principles are considered to be fundamental, the parties may provide for a more active involvement of such a Board. In the present case, the system of supervision was of little help because it was not the specific agreements which were subject to religious supervision, only the general activities of the bank. The powers of the Board were set out not in the financing agreements but in the bank's Articles of Association. Although it may not be in some banks' interest to subject their financing and commercial transactions to detailed supervision, that is an available and workable option for traders serious about the incorporation of Islamic principles. The option is not entirely free from difficulties; there is much controversy over what

financing or commercial arrangements are permitted by Sharia and also there is a potential problem of conflict given that some of these Boards, as is the case here, are managed and run by the banks themselves. In some countries (eg Malaysia) the Board is state-regulated, making the decisions, to an appreciable degree, more independent.

JC

**MARINE INSURANCE – DUTY OF UTMOST GOOD FAITH –  
MISREPRESENTATION – PRE-CONTRACT – BREACH OF WARRANTY –  
FRAUDULENT PRESENTATION OF A CLAIM**

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*Eagle Star Insurance Co Ltd v Games Video Co SA and others (The Game Boy)*

[2004] EWHC 15; [2004] 1 Lloyd's Rep 238

English Commercial Court

**Facts**

The insured vessel, the *Game Boy*, was lost on 13 January 1999 while she was moored at the Avlis shipyard in Greece, as a result of the detonation of an explosive device at a point below the waterline on her port side. The incident caused ingress of water which resulted in her sinking.

The *Game Boy* had a distinct and unusual history. She was built in Bulgaria in 1965 as a naval training ship for the Russian navy. She was brought to Greece in 1989 and soon after transferred into the ownership of Seniorita Shipping. She was then laid up until steps were taken in 1993 to convert her into a floating bar and discotheque. This venture was not a success and it came to an end in late 1994 when she was arrested by creditors. Attempts were made over the next few years to sell the vessel by auction but on each occasion she failed to achieve her reserve price. She was still under arrest at the time she was identified as a suitable vessel by a Russian businessman, Mr Xirotiris, and his business associates in Greece to be used as a floating casino.

While negotiations for the purchase of the vessel continued, Mr Xirotiris set up a company, Games Video Co. (GVC), and on 9 April 1998 appointed Mr Ghiolman, a leading figure in the Greek tourist business, as manager in consideration of a 30 per cent shareholding in this company. The plan was that GVC would purchase the ship and Casinomar SA, an experienced casino operator, would operate a casino on board and fund some of the work on the vessel which was necessary to enable her to trade as a floating casino.

The purchase was completed in June 1998 and the vessel was insured on 12 June 1998 in the sum of US\$1,800,000 for four months. The cover was subsequently extended to 13 March 1999. The policy, *inter alia*, contained an express warranty which read:

Warranted approval of Lay-up arrangements, Fire Fighting Provisions and all movements by Salvage Association and all recommendations to be complied with prior to attachment.

In November 1998 the insured vessel was shifted to the Avlis Shipyard where she remained in the old yard until being towed to the dry-dock area in December, where the loss took place.

The total loss claim subsequently presented was declined by underwriters. They commenced proceedings to obtain declarations that they were not liable to their assureds and that the policy had been validly avoided. Their primary case was that the value of the vessel had been knowingly and fraudulently overstated. They, at the same time, raised a number of additional defences, including allegations of breaches of warranty and an allegation of fraudulent presentation of the claim.

**Decision**

- (1) The court concluded that the assureds had no genuine belief that the value of the vessel was US\$1,800,000. In reality, she was not worth more than the scrap value of approximately US\$100,000 to US\$150,000 and the assureds were aware of this. In the light of this finding, the

court had no other option but to hold that a material misrepresentation was committed by the assureds who overstated the genuine value of the vessel. Such misrepresentation was held to have induced the underwriters to accept the risk on current terms.

- (2) The express warranty to the effect that all recommendations of the Salvage Association were 'to be complied with prior to attachment' was held to be breached by the assureds as two of the ongoing recommendations, relating to the availability of a telephone on board and the attendance of a watchman, had not been complied with. The assureds' contention that, as a matter of construction, the Salvage Association's recommendations only had to be complied with 'prior to attachment' of the risk or, possibly, prior to any extension of cover, was rejected by the trial judge, Simon J.
- (3) It was beyond doubt that the assureds provided at least three documents, which were not authentic, to a representative of underwriters investigating the claim in 1999. The judge held that the assureds had thereby used fraudulent devices in order to advance their claim with the intention, and in the expectation, that underwriters would accept the documents at face value and pay the claim. The consequence of using fraudulent devices is to defeat the claim. In such circumstances it was held that underwriters were discharged from any liability to the assureds in respect of the present claim in any event.

### Comment

In the practice of marine insurance, it is common to see underwriters denying liability in every possible way in cases where their initial investigations indicate the possibility of fraud or culpable misconduct on the part of the assured. In these circumstances the technicality of the defence relied on will not bother underwriters in the slightest degree. This case is not only a good illustration of this market practice, but also demonstrates how effective claims investigation departments of underwriters can be in acquiring relevant evidence in order to defeat doubtful claims.

### Overvaluation

It is a well-settled principle of marine insurance law that a false statement by the assured as to the value of the subject-matter insured might entitle the underwriter to avoid the policy. This is likely to arise in cases where the overvaluation is so great as to make the risk speculative. For example, in *Ionides v Pender* (1874) LR 9 QB 531 a cargo of spirits worth £973 was insured under a valued policy for £2,800. The assured argued that the overvaluation was justified in that it took account of the assured's anticipated profits on resale, but the jury found that the overvaluation was excessive and amounted to breach of pre-contractual duty of utmost good faith.

As valuation is a matter of opinion, by virtue of s. 20(5) of the Marine Insurance Act (MIA) 1906, it will be regarded as excessive in cases where the representor does not make it in good faith. In *Inversiones Manria SA v Sphere Drake Insurance Co plc (The Dora)* [1989] 1 Lloyd's Rep 69, for instance, when the assured took out a valued policy on a yacht, valuing her at a price paid for her, the fact that this was appreciably more than the open market value was held not to be material as he was acting in good faith. It is, similarly, safe to assume that the overvaluation which can be explained as part of an ordinary business transaction will normally not be found excessive (*Mathie v Argonaut Marine* (1925) 21 L.L. Rep 145).

In the present case, from the outset, the underwriters' contention was that the vessel's value at the time of formation of the contract was no more than £100,000 and the assureds knowingly insured her for £1,800,000. There is no doubt that an overvaluation to this extent, 18 times of the actual value, is excessive and converts the risk into a speculative risk. However, the burden was on the shoulders of the underwriters to prove that the vessel was overvalued. Underwriters had a mountain to climb as the assureds at all times maintained that the policy valuation was made in good faith and supported by a series of documents. At the centre of the underwriters' defence was the attempt to challenge the authenticity of the documents on which the assureds sought to rely. This required a close scrutiny of all documents relied on by the assureds to show that they had a genuine belief in the value expressed in the policy. The following documents were scrutinised by the court during the trial:

- A pre-purchase condition report dated 10 March 1998 made by a surveyor, Mr Tsapes, which included a statement that the vessel was worth about US\$2 million. In the event, the judge concluded that: (i) the report relied upon was not made in March 1998; (ii) the photographs attached to it were selected with a view to giving a misleading picture of the vessel; (iii) the report was put forward with a view to deceiving the court; (iv) there was no proper basis for the valuation of US\$2 million; (v) these facts were known to the assureds; and (vi) the report provided no support for any belief that the value of the vessel was US\$1.8 million.
- A management agreement dated 9 April 1998 purportedly signed by Mr Xirotiris and Mr Ghiolman, which contained reference to an asking price for the vessel of US\$1.8 million, described as 'reasonable'. However, evidence given to the court by handwriting experts led the judge to conclude that the document had been created for the purpose of the proceedings and that Mr Xirotiris's signature had been forged deliberately.
- A Memorandum of Agreement ('MOA') for the sale and purchase of the vessel, which referred to a price of US\$1.8 million and contained provisions for its payment by instalments. The judge concluded that the MOA did not reflect the true nature of the transaction; that the payments said to have been made were not in fact made; and that US\$1.8 million was not the true price.

The judge was also satisfied that certain notarised payment documents produced were not genuine and that three receipts for sums totalling US\$1,080,000 were false.

### **Breach of warranty**

By virtue of s. 33(1) of the MIA 1906, a warranty is a term by which the assured undertakes 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. Warranties play a significant role in marine policies in determining the scope of the cover agreed by the underwriter. That is the main reason why the remedy for non-compliance with a warranty is automatic discharge from liability, even though there might not be a causal link between the breach and loss (see s. 33(3) of the MIA 1906 and the House of Lords' judgment in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233).

The automatic discharge remedy coupled with the fact that no causal link is required in order to rely on this defence, make warranties very attractive from the underwriter's perspective. It is, therefore, not surprising to see warranties regularly in marine policies. In fact, underwriters are occasionally criticised for relying on this defence rather readily without evaluating whether compliance with the warranty would reduce the risk of loss or not. This seems to be the case in the present case as it is rather doubtful whether the loss would have been avoided even if the recommendations of the Salvage Associations had been followed.

On occasions, in the process of drafting warranties parties fail to make their intentions clear in the words which they adopt. In these circumstances judicial construction of the warranty is crucial. In the present case, the language of the warranty has created a similar problem. The underwriters argued that the words 'prior to attachment' were to be read as meaning that the assureds warranted that they would comply with the Salvage Association's recommendations made at the time of the attachment of the risk or any extension to the risk. The assureds, on the other hand, argued that, on the proper construction of the policy, the Salvage Association recommendations only had to be complied with prior to attachment of the policy or possibly when the cover was extended at the end of November/beginning of December.

Generally speaking, in the process of identifying the meaning of the words used in a warranty, courts consider the rationale behind the warranty and construe the term against that background. In *Brownsville Holdings Ltd and another v Adamjee Insurance Co Ltd (The Milasan)* [2000] 2 Lloyd's Rep 458, for example, the court was asked to construe a warranty in a yacht policy which required 'professional skippers and crew' to be 'in charge at all times'. The insurer contended that the warranty required that the assured employed at all times a person who was professionally qualified to be a skipper of this type of motor yacht. Aikens J decided, however, that the rationale for the

warranty was to ensure that the vessel was properly looked after all the time, both winter and summer, and wherever she was, whether cruising, or in a marina for the winter months. Accordingly, he held that the words 'professional skipper' referred to a person who had some professional experience that qualified him to be regarded as skipper and this did not necessarily mean that he had to pass formal examinations. Adopting a similar approach in the present case, Simon J identified the commercial purpose behind the warranty as ensuring that the assureds would comply with and continue to comply with the express terms of the Salvage Association's recommendations throughout the period on risk. It would make no commercial sense that the assured would agree to comply with the recommendations only on the date that the risk attached, but not thereafter.

In the light of this construction, it was necessary to establish whether the assured was in breach of ongoing recommendations made by the Salvage Association. In their final survey before the loss of the vessel, the Salvage Association made 34 recommendations including the following ongoing recommendations:

- 13. VHF Radio (using battery power) and telephone to be available at all times. Telephone numbers of personnel to be contacted in any emergency to be posted.
- 22. Security watchman to be in attendance at the entrance to the vessel at all times, with the names of all contractors, labourers and visitors on board recorded in a log book.

The underwriters argued that these recommendations were breached. Simon J concurred with the underwriters' argument mainly because it became apparent during cross-examination that the witness statements of the watchman on board the vessel were inconsistent and contradictory. For example, the watchman's contention was that on the night of 12 January he left the vessel to telephone his wife but he was replaced by a stand-in and that the warranty was therefore complied with. In his witness statement, the watchman suggested that the watchman on the *Hamilton I*, another vessel anchored in the shipyard, was the most likely stand-in. In his evidence, he initially said that the foreman took his place and later that the watchman on the *Hamilton I* had done so. Subsequently, during cross-examination he said that it was the fireman who had been on the vessel as watchman. This inconsistency led the court to conclude that on the balance of probability, the watchman asked nobody to replace him when he was away. Also, the fact that the watchman had to leave to telephone his wife was a clear indication that there was no telephone on board the vessel.

### **Fraudulent presentation**

In the wake of the judgment of the Court of Appeal in *Agapitos v Agnew* [2003] QB 556; [2002] 2 Lloyd's Rep 42, it is clear that using fraudulent devices to promote a valid claim is to be treated in the same manner as a fraudulent claim. The consequences of using fraudulent devices will, therefore, be at least the defeat of the claim in question (it has been suggested, *obiter dictum*, by Mance LJ in the *Agapitos v Agnew* that post-contractual duty of utmost good faith and s. 17 of the MIA 1906 did not have a role to play in this context). On the basis that at least three of the documents relied upon by the assureds were not authentic, ie the report prepared by Mr Tsapes, the management agreement and the MOA for the sale and purchase of the vessel, the underwriters argued that:

- (i) either fraudulent devices were used to promote a valid claim – this would have been the case had the court decided that there was no fraudulent overvaluation or breach of warranty; or
- (ii) the claim was fraudulent as the assureds had no honest belief in the truth of the claim (see *Derry v Peek* (1889) 14 App. Cas. 337, 374).

Since it had already been established that the assureds were aware of the overvaluation and committed breaches of the warranty, the court held that this was a fraudulent claim. It was clear to the assureds that they had no valid claim but this did not stop them from advancing lies in order to seek to be indemnified.

### **Conclusion**

The court, approving all the major defences raised, held that the underwriters were entitled to the declarations that they sought and that the assureds' application for a declaration that they were

entitled to an indemnity under the policy would be rejected. No doubt the claims investigation departments of the relevant underwriters deserves credit for their hard work which made life easier for the judge in finding the fraudulent intent of the assureds.

BS

## JURISDICTION – BRUSSELS JURISDICTION CONVENTION – *LIS PENDENS* – APPLICATION TO JURISDICTION AGREEMENTS

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*Erich Gasser GmbH v Misat Srl*  
Case C-116/02 ECJ [2004] Lloyd's Rep 222

### Facts

Gasser, a company incorporated and domiciled in Austria, had for several years sold children's clothing to Misat, a company incorporated and domiciled in Rome. Their commercial relationship broke down and litigation followed.

In April 2000 Misat commenced legal proceedings against Gasser before the Tribunale Civile e Penale di Roma, the object of which was to obtain the following rulings: that the contract with Gasser had been terminated; that Misat had not failed to perform its obligations under the contract; that Gasser pay it damages for failure to fulfil its obligations under the contract of fairness, diligence and good faith; and that Gasser also reimburse certain costs.

In December 2000 Gasser commenced proceedings against Misat before the Regional Court of Feldkirch, Austria, in which Gasser sought to obtain the payment of outstanding invoices.

Gasser submitted before the Austrian court that it had jurisdiction because (i) Austria was the place of performance of the contract within the meaning of Article 5(1) of the Brussels Jurisdiction Convention, and (ii) it was the designated court in a choice-of-court clause which appeared on all the invoices sent by Gasser to Misat. This amounted to a jurisdiction agreement with the meaning of Article 17 of the Convention, for it accorded with their practice and amounted to an international trade usage.

On the other hand, Misat contended that the Austrian court did not have jurisdiction, for by virtue of Article 2 of the Convention jurisdiction was vested in the Italian court, the court of the place where Misat was domiciled. Misat also contested the existence of the jurisdiction agreement and introduced the fact that it had commenced the Italian proceedings before Gasser had commenced the Austrian case. This produced a *lis pendens* and under Article 21 of the Convention jurisdiction was vested in the court first seised, namely the Italian court.

The Regional Court of Feldkirch of its own motion stayed its proceedings pursuant to Article 21 until the jurisdiction of the Rome court had been established. It confirmed its own jurisdiction by virtue of Article 5(1) but did not rule on the existence of a jurisdiction agreement conferring jurisdiction on itself. The jurisdiction clause was contained in invoices sent to MISAT which had repeatedly and without objection settled them.

GASSER appealed to the Oberlandesgericht Innsbruck contending that the Regional Court of Feldkirch should be declared to have jurisdiction and that proceedings should not have been stayed.

The Oberlandesgericht Innsbruck referred several questions to the European Court of Justice for a preliminary ruling, the most significant of which was the following.

May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention), review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?

## Decision

The European Court of Justice (ECJ) held:

- (i) Article 21 of the Convention was to be construed as including the situation where the court second seised claimed jurisdiction under a jurisdiction agreement within the meaning of Article 17. The court second seised in such a circumstance is obliged to stay its proceedings until the court first seised has declared that it has no jurisdiction.
- (ii) Article 21 was intended to avoid parallel legal proceedings before the courts of different Contracting States and to avoid inconsistent decisions. In order to achieve these aims the Article was to be interpreted broadly so as to include all situations of *lis pendens* before the courts in Contracting States, irrespective of the domicile of the parties.
- (iii) Under Article 21 it was clear that the court second seised had to stay proceedings of its own motion until the jurisdiction of the court first seised had been established. Where it was so established, the court second seised was obliged to decline jurisdiction in favour of the court first seised.

## Comment

### Introduction

The case is of material significance for it resolves a long identified problem in relation to the Brussels Jurisdiction Convention, and it is a problem which has caused substantial debate and difficulty in the interpretation of the Convention by the English courts. Several English cases have been referred to the ECJ on the same point of law.

The reference for a preliminary ruling was brought under the 1971 Protocol to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, as subsequently amended. The Convention was from the 1 March 2002 replaced by Council Regulation (EC) 44/2001, the effect of which is to change the source of the law and to facilitate future amendments rather than to introduce substantive changes. Nonetheless the formal presentation of the rules has been changed, with the former Convention Articles 17 and 21 replaced by Regulation Articles 23 and 27. The impact of the current decision of the ECJ applies equally to the EC Regulation.

### The reference

An initial question arose in connection with the reference to the ECJ, for the Austrian court was inviting the ECJ to provide an opinion without the question of the existence of a jurisdiction agreement conferring jurisdiction on the Austrian court having been determined. At the time of the reference all that existed was a submission by Gasser that such an agreement existed. Under the preliminary-ruling procedure laid down by the 1971 Protocol, it is for the national court before which the dispute has been brought to determine the need for a ruling and the relevance of the questions which it submits to the ECJ (Case C-220/95 *Van den Boogaard* [1997] ECR I-1147, para. 16; Case C-295/95 *Farrell* [1997] ECR I-1683, para. 11; Case C-159/97 *Castelletti* [1999] ECR I-1597, para. 14; Case C-III/01 *Gantner Electronic* [2003] ECR I-1379, paras 34 and 38). Nevertheless the national court must have regard to the function entrusted under the Protocol to the ECJ and avoid inviting advisory opinions on general or hypothetical questions.

In the present circumstances the proposition that a jurisdiction agreement might exist could not be regarded as hypothetical. Moreover the national court was justified in taking the view that, before determining the existence or otherwise of the jurisdiction agreement, the question regarding the relationship between Articles 17 and 21 should be determined by the ECJ. If the existence of a jurisdiction agreement within the meaning of Article 17 was held by the ECJ to displace the application of Article 21, then the national court will have to return to and rule on that issue. Conversely, if the ECJ gave a negative answer the question would no longer be an issue for determination by the national court. Treating the matter in this way meant that the national court

would only address the question of the existence of the jurisdiction agreement, with the difficulty and cost involved, if it was a relevant question for determination.

The ECJ therefore held that under the 1971 Protocol a national court could request a preliminary ruling 'even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the court are relevant' (para. 27). It remains the responsibility of the national court to provide the ECJ with the factual and legal information necessary to enable it to give an informed interpretation of the Convention and to indicate why the opinion of the court is necessary to enable it to give judgment (*Gantner Electronic*, above, paras 35, 37 and 38).

### **Relationship between Articles 17 and 21**

Under Article 17 jurisdiction may be conferred on the courts of a Contracting State by an express jurisdiction agreement, usually in the form of a clause in a contract. The only limitation relates to matters that fall within the exclusive jurisdiction provisions of Article 16, but rights under a jurisdiction agreement may always be waived, as is acknowledged by Article 18.

Article 21 has the purpose of avoiding parallel litigation and irreconcilable judgments which are not capable of being recognised and enforced by virtue of Article 27(3) of the Convention (see Case C-144/86 *Gubish Maschinenfabrik* [1987] ECR 4861). Article 21 makes it clear that in a situation of *lis pendens* priority is given to the court first seised. The court second seised must stay proceedings of its own motion until the jurisdiction of the court first seised has been established, and if it is established the court must decline jurisdiction in favour of the court first seised. The Article does not expressly distinguish between any of the various heads of jurisdiction recognised in the Convention, although in Case C-351/89 *Overseas Union Insurance and others* [1991] ECR I-3317, para. 26, it was held that Article 21 has no application where the court second seised has exclusive jurisdiction under Article 16 of the Convention.

In view of the purpose of Article 21 the court concluded that the Article must be interpreted broadly so as to cover all situations of *lis pendens* before the courts of Contracting States, irrespective of the domicile of the parties (subject to the above reference to Article 16). It continued to apply to a situation such as the present where the court second seised claimed to acquire jurisdiction under a jurisdiction agreement within the terms of Article 17. The court viewed the question of a jurisdiction agreement as an 'independent concept to be appraised solely in relation to the requirements of Article 17' (citing Case C-214/89 *Powell Duffryn* [1992] ECR I-1745, para. 14). It also considered the approach adopted to be supported by Article 19 which requires a court of a Contracting State to declare of its own motion that it has no jurisdiction only where it is seised of a claim which is within the exclusive jurisdiction of the courts of another Contracting State by virtue of Article 16.

The court therefore refused to draw a parallel between exclusive jurisdiction acquired under Article 16 and exclusive jurisdiction acquired by virtue of a jurisdiction agreement within the provisions of Article 17. Beyond the reasons already outlined, the court considered that the court second seised with jurisdiction by virtue of the jurisdiction agreement is not in any better position than the court first seised to determine whether it has jurisdiction, in other words to determine whether there exists a valid jurisdiction agreement. Also, where jurisdiction is derived from a jurisdictional agreement it was always possible for the agreement to be waived, with the defendant having an option to enter an appearance before the court first seised, as contemplated by Article 18.

The interpretation given by the court to Article 21 is not in any sense a surprise, but that makes it no less questionable. Under the Convention, by Article 17 jurisdiction agreements are given an elevated position in the hierarchy of jurisdictional provisions. The interpretation advanced by the court will serve to reduce their standing and the certainty they are capable of creating in an otherwise uncertain and fluid area of law. It may also encourage parties to commence litigation which disregards the terms of a previously agreed jurisdiction agreement in the hope of causing confusion that may ultimately just see matters turning out to their advantage or at least produce delay and

inconvenience to the other party. Unfortunately, the court was not prepared to be influenced by these arguments, commenting with a regrettable lack of realism that they 'are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose' (para. 53).

In the present case there was no question other than that the jurisdiction agreement, if established, would carry the effect attributed to it by Article 17. This issue was which court should decide on the existence and validity of the jurisdiction agreement. Was it to be the court first seised, the Italian court, or the court second seised, the Austrian court on which the jurisdiction agreement conferred jurisdiction? The court decided it was the former on grounds of interpretation, adopting the view that no one court was better positioned than the other to decide the question. The latter reason must again be doubtful. In general the court on which jurisdiction is conferred by a jurisdiction agreement must be best positioned to determine the existence and validity of the agreement, and this is particularly so when the governing law of the agreement is the *lex fori*, requiring the court to address the question of the jurisdiction agreement in the context of its jurisprudence. The nuances of national law may not be effectively grasped or may be misunderstood by a foreign court.

The decision of the ECJ overturns the interpretation of the Convention adopted by the English courts which, following the decision of the Court of Appeal in *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588, accepted that Article 17 took precedence over Article 21 of the Brussels Convention. It is equally true to say that this interpretation aroused much academic debate (see Briggs, 'Anti-European Teeth for Choice of Court Clauses' [1994] LMCLQ 158).

#### **Article 21 and procedural delay**

A further question referred to the court enquired whether Article 21 could be derogated from where proceedings before courts in the Contracting State in which the court first seised is established are excessively long in duration. The court ruled that the question was admissible notwithstanding that no concrete information had been provided to suggest that the Tribunal Civile e Penale di Roma had failed to fulfil its obligations to give judgment within a reasonable time and thereby infringed Article 6 of the European Convention on Human Rights. It was sufficient if the average duration of proceedings in the Contracting State in question was excessively long.

The court rejected any association between the provisions of the Convention and unreasonable delay on two principal grounds. There was no express provision relating to the association with procedural delay to be found in Article 21 or any other provision of the Convention. The Convention was based on mutual trust, the equivalence of courts and legal certainty and therefore it was incompatible with the philosophy and objectives of the Convention for national courts to be under a duty to respect the rule relating to *lis pendens* only if it was considered that the court first seised would give judgment within a reasonable time. Further, it was also the case that the question of excessive delay could only be determined after an inquiry into all the circumstances of the case and it was inappropriate for such an inquiry to take place in the context of the Brussels Convention. The question of procedural delay was best considered under Article 6 of the ECHR.

DRT

## **JURISDICTION – ENGLISH ANTI-SUIT INJUNCTIONS – COMPATIBILITY WITH BRUSSELS JURISDICTION CONVENTION – OPINION OF ADVOCATE GENERAL**

### *Turner v Grovit*

Case C-159/02, [2004] 1 Lloyd's Rep 216

#### **Facts**

Turner was a British national and legal adviser employed in London by a company which was a member of the Chequepoint Group of companies managed by Grovit. The group was comprised of several companies incorporated in several countries, including Changepoint SA whose registered

office was in Spain. At his request Turner was transferred to the group's office in Madrid and thereafter he was placed on the payroll of Harada Ltd, whose registered office was in the United Kingdom.

Shortly after his transfer Turner asked to terminate his contract with Harada Ltd and commenced proceedings against the company before the Employment Tribunal in London. He claimed that attempts had been made to implicate him in illegal and irregular conduct relating to social security deductions, and that this amounted to unfair dismissal. The Employment Tribunal dismissed a challenge for lack of jurisdiction, which was affirmed on appeal, and also awarded Turner damages.

Changepoint SA and Harada Ltd commenced proceedings against Turner in a Madrid court alleging failure properly to perform his contract of employment. Turner refused to accept service of the writ and never entered an appearance in the Spanish proceedings. Turner then commenced English proceedings and obtained an anti-suit injunction against Grovit, Harada Ltd and Changepoint SA restraining them from continuing the proceedings commenced in Spain. The English courts were satisfied that the Spanish proceedings had been commenced to intimidate and exert pressure on Turner.

The English decision was appealed to the House of Lords which thereupon decided to refer the following question to the ECJ for a preliminary ruling under Article 3(1) of the 1971 Protocol on the interpretation of the 1968 Brussels Jurisdiction Convention:

Is it consistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on September 27 1968 (subsequently acceded to by the United Kingdom) to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?

#### **Opinion of Advocate General Ruiz-Jarabo Colomer**

The Advocate General was of the opinion that the ECJ should give the following answer to the question referred to it by the House of Lords:

The Convention of September 27 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as precluding the judicial authorities of a Contracting State from issuing orders to litigants restraining them from commencing or continuing proceedings before judicial authorities of other Contracting States.

#### **Comment**

The opinion of the Advocate General frowns on the long-established English jurisdiction and practice on prescribed occasions to protect its own jurisdiction by issuing anti-suit injunctions or, as is now the preferred language, restraining orders, the effect of which is to restrain a party within the jurisdiction of the English courts from commencing or participating in foreign litigation.

The jurisdiction derives from the general injunctive jurisdiction presently established by s. 37(1) of the Supreme Court Act 1981, and is exercisable in relation to parties who are within the jurisdiction of the English court, usually by virtue of already being engaged in English litigation. In strictness the order of the court is not directed at any foreign jurisdiction nor a foreign court but to a person engaged or about to engage in foreign litigation and who is subject to the jurisdiction of the English court. It remains open to the foreign court to assume jurisdiction and for the party to participate in the foreign proceedings, albeit in breach of the English order and liable for the consequences of that breach. However, outward perceptions may view the effect of a restraining order differently and less innocently, and equally the English courts have become increasingly sensitive to the way foreign courts may perceive and respond to a restraining order, to such a degree that the anticipated foreign response will in all likelihood influence the exercise of discretion in deciding whether or not to make an order (see *Navigation Maritime Bulgare v Rustal Trading Ltd, The Ivan Zagubanski* [2002] 1 Lloyd's Rep 106; *Evalis SA v SIAT* [2004] Lloyd's Law Reports I & R 187, at 200 to 201, per Andrew

Smith J. Contrast *The Angelic Grace* [1995] 1 Lloyd's Rep 87, 96, per Millett LJ). More generally the discretion will be exercised in favour of making a restraining order when the English court is adjudged to be *forum conveniens* (*Airbus Industrie GIE v Patel* [1997] ILPr 230), and the position in favour of making an order becomes even stronger when it can be shown that the proposal to commence or participation in foreign proceedings is abusive, as where the object is to frustrate or obstruct the English proceedings (*Société Nationale Aérospatiale v Lee Kui Jak* [1987] AC 871). Before granting a restraining order the English court must be satisfied that the applicant has a legitimate interest in maintaining English jurisdiction, as, for example, where there is a contractual right not to be sued in a particular jurisdiction because of the existence of an exclusive jurisdiction clause or an arbitration clause (*British Airways Board v Laker Airways Ltd* [1985] AC 58).

Restraining orders are peculiar to common law jurisdictions and are unknown in civil jurisdictions. Unsurprisingly, therefore, they receive no mention in the Brussels Convention, but they are capable of achieving some of the same objectives as are associated with the Convention, such as certainty and the avoidance of multiple litigation and the risk of inconsistent judgments. The question referred by the House of Lords to the ECJ is whether they are compatible with the provisions and philosophy of the Convention, which does not expressly forbid the assumption of such a head of jurisdiction by the courts of a Contracting State. In referring the question the House of Lords expressed the view that it perceived no incompatibility with the Convention.

The Advocate General analysed matters differently.

One of the pillars on which the Brussels Convention is established is the principle of mutual trust and co-operation. The legal system of each Contracting State is recognised to have the capacity to contribute independently to the operation of the Convention, yet maintaining a harmony with the role of other legal systems. Beyond the special role of the ECJ, there exist no superior authorities, and no one Contracting State has the authority to resolve jurisdictional issues that may arise between Contracting States, which is the province of the Convention itself. The Convention establishes uniform rules on the distribution of jurisdiction among Contracting States and embodies the presumption of equality between the different legal systems. The Advocate General considered that '[i]t would be contrary to that spirit for a judicial authority in Member States to be able, even if only indirectly, to have an impact on the jurisdiction of the court of another Contracting State to hear a given case' (para. 32). The dilemma produced by English restraining orders in the context of the Brussels Convention is well illustrated by the facts and judicial response in *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588.

The Advocate General considered the mutual trust argument decisive but also proceeded to cast doubt on too firm an adherence to the view that English restraining orders operate only *in personam*. In this regard the Advocate General was aligning himself with a growing body of informed opinion and it is difficult to gainsay the point. Whatever the strict nature of the process leading to the grant of a restraining order, its indirect effect is to interfere with the jurisdiction of a foreign court, for the court as a result of the order is deprived of jurisdiction by virtue of the inability of the enjoined party to refer a dispute to the court. The line to be drawn between an order of the court addressed to an individual within its jurisdiction and an order addressed to a foreign court is very faint and imprecise, and ultimately a judicial order should be assessed by its practical effect and not necessarily by its innate nature.

The opinion of the Advocate General is part of the process associated with a reference to the ECJ and it will be considered in due course, together with the submissions of other relevant parties, by the ECJ. The opinion therefore does not represent the concluded decision of the ECJ but it is an established fact that the opinion of the Advocate General may be highly influential. However, until the ECJ gives its ruling it is probable that the English courts will continue to apply the established English law and practice. This was the view at first instance of Moore-Bick J in *The Hari Bhum* [2004] 1 Lloyd's Rep 206, at 212, para. 26.

# ARTICLES

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## **138** Scope of coverage under the UNCITRAL Draft Instrument

UNCITRAL has made considerable progress on its Transport Law project since it began work two years ago. The new convention's scope of coverage is one of the most important issues to have emerged and several aspects of this key issue are examined here: the types of transactions governed, building on the traditional distinction between included bills of lading and excluded charter parties; the geographic reach of the convention, as it expands to 'maritime-plus' coverage; the need for an international sea leg; and the acceptance of both inbound and outbound coverage.

Professor Michael F Sturley  
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Rosenberg  
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## **155** The road to Vancouver – the development of the York-Antwerp Rules

General Average is a concept that is peculiar to maritime transport and the basic principle has long been recognised by sea-faring nations in similar terms: any sacrifice of property, such as jettison, or any extraordinary expenditure that is made for the common safety of ship and cargo is contributed to by the surviving property on the basis of arrived values. However divergence in the application of this principle led to a concerted international effort towards greater uniformity, culminating in the York-Antwerp Rules of 1890. This article traces that initial movement for uniformity and outlines subsequent reforms and new controversies that have emerged.

Richard Cornah  
*Fellow of the Association of  
Average Adjusters*

## **167** The CMI Review of Marine Insurance

The CMI has since 1999 been engaged in a review of national laws of marine insurance. The CMI's International Working Group (IWG) has thus far focussed on good faith, the duty to disclose, alteration of risk and warranties and is attempting to formulate conclusions and recommendations on the areas studied. One of the most important questions asked here is whether the maritime legal fraternity should be content with merely identifying areas in which a law or practice is deficient or whether the knowledge of such deficiency does not carry with it an obligation to set matters to rights.

Professor John Hare  
*Professor of Shipping Law at  
the University of Cape Town*

## **174** Places of refuge: the debate moves on

Since the publication in this journal of my article written on this subject in February 2003, the discussion of this issue has featured large in maritime law circles. The purpose of the present article is to describe the work done by the CMI in preparation for the International Conference in May–June 2004, and to consider this work in the light of the developments at the IMO, in the EU and elsewhere.

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# Scope of coverage under the UNCITRAL Draft Instrument

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The University of Texas School of Law*

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UNCITRAL has made considerable progress on its Transport Law project since it began work two years ago. The new convention's scope of coverage is one of the most important issues to have emerged and several aspects of this key issue are examined here: the types of transactions governed, building on the traditional distinction between included bills of lading and excluded charter parties; the geographic reach of the convention, as it expands to 'maritime-plus' coverage; the need for an international sea leg; and the acceptance of both inbound and outbound coverage.

## Introduction

The United Nations Commission on International Trade Law (UNCITRAL) is currently in the midst of its new project on Transport Law, which is designed to develop a new international convention to replace the UN Convention on the Carriage of Goods by Sea<sup>1</sup> (commonly known as the Hamburg Rules).<sup>2</sup> If the project is successful, the new convention will also

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<sup>1</sup> United Nations Convention on the Carriage of Goods by Sea, 31 March 1978, 17 ILM 608, reprinted in 6 *Benedict on Admiralty*, Doc. No. 1-3, Frank L Wiswall Jr (ed), (2003, 7th rev. edn) (the Hamburg Rules). Although the convention entered into force in 1992 and almost 30 nations are now parties, the major commercial and maritime powers have not adopted the Hamburg Rules (and do not appear likely to do so). The Contracting States represent only a small proportion of international trade. Indeed, over one-third of the parties to the Hamburg Rules (Austria, Botswana, Burkina Faso, Burundi, the Czech Republic, Hungary, Lesotho, Malawi, Uganda, and Zambia) are land-locked.

<sup>2</sup> For a detailed discussion of the process leading to the Hamburg Rules see generally Joseph C Sweeney, 'The UNCITRAL Draft Convention on Carriage of Goods by Sea', 7 J Mar L & Com (1975) 69 (Part I); 7 J Mar L & Com (1976) 327 (Part II); 7 J. Mar L & Com (1976) 487 (Part III); 7 J Mar L & Com (1976) 615 (Part IV); 8 J Mar L & Com (1977) 167 (Part V).

supersede two more popular liability regimes, the Hague Rules,<sup>3</sup> which were promulgated in 1924, and the Hague-Visby Rules, the Hague Rules as amended<sup>4</sup> by the 1968 Visby Protocol,<sup>5</sup> which is now the dominant convention for the international carriage of goods by sea.<sup>6</sup>

UNCITRAL began its formal work on this project just over two years ago, following almost four years of preliminary work by the Comité Maritime International (CMI).<sup>7</sup> In December 2001, the CMI submitted its final Draft Instrument,<sup>8</sup> which had been prepared by its International Sub-Committee on Issues of Transport Law and approved by its Executive Council.<sup>9</sup> UNCITRAL made only minor changes to convert the CMI's final Draft Instrument into its own 'Preliminary Draft Instrument', which it published as an UNCITRAL document<sup>10</sup> and referred to its Working Group III (Transport Law).<sup>11</sup>

This revitalized<sup>12</sup> Working Group first met in April 2002<sup>13</sup> at United Nations Headquarters in New York. Alternating between spring meetings in New York and autumn meetings at UNCITRAL Headquarters in Vienna, the Working Group has now devoted seven weeks to the discussion of the Draft Instrument (and plans to devote two more weeks to the project in May 2004<sup>14</sup> and another two weeks in November/December 2004<sup>15</sup>).

Based on the tentative views expressed during the first reading of the Preliminary Draft Instrument at the first three Working Group sessions, the UNCITRAL Secretariat prepared a

<sup>3</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 Aug 1924, 51 Stat. 233, TS No 931, 120 LNTS 155, reprinted in 6 *Benedict on Admiralty*, Doc. No. 1-1, Frank L Wiswall Jr (ed), (2003, 7th rev. edn) (the Hague Rules). For a history of the Hague Rules, see Michael F Sturley, 'The History of COGSA and the Hague Rules', 22 *J Mar L & Com* (1991)1, 18-32 (hereinafter Sturley, History).

<sup>4</sup> In many countries the 1968 Hague-Visby Rules have been further amended by the 1979 Special Drawing Right (SDR) Protocol. Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 21 December 1979, 1984 Gr. Brit. TS No 28 (Cmnd. 9197) (entered into force 14 February 1984), reprinted in 6 *Benedict on Admiralty*, Doc. No. 1-2A Frank L Wiswall Jr (ed), (2003, 7th rev. edn). In other words, two major versions of the Hague-Visby Rules are currently in force.

<sup>5</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 23 February 1968, 1977 Gr. Brit. TS No 83 (Cmnd. 6944) (entered into force 23 June 1977), reprinted in 6 *Benedict on Admiralty*, Doc. No. 1-2 Frank L Wiswall Jr (ed), (2003, 7th rev. edn). The Hague Rules as amended by the 1968 Visby Protocol will, hereinafter, be referred to as the Hague-Visby Rules.

<sup>6</sup> Countries that have ratified the Visby Protocol, or have adopted the Hague-Visby Rules by domestic legislation, include Canada, Japan, Singapore, Hong Kong, Australia, and most of the nations of Western Europe. For a current list of the countries that have ratified the Visby Protocol see, for example, 2002 *CMI Yearbook*, at 323-4.

<sup>7</sup> See generally Michael F Sturley, 'The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress', 39 *Texas Int'l LJ* (2003) 65, 69-72 (hereinafter Sturley, Interim View).

<sup>8</sup> CMI Draft Instrument on Transport Law, in 2001 *CMI Yearbook* 532 (hereinafter CMI Draft Instrument).

<sup>9</sup> See Sturley, Interim View, n. 7 above, at 72.

<sup>10</sup> See Preliminary Draft Instrument on the Carriage of Goods by Sea, UN Doc. A/CN.9/WG.III/WP.21, UNCITRAL, Annex (2002) (hereinafter UNCITRAL Preliminary Draft Instrument). The provisions of the UNCITRAL Preliminary Draft Instrument (sometimes discussed simply as the Preliminary Draft Instrument) are cited by Article number. The commentary, which follows most of the Articles, is cited by the paragraph number of the UNCITRAL Report. The UNCITRAL Report, including the Preliminary Draft Instrument, is available, along with most UNCITRAL documents cited in this Article, on the UNCITRAL web site: [www.uncitral.org](http://www.uncitral.org).

<sup>11</sup> See eg, Report of the Working Group on Transport Law on the Work of Its Ninth Session, UNCITRAL, 35th Session, paras 13 to 15, UN Doc. A/CN.9/510 (2002) (hereinafter Ninth Session Report).

<sup>12</sup> A previous 'Working Group III' had met in the 1970s to discuss international legislation on shipping. See, eg, 'Report of the Working Group on International Legislation on Shipping on the Work of Its Sixth Session', UNCITRAL, 6th Session, Doc. A/CN.9/88 (1974), reprinted in 5 *UNCITRAL Yearbook* 113 (1974). Its work ultimately produced the Hamburg Rules, n. 1 above. The current Working Group III's first meeting on the new proposal was accordingly the 'ninth session' of Working Group III.

<sup>13</sup> Ninth Session Report, n. 11 above, para. 15.

<sup>14</sup> See Report of Working Group III (Transport Law) on the Work of its Twelfth Session, UNCITRAL, 37th Session, para. 182, UN Doc. A/CN.9/527 (2003) (noting that the 13th session will be held in New York May 3-14, 2004) (hereinafter Twelfth Session Report).

<sup>15</sup> The 14th session is tentatively scheduled (subject to approval by the Commission) to be held in Vienna from 29 November to 10 December 2004. The final schedule should be approved at the Commission's summer 2004 meeting.

'Revised Draft Instrument' for discussion at last autumn's meeting in Vienna.<sup>16</sup> The Secretariat made few substantive changes,<sup>17</sup> but the drafting was revised to reflect the typical United Nations style<sup>18</sup> and a number of policy choices are highlighted.<sup>19</sup> The Revised Draft Instrument will be the working draft for at least the spring 2004 meeting and most likely for the autumn 2004 meeting as well.

The scope-of-coverage issues go to the heart of the new convention. How broadly should the Instrument apply? What criteria must be satisfied for the Instrument to apply? Some of these questions have been particularly controversial, but it appears that substantial consensus is now emerging on most of these issues.

This article highlights two major topics relating to the scope of coverage. The first concerns the types of transactions that the new convention might govern, and arises as a result of the intersection between changing commercial practices and the long-standing 'charterparty exception' under the Hague and Hague-Visby Rules. The second concerns the geographic reach of the new convention, and again arises in large measure as a result of changing commercial practices. Resolution of the second issue appears likely to implicate the treatment of performing parties, including the extent to which performing parties are entitled to automatic 'Himalaya' protection.

#### Types of transactions governed by the Draft Instrument

When the Hague Rules were negotiated over 80 years ago, there were attempts to regulate all forms of carriage, including carriage under charterparties. The so-called 'tramp' shipowners, which operate under charterparties, reacted indignantly. Danish shipowner A P Möller, for example, opened his remarks at the CMI's London Conference, where the Hague Rules received their final revision before the diplomatic conference at which they were adopted,<sup>20</sup> with the following disclaimer:

I am a tramp shipowner, and ... my feelings are naturally coloured by my calling ... I would also ask your pardon if in the following remarks I should make some criticisms ... I would ask them to be attributed to the natural feeling of impatience of the man who is receiving medicine when there is nothing wrong with him.<sup>21</sup>

He went on to explain that the impetus for the new Rules came from 'the position as regards liner bills-of-lading'.<sup>22</sup> It was common knowledge that

... the liner bill-of-lading is full of clauses in small print that few people have the good eyes to read and no one has time to read. Merchants could justly say that there was no freedom of contract in liner bills-of-lading, and so far as I understand it the whole agitation for reform arose through that circumstance.

<sup>16</sup> See Draft Instrument on the Carriage of Goods by Sea, UNCITRAL, UN Doc. A/CN.9/WG.3/WP.32 (2003) (hereinafter Revised Draft Instrument).

<sup>17</sup> One of the Working Group's few substantive decisions was the deletion of the navigational fault defense. More typically, the Working Group decided to retain the existing text as a basis for further discussion, perhaps with the addition or deletion of square brackets. See, eg, Report of Working Group III (Transport Law) on the Work of its Eleventh Session, UNCITRAL, 36th Session, para. 163, UN Doc. A/CN.9/526 (2003) (hereinafter Eleventh Session Report).

<sup>18</sup> Perhaps the most visible change is the renumbering of the Articles. The Revised Draft Instrument now has 89 Articles, arranged in 19 chapters, with fewer subdivisions within the Articles.

<sup>19</sup> See eg, Revised Draft Instrument, n. 16 above, at 5 n.3 (highlighting the scope issue in the 'contract of carriage' definition).

<sup>20</sup> See Sturley, History, n. 3 above, at 27–8.

<sup>21</sup> Comité Maritime International, London Conference, October 1922, at 330 (Bulletin no 57) (hereinafter London CMI Conf. Rep.) (statement of A P Möller), reprinted in 2 *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* Michael F Sturley (ed) (1990) 240 (hereinafter Legislative History).

<sup>22</sup> *Ibid.*

But in his field, the situation was completely different.

Tramp shipping is done on a basis of free contract. The Bill-of-Lading is not the primary document; the primary document is the charterparty, and the charterparty is gone through by both parties and signed by both parties.<sup>23</sup>

Many others supported the idea that regulation was necessary for bills of lading but not for charterparties.<sup>24</sup> Thus the Hague Rules' coverage was defined in terms of the type of document issued. The central phrase 'contract of carriage' was limited to 'contracts of carriage covered by a bill of lading or any similar document of title'.<sup>25</sup> For charterparties, a compromise was agreed. To the extent that a charterparty governed the transaction (meaning, in effect, so long as the dispute remained between the original contracting parties under the charterparty), the Hague Rules would not apply. But if a bill of lading was issued under the charterparty and negotiated to a third-party holder, thus creating a new contract between the issuer and the third-party holder, then the Hague Rules would apply.

This charterparty compromise is expressed in two provisions. The first sentence of the second paragraph of Article 5 explains in very general terms:

The provisions of this convention shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of this convention.<sup>26</sup>

And the 'contract of carriage' definition, partially quoted above, goes on to include

... any bill of lading or any similar document [of title] issued under a pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.<sup>27</sup>

The Visby Protocol did not amend these provisions, and thus they remain unchanged in the Hague-Visby Rules.<sup>28</sup> When the Hamburg Rules were negotiated, the charterparty compromise remained acceptable, and the treatment of charterparties is substantially the same under Article 2(3) as it is under the Hague and Hague-Visby Rules.<sup>29</sup> The central features of the 80-year-old compromise remain fully acceptable to the commercial interests today.<sup>30</sup>

The current problem is that commercial practice has changed, and it is no longer so easy to recognize when a shipment is carried under a 'bill of lading or similar document of title' and when it is carried under a 'charterparty'. Because many liner shipments are already being carried under documents that would not qualify as bills of lading in many legal systems, and future developments are likely whereby liner shipments would increasingly be carried without the issuance of any documents at all, the Draft Instrument broadly defines 'contract

<sup>23</sup> Ibid at 333 (statement of A P Möller), reprinted in 2 Legislative History, n. 21 above, at 343.

<sup>24</sup> See eg, 2 Int'l Law Ass'n, Report of the 30th Conference, at 29 (Hague Conf. 1921) (hereinafter Hague Conf. Rep.) (statement of J S McConechy), reprinted in 1 Legislative History, n. 21 above, at 135; *ibid* at 32 (statement of J P Rudolf), reprinted in 1 Legislative History, n. 21 above, at 138; *ibid* at 7–8 (statement of J M Cleminson), reprinted in 1 Legislative History, n. 21 above, at 183–4; Uniform Ocean Bills of Lading: Hearings on S. 1152 Before the House Comm. on Merchant Marine & Fisheries, 74th Cong., 2nd Session, at 8–9 (1936) (Commerce Department memorandum), reprinted in 3 Legislative History, n. 21 above, at 606–7; see also Grant Gilmore and Charles L. Black Jr *The Law of Admiralty* (1975 2nd edn), 145–7.

<sup>25</sup> Hague Rules, n. 3 above, Art. 1(b).

<sup>26</sup> *Ibid*, Art. 5.

<sup>27</sup> *Ibid*, Art. 1(b).

<sup>28</sup> See Hague-Visby Rules, n. 5 above, Arts 1(b), 5.

<sup>29</sup> See Hamburg Rules, n. 1 above, Art. 2(3).

<sup>30</sup> See eg Ninth Session Report, n. 11 above, para. 62 (noting the Working Group's 'strong view' that 'the exclusion of charterparties was appropriate').

of carriage', without reference to any document, as 'a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea'.<sup>31</sup> Although the intent was to cover traditional bills of lading and whatever bill-of-lading substitutes may develop in the future, concern has been expressed that this very broad definition may inadvertently pick up charterparty substitutes.

The traditional charterparty continues to flourish, but it is now necessary to consider other contracts that are similar to charterparties in some relevant ways, such as towage contracts, contracts of affreightment, volume contracts, and service contracts. Like charterparties, these contracts tend to be concluded between sophisticated parties with comparable bargaining power. As this was the original justification for excluding charterparties from the Hague Rules,<sup>32</sup> a strong case can be made that the parties to these contracts do not need the protection of a mandatory convention. Bracketed language in Article 3.3.1 of the Preliminary Draft Instrument (Article 2(3) of the Revised Draft Instrument) thus raises the possibility that some of the modern-day equivalents of charterparties should also be excluded from the coverage of the Draft Instrument, just as charterparties are.<sup>33</sup> But the rigorous definition of a 'charterparty' is notoriously difficult,<sup>34</sup> and no satisfactory definition has yet been proposed. Trying to define a modern-day equivalent is even more difficult.

The United States has advanced a proposal<sup>35</sup> (strongly supported by key elements of the US industry<sup>36</sup>) that makes the definitional task even more complex (or at least recognizes that changing commercial needs have made the task more complex). Under the current conventions, only two possibilities exist. Some contracts of carriage (most obviously bills of lading) are mandatorily covered by the legal regime and the parties may not contractually reduce the carrier's liability.<sup>37</sup> Other contracts of carriage (most obviously charterparties) are not covered by the regime as a matter of law, but the parties may contractually incorporate the regime if they choose to do so.<sup>38</sup> For some specialized and customized agreements used in liner trades, however, neither of these approaches is fully satisfactory, and the United States has therefore proposed a new approach to address them.

For ease of reference, the US proposal dubs these hybrid agreements 'Ocean Liner Service Agreements' (OLSAs).<sup>39</sup> Like charterparties, they are specifically negotiated between sophisticated parties with relatively equal bargaining power. Like bills of lading, they are used in the liner trade. The United States proposes that the new convention should govern these agreements with the force of law (thus pre-empting, for example, inconsistent state

<sup>31</sup> UNCITRAL Preliminary Draft Instrument, n. 10 above, Art. 1.5; Revised Draft Instrument, n. 16 above, Art. 1(a).

<sup>32</sup> See n. 24 above and accompanying text.

<sup>33</sup> UNCITRAL Preliminary Draft Instrument, n. 10 above, Art. 3.3.1; Revised Draft Instrument, n. 16 above, Art. 2(3). The bracketed language suggests that the charterparty exception might be extended to cover 'contracts of affreightment, volume contracts, or similar agreements'.

<sup>34</sup> See, eg, G J van der Ziel, 'The UNCITRAL/CMI Draft for a New Convention Relating to the Contract of Carriage by Sea', (2002) 25 *Transportrecht* 265, 268. Moreover, this is not a new problem. Efforts to define 'charterparty' during the Hague Rules negotiations were also unsuccessful.

<sup>35</sup> See Preliminary Draft Instrument on the Carriage of Goods by Sea: Proposal by the United States of America, UNCITRAL, UN Doc. A/CN.9/WG.III/WP.34, paras 18–28 (2003) (hereinafter US Proposal).

<sup>36</sup> In the United States, the World Shipping Council (WSC), an organization representing the major liner carriers serving the US market, and the National Industrial Transportation League (NITL) took the position that the parties to a 'service contract' should generally have freedom of contract as between themselves. See World Shipping Council & National Industrial Transportation League, 'Joint Statement of Common Objectives on the Development of a New International Cargo Liability Instrument', para. B(11), available at <http://www.worldshipping.org/jointstatement.pdf> (hereinafter WSC/NITL Agreement). This WSC/NITL position provided the impetus for the current position expressed in the US Proposal (after consultation with other affected interests and further refinement).

<sup>37</sup> See eg Hague Rules, n. 3 above Art. 3(8); Hague-Visby Rules, n. 5 above, Art. 3(8).

<sup>38</sup> See below n. 43 and accompanying text.

<sup>39</sup> See US Proposal, n. 35 above, paras 18 to 22.

law<sup>40</sup>) unless the parties specifically opt out of the international regime.<sup>41</sup> In recognition of the specific negotiation that typically occurs between sophisticated parties with relatively equal bargaining power, the United States also proposes that the parties have the freedom of contract that would enable them to avoid the application of the new regime to the extent that it does not meet their needs.<sup>42</sup>

The practical effect of the US proposal would be to subject charterparties and OLSAs to very similar treatment. As between the immediate parties, both charterparties and OLSAs would generally be governed by the Instrument's substantive provisions, but only to the extent that the parties wished the Instrument to apply. Under current practice, charterparties typically incorporate the Hague or Hague-Visby Rules as a matter of contract,<sup>43</sup> and they would presumably continue to incorporate the new international convention. The OLSA parties would be governed by the Instrument unless they opted out of coverage, and they would presumably do so rarely (to the extent that current charterparty practice provides a useful guide). The only difference would be in the default rule: Under the charterparty exception, it is necessary to opt into coverage. Under the US proposal, it would be necessary to opt out of coverage for OLSAs. For third parties, the treatment would be identical. Notwithstanding the charterparty exception, a third party who takes a bill of lading issued under a charterparty is still entitled to the protection of the Hague, Hague-Visby, or Hamburg Rules, as the case might be.<sup>44</sup> Similarly, a third-party consignee or other claimant under a shipment governed by an OLSA would also be entitled to the protection of the new Instrument because the derogation agreement would generally be binding only as between the immediate parties to the OLSA.

The US proposal sparked considerable discussion within the UNCITRAL Working Group, both in the formal meetings and in the informal corridor conversations. In a most striking development, a few delegates suggested that the United States' proposed treatment of OLSAs was so sensible that charterparties should benefit from the same treatment. This would permit the parties to a private carriage agreement to retain the full freedom of contract that they enjoy today while recognizing that most charterparties already incorporate one of the existing liability regimes with a clause paramount.<sup>45</sup> If most of the affected interests are already governed by an international liability regime, the argument runs, why not make that the default rule? This would save the parties the need to include such a clause paramount while giving stronger affect to the typical choice (ensuring that it applies with the force of law and not simply as a contractual term that could be overridden by some inconsistent local law). And for the few parties that did not want the international regime to apply, they would always have the freedom to contract out of the regime.

In an effort to bring some order to the discussion, Professor Francesco Berlingieri, the senior Italian delegate to UNCITRAL Working Group III and an active participant in the CMI process

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<sup>40</sup> If the default rule is coverage under the Draft Instrument, then the uniform regime would apply as a matter of law except to the extent that the parties agreed to alter it. But if these contracts are excluded completely, as charterparties are, then the parties' decision to apply the uniform regime would presumably take effect only as a matter of contract. To the extent that otherwise applicable law is inconsistent with the Draft Instrument, the parties may not have the power to pre-empt it by contractual agreement. The approach advocated in the US Proposal would therefore maximize the uniform application of the new rules. Under the charterparty approach, New Jersey tort law might interfere with the uniformity and predictability that would otherwise be possible. Cf *Colgate Palmolive v S/S Dart Canada*, 724 F.2d 313, 315 to 316 (2d Cir. 1983) (holding that New Jersey law rather than COGSA governed the claim).

<sup>41</sup> See US Proposal, n. 35 above, para. 23.

<sup>42</sup> Ibid, paras 23 to 24.

<sup>43</sup> See Michael F Sturley, 'The Application of COGSA as a Matter of Contract', in 2 *A Benedict on Admiralty* 5-7 and n.6 (2003, 7th rev. edn) (collecting cases).

<sup>44</sup> See Hague Rules, n. 3 above Arts 1(b), 5; Hague-Visby Rules, n. 5 above, Arts 1(b), 5; Hamburg Rules, n. 1 above, Art. 2(3).

<sup>45</sup> See n. 38 above.

for many years, invited all of the UNCITRAL delegates (and any other interested parties) to attend a round table discussion in London for two days in late February 2004. Although this gathering had no official status, the opportunity to exchange ideas was very valuable. Moreover, it is reasonable to predict that when essentially the same people gather in New York for the next UNCITRAL session, the official discussion will proceed more efficiently.<sup>46</sup>

No formal votes were taken at the round table, but at least two positions clearly emerged from the discussions. First, there was very little support for the suggestion that charterparties should be subject to the terms of the new convention as a default rule (subject to the parties' freedom to contract out of the regime). The most compelling reason for this conclusion is that the commercial interests that would be affected by any change in the current approach simply do not want it. They are perfectly content with contracting into the coverage of an international regime and permitting its rules to apply solely as a matter of contract and they strongly oppose the suggested alteration. Because the entire UNCITRAL process is being driven by the perceived needs of the commercial parties, the lack of commercial support for a new charterparty rule is enough to preserve the status quo.

Second, there was extensive support (at least in broad terms) for the US proposal that OLSAs should be subject to the new convention as a default rule, but that the parties should have the freedom to derogate from the new convention as between themselves. In the classic phrase of the chartering industry, this support is still 'subject to details'. Most significantly, it will be necessary to determine how OLSAs should be defined. Various delegations have differing ideas about how the new instrument should distinguish between those parties that need the protection of a fully mandatory law and those parties that should be allowed to negotiate for the tailored regime that best suits their particular needs. But the discussion seems likely to go forward on the assumption that many sophisticated parties in the liner trade will have the freedom of contract that they seek.

No consensus emerged at the round table on how to implement the policies that were generally accepted. Most delegates were supportive of a two-step approach in which step one would be to define what was to be covered by the convention (for example, bills of lading, similar arrangements, and OLSAs) and what was to be excluded (for example, charterparties and similar arrangements). Step two would then be to define which of the included items were subject to the convention on a mandatory basis (for example, bills of lading) and which were to be permitted freedom of contract (for example, OLSAs). But there was no agreement how either of these steps would be performed.

At least three possibilities were discussed for the first step: a documentary approach (in which inclusion and exclusion are defined on the basis of the type of document, if any, issued for the transport); a contractual approach (in which the types of contracts covered by the new convention would be defined); and a trade approach (in which the liner trade, for example, could be defined to identify the shipments that would be included within the scope of the convention while tramp shipping might be defined to identify the shipments that would not be included).

Multiple possibilities also exist for the second step. The US proposal suggests a detailed definition of an OLSA,<sup>47</sup> while some other delegations have suggested a need to distinguish between contracts of adhesion and contracts that were the subject of individual bargaining.

In the context of the years of study and negotiation that have already taken place, it is remarkable how much was accomplished at the London round table. Much remains to be

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<sup>46</sup> The Swedish UNCITRAL delegate, Professor Johan Schelin, served as the rapporteur at the round table and prepared a report, 'Freedom of Contract and Carriage of Goods', to summarize the discussions in London and to 'serve as a tool for future negotiations'.

<sup>47</sup> See US proposal, n. 35 above, para. 29.

done, but widespread support now exists for the likely approach that the new convention will take in determining the agreements that are to be covered and how that coverage will apply (at least in general terms). It would not have been possible to make that claim before the meeting.<sup>48</sup>

### The geographic reach of the Draft Instrument

When the UNCITRAL Working Group began its deliberations over two years ago, the most controversial aspect of the Draft Instrument was the coverage of the entire contract of carriage, including land carriage preceding the loading of the vessel and land carriage subsequent to the unloading of the vessel.<sup>49</sup> How this coverage should be defined and the consequences that should flow from it have been major topics of discussion at every meeting. There are several discrete aspects to the subject. The first is whether the new convention should apply on a 'door-to-door' basis, as opposed to the more limited 'tackle-to-tackle' coverage of the Hague and Hague-Visby Rules or 'port-to-port' coverage of the Hamburg Rules. The resolution of this aspect of the problem has turned on the treatment of 'performing parties', meaning those entities (other than the contracting carrier) that in fact perform the contract of carriage. Two more aspects of the geographic scope issue are the internationality of the sea leg and the application of the new convention to inbound and outbound carriage. I address each of these four aspects of the issue in this section.

#### *Door-to-door coverage*

In sharp contrast with the previous international maritime transport conventions,<sup>50</sup> the coverage is *contractual*: it is defined by the contract of carriage itself.<sup>51</sup> If the contract covers land carriage preceding the loading of the vessel and land carriage subsequent to the unloading of the vessel, then the Draft Instrument does too. But if the contract covers only the maritime leg of a multimodal movement, then that is all that the Draft Instrument covers. In other words, if a contract of carriage provides for a shipment from one port to another port, then the Draft Instrument's coverage is simply 'port-to-port'. But if a contract of carriage provides for a shipment from the shipper's manufacturing plant to the consignee's warehouse, then the Draft Instrument's coverage is 'door-to-door'.<sup>52</sup>

This door-to-door coverage is somewhat narrower than full multimodal coverage. In a true multimodal regime, the contract of carriage could provide for *any* two (or more) modes of carriage.<sup>53</sup> Thus a multimodal regime would govern a shipment involving road and rail transport. The Draft Instrument, in contrast, requires a maritime leg.<sup>54</sup> Thus, it could be

<sup>48</sup> Cf, eg, Ninth Session Report, n. 11 above, para. 69.

<sup>49</sup> See eg Patrick J S Griggs, *International Maritime Law – A Busy Schedule*, *CMI News Letter*, Jan–April 2003, at 7, 8 (describing door-to-door coverage as '[p]erhaps the most controversial aspect' of the Draft Instrument).

<sup>50</sup> The Hamburg Rules are 'port-to-port'. See Hamburg Rules, n. 1 above, Art. 4(1). The Hague and Hague-Visby Rules, however, are 'tackle-to-tackle'. See Hague Rules, n. 3 above, Art. 1(e); Hague-Visby Rules, n. 5 above, Art. 1(e).

<sup>51</sup> See UNCITRAL Preliminary Draft Instrument, n. 10 above, Arts 3.1, 4.1; Revised Draft Instrument, n. 16 above, Arts 2(1), 7; see also Position Paper on Multimodality of the Draft Instrument, paras 2(1) to 2(2), UN Doc. A/CN.9/WG.III/WP.33 (2003) (hereinafter Netherlands' Position Paper).

<sup>52</sup> Similarly, the UNCITRAL Draft Instrument's coverage may be 'door-to-port' or 'port-to-door', depending on the scope of the contract. See UNCITRAL Preliminary Draft Instrument, n. 10 above, Art. 4.1; Revised Draft Instrument, n. 16 above, Art. 7.

<sup>53</sup> See, eg, United Nations Convention on International Multimodal Transport of Goods, 24 May 1980, Art. 1(1), UN Doc. TD/MT/CONF/16 (1980), reprinted in 6 *Benedict on Admiralty*, Doc. No. 1–4 Frank L Wiswall Jr (ed), (2003, 7th rev. edn) (defining 'international multimodal transport' as 'the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country').

<sup>54</sup> See UNCITRAL Preliminary Draft Instrument, n. 10 above, Art. 1.5 (defining 'contract of carriage' to require the goods to be carried 'wholly or partly by sea'); Revised Draft Instrument, n. 16 above, Art. 1(a) (same).

described as a 'maritime plus' convention.<sup>55</sup> Because the existing liability regimes are port-to-port or narrower,<sup>56</sup> 'maritime plus' was already controversial. Many feared that the new regime would conflict with existing unimodal regimes, particularly CMR<sup>57</sup> and CIM-COTIF<sup>58</sup> (the European road and rail conventions). Thus during the UNCITRAL Working Group's opening discussion of the Draft Instrument, a number of delegates spoke in general terms against the concept of door-to-door coverage and instead favored restricting the application of the Instrument to a port-to-port basis.<sup>59</sup>

The UNCITRAL Draft Instrument dealt with these concerns by proposing a narrow 'network' system. Under a full network system, the liability rules for each leg would be determined by the rules that would otherwise be applicable to that leg, and the same rules would apply for both the performing party (the unimodal carrier that is generally subject to the relevant rules) and the contracting carrier. Under Article 4.2.1 of the Preliminary Draft Instrument, which attempts to keep the network system as narrow as possible, liability would be based on the relevant unimodal regime when it can be shown that the damage occurred during land transport that would otherwise have been subject to a mandatorily applicable international convention.<sup>60</sup> In practical terms, this means that European road carriage, which is subject to the regional convention known as CMR,<sup>61</sup> and European rail carriage, which is subject to the regional convention known as CIM-COTIF,<sup>62</sup> would be subject to the special network rules.<sup>63</sup> The non-European delegations at the CMI's International Sub-Committee generally did not advocate the network principle,<sup>64</sup> but it was universally recognized that the adoption of a

<sup>55</sup> See eg, Netherlands' Position Paper, n. 51 above, para. 1(c).

<sup>56</sup> See n. 50 above.

<sup>57</sup> Convention on the Contract for the International Carriage of Goods by Road, 19 May 1956, 399 UNTS 189 (hereinafter 'CMR').

<sup>58</sup> Article 3(1) of the Convention Concerning International Carriage by Rail (COTIF), 9 May 1980, 1987 Gr Brit TS No. 1 (Cm. 41), provides that 'international through traffic' is subject to the 'Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM)', which forms Appendix B to COTIF. These rules will be cited herein as CIM-COTIF. A new version of CIM-COTIF was promulgated in 1999, but is not yet in force.

<sup>59</sup> See Ninth Session Report, n. 11 above, paras 27–9.

<sup>60</sup> The Preliminary Draft Instrument does not adopt a full network system. To maximize uniformity, Art. 4.2.1 adopts a network system that is as narrow as possible. Only mandatory laws are respected on the theory that an international convention should have the power to override any regime that the parties themselves could contractually avoid. Moreover, Art. 4.2.1 respects only international conventions on the theory that a nation ratifying a new international convention must be prepared to give up some of its preexisting domestic law, even if that domestic law had been mandatory.

<sup>61</sup> See CMR, n. 57 above. Morocco and some of the successor states to the former Soviet Union are the only parties to CMR that are not at least partially within Europe. The Inter-American Convention on Contracts for the International Carriage of Goods by Road, 15 July 1989, OAS TS No. 72, 29 ILM 81, is of no practical significance. According to the OAS website, no nation has yet ratified it. See Organization of American States, Inter-American Convention on Contracts for the International Carriage of Goods by Road, available at <http://www.oas.org/juridico/english/signs/b-55.html>. The signatories are Bolivia, Colombia, Ecuador, Guatemala, Haiti, Paraguay, Peru, Uruguay, and Venezuela.

<sup>62</sup> CIM-COTIF, n. 58 above. COTIF applies primarily in Europe and the Middle East.

<sup>63</sup> The Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, 12 October 1929, 49 Stat. 3000, 137 LNTS 11, would also come within the narrow network exception. See UNCITRAL Preliminary Draft Instrument, n. 10 above Art. 4.2.1. The combination of sea and air carriage, however, is sufficiently unusual that this is not a major practical concern.

The Convention on the Contract for the Carriage of Goods by Inland Waterways (CMN), 6 February 1959, 1961 Unidroit 399, translated in 1 Int'l Transport Treaties II-1 (1986), was never ratified by any nation. If the 2000 Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI), enters into force, then European river and canal carriage would also be within the narrow network exception. See UNCITRAL Preliminary Draft Instrument, n. 10 above, Art. 4.2.1.

<sup>64</sup> The US MLA's proposed COGSA amendments did not adopt a network principle, but did respond to the political power of the railroads and truckers with an exclusion for rail and motor carriers. See generally Michael F Sturley, 'Proposed Amendments to the Carriage of Goods by Sea Act', 18 Hous. J. Int'l L. 609, 641–3 (hereinafter Sturley, Proposed Amendments).

network system was almost certainly a political necessity to achieve a compromise that could be ratified in Europe.<sup>65</sup>

Article 8 of the Revised Draft Instrument (which generally corresponds to Article 4.2.1 of the Preliminary Draft Instrument) suggests a possible revision that would expand the network exception if it were adopted. Specifically, it adds the bracketed phrase 'or national law' after 'international convention'.<sup>66</sup> This addition reflects proposals from Canada<sup>67</sup> and Sweden,<sup>68</sup> but it has been highly controversial and has not been accepted by the Working Group.

The scope of coverage issue was the single most important topic on the agenda at the spring 2003 UNCITRAL session in New York.<sup>69</sup> Indeed, the second week of the session was devoted to a discussion of the subject.<sup>70</sup> The Working Group recognized that the choice between a door-to-door convention and a port-to-port convention would have implications throughout the Instrument, and it was therefore important to address the issue in a detailed and systematic fashion. Moreover, the preliminary discussion of the issue at the spring 2002 meeting in New York suggested that this would be a highly controversial debate with strongly held views on both sides.<sup>71</sup> To assist the discussion, the UNCITRAL Secretariat (with help from the CMI) prepared a 42-page background paper entitled 'General remarks on the sphere of application of the Draft Instrument'.<sup>72</sup>

In view of this background, it is remarkable how non-contentious the scope discussion turned out to be. There seemed to be widespread agreement, perhaps even a consensus among the national delegations speaking on the issue, that the world had little need for another port-to-port convention,<sup>73</sup> and that some sort of door-to-door (or even multimodal) convention was therefore appropriate.<sup>74</sup>

Furthermore, there seemed to be broad agreement that the Draft Instrument needed to address the potential problems created by its door-to-door application, and that the appropriate treatment of performing parties was the primary way to do this. Although many views were expressed on how to treat performing parties, the divergence of opinion on the fundamental issues was less than many had anticipated.

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<sup>65</sup> Even the Italian Proposal, see below n. 97 to 100 and accompanying text, which does not advocate a network principle, makes special provision for 'non-maritime' performing parties to meet the needs of road and rail carriers.

<sup>66</sup> See Revised Draft Instrument, n. 16 above, Art. 8.

<sup>67</sup> See below n. 94, 95, 96 and accompanying text.

<sup>68</sup> See below n. 95.

<sup>69</sup> See Provisional Agenda, UNCITRAL, para. 24, UN Doc. A/CN.9/WG.III/WP.24 (2002).

<sup>70</sup> See Eleventh Session Report, n. 17 above, paras 219–267.

<sup>71</sup> A somewhat tangential discussion of the issue at the beginning of the autumn 2002 meeting in Vienna reinforced this prediction. See Report of Working Group III (Transport Law) on the Work of Its Tenth Session, UNCITRAL, 36th Session, paras 25–8, UN Doc. A/CN.9/525 (2002).

<sup>72</sup> Preparation of a Draft Instrument on the Carriage of Goods by Sea: General Remarks on the Sphere of Application of the Draft Instrument, UN Doc. A/CN.9/WG.III/WP.29 (2003) (hereinafter General Remarks).

<sup>73</sup> The FIATA observer spoke in favour of a port-to-port convention, but even he described his own position as a 'lonely' one. See 'Preparation of a Draft Instrument on the Carriage of Goods by Sea: Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument', UNCITRAL, at 3–5, UN Doc. A/CN.9/WG.III/WP.28 (2003) (hereinafter Compilation of Replies).

<sup>74</sup> See Eleventh Session Report, n. 17 above, para. 239 ('[W]ide support was expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port'). The head of the US delegation was struck by the extent to which views had developed over the course of one year: 'Last year, delegates seemed evenly divided between those who wanted a door-to-door scope instead of a port-to-port scope . . . This year, there was overwhelming support for some kind of a door-to-door approach.' Robert Mottley, UNCITRAL Moves Forward, *American Shipper*, June 2003, at 46 (quoting Mary Helen Carlson, head of the US delegation to UNCITRAL's Working Group III).

### *The treatment of performing parties*

Because there was broad agreement that the appropriate treatment of performing parties was the primary way to address the potential problems created by the Draft Instrument's door-to-door application, this aspect of the subject warrants special attention here.

#### *Background*

The Hague and Hague-Visby Rules on their face regulate the relationship between the 'shipper' and the 'carrier'. In modern commercial shipping practice, however, the 'carrier'<sup>75</sup> never performs all of its duties under the contract of carriage itself. Quite apart from the fact that most carriers are corporations, which can act only through their agents, virtually every carrier today subcontracts with separate companies to perform specialized aspects of the carriage.<sup>76</sup> For decades, shipowners have contracted with independent stevedores to load and unload their vessels,<sup>77</sup> and with independent terminal operators to store cargo prior to loading or after discharge. With the explosion of door-to-door shipments, few (if any) carriers would even have the physical capacity to perform all of their duties under a typical contract of carriage. Indeed, some carriers perform *none* of their duties under the contract of carriage themselves. Many non-vessel-operating carriers, or NVOCs,<sup>78</sup> contract with the shipper to carry the cargo but then subcontract every aspect of the transportation. Although the carrier is ordinarily liable for the loss or damage caused by its subcontractors, the early liability regimes made no effort to address the responsibility of those parties that actually performed the contract.

The Hamburg Rules made some effort to deal with this problem by introducing the concept of an 'actual carrier', which Article 1(2) defines as

... any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.<sup>79</sup>

This broad definition<sup>80</sup> thus starts with the carrier's employees, agents, and subcontractors to

<sup>75</sup> 'Carrier' is defined in the Draft Instrument as the 'person that enters into a contract of carriage with a shipper'. UNCITRAL Preliminary Draft Instrument, n. 10 above, Art. 1.1; Revised Draft Instrument, n. 16 above, Art. 1(b). The 'carrier' is thus the party that promises to perform the carriage, not necessarily the party that does perform the carriage. The Hague and Hague-Visby Rules do not fully define 'carrier', but the focus is on the promise to perform the carriage. Article 1(a) declares that "'[c]arrier" includes the owner of the vessel or the charterer who enters into a contract of carriage with a shipper', Hague Rules, n. 3 above, Art. 1(a).

<sup>76</sup> See, eg, van der Ziel, n. 34 above, at 269 ('In modern marine transport, the carriage of goods is mainly a process during which the actual handling of the goods is often done by machines operated by (personnel of) intermediaries').

<sup>77</sup> See Grant Gilmore and Charles L Black Jr, *The Law of Admiralty* (1975, 2nd edn) 278 ('Under the customary employment pattern the harbor worker is hired by a master stevedore or other independent contractor and not by the shipowner'); see also *Edmonds v Compagnie Generale Transatlantique*, 443 US 256, 263 to 264 (1979) (contrasting 'recurring situation' in which a longshoreman is 'employed by a stevedoring concern' with the 'less familiar arrangement where the ... longshoreman loading or unloading the ship is employed by the vessel itself').

<sup>78</sup> In the United States, the statutory term is 'non-vessel-operating common carrier' or 'NVOCC' (which also requires that the NVOC qualifies as a 'common carrier'). See eg, 46 USC app. §1702(17)(B) (2000) (defining an NVOCC as 'a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier').

<sup>79</sup> Hamburg Rules, n. 1 above, Art. 1(2).

<sup>80</sup> It is unclear just how broadly the 'actual carrier' definition should be read. At the very least, it contemplates vessel owners or operators in the transshipment context. (The definition would undoubtedly cover land carriers in a door-to-door shipment, too, except that the Hamburg Rules apply on a port-to-port basis. See n. 50 above.) The language is broad enough to cover 'any person' that performs any aspect 'of the carriage of the goods'. The key question is whether 'the carriage of the goods, or ... part of the carriage' includes every necessary aspect of moving the cargo from the place of receipt to the place of delivery (such as loading and unloading the vessel), or whether it includes only those aspects of the overall carriage of the goods that could themselves be described as a carriage of the goods (such as the carriage on a feeder vessel from the place of receipt to a transshipment port). A logical interpretation of

whom the carrier itself has delegated the performance of the contract of carriage. The final clause, covering 'any other person ...' then covers sub-subcontractors, and so on down the line.

#### *The performing party definition*

The early drafts of the CMI Instrument introduced a very broad concept of 'performing carrier',<sup>81</sup> but this proved to be one of the most controversial aspects of the project. Even the term 'performing carrier' was criticised, on the ground that many independent parties performing the carrier's obligations under the contract of carriage do not literally 'carry' the goods. Thus, the new term 'performing party' was introduced.<sup>82</sup>

More fundamentally, the performing party definition (found in Article 1.17 of the Preliminary Draft Instrument and Article 1(e) of the Revised Draft Instrument) proved highly controversial.<sup>83</sup> Some delegations to the CMI's International Sub-Committee supported a broad definition in order to ensure that all litigation for cargo damage would be subject to a uniform liability regime, regardless of a defendant's role in the transaction. If all of the potential defendants were subject to the same rules, there would also be less of an incentive to pursue multiple lawsuits against different defendants. FIATA, in contrast, was particularly anxious to ensure that its own members would not be covered by the definition when they undertook to carry goods but had no intention of performing the obligation themselves.<sup>84</sup> In Madrid in November 2001, during the International Sub-Committee's last meeting before submitting its final draft, the performing party definition was significantly narrowed (on FIATA's motion),<sup>85</sup> with the result that far fewer parties would be governed by the substantive liability provisions.<sup>86</sup>

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the language suggests the broad reading. The phrase 'the carriage of the goods' must refer to the carrier's obligation to carry the cargo from the place of receipt to the place of delivery, and it would be utterly nonsensical to say that loading and unloading the vessel, for example, were not 'part' of that overall obligation (assuming that the place of receipt is prior to loading and the place of delivery is subsequent to unloading). It is less certain whether the Hamburg Conference intended such a broad definition. See Sweeney, Part IV, n. 2 above, at 629–31 (discussing the definitions of, and distinction between, contracting carrier and actual carrier).

<sup>81</sup> See eg, Issues of Transport Law: Draft Outline Instrument, Art. 1.4, in 2000 *CMI Yearbook* 122–3 (discussed at the Singapore Conference in February 2001); see also Issues of Transport Law: Draft Outline Instrument, Art. 1.3, in 2001 *CMI Yearbook* 357 (discussed at the Fifth Meeting of the International Sub-Committee on Issues of Transport Law in July 2001) (hereinafter May 2001 draft).

<sup>82</sup> Despite the differences in terminology (and some significant differences in detail), the Hamburg Rules' 'actual carrier', the early CMI drafts' 'performing carrier', and the UNCITRAL Draft Instrument's 'performing party' all express essentially the same concept. The change from 'carrier' to 'party' was made because the word 'carrier' is often counterintuitive, particularly in the door-to-door context. Many of the carrier's duties under the contract of carriage are performed by entities, such as stevedores or terminal operators, that would not ordinarily be called 'carriers', even though their work is an indispensable part of the carriage of goods. The CMI draftsmen also found the word 'actual' to be confusing because it suggested that the 'carrier,' meaning the contracting carrier, was not 'actually' a carrier after all (despite being called the 'carrier' throughout the convention). It is noteworthy that Professor van der Ziel, recognizing the substantial similarity of the terms, summarizes the UNCITRAL Preliminary Draft Instrument's treatment of performing parties by describing them as 'actual carriers'. See van der Ziel, n. 34 above, at 272.

<sup>83</sup> The controversy is discussed in the UNCITRAL Preliminary Draft Instrument's commentary, n. 10 above, paras 14–18; see also van der Ziel, n. 34 above, at 269.

<sup>84</sup> At the time, it appeared that the Instrument would impose liability on performing parties. See, eg, May 2001 draft, n. 81 above, Art. 6.3. If the Instrument does not impose liability on non-maritime performing parties, see for example, n. 103 below and accompanying text, then FIATA's objections to the broad definition would be weaker.

<sup>85</sup> See Draft Report of the Sixth Meeting of the International Sub-Committee on Issues of Transport Law, in 2001 *CMI Yearbook* 305, 341 to 342 (hereinafter Sixth Meeting Report). The draft report of the sixth meeting was formally approved at the International Sub-Committee's seventh meeting in February 2003.

<sup>86</sup> See *ibid* at 342. The narrowing of the definition, if ultimately accepted, would have unintended consequences on other parts of the Draft Instrument. Other provisions that refer to 'performing party' were all drafted with a broader definition in mind. See eg, UNCITRAL Preliminary Draft Instrument, n. 10 above Arts 1.9, 1.11, 1.20, 6.1.3, 6.9.1, 6.9.3, 6.10, 7.3, 8.1, 8.2, 8.3.1, 10.1, 10.4.1, 10.4.3, 11.3, 13.1, 17.2; Revised Draft Instrument, n. 16 above, Arts 1(j), 1(k), 1(o), 14(2), 20(1), 20(3), 21, 27, 33, 34, 37, 46, 50, 52, 55, 63, 89.

The narrow definition was carried forward in the Preliminary Draft Instrument, but the commentary recognized that this was still an open issue.<sup>87</sup> In the Revised Draft Instrument, a footnote to Article 1(e) continues to note the possibility of a broader alternative.<sup>88</sup> At the autumn 2003 meeting in Vienna, the Working Group first discussed this definition in the context of the overall treatment of performing parties. There appeared to be substantial support for the wider definition, but the question has not yet been finally resolved.<sup>89</sup>

#### *The substantive liability of performing parties*

The substantive liability provisions<sup>90</sup> also generated some controversy. During the International Sub-Committee's deliberations, FIATA proposed that the Draft Instrument should not impose any liability on performing parties, and a few other delegations (representing carrier interests) offered some support for this view.<sup>91</sup> At the opposite extreme, support was expressed for a uniform liability regime,<sup>92</sup> under which the contracting carrier and all performing parties would be subject to the same liability rules, but it was generally recognized that it would probably be impossible to achieve a truly uniform regime in practice.<sup>93</sup> Many delegates still agreed that the ultimate convention should provide a liability regime that is 'as uniform as possible'.

When the performing party issue became bound up with the scope of coverage issue, several countries advanced proposals for how the Instrument should treat performing parties. Canada<sup>94</sup> and Sweden<sup>95</sup> each advocated a simple (albeit far-reaching) modification of the Preliminary Draft Instrument's network system to give effect not only to other mandatory international conventions but also to mandatory national law.<sup>96</sup>

<sup>87</sup> UNCITRAL Preliminary Draft Instrument, n. 10 above, para. 16.

<sup>88</sup> Revised Draft Instrument, n. 16 above, at 8 n.9.

<sup>89</sup> See Twelfth Session Report, n. 14 above, para. 42.

<sup>90</sup> UNCITRAL Preliminary Draft Instrument, n. 10 above, Art. 6.3; Revised Draft Instrument, n. 16, Art. 15 above.

<sup>91</sup> In the United States, the WSC and the NITL took the position that the contracting carrier alone should be liable for any cargo loss or damage. See WSC/NITL Agreement, n. 36 above, para. B(6). This WSC/NITL position went well beyond the FIATA proposal because it would have called for the preemption of any liability that performing parties have under current law (including existing tort law). There appears to be no support for this extreme position.

<sup>92</sup> A uniform liability regime would have obvious benefits of uniformity and predictability, at least from the perspective of those that regularly deal in international multimodal shipments. Complicated questions as to when and how the damage occurred would be minimized, with the result that disputes could be settled more easily. Because every defendant would be liable on the same basis, there would be no artificial effort to sue defendants who were subject to higher limits on liability. Of course, from the perspective of an inland carrier that deals regularly in unimodal shipments and is rarely involved in an international multimodal shipment, the uniform liability regime would decrease uniformity and predictability. Some inland carriers might even be unaware whether a particular container was moving under a unimodal or multimodal contract.

<sup>93</sup> Eleventh Session Report, n. 17 above, para. 239. It is widely recognized that at least some important countries will be unwilling to pre-empt their existing rules governing unimodal transport to apply a new international 'maritime plus' convention. In particular, the European countries are unwilling to abandon CMR and CIM-COTIF, and some nations appear unwilling to abandon their domestic law regimes. Thus, no serious support was expressed for adopting a fully uniform liability regime, even by those delegations that would have preferred this solution if it were attainable.

<sup>94</sup> Preliminary Draft Instrument on the Carriage of Goods by Sea: Proposal by Canada, UNCITRAL, para. 9, UN Doc. A/CN.9/WG.III/WP.23 (2002) (hereinafter Canadian proposal).

<sup>95</sup> Preliminary Draft Instrument on the Carriage of Goods by Sea: Proposal by Sweden, UNCITRAL, UN Doc. A/CN.9/WG.III/WP.26 (2002) (hereinafter Swedish Proposal).

<sup>96</sup> An earlier draft of the CMI Instrument had included precisely the language that the Canadian proposal would add. See May 2001 Draft, n. 81 above, Art. 4.4(a). This language had been deleted from the draft in preparation for the November 2001 meeting of the CMI's International Sub-Committee, see Sixth Meeting Report, n. 85 above, at 318, on the basis of a full discussion of the issue at the July 2001 meeting, see Report of the Fifth Meeting of the International Sub-Committee on Issues of Transport Law, in 2001 *CMI Yearbook* 265, 291-3. The Canadian delegation at the CMI meeting spoke in favor of deleting the language that the Canadian delegation to the UNCITRAL Working Group wished to restore. See *ibid* at 291 (comments of Professor Tetley).

Italy<sup>97</sup> argued that the Preliminary Draft Instrument's network system is both too broad<sup>98</sup> and too narrow.<sup>99</sup> It proposed to apply the Instrument in all suits against the contracting carrier, regardless of where the loss or damage occurs, and all suits against maritime performing parties. The new convention would be not only a multimodal instrument in the 'maritime plus' context but also the unimodal instrument for the maritime mode. Thus maritime performing parties should expect it to apply. Non-maritime performing parties, on the other hand, would expect to be liable on the terms applicable to their own contracts with the contracting carrier. To protect this expectation, the Italian proposal would permit cargo interests to sue inland performing parties only on a subrogation-like basis.<sup>100</sup> In essence, a cargo claimant could recover from an inland performing party on the same basis as the door-to-door contracting carrier could have recovered.

Under the US proposal,<sup>101</sup> the contracting carrier's liability would be determined by the narrow network principle found in Article 4.2.1 of the Preliminary Draft Instrument.<sup>102</sup> This is itself a compromise suggestion, based on the desire to achieve as uniform a system as possible and the belief that it will be necessary to extend at least this much deference to CMR to achieve a convention that will be widely ratified. For inland performing parties, the United States would neither create a new cause of action nor preempt an existing cause of action.<sup>103</sup> Cargo claimants would be free to sue inland performing parties on exactly the same terms as they do today under existing law. For maritime performing parties, the Draft Instrument would recognize a direct cause of action on its own terms.<sup>104</sup>

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<sup>97</sup> Preliminary Draft Instrument on the Carriage of Goods by Sea: Proposal by Italy, UNCITRAL, UN Doc. A/CN.9/WG.III/WP.25 (2002) (hereinafter Italian proposal).

<sup>98</sup> Italy argued that the Preliminary Draft Instrument is too broad in demanding the application of the underlying unimodal regime to the door-to-door carrier under a multimodal contract. In Italy's view, there is no need to apply CMR or CIM-COTIF to the door-to-door carrier even if the damage occurs during inland carriage in Europe. The door-to-door carrier would not be a road carrier that would expect to be governed by CMR or a rail carrier that would expect to be governed by CIM-COTIF. It did not contract to carry the goods by road or rail within Europe; it contracted to carry the goods by different modes, often to or from a country that is not a party to CMR or CIM-COTIF. The door-to-door carrier would be a CMR or CIM-COTIF shipper (under its contract with the European trucker or railroad), not a CMR or CIM-COTIF carrier. Thus, there should be no conflict between either CMR or CIM-COTIF and the Preliminary Draft Instrument with respect to door-to-door carrier, even if the Preliminary Draft Instrument were to apply for damages on an inland European leg. The Italian view of the relationship between CMR and the UNCITRAL Draft Instrument is not universally shared. For an argument rejecting the Italian view, see generally Malcolm Clarke, 'A Conflict of Conventions: The UNCITRAL/CMI Draft Transport Instrument on Your Doorstep', JIML 9 [2003] 1 28.

<sup>99</sup> Italy argued that the Preliminary Draft Instrument is too narrow in failing to respect the interests of non-European inland carriers. A Canadian trucker has just as strong an expectation that the mandatory Canadian law will apply to it as the European trucker's expectation to be governed by CMR.

<sup>100</sup> Pending some indication of support from other nations, Italy did not fully develop the proposal. Thus, there are no details as to how the subrogation-like action would work in practice. But at the very least, the same legal regime would govern the shipper's direct action against the subcontracting performing party as would have governed in an action by the door-to-door carrier against its subcontractor, the performing party.

<sup>101</sup> US proposal, n. 35 above.

<sup>102</sup> Ibid, para. 5. The United States accordingly opposes the inclusion of the bracketed 'or national law' language in Art. 8 of the Revised Draft Instrument. See n. 66 to 68 above and accompanying text. The support of even the narrow network principle distinguishes the US Proposal from the Italian Proposal. See also n. 104 below.

<sup>103</sup> This aspect of the proposal satisfied the request of the US railroads that the new Instrument not apply to them. See eg, Comments on Behalf of the Association of American Railroads Relating to the Preliminary Draft Instrument on the Carriage of Goods by Sea, Doc. No. MARAD-2001-11135-12, at 3 (filed 13 September 2002) (expressing the Association's opposition to extending the scope of the Preliminary Draft Instrument to cover inland carriers 'to the extent that it adversely affects the current liability system applicable to US ... railroads'); Compilation of Replies, n. 73 above, at 34 (substantially identical comments filed with UNCITRAL). It also distinguishes the US proposal from the Italian proposal. See also n. 104 below.

<sup>104</sup> The US and Italian proposals were very similar, but they differed in two significant ways: (1) For claims against the contracting carrier, the US proposal adopts the narrow network principle of the UNCITRAL Preliminary Draft Instrument, whereas the Italian proposal would apply the new convention on a uniform basis. Outside Europe, this difference has no practical significance. Within Europe, however, this difference may be of great political importance.

At the autumn 2003 UNCITRAL session, the treatment of performing parties was one of the first substantive issues addressed. The discussion began with the circulation of a joint statement by Italy and the Netherlands<sup>105</sup> expressing their preference for 'a uniform liability regime' for the contracting carrier, as described in the Italian proposal,<sup>106</sup> but recognizing the lack of support for their preferred solution. They accordingly supported the US proposal, subject to some clarifications (which are fully consistent with the US position).<sup>107</sup> With this strong endorsement to begin the discussion, there was substantial support for the US proposal.<sup>108</sup> But contrary views are still strongly held and all of the proposals are still on the table.<sup>109</sup> As is generally the case with most issues facing the Working Group, 'a final decision [will] be made at a future session'.<sup>110</sup>

*Automatic Himalaya protection for performing parties*<sup>111</sup>

If negligent performing parties are to be directly liable for the damages that they cause, either in tort actions or under the terms of the Instrument, it becomes necessary to consider the familiar 'Himalaya' question.<sup>112</sup> The issue first arose under the Hague Rules, which do not explicitly address the problem.<sup>113</sup> Some courts have held under the Hague Rules that when negligent subcontractors are sued in tort, they are entitled to the benefit of the carrier's defenses and limits of liability.<sup>114</sup> Others have held in the same context that negligent subcontractors are not entitled to the benefit of the carrier's defenses and limits of liability unless the contract of carriage explicitly extends the benefit to third parties<sup>115</sup> (which now is generally done in a provision known as a Himalaya clause).

The Hague-Visby Rules (in Article 4 *bis*) attempted to extend 'Himalaya' protection automatically to at least the carrier's servants and agents, although apparently not to independent contractors. The provision was ambiguous, however, and there has been disagreement as to how broadly it extends.<sup>116</sup> Article 7(2) of the Hamburg Rules also extends

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The US delegation is less optimistic than Italy's that European countries would be willing to ratify a liability convention without a network exception. (2) For claims against inland performing parties, the US proposal leaves the parties' rights under current law unchanged, whereas the Italian proposal would introduce a subrogation-like concept. Cf n. 100 above and accompanying text. To the extent that mandatory law governs performing parties, as it does for inland carriers in Europe, the two approaches would likely yield the same results. But to the extent that the contracting carrier and its subcontractors have contractual freedom to negotiate their own liability terms, the differences could be dramatic. In the United States, for example, the US proposal would continue to permit tort suits against performing parties, which would have only the uncertain protection they can obtain under Himalaya clauses, whereas the Italian proposal would put claimants in the same position as the contracting carriers, which may have accepted minuscule liability limits in return for lower freight rates.

<sup>105</sup> Statement of Italy and the Netherlands on the Proposal by the United States of America (circulated to delegates of UNCITRAL Working Group III at its Twelfth Session) (6 October 2003) (summarized in Twelfth Session Report, n. 14 above, paras. 20 to 21) (hereinafter Italian-Dutch Statement).

<sup>106</sup> See n. 97, 100 above and accompanying text.

<sup>107</sup> The Italian-Dutch Statement, n. 105 above, clarifies (1) that the contracting carrier is liable on the Instrument's terms from receipt to delivery (which would mean door-to-door coverage in an appropriate case), subject to the 'limited network exception' of Revised Draft Instrument Art. 8 without any reference to national law (which would be the same as the limited network exception of Preliminary Draft Instrument Art. 4.2.1); (2) that the Instrument would also apply to maritime performing parties; and (3) that the Instrument would not apply to non-maritime performing parties.

<sup>108</sup> See Twelfth Session Report, n. 14 above, paras 20–7.

<sup>109</sup> See *ibid.*, paras 24–7.

<sup>110</sup> See *ibid.*, para. 27.

<sup>111</sup> See UNCITRAL Preliminary Draft Instrument, n. 10 above, Art. 6.3.3; Revised Draft Instrument, n. 16 above, Art. 15(5).

<sup>112</sup> See generally Michael F Sturley, 'Third Party Rights and the Himalaya Clause', in *2A Benedict on Admiralty* § 169 (7th rev. edn 2003).

<sup>113</sup> See eg, *Robert C Herd & Co v Krawill Mach. Corp.*, 359 US 297, 301 to 302 (1959).

<sup>114</sup> See eg, Michael F Sturley, 'International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation', 27 Va. J. Int'l L. (1987) 729, 771–3 (discussing German cases).

<sup>115</sup> See eg, *Herd*, 359 US at 308; *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 (HL 1961).

<sup>116</sup> The literature is divided on the meaning of Article 4 *bis* in the Hague-Visby Rules. Compare eg, William Tetley, *Marine Cargo Claims* (1978, 2nd edn) 387; Kurt Grönfors, 'Why not Independent Contractors?', J. Bus. L. (1964) 25, 27;

Himalaya protection automatically to the carrier's servants and agents, and Article 10(2) effectively extends the protection to 'actual carriers', thus picking up subcontractors.

During the CMI process, there was widespread support for the proposition that every potential defendant should have automatic 'Himalaya' protection. Although this approach would not provide completely predictable treatment on uniform terms to all actions for cargo loss or damage, it would at least ensure that some of the Instrument's core provisions (those governing the carrier's defences and limits of liability) would apply to all actions. It would also reduce the incentive to sue subcontractors that might otherwise be subject to higher liability under current non-uniform laws.

One significant caveat was expressed to the suggestion in favour of universal Himalaya clause protection. Some of those favouring a broad definition of 'performing party'<sup>117</sup> felt that all performing parties should be entitled to the benefit of the carrier's defenses and limits of liability because they would assume the carrier's responsibilities and liabilities under the Instrument. Performing parties would take the bitter with the sweet. If the narrow definition is adopted,<sup>118</sup> however, or if performing parties do not assume any liability under the Instrument,<sup>119</sup> then this rationale no longer applies. Many feel that it would be unfair to give subcontractors all of the benefits of the Instrument if they assume no responsibility under it.<sup>120</sup>

### *The internationality of the sea leg*

Another geographic scope-of-coverage issue that has been significant in the UNCITRAL negotiations concerns the 'internationality' of the sea leg: must the goods travel by sea from one country to another country, or is it sufficient to have an overall movement from one country to another (even if the sea leg is domestic)? A hypothetical involving the US trade,<sup>121</sup> which was discussed during the UNCITRAL negotiations, well illustrates the issue. Suppose that a contract of carriage calls for the goods to be transported from Vancouver to Honolulu.<sup>122</sup> If they are taken by sea directly from Vancouver to Honolulu, that is an international movement with an international sea leg and the Instrument should undoubtedly apply. If the goods are trucked from Vancouver to Seattle, however, and then taken by sea from Seattle to Honolulu, then the sea leg is not international, and some would argue that the Instrument should not apply.

When the issue was discussed in New York at the spring 2003 meeting, the Working Group's 'prevailing view' favored the approach adopted in Article 3.1 of the Preliminary Draft Instrument, under which the internationality of the overall carriage triggered the application of the convention but the internationality of any particular leg (including the sea leg) was irrelevant.<sup>123</sup> There was enough support for the requirement of an international sea leg, however, that the Secretariat was requested 'to reflect it, as a possible variant', in the next

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G A Zaphiriou, 'Amending the Hague Rules', J. Bus. L. (1971) 12, 14, with, eg, George F Chandler, 'A Comparison of COGSA, the Hague-Visby Rules, and the Hamburg Rules', 15 J. Mar. L. & Com. (1984) 233, 265; Anthony Diamond, 'The Hague-Visby Rules', Lloyd's Mar. & Com. L.Q. (1978) 225, 249-51; John W Richardson, 'The Hague-Visby Rules - A Carrier's View', in *The Hague-Visby Rules and The Carriage of Goods by Sea Act, 1971*, at 8 (1977) Lloyd's of London Press Seminar (hereinafter Lloyd's Seminar). Cf eg, John Maskell, 'The Influence of the New Rules on Contracts of Carriage', in Lloyd's Seminar, above, at 5 to 6 (finding Art. 4 *bis* ambiguous); Michael J Mustill, 'Carriage of Goods by Sea Act 1971', 11 *Arkiv for Sjørett* (1972) 684, 709 (same).

<sup>117</sup> See n. 82 above.

<sup>118</sup> See n. 84, 85 86 above and accompanying text.

<sup>119</sup> See n. 90 to 110 above and accompanying text.

<sup>120</sup> See eg, Twelfth Session Report, n.14 above, paras 21, 23; *US proposal*, n. 35 above, paras 7, 9.

<sup>121</sup> Despite the emphasis on this hypothetical during the UNCITRAL negotiation, the issue does not have much practical significance in the United States. Simple geography makes it unusual to have an international contract of carriage in which the goods are carried in part by sea without the goods being carried internationally by sea. The hypothetical nevertheless illustrates the issue well, and gains some added relevance from the CMI perspective because Vancouver will host the CMI's 38th conference in May and June 2004.

<sup>122</sup> See Eleventh Session Report, n. 17 above, para. 243.

<sup>123</sup> See *ibid.*

draft.<sup>124</sup> In the Revised Draft Instrument, therefore, variant C of Article 2.1 reflected this requirement. Then, when this provision was discussed in Vienna at the autumn 2003 meeting, most delegations agreed that the scope of the Instrument should be restricted so that it applied to the door-to-door carriage of goods only when (1) the carriage included a sea leg, and (2) the sea leg involved international transport.<sup>125</sup>

#### *Inbound and outbound coverage*

Another geographic scope-of-coverage issue has been surprisingly uncontroversial. The Hague and Hague-Visby Rules by their terms generally apply only to outbound coverage.<sup>126</sup> In other words, these regimes govern carriage *from* contracting states but not *to* contracting states. In practical terms, this means that consignees, who often bear the initial loss when cargo is damaged and who thus bring the recovery action against the carrier, do not benefit from the international regime that has been adopted in their own country. The United States, in contrast, has applied its cargo liability regime to inbound and outbound carriage since the Harter Act,<sup>127</sup> and thus departed from the Hague Rules approach when it enacted COGSA,<sup>128</sup> but most Hague and Hague-Visby countries have not followed this example.<sup>129</sup> Indeed, the issue was discussed during the negotiations leading to the Visby Protocol, but extending the regime to inbound carriage was too controversial.<sup>130</sup> The Hamburg Rules finally overcame this reluctance and extended the scope of application to cover inbound and outbound carriage.<sup>131</sup>

When this issue arose during the CMI negotiations, it was readily agreed that the new convention should apply to inbound and outbound carriage. This choice was reflected in Article 3.1 of the CMI Draft Instrument, carried forward to the Preliminary Draft Instrument, and is now reflected in Article 2.1 of the Revised Draft Instrument. It has not been controversial.

#### **Conclusion**

Many issues still remain to be resolved in the UNCITRAL process. And as the Hamburg Rules so vividly demonstrate, completing the UNCITRAL process is merely the first step in achieving a successful convention that will be broadly ratified by the world's maritime and commercial powers. It is still too early to predict exactly what the new convention will eventually contain.

Despite the need for caution, it is at least clear that the issues discussed here will be important parts of whatever compromise solution is ultimately negotiated. Moreover, the progress that has been achieved on these issues is an encouraging sign that a compromise solution will in fact ultimately be negotiated. These issues were among the most contentious when the UNCITRAL Working Group first addressed them. A substantial consensus is nevertheless emerging on all of these major points.

<sup>124</sup> See *ibid.*

<sup>125</sup> See Twelfth Session Report, n. 14 above, para. 56. There was considerable debate as to how this general policy decision should be reflected in a new draft to replace the three variants in Article 2.1 of the Revised Draft Instrument. See *ibid.* paras 57 to 75. In the end, the Working Group instructed the Secretariat to prepare a revised draft. See *ibid.* para. 74.

<sup>126</sup> See Hague Rules, n. 3 above, Art. 10; Hague-Visby Rules, n. 5 above, Art. 10(a) to (b).

<sup>127</sup> See Harter Act §3, 46 USC app. §192 (2000) (applying to shipments '*to or from* ports of the United States') (*emphasis added*).

<sup>128</sup> See COGSA §13, 46 USC app. §1312 (2000) (statute 'appl[ies] to all contracts for carriage of goods by sea *to or from* ports of the United States in foreign trade') (*emphasis added*). COGSA's enacting clause similarly provides '[t]hat every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea *to or from* ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act'. 46 USC app. §1300 (2000) (*emphasis added*).

<sup>129</sup> Professor Tetley has suggested that only Belgium and possibly the Philippines also apply their domestic legislation to both inbound and outbound shipments. See William Tetley, 'Acceptance of Higher Visby Limits by US Courts', 23 J. Mar. L. & Com. (1992) 55, 56 & nn. 5 to 6.

<sup>130</sup> See Michael F Sturley, 'Bills of Lading for Cargo Carried in Foreign Trade', 2A *Benedict on Admiralty* §41, at 5–2 n. 10 (7th rev. edn 2003).

<sup>131</sup> See Hamburg Rules, n. 1 above, Art. 2(1).

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# The road to Vancouver – the development of the York-Antwerp Rules

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General Average is a concept that is peculiar to maritime transport and has its origin in the earliest days of sea-borne trade in the Mediterranean. The basic principle was recognised by sea-faring nations in similar terms: any sacrifice of property, such as jettison, or any extraordinary expenditure that is made for the common safety of ship and cargo is contributed to by the surviving property on the basis of arrived values. In the eighteenth century divergence between English and European/US law and practice in the application of this principle became a serious inconvenience to commercial interests and from 1860 onwards there was a concerted international effort towards greater uniformity, culminating in the York-Antwerp Rules of 1890, which became operative by insertion into contracts of affreightment. This article traces that initial movement for uniformity and outlines subsequent reforms and new controversies that have emerged as the Rules have been revised periodically, including proposals to be considered by the Comité Maritime International in Vancouver between 31 May and 4 June 2004.

## Introduction

Since 1890 the practical application of the principles of General Average has been governed by the incorporation of the York-Antwerp Rules into contracts of affreightment. After the 1924 revision of the Rules, their custodian has been the Comité Maritime International (CMI),<sup>1</sup> a non-governmental international organisation dedicated to the unification of maritime law in all aspects, and is made up from National Maritime Law Associations.

The International Union of Marine Insurers (IUMI) expressed dissatisfaction with the last revision of the Rules in 1994 and in their 1998 conference in Berlin, a working group submitted a paper entitled 'General Average – how should it be changed?'. This resulted in a formal request to CMI the following year for further reform of the York-Antwerp Rules to be given urgent consideration. IUMI felt that the concept of General Average reflected in the current York-Antwerp Rules was outdated. The increasing complexity of modern commerce made General Average costly and time-consuming, and created an unnecessary burden for property insurers and unnecessary trouble for commercial interests. Their proposed solution (recognising the difficulties of completely abolishing a concept embedded in the law of most maritime nations) was to restrict the categories of loss or expense that would be made good by General Average contributions between the parties; more losses would be allowed to lie where they fell.

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<sup>1</sup> Comité Maritime International [www.comitemaritime.org](http://www.comitemaritime.org).

For reasons that are more fully explained below, the York-Antwerp Rules recognise two main types of allowance:

- (i) 'Common safety' allowances: sacrifices of property (such as flooding a cargo hold to fight a fire) or expenditure (such as salvage or lightening a vessel) that were made or incurred while the ship and cargo were in the grip of peril. Since the early nineteenth century, English law and practice largely recognised only this category of General Average.
- (ii) 'Common benefit' allowances: once a vessel was at a port of refuge, European countries and the United States generally viewed expenses necessary to enable the ship to resume the voyage safely (but not the cost of repairing accidental damage to the ship) as also being General Average, for example the cost of discharging, storing and reloading cargo as necessary to do repairs, port charges, and wages etc during detention for repairs and outward port charges.

In addition to addressing various minor differences in practice, the main thrust of the York-Antwerp Rules has been to unite these two strands.

IUMI's solution to the problems they perceived was to reduce the number of General Averages by restricting General Average to 'common safety' situations by making it a prerequisite for all allowances that they should relate strictly to sacrifices and expenditure in time of actual peril. Arguments for and against this radical proposal (and other incremental changes proposed by IUMI) were aired at subsequent CMI meetings in Toledo (2000), and Singapore (2001) and a working group was set up to give the matter more detailed consideration. Their report dated 7 March 2003<sup>2</sup> was progressed further by an International Sub-Committee meeting at Bordeaux in June 2003 and a final version has been made ready to present to the 38th CMI Conference<sup>3</sup> which sets out both sides of the debate as evenhandedly as possible.

The purpose of this paper is not to duplicate that report, but rather to provide a context for it. In setting out the historical background, I must fully acknowledge the use made of the work of the past and present editions of Lowndes and Rudolf on *General Average and the York-Antwerp Rules*<sup>4</sup> and the writings of Fellows of the Association of Average Adjusters. Any inaccuracies come not from the originals but from my attempt to compress a complex story into a manageable compass.

### The parting of the ways

Whilst the concept of General Average is of ancient origin, it was the Ordinance of Louis XIV in 1681 that provided a framework regarding General Average that influenced the rest of Europe to set down maritime law in this important area. By 1750, codes had been published in Hamburg, Prussia, Denmark, Sweden and Spain together with ordinances in Amsterdam, Rotterdam and Middleburg. The definition found in the French code was followed elsewhere in similar terms:

Every extraordinary expense, which is made for the ship and merchandize conjointly or separately, and every damage that shall occur to them from their loading and departure until their return and discharge, shall be reputed average. Extraordinary expenses for the ship alone, or for the merchandize alone, and damage which occurs to them in particular, are simple and particular average; and extraordinary expenses incurred, and damage suffered, for the common good and safety of the merchandize and the vessel, are gross and common average.

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<sup>2</sup> See [www.comitemaritime.org/worip/genave/report](http://www.comitemaritime.org/worip/genave/report).

<sup>3</sup> Vancouver, BC, Canada, 31 May–4 June 2004.

<sup>4</sup> Lowndes and Rudolf, *The Law of General Average and the York-Antwerp Rules* (12th edn), ed D J Wilson, J H S Cooke, Sweet & Maxwell London 1997.

Although the introduction of Napoleon's 'Code de Commerce' resulted in a partial change in France, the pattern throughout Europe had been set, as was the general practice of allowing all or most expenses while at a port of refuge as General Average. In many countries this latter practice was implied rather than set out in detail, although there were some exceptions, for example the Prussian code:

If a vessel, having sprung a leak or sustained any other damage, be forced to go into a port, all the charges inwards and outwards, and the charges of unloading and re-loading, if the cargo has to be discharged in port in order to repair the vessel, or for other sufficient reasons, and, also, the maintenance of the crew in port and their wages during the delay, shall be general average.

Some minor distinctions were also made; for example the Spanish code allowed wages while detained at a port of refuge if the vessel was under time charter, but not if engaged on a voyage freight basis. The Napoleonic Code changed French law to the extent that if resort to a port of refuge was due to Particular Average (accidental) damage, no General Average allowances were permitted. Otherwise, the European practice remained that costs at a port of refuge would be General Average whether the damage in question was due to a General Average act or an accident in the voyage.

The law and practice of the United States developed along similar lines. The Supreme Court defined General Average in the following terms:<sup>5</sup>

General average contribution is defined to be a contribution by all parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to general average are usually divided into two great classes: (1) Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing. (2) Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.

Writing in 1923 (with reference to American law rather than the York-Antwerp Rules) the American Adjuster Ernest Longdown noted, on the basis of authorities going back as far as 1808, that the following expenses might be allowed at a port of refuge:

Pilotage and towage into port, extra men hired to assist in pumping, wharfage on vessel, quarantine dues, discharging cargo, storing and reloading cargo, consular fees, fees of diver, pilotage and towage out of port, surveyor's fees, Bill of Health, restowing cargo, Agency fees, wages and provisions, fuel and engine stores.

He continued with regard to ports of call:

A port of call, at which the vessel intends to stop for orders, or for coal, or other purpose, in the ordinary course of the voyage, may become a port of refuge, if because of damage sustained, she is so disabled either before reaching such port, or while there, as to be prevented from continuing the voyage until repairs are made, and the cost of wages and provisions, and other expenses common to vessel and cargo, during the extra detention for that purpose, are contributed for. The Supreme Court, in a case of this kind, held that the expense of the wages and provisions during the extra detention caused by the voluntary act of the master was incurred 'to promote the general safety of the associated interests' and that such expense was a proper subject of general average contribution.<sup>6</sup>

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<sup>5</sup> *The Star of Hope* (1869) 9 Wallace 203, US Sup. Ct.

<sup>6</sup> *Hobson v Lord* [1875] 2 Otto 397, US Sup. Ct..

It is difficult to pinpoint the stage at which English practice began to diverge from other trading nations, but it appears to be around the beginning of the nineteenth century. References can be found in contemporary books by Benecke and Robert Stevens, the earliest professional average adjusters who practised in the City of London from about 1800 onwards. Stevens was originally an insurance broker whose advice on settling averages was much sought after. Reportedly his life in his new profession was interrupted when he killed a man in a duel and had to flee to France, leaving the business in the hands of his clerk William Richards. It is not recorded whether the cause of the duel was an affair of the heart or a dispute over expenses at a port of refuge.

#### Private battles

In a pamphlet published in 1844, the Liverpool-based adjuster, Richard Lowndes, outlined the injustice that was already being felt by commercial interests because of variations in the treatment of General Average allowances.

It is not often, therefore, that an average is adjusted at any other place than the port of destination. And the law which prevails at that port is binding upon the merchants and the shipowner, however widely it may differ from the law of England, and although all the parties interested may be British subjects. In a case where a British shipowner had recovered from a British merchant, the proprietor of goods on board, a larger sum, as his proportion of a general average, then he would have been entitled to if the average had been adjusted in England, it was decided, in the Court of King's Bench, that he had a right to retain it. It was due according to the laws of the country where the voyage ended, and those laws must be submitted to.

But the duty of submission to foreign laws does not extend to an English underwriter. His liability is confined to general average as it is understood and practised in England. Such, at least, is the received opinion, and it is constantly acted upon. The question has not yet been expressly determined at law; but the language of the judges, on several occasions, has been such as to favour that view; and, no doubt, any attempt to render an English underwriter liable for foreign average adjustments would incur a formidable opposition. Hence, a merchant may be a loser from the differences between the English and foreign laws of average. In one case of the kind, some little time ago, the loss to the owner amounted to £200 on a shipment of goods, the whole value of which did not exceed £1,200. His share of the average, as adjusted at New York, was about £282, which, of course, he was obliged to pay to the shipowner. His underwriters in London caused a fresh adjustment to be drawn out at Lloyd's, by which it appeared, that his proportion should be only £82; and that sum was all he received from them.

He goes on to note that 'the English laws are more unfavourable to General Average than those of almost any other country'. With regard to what he termed 'intermediate' (ie common benefit) charges he noted the widespread practice elsewhere of allowing such costs as General Average before continuing,

In this country it has, for some years, been customary to apportion such charges in a peculiar manner. The inward port charges and the expense of unloading the cargo are allowed in general average, whether the damage was occasioned by an accident or a sacrifice. The warehouse rent of the cargo is charged specifically to its owners. The outward port charges, as well as the cost of re-shipping the cargo, fall exclusively upon the shipowner, as do the wages and maintenance of the crew during the stay.

His distaste for the practice was made clear: 'the English practice is not very strongly supported by authority of any sort. It is of modern origin and adopted by no other country'. In particular, 'the practice as to outward port charges and the warehousing and reloading of cargo is still more destitute of legal precedents in its favour', and he continued with a withering analysis of the arguments put forward by Stevens. However, Lowndes recognised that he was in a minority; the practice of most adjusters and of Lloyd's was against him and he

felt this would probably be sufficient to persuade a court of law in favour of the status quo.

The date of 1844 puts the pamphlet at the very beginning of his career as an average adjuster; like many other adjusters he would have started as an insurance broker, working in the flourishing Liverpool insurance market, whose Underwriters' Association was founded in 1802. As he grew to eminence in the profession his views appear to have changed and the first two editions of the General Average 'bible' (*Lowndes on the Law of General Average*) support the English practice which he had also advocated at the conference leading to the York Rules of 1864. However, by the time of the third edition the youthful iconoclast began to reappear and from 1876 onwards he ignored English practice in cases where a vessel resorted to a port of refuge due to sacrifice damage, and allowed all costs to General Average. He records that his adjustments were 'after more or less discussion, passed by Underwriters', but eventually one such adjustment came before the courts. In *Atwood v Sellar*<sup>7</sup> he had the satisfaction of receiving the unanimous support of the Court of Appeal. His youthful fears that a court would feel constrained by the weight of customs of Lloyd's and the practice of London adjusters proved to be unfounded. Thesiger LJ found that the practice of adjusters was not founded upon true principles, nor was it in accordance with authority. The judge also welcomed the fact that the effect of the Court of Appeal judgment would be to put English law on 'a footing which more nearly assimilates it, in matters in which assimilation is desirable, to the law obtaining in other mercantile communities'.

Suitably fortified, Lowndes began to follow the practice, now espoused in the third edition of the 'bible', of allowing as General Average the costs of warehousing and reloading cargo, even when the vessel went in to a port of refuge on account of Particular Average (accidental) damage. Although generally approved by the Liverpool insurance market, London was less impressed and the supporters of the existing Custom of Lloyd's resisted one such General Average claim, which then came before the courts in *Svensden v Wallace*.<sup>8</sup>

The case involved a vessel, carrying a cargo of rice from Rangoon to Liverpool, which sprang a leak in a storm and had to put back to Rangoon for repair. The cargo was landed in order to repair the ship, stored and later reloaded. The weight of custom was not found to be convincing and in the Queen's Bench Division, Lopes J felt himself bound by *Atwood v Sellar* on the point of principle, as he concluded:

The putting into a port of refuge, if necessary, is an act of voluntary sacrifice, undertaken for the common benefit of the adventure, ship, cargo, and freight, and I think every expense consequent upon it, incurred to enable the ship afterwards to proceed safely on her voyage with her cargo so as to earn the freight, is incurred for the common benefit of the adventure, and is chargeable to general average.

However, a majority of the Court of Appeal reversed his decision. Brett MR considered that expenses incurred after the vessel was safely in port were unconnected with danger to ship and cargo:

Unless, therefore, we are bound by authority to hold otherwise, I am of the opinion that, according to the law of England, when a ship is obliged, for the safety of ship and cargo, to go into and goes into a port of distress in order to repair damage done by sea peril, the expenses of going into the port are general average expenses; that if it is necessary for the safety of both ship and cargo to unload the cargo, or if it is necessary to unload the cargo in order to repair the ship, though it is not necessary for the safety of the cargo, the expense of unloading the cargo is a general average expense; but if the unloading of the cargo is not for either of these causes the expense of unloading is not a general average expense. I am of opinion, in the same way and in

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<sup>7</sup> (1880) 5 QBD 286.

<sup>8</sup> (1883) 11 QBD 61(1884) 13 AC 69; (1885) 10 HL 404.

the same case, that the expenses of warehousing, guarding, or manipulating the cargo, of repairing the ship, of reloading the cargo, of taking the ship out of port, of the charges of going out of port, are not general average expenses.

Unlike Thesiger LJ, he appears to have been unmoved by thoughts of international uniformity as he declared:

I should doubt the expediency of making the law of the greatest commercial and maritime country of the world bend to the law of other countries where commercial operations are far less extensive and where commercial adventure is more timid.

Whether or not gripped by the same imperial worldview, the House of Lords confirmed that the costs of reloading cargo should not be General Average. Lord Blackburn left the question of the expenses of leaving port undecided and criticised *Atwood v Sellar* in a way that raised doubts about aspects of that case; matters therefore remained in a state of some confusion. Practitioners sought refuge in the Association of Average Adjusters' Rules of Practice which took the judgments of the above cases as a basis for rules which also dealt with some of the open questions. In short, if a vessel entered a port of refuge because of sacrifice damage, all subsequent costs were General Average; if the entry was due to Particular Average damage, General Average finished with the discharge of cargo, storage costs fell on cargo and outward port charges were a charge on freight. Whilst the position in England, and in particular between adjusters in Liverpool and London, had been clarified, there remained the problem that the rest of the world was, however timidly, continuing to march to a different tune.

#### Public debate

While Richard Lowndes had been fighting his battles from his office in Liverpool the debate regarding the continuing state of international chaos was very much in evidence on the public stage. In 1860 an appeal was made by the Liverpool Underwriters' Association, Lloyd's and several commercial bodies to the splendidly titled National Association of Social Science. This august body sent a circular letter to all the Maritime countries of Europe and to the United States, signed by the Chairman of Lloyd's, the LUA and a long list of the great and the good in commerce.

The system of general average is one which, to prevent confusion and injustice, pre-eminently requires that the same principles should be acknowledged amongst the chief maritime nations. So far is this from being the case, however, that some of the most important rules vary not only in the same country, but in the same port. Uncertainty in law is always an evil; and, in regard to general average, the evil is peculiarly felt. The ship may be owned in one country, insured in another, her cargo owned and insured in several, and the port of destination, where the general average is made up, may be in a country which has different rules to any of the others. What is considered to be particular average on ship in one port is held to be general average in another, so that the owner of an outward-bound ship may find himself unable to recover his loss either from his underwriters at home, or as general average abroad; or, on the other hand, he may be in a position to indemnify himself fraudulently twice over. A similar remark would apply to special charges on freight and on cargo. A very large proportion of the most important questions rests in England nominally upon the decision of that extremely vague authority, 'the custom of Lloyd's', but really depends upon the idiosyncrasy of the particular adjuster who may be entrusted with the papers. Hence arise many cases where apparently injustice must be done to assurer or assured. Either the assurer finds himself saddled with a loss against which he believed himself insured, or the underwriter pays one which was not considered in the premium ...

The evils of such a state of things are notorious and unquestioned, though it may be doubted whether many which are distinctly traceable to it, and are therefore removable, are clearly realised as proceeding from this source. Probably the chief reason which has hitherto prevented any general movement in favour of this reform, is an exaggerated estimate of the

difficulties in the way of carrying it out. The difficulties are, no doubt, considerable, but they are far from being insuperable, and the importance of the end amply justifies an attempt to grapple with them.

The subsequent conference on 25 September 1860 was attended by all the interested parties and, after three days of discussion, they issued a joint resolution. They resolved that the Council of the Association should work to draw up a bill which would be enacted by the legislatures of the leading maritime nations, after a six-month period for discussion of the draft. The bill was to embody the consensus reached about General Average that was reflected in 11 separate resolutions, of which the following two are the most relevant here:

6. The expense of warehouse rent at a port of refuge on cargo necessarily landed there, the expense of re-shipping it, and the outward port charges at that port, ought to be allowed in general average.

8. The wages and provisions for the ship's crew ought to be allowed to the shipowners in general average, from the date the ship reaches a port of refuge until the date on which she leaves it.

The decision to proceed on the basis of legislation may seem unrealistic to those familiar with the time required for modern conventions to come into effect, but it was clearly considered to be feasible at the time. However, the idea of legislation was to prove deeply unpopular in some quarters, principally amongst Lloyd's underwriters. This may have been exacerbated by an unfortunate circumstance relating to the distribution of papers intended for a discussion at the Guildhall on 6 June 1862. The draft bill was circulated in April, giving rather less than the six-month review period intended, but, to make matters worse, the notice of the meeting reportedly did not reach Lloyd's until a few days before the meeting. Understandably, the committee of Lloyd's felt it was impossible to deal with the matter in such a short time and wrote to the president of the meeting accordingly. All public discussion of General Average was therefore taken off the agenda, but private consultations continued to take place. The results of these deliberations were published in January 1864, to be followed by the Third International General Average Congress at York in September of the same year. The representative of Lloyd's made it clear that the committee objected both to the use of legislation and to the terms of the bill itself and he was instructed to disassociate Lloyd's from the proceedings. The congress issued a formal resolution making it clear that their objective went beyond enacting a bill in England and remained the establishment of uniformity throughout the maritime world. The 11 York Rules were agreed upon and, although universal legislation remained the ideal, it was moved that, pending legislation, the Rules should be inserted into bills of lading and charterparties.

Little seems to have happened until 1875, when, at the annual Congress of the Association for the Reform and Codification of the Law of Nations, the topic was raised again as being worthy of attention. A meeting was duly convened in August 1877 at Antwerp, attended by 68 delegates. The two delegates from Lloyd's presented a letter from their Chairman protesting against the York Rules being used as a basis for discussion,

... for in the opinion of the committee, these rules extend considerably, both in principle and amount, the area in which general average may be recovered, and the attempt to establish uniformity is carried out solely by introducing into the law of England cases of general average which are allowed abroad, but not in England, and which the committee consider most objectionable.

The Lloyd's position was that uniformity could best be achieved by universal and total abolition of General Average, or failing that, any differences should be dealt with by the restriction rather than the enlargement of existing English practice. Having started the 18th century with a restriction in General Average under English practice, the Committee of Lloyd's

plainly had no desire to see the situation reversed as the century moved to its close. However, the feeling of the meeting was against the views expressed by the Lloyd's delegates and the York Rules were approved with some minor amendments. A proposal to include a definition of General Average in the Rules was not successful. The emphasis on legislation seems to have diminished and the General Shipowners' Association in 1878 recommended that the 'most effectual mode of procedure' would be a general agreement by all parties to insert appropriate wording in bills of lading and charterparties.

Despite the continuing opposition from Lloyd's, other underwriters and mutual associations apparently agreed to the inclusion of appropriate General Average clauses without additional premium. In the interim, cases like *Atwood v Sellar* had narrowed the gap between the English law and York Rules versions of General Average. Richard Lowndes was no doubt pleased to note at the 1880 meeting of the Association of Average Adjusters that all but two of the York Rules were now mirrored by English law and practice. By 1881 the York Rules were said to have become 'all but universally adopted', and the revised York-Antwerp Rules agreed in 1890 were equally well received.

Much had been achieved in 30 years, and it is a story of remarkable co-operation between the commercial interests of so many nations, but some luminaries clearly felt there was still unfinished business to attend to. The York-Antwerp Rules of 1890 remained essentially a list of agreed practices on specific points and contained no general statement of principles. As sail gave way to steam, the growth in international trade became ever more rapid and it was felt that the present rules might lose their value as circumstances changed. Constant revision could perhaps be avoided if some overall guiding principles could be identified and allowed to illuminate the practical solutions offered by individual rules.

Articles appeared and papers were presented on various occasions and in 1910 Dowdall KC, who was a leading figure in the movement, presented a paper on the 'Codification of General Average' to the International Law Association conference in London. He subsequently acted as convenor of a working party drawn from the major maritime nations which reported in 1912. A draft code was produced in 1914, to a mixed reception, but further progress was halted by World War I. Eventually, a new version of the York-Antwerp Rules, which updated some individual rules and was prefaced for the first time by seven rules outlining general principles, was presented to the 1924 International Law Association conference in Stockholm. After four days of review the new rules were agreed and adopted by the general conference under six resolutions, including:

4. In the opinion of this Conference the draft as so amended will attain the objects to which the International Shipping Conference directed its attention, viz:

*First* Bring the York-Antwerp Rules 1890 into line with modern requirements

*Second* Establish principles which may be accepted and applied in those cases which are not provided for in such rules.

The modern structure was now in place and received the blessings of representatives of insurers (including Lloyd's), shipowners, and several chambers of commerce and other merchants' organisations. No doubt many at the final conference dinner felt a warm glow of satisfaction, helped by the fine wines.

This period of certainty was relatively short lived. Everyone at Stockholm evidently thought they knew what they wanted and had achieved, but Roche J in *Vlassopoulos v British and Foreign Marine Insurance Co*<sup>9</sup> thought otherwise. The foremast of the *Makis* had collapsed at a loading port, causing damage as a derrick fell into a hold. The vessel was not in immediate

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<sup>9</sup> [1929] 1 KB 187.

peril but repairs were necessary for the safe prosecution of the voyage. Allowances were claimed under Rules X and XI of the 1924 Rules while these repairs were done. The judge held that such allowances were not valid because of the absence of imminent peril and:

... a general set of Rules provided laying down the general principles which are to operate, then the Rules go on to deal with certain specific cases, and I am satisfied on the true construction of the Rules that those cases are dealt with not by way of mere illustration, but in order to make definite and certain what the Rules decide about certain cases which are on the border line and which might be held to be on one side or the other of the line which is to be drawn under the general Rules ... It is, I think, as if the Rules had provided that Rules A, B, C, and so forth constitute the general rules for general average and then followed the words: 'And in particular 1,2,3,4' and so on 'are cases of general average'.

Although undoubtedly consistent with his earlier judgment given in 1926 regarding the 1890 Rules, this construction was exactly opposite to the intentions of the Stockholm Conference and international practice. An accord (the *Makis* agreement) was speedily drawn up by the leading British shipowners and underwriters to the effect that: 'Except as provided in the numbered Rules 1 to 23 inclusive, the adjustment shall be drawn up in accordance with the lettered Rules A to G inclusive.' This wording was the basis for the Rule of Interpretation that was introduced in 1950 and is found in all subsequent versions. This basis of interpretation works well in practice, although it has taken two subsequent revisions of the Rules to iron out two unsatisfactory consequences.

In solving the *Makis* problem, the Rule of Interpretation had also let in situations where nothing untoward had happened during the common venture other than the mere discovery of a pre-existing damage. If the damage found required repairs necessary for the safe prosecution of the voyage, then allowances under Rules X and XI could be made. In his AAA chairman's address in 1969, John Crump called this 'an outstanding candidate for exclusion'. Counsel's opinion confirmed that such allowances were correct according to a proper construction of the Rules but adjusters followed that advice with reluctance. The remedy was provided by the 1974 Rules which excluded such allowances when there had been no accident or extraordinary circumstances connected with the damage during the voyage.

The other anomaly only came to light with the case of *Corfu Navigation Co v Mobil Shipping*.<sup>10</sup> The *Alpha* grounded in the mouth of the Zaire river in heavy silt conditions, and damage to the main engine occurred during refloating operations. The court found that this was partly due to the unskilful way the master conducted operations but that Rule VII only required an 'actual intention to refloat the ship' with no mention of 'reasonableness'. The requirement for reasonableness in Rule A would not be imported into a numbered Rule so the claim should succeed. It is highly unlikely that any particular rule was intended to escape in this way when the whole thrust of the Rules was towards equity, but the 1994 Rules put the matter beyond doubt by stipulating in a Rule Paramount that 'In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred'.

As maritime commerce changed, new challenges emerged for the international community. During the 1970s and 1980s a series of notorious tanker casualties focused the world's attention on the catastrophic effects of oil pollution. The importance of the role of the salvor in also saving the environment from damage as he rescued property was widely recognised, as was the fact that the 'no cure, no pay' contracts left the salvor unreasonably exposed.

Although a limited 'safety net' was made available under Lloyd's Open Form it was recognised that this did not go far enough and a new system of special compensation payable to salvors was introduced by Article 14 of the International Convention on Salvage 1989. Article 14

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<sup>10</sup> [1991] 2 LR 52.

provided for special compensation to be paid by the shipowner to the salvor for preventing or minimising damage to the environment by the ship and/or her cargo, in circumstances where the salvor had failed to earn a sufficient customary salvage reward under Article 13 (which dealt with the criteria for fixing the reward and included efforts by the salvor to prevent or minimise damage to the environment). It was agreed (the so-called 'Montreal compromise') that Article 13 awards would be payable by property underwriters but that Article 14 'special compensation' would be paid by the vessel's P&I Club. An amendment to Rule VI of the York-Antwerp Rules 1974 was put forward and adopted in 1990, making it clear that only Article 13 awards could be allowed in General Average. However, other problems relating to pollution liabilities were becoming ever more apparent and began to be addressed seriously in the run up to the next revision of the Rules.

Under the York-Antwerp Rules 1974 there is no explicit reference to pollution-related liabilities and expenditure, but it was well established in practice, and supported by authority, that such liabilities and expenditures can fall within General Average. Assume, for example, a loaded tanker runs aground in the path of an approaching typhoon and with no salvage assistance in the vicinity. The master decides to jettison part of the cargo of oil rather than risk the total loss of ship and cargo and the much larger spillage of oil that would occur if the vessel remains aground and the typhoon strikes. Under the York-Antwerp Rules 1974, not only will the jettison be allowed in General Average, but also the direct consequences of the jettison, eg liabilities to nearby fish farm owners and other environmental damage.

When the 1974 York-Antwerp Rules were under revision, many adjusters expressed concern at the practical problems that were involved in allowing environmental liabilities in General Average. As casualties such as the *Exxon Valdez* had shown, such liabilities could exceed the likely values of ship and cargo by a huge margin; litigation also meant that the extent of these liabilities often could not be determined for many years, delaying the adjustment process. Property insurers felt that they were becoming exposed to pollution liabilities through the 'back door' of General Average, whereas liability insurers (principally the P&I Clubs) felt that, if something could be shown to benefit property interests, their insurers should pay. Trying to fight this battle on a case-by-case basis was plainly highly undesirable and the York-Antwerp Rules again provided the medium for a workable compromise.

Following discussions at the 1994 Sydney CMI Conference, it was decided to exclude pollution liabilities, and the York-Antwerp Rules 1994 adopted a new exclusion under Rule C, stating that:

In no case shall there be any allowance in General Average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure.

However, it was realised that in many cases expenses relating to pollution avoidance (as opposed to liability) had to be incurred for the common safety, and it was felt that these should not be excluded. Rule XI was therefore amended to provide in a new sub-paragraph (d) a list of circumstances in which anti-pollution measures would be allowed, for example in order for a ship to be permitted access to a port of refuge, or to carry out an operation for the common safety, or to enable repairs to be effected. Actual clean-up costs still remain for the account of the owner or his P&I Club, and it is usually a straightforward matter to divide one category of expense from the other.

#### Future revision

It is perhaps unsurprising that a unique concept such as General Average has also produced a unique protocol in the York-Antwerp Rules: designed by committee, but governed by practical considerations and ready to respond to changes in maritime trade; not a convention but enjoying a universality of application that few conventions can match.

However successful in the past, General Average and the York-Antwerp Rules must earn their place in the future on the basis of practical merit and relevance to modern trade. The maritime community has already taken action with regard to General Averages where the amounts involved are small in the context of the maritime adventure, by adopting General Average absorption clauses in their hull policies. These clauses provide for hull insurers to pay General Average in full up to a specified limit, thus avoiding the expense and trouble of collecting security and contributions from cargo interests. A straw poll amongst colleagues suggests that over 70 per cent of blue water tonnage has an absorption clause of some kind and that this has helped to reduce the number of cases involving collections from cargo by some 50 per cent over the last five years. The effects of the ISM Code and increasing containerisation have also played a part in this reduction.

Once uneconomic cases are excluded, many feel that General Average still has a vital role to play and most practitioners feel uneasy about losing the common benefit elements that seem to work well in practice. Marine casualties are complex problems that bring together different parties, often in great number, whose interests sometimes coincide and sometimes conflict. The resolution of the conflicts is made possible by the background of international conventions, case law, established practice, and the framework of the York-Antwerp Rules – in short, one does not have to negotiate everything from scratch, or reinvent the wheel every time a casualty occurs. The best contemporary analogy is perhaps of the Help menu on a computer screen: click on the York-Antwerp Rules menu and in plain language, in only a few pages, a clear set of guidelines is set out. Complex points of principle do arise, but one should not lose sight of the remarkable simplicity of the basic text, which allows the voyage to continue while rights and liabilities are preserved for future action, if appropriate.

It is not difficult to see the practical attraction of a concept of General Average that includes the common benefit idea. As Willmer J said in relation to a salvage case:<sup>11</sup>

It is no use saying that this valuable property ... is safe, if it is safe in circumstances where nobody can use it. For practical purposes, it might just as well be at the bottom of the sea.

For commercial men the objective of a voyage is not safety in a port in an obscure location but safe arrival at destination. The fact that there is a seamless transition between common safety and common benefit has a profound effect on the avoidance of disputes, leaving aside the significant implications relating to abandonment of the voyage and the demonstration of a constructive total loss claim on a hull policy if the common benefit expenses were to disappear. The agreed framework for dealing with common benefit expenditure increases the likelihood that the voyage will be prosecuted without lengthy legal wrangling and delay; the ability to allow transshipment costs, for example, as substituted expenses will often bring cargo forward very rapidly.

Such benefits are apparent even to those that have had strong criticisms to make in other areas. Knut Selmer commented:<sup>12</sup>

The distribution of 'common benefit' expenses has psychological implications which should not be overlooked. The sharing of expenses incurred for the continuation of the transport after vessel and cargo have been brought to safety in a port of refuge probably means a great deal for the smooth winding up of complicated averages. It acts as a 'buffer' between the parties in situations where their interests may diverge materially. The equitable distribution makes it easy to arrive at practical arrangements regarding repairs and on-carriage. Regardless of the nature of the arrangement, the parties will to some extent look upon it as a compromise solution, because the costs of the measures chosen are divided proportionately between them. Legal

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<sup>11</sup> *The Glaucus* (1948), LR 81 263.

<sup>12</sup> Knut Selmer, *The Survival of General Average, a Necessity or an Anachronism?* 1958.

proceedings will consequently be rare, and questions of law will be veiled, particularly when it comes to the shipowner's obligation to fulfil his promise to transport. The writer believes that this function of the 'common benefit' rules is of considerable value.

At a time when the virtues of mediation and compromise in commercial life are being re-discovered, this is a part of the York-Antwerp Rules' legacy that seems to be very much in tune with the modern world.

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# The CMI Review of Marine Insurance

To rest on century-old laurels or to tread on hallowed ground?

**Professor John Hare**

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The Comité Maritime International has since 1999 been engaged in a review of national laws of marine insurance. The CMI's International Working Group (IWG) has thus far focussed on good faith, the duty to disclose, alteration of risk and warranties. The task was undertaken in the knowledge that in all likelihood there would be no recommendation for a convention or other form of international instrument to regulate marine insurance. Nevertheless, the study represents an important research project, and the IWG is attempting to formulate conclusions and recommendations on the areas studied.<sup>2</sup>

One of the most important questions asked is whether the maritime legal fraternity should be content with merely identifying areas in which a law or practice is deficient or whether the knowledge of such deficiency does not carry with it an obligation to set matters to rights. This note examines some of the problems encountered with certain corner-stone principles of marine insurance, and suggests that lawyers should put their marine insurance house in order rather than leave reform entirely to the market and the courts.

## The background to the CMI's work on marine insurance

It is over 100 years since maritime lawyers last made a concerted and international attempt to agree upon the harmonisation of certain basic issues of marine insurance law. That attempt took place at the Buffalo Conference of the International Law Association in 1899, which in turn led to the adoption of the Glasgow Marine Insurance Rules in 1901. The Glasgow Rules appear to have disappeared, abrogated by disuse, their significance no doubt eclipsed by the promulgation of Sir MacKenzie Chalmers' masterly 1906 UK Marine Insurance Act (MIA 1906).

Throughout the twentieth century, marine insurance was practised in most parts of the world under the influence of the MIA 1906. Regional initiatives such as those in Scandinavia have made their mark in seeking both certainty and reform.<sup>3</sup> But for many countries that inherited

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<sup>1</sup> Member of the Executive Council of the Comité Maritime International, and Chair of the CMI International Working Group on Marine Insurance. The comments that follow in this note are the opinions of the author and do not necessarily reflect the views of the IWG. All of the IWG's papers are available on the CMI website at [www.comitemaritime.org](http://www.comitemaritime.org). All website references in this note were last visited on 28 April 2004.

<sup>2</sup> The report of the IWG will be presented to the CMI's 38th International Conference in Vancouver in June 2004.

<sup>3</sup> The Norwegian Marine Insurance Plan, a contractual set of rules for marine insurance upon the terms, is at [www.norwegianplan.no](http://www.norwegianplan.no). For a review of the 2003 Norwegian marine insurance market and the inroads it has made on the international underwriting market, see [www.cefor.no/news](http://www.cefor.no/news).

MIA 1906 directly or indirectly, marine insurance law has remained static and relatively stable, and that stability has been reflected in the comparative paucity of reported marine insurance cases in most maritime jurisdictions.

Unfortunately however the stability of the law of marine insurance has not been mirrored in a like stability in marine insurance practice. Many sectors of the industry face survival challenges. Perhaps it was these same hard times that in turn prompted an evaluation of the national legal regimes in which marine insurance operates. In the 1990s initiatives were started in the USA, Australia, New Zealand, China, and South Africa (to name but a few) to examine domestic marine insurance laws. And in those countries where the MIA 1906 is most influential the evaluation began with a re-examination of whether or not the 1906 Act continued to serve the industry in the changed times and market circumstances of the approaching twenty-first century.

In the knowledge that such national review processes were gathering momentum, the CMI in 1998 took up Lord Mustill's challenge to undertake an international study of marine insurance. The CMI started the ball rolling by co-hosting, with the Scandinavian Institute of Maritime Law, a Marine Insurance Symposium in Oslo. The symposium took the form of an exploration of common ground and diversity in issues of ship insurance. It did not deal with cargo insurance, nor did it seek answers. It was primarily an academic discussion forum. But it served to identify a number of issues of marine insurance which deserved further research. These were summed up by CMI President Patrick Griggs at the end of the symposium as:

1. insurable interest
2. insured value
3. ordinary wear and tear and inherent vice
4. inadequate maintenance, fault in design, construction or material
5. duty of disclosure, before and during currency of cover
6. consequence of loss of class, unseaworthiness and breach of safety regulations
7. warranties – express and implied, consequences of breach and alteration of risk
8. change of flag, ownership or management
9. misconduct of the assured during the period of cover
10. responsibility for conduct of others – identification
11. the duty of good faith
12. management issues, especially the ISM Code

The upshot of the Oslo Symposium was a decision by the CMI that there was sufficient indication of an emerging national diversity on these and other issues of marine insurance to warrant an international review of the law of marine insurance. An International Working Group (IWG) was set up under the chair of Dr Thomas Remé<sup>4</sup> and its composition was designed to represent both underwriters and lawyers, the latter having a good mix of academics and practitioners, drawn from both common law and civilian roots.

The IWG decided at an early stage to expand its purview from examining ship-only (Hull and Machinery (H&M)) insurance as had been done in Oslo, to looking at cargo insurance as well. Under the guidance of Dr Remé, a CMI questionnaire was sent out to member associations in 1999. The review process benefited enormously from the detailed replies received from many national associations.<sup>5</sup>

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<sup>4</sup> With Professor John Hare taking over the chair from 2001, and Professor Malcolm Clarke standing in for Professor Hare during his leave of absence in 2003.

<sup>5</sup> The IWG received a boost from the attendance of delegates from 34 countries at a conference entitled 'Marine insurance at the turn of the millennium', convened by Professor Marc Huybrechts and the European Institute of Maritime and Transport Law at the University of Antwerp in November 1999. The conference papers were published by Intersentia ([www.intersentia.be](http://www.intersentia.be)). The two Antwerp conference volumes contain a wealth of research material on marine insurance.

The daunting task of evaluating the replies was undertaken by Professor Trine-Lise Wilhelmsen of the Scandinavian Maritime Law Institute. To ensure focus, the IWG resolved to concentrate initially on four issues which were identified as the ones most in need of attention:<sup>6</sup>

- the duty of good faith
- the duty of disclosure
- alteration of risk
- warranties.

To this was later added

- responsibility for conduct of others – identification.

The Australian Law Reform Commission has also added significantly to international scholarship with a comprehensive report on the Australian review of the Australian Marine Insurance Act 1909.<sup>7</sup>

#### Summary of the IWG's work

The central purpose of the review initiative was to identify

- Those areas of *similarity* in the approach of national legal systems to certain issues of marine insurance
- Those areas of *difference* where a measure of uniformity would better serve the marine insurance industry
- Those areas of difference where *differences provide sound reasons for competitive edge* and where seeking uniformity would be undesirable
- Those areas where *differences are profound*, and where seeking uniformity would be unrealistic.

The IWG was enjoined to seek solutions to identified problems in the law of marine insurance; these solutions would allow the law to take account of:

- 1) the role which marine insurance should play in promoting the highest internationally accepted standards of safety at sea, with particular regard for the insistence upon and enhancement of safety of all marine personnel, both sea-going and shore-based
- 2) the current economic structures within which marine insurance is underwritten, with regard to *inter alia* regional co-operation, competition and regulation such as that emanating from the EC
- 3) the differences and similarities in the civilian and common law legal systems, both in relation to the content of substantive law, procedural issues, and idiosyncrasies in draughtsmanship.

The 37th Conference of the CMI, held in Singapore in 2001 authorised the continuation of the review, but recognised that there may not be a tangible outcome to the process: it asked the group to seek either

- a measure of harmonisation which may be feasible and desirable and would better serve the marine insurance industry; or

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<sup>6</sup> Papers have been prepared for the IWG by Mr Andrew Tulloch, (Good Faith); Mr Graydon Staring (Warranties and Conditions); Professor Malcolm Clarke (Alteration of Risk); and Professor Trine-Lise Wilhelmsen (Generally analysing the questionnaire replies and dealing extensively with non-disclosure. Professor Wilhelmsen's second paper deals with Misconduct of the Assured and Identification). All are available on the CMI website at [www.comitemaritime.org/worip/marineinsurance.html](http://www.comitemaritime.org/worip/marineinsurance.html) and in the Singapore Conference documents at [www.comitemaritime.org/singapore2/conference37/insurance/insurance.html](http://www.comitemaritime.org/singapore2/conference37/insurance/insurance.html).

<sup>7</sup> This report is available on the internet at <http://www.austlii.edu.au/au/other/alrc/publications/reports/91/>.

- the dissemination by the CMI of the products of the IWG's research which would in itself promote better knowledge and understanding of such differences.

### *Recent proposals*

The on-going work of the IWG has been presented to CMI colloquia at Toledo and at Bordeaux and informal group meetings have been held from time to time. Three possible options were debated. First, an international convention. This was soon ruled out as too inflexible and impractical in view of the undoubted national differences in marine insurance laws and in the legal backgrounds in which they operate. Second, a Model Law. This option was again ruled out as being too prescriptive a measure for an industry which is largely self regulating. The IWG may however make recommendations on the way in which it is considered best to deal legislatively with certain issues reviewed. Finally, there is the option of the recommendation of terms of cover for incorporation into marine insurance policies.

And even if none of these three steps is taken, the CMI hopes that its review will inform and promote harmonisation of marine insurance policy – both in relation to drafting domestic legislation and in the revision of insurance contract terms. That this process has already taken root has given the IWG some heart. Apart from the input that the Group's work has had upon national reform initiatives (in Australia and in South Africans for a start, and in the USA discussions towards a marine insurance act for the US re-opened last year), the London market has, in its 2003 H&M terms, all but done away with the warranty and replaced it with specific terms, stipulating specific consequences.<sup>8</sup> This is surely a step in the right direction, though, like it or not, the 2003 terms still operate under the mantle of the English law warranty. The only way to remove the silent and at times undoubtedly uninvited workings of the English law warranty in those countries where it is recognised is to legislate it away.<sup>9</sup>

### *Issues of principle?*

The London market's 2003 reformed hull clauses have given rise to an issue of principle in the debates of the IWG. If the law is recognised as being unjust, unfair or plain wrong, should it not be the responsibility of the lawyers to recommend changes to put that law right? Is it sufficient to point to the wrongs, and to allow the industry to put right what the lawyers got wrong in the first place? Yes, marine insurance law is relatively settled. But there are areas in which the market surely finds it very difficult to operate with any degree of certainty. The test of materiality in relation to pre-contractual non-disclosure is one. The remedy for an absence of good faith is another. And for a half a century jurists have been lamenting and lambasting the iniquitous and ubiquitous English law warranty. Are we satisfied that we have done our best as lawyers to imbue the law with certainty and equity if reform of bad laws is left to evolve slowly through the courts or through the influence of market forces? Should not today's lawyers have the responsibility to correct those bad laws created by lawyers in previous generations? How else can they serve the market in which they operate?<sup>10</sup>

Take the notion of good faith: in the civilian codes, there is a requirement of good faith in all

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<sup>8</sup> Thus, for example, the navigating provisions in the 2003 H&M clauses are no longer expressed as warranties. Rather, the contract stipulates expressly that underwriters are not liable during any period of breach. Cover resumes post breach. The International Underwriting Association (IUA) in London has confirmed that the CMI's work was one of the factors which influenced their re-drafting of the 2003 H&M policy. With the kind permission of the IUA, the 2003 policies are available on the UCT Shipping Law site at [www.uctshiplaw.com/fulltext/iaa/iuaintro.htm](http://www.uctshiplaw.com/fulltext/iaa/iuaintro.htm). There is also a most useful comparative table outlining the differences between the 2003 terms and previous terms.

<sup>9</sup> Upon which, see further below.

<sup>10</sup> The 2003 Donald O'May lecture on marine insurance by The Rt Hon Lord Justice Longmore echoed the call taken up in 1980 by the English Law Commission for legislative reform; see Report No. 104 Cmnd 8064, October 1980, p. 82. See also Hare *The Omnipotent Warranty: England v The World* at [www.uctshiplaw.com/imicfram.htm](http://www.uctshiplaw.com/imicfram.htm).

contracts. The absence of good faith generally gives rise to a remedy for the aggrieved party. Though it is usually the insurer who calls for help where the assured acts in breach of good faith, the obligation falls on both parties: the insurer, too, must act in good faith or face the consequences of its bad faith.<sup>11</sup> In English law the courts are more protective of the contractual adversarial rights of each party to benefit legitimately at the other's expense, and they have been reluctant to treat the absence of good faith as a stand-alone ground for relief. In marine insurance, although the English courts have created a notional higher standard of better or best faith in 'utmost good faith' the courts have shied away from giving a remedy to the victim of an absence of utmost good faith. Only recently has there been a movement in the direction of allowing relief. But the movement remains tentative. Even in *The Star Sea*<sup>12</sup> the English House of Lords put the brakes on a generalised recognition of the right to avoid a contract where there has been an absence of (utmost) good faith. And many common law courts stop short of giving relief of any sort to the victim of a breach of the duty of good faith unless there is a fraud.<sup>13</sup> We common lawyers vacillate, as heifers at a dip, unable to face a leap of faith to commit to the principle that an insured who acts dishonestly in his or her dealings with an insurer in relation to any material aspect of a marine insurance contract should thereafter forfeit the right to benefit from a claim – even where no fraud has taken place.<sup>14</sup> The courts agonise between enforcing section 17 of the MIA 1906 (or its equivalent in other jurisdictions) or the common law consequences of fraud, and often back off without invoking either, reluctant to embark on what has been called 'post-contractual disciplining'.<sup>15</sup> The message to the industry is undeniable: in many common law countries, as long as you stop short of fraud, you can stretch the truth as much as you like to serve your own ends. The insurer is fair game. We have surely waited long enough for the courts to develop the law of good faith beyond section 17. Is the time not ripe for legislative reform?

#### *The need for legislative reform*

If there be any doubt that legislative intervention is required, one need go no further than to examine the English law warranty.<sup>16</sup> Section 33 of the MIA 1906 gave legislative authority to the insurance warranty developed by the English courts during the preceding century:

A warranty . . . is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

Described as the trump card in the hands of the insurer (though perhaps more like a joker), it is no answer to aver that the industry seldom relies on a breach of warranty defence. It is sufficient that the insurer hint of the defence of an often innocent breach of a (trivial, non-causative) warranty for the insured to be pressured into settlement. The English Law Commission in 1980 declared, with characteristic phlegm 'It seems quite wrong that an

<sup>11</sup> The Canadian Supreme Court of Appeal recently upheld an award of R1m in punitive damages against an insurance company that maliciously defended a claim: See *Whiten v Pilot Insurance Company* [2002] 1 SCR 595, 2002 SCC 18.

<sup>12</sup> *Manifest Shipping Ltd v Uni-Polaris Insurance Ltd* [2001] 1 Lloyd's Rep 1.

<sup>13</sup> See for example in English law *K/S Merc-Scandia v Lloyd's Underwriters (The Mercandian Continent)* [2001] 2 Lloyd's Rep 563 and in South Africa, *Videtsky v Liberty Life Insurance Association* 1990 (1) SA 386 (W).

<sup>14</sup> For example, where a dishonest insured did not specifically intend to defraud the insurer or where the insurer would have had to pay the claim anyway, whether or not the dishonesty had occurred.

<sup>15</sup> *Pan Atlantic Company Limited v Pine Top* [1994] 2 Lloyd's Rep 427 and the English Court of Appeal decision in *Konstantinos Agipatos v Agnew and others* [2003] QB 556.

<sup>16</sup> On which see Hare *The Omnipotent Warranty: England v The World* at [www.uctshiplaw.com/imicfram.htm](http://www.uctshiplaw.com/imicfram.htm) and Staring *Harmonisation of Warranties and Conditions* CMI IWG paper at [www.comitemaritime.org/future/pdf/harmonization\\_w&c.pdf](http://www.comitemaritime.org/future/pdf/harmonization_w&c.pdf).

insurer should be entitled to demand strict compliance with the warranty which is not material to the risk and to repudiate the policy for a breach of it'.<sup>17</sup> It remains 'quite wrong' – yet 44 years later we have done nothing to right that wrong.

There is an argument that the common law systems favour court-made law in place of over-regulation and that marine insurance would be better left alone to evolve itself. 'Virtuous inactivity' is how Professor Clarke describes it.<sup>18</sup> The argument is that formulae and precise rules 'while they may achieve certainty in the marketplace, lend themselves to injustices; the applicable doctrines having no inherent flexibility to deal with the nuances of differing fact situations'.<sup>19</sup> But with marine insurance, the law is already partly codified by the MIA 1906 which has been exported to so many other jurisdictions.<sup>20</sup> Marine insurance law has for more than a century been more than a matter of court-made common law. Nor is the MIA 1906 a purely domestic matter. It reaches far and wide. The Act is a century old. It has some notions which have been overtaken by a much-changed world (utmost good faith is perhaps one<sup>21</sup>). It has left gaps that have not been properly filled by the courts (or that have been filled with little or no uniformity among the nations that apply the Act).<sup>22</sup> Maritime lawyers have a duty to the market to fill the gaps and alleviate the inconsistencies.

### Looking to the future

If one re-visits the central aim of the CMI which is to seek harmonization of international maritime laws, and if one were bolder than lawyers usually are, one could envisage a formula (dread though the concept may be to the common lawyer) around which national laws could at least tidy up their marine insurance laws in relation to good faith and related concepts:

*Marine insurance contracts would be contracts of good faith. Good faith would require each party to conduct itself with the other party in relation to all material aspects of their insurance contract according to objective norms recognized by the society in which they are being judged.*

*Acting in good faith would require each party before and at all times during the contract and in the submission of claims, to be honest in relation to all material matters, to disclose all – and not misrepresent any – material facts; and to disclose any material alteration of the risk during the currency of the policy.*

*Certain terms<sup>23</sup> may be stated by the parties in the contract as requiring strict compliance; in the absence of strict compliance by either party, the contract may stipulate that the other party shall have the right to cancel the contract (or even that the contract shall terminate automatically), regardless of whether non-compliance caused the loss. Such should be the case in relation to safety at sea, class, ownership, management and ISM Code compliance. The insurance law 'warranty' would disappear. It would not be needed.*

<sup>17</sup> See n. 8.

<sup>18</sup> Professor Clarke's paper on *Alteration of Risk* produced for the IWG and at [www.comitemaritime.org/future/pdf/alt\\_risk.pdf](http://www.comitemaritime.org/future/pdf/alt_risk.pdf).

<sup>19</sup> Kirby J in his address to the CMI Sydney Conference, quoted in Tulloch's paper produced for the IWG and at [www.comitemaritime.org/future/pdf/utm\\_g\\_faith.pdf](http://www.comitemaritime.org/future/pdf/utm_g_faith.pdf).

<sup>20</sup> The Act is also applicable by reference in policies written in other countries as subject to English law, such as the Belgian Corvette Policy and most of the world's P&I cover.

<sup>21</sup> Can there be good, better and best faith? Is not good faith as profound a standard of behaviour as utmost good faith? The much quoted rejection of 'utmost' good faith by the South African Supreme Court of Appeal in *Mutual & Federal Insurance v Oudtshoorn Municipality* 1985 (1) SA 419 (AD) is perhaps not heresy after all: 'uberimae fides is an alien, vague and useless expression without any particular meaning in law... Our (South African) law has no need for uberimae fides and the time has come to jettison it'.

<sup>22</sup> For example the test of materiality of non-disclosure, *Pan-Atlantic* notwithstanding (*Pan Atlantic Company Limited v Pine Top* [1994] 2 Lloyd's Rep 427). Reasonable assured? Reasonable insurer? Reasonable person? One-tier or two-tier? The tests differ from case to case and from country to country.

<sup>23</sup> The expression 'term' is used to attempt neutrality in view of the different interpretation of the word 'condition' in the common law and civilian systems.

*Materiality in relation to an absence of good faith, a failure to disclose, a misrepresentation or a breach of a contractual term (not requiring strict compliance) would be assessed according to a two-tier test of whether a reasonable insurer and a reasonable assured, both operating within the norms of the society and the context of the transaction in which such materiality is being adjudged, would consider the conduct to have affected the acceptance of the risk, the assessment of the premium and or the evaluation of claims by the insurer, and or the acceptance of cover by an insured.*

*Materiality would require a causative link between the breach and the loss or the claim.*

*Any material absence of good faith or material breach of the obligation to disclose or not to misrepresent or any material breach of an essential term going to the root of the contract, would give the aggrieved party the right to treat the contract as at an end, effective from the date of the breach, with the right to claim damages. Material breach of a non-essential term not relating to good faith, disclosure or misrepresentation and not contractually stipulated as requiring strict compliance, would suspend cover until the breach is remedied.*

*A non-material absence of good faith or breach of the obligation to disclose or not to misrepresent not founding a right to cancel the contract of insurance may nevertheless give rise to a claim for damages.*

Too inflexible? To the common lawyer, probably heresy. To the civilian, a necessary definition to give content to a law that is not doing its job properly. Guidelines such as these would undoubtedly clip the wings of judicial interpretation, but is this necessarily a bad thing? Especially as similar laws are being interpreted in different ways by different courts even in the same country, let alone in differing jurisdictions operating under different legal systems – many having the MIA 1906 as their highest common factor. Is too much domestic judicial flexibility not an expensive luxury which an already embattled internationalised industry cannot afford? Such footsteps in the direction of better certainty, albeit on hallowed ground, would surely be welcomed by the market – and should not be feared by lawyers.

There is another reason for reform, and a compelling one: tidying up the operation of these essential terms in marine insurance will also allow the insurance industry (and the lawyers who serve it) to play a more defined role in promoting, as a pre-condition of cover, basic tenets of safety at sea and environmentally friendly shipping. That should be an over-arching aim of all involved in maritime lawmaking.

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# Places of refuge: the debate moves on

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Since the publication in this journal of my article written in February 2003,<sup>2</sup> the discussion of this issue has featured large in maritime law circles. A further paper by Dr Z Oya Özçayır summarised the recent work of the International Maritime Organisation (IMO), and the European Union (EU) in this area.<sup>3</sup> The purpose of the present article is to describe the work done by the Comité Maritime International (CMI) in preparation for the International Conference to be held in Vancouver in May–June 2004,<sup>4</sup> when this will be one of the major topics to be debated, and to consider this work in the light of the developments at the IMO, in the EU and elsewhere.

## The CMI International Subcommittee on Places of Refuge: the principal issues identified

This group, consisting as it does of lawyers based all over the world, has met only once since January 2003, namely in London on 17 November 2003, although an informal discussion did also take place in June 2003 at the CMI Colloquium in Bordeaux. However the wonders of electronic communication have enabled the working group to develop its thinking, and at the November meeting it was decided to divide the subject into eight separate issues and to produce a set of papers on each of these issues which would be published in the CMI Year Book 2003 and would serve as the basic materials for the debate in Vancouver. Those papers are published on the CMI website<sup>5</sup> and it is not therefore necessary to reproduce them in full here. However a brief summary of their substance is appropriate.

### *The obligation to offer a place of refuge to a ship in distress*

- (a) Is there such an obligation on the coastal state under existing customary law or convention?
- (b) Does it need to be expressed in an instrument?

In his paper, Professor van Hooydonck<sup>6</sup> emphasises that there is no simple answer to these questions. He contrasts the theory of an absolute right of access, based historically on the universal duty to assist those on board a ship in distress, with the suggestion that a coastal

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<sup>1</sup> Rapporteur of the CMI Working Group on Places of Refuge; Adviser to the UK Delegation at the 1989 International Conference on Salvage; CMI Delegate to the International Oil Pollution Compensation Fund.

<sup>2</sup> Places of Refuge: International Law in the making? JIML 9 [2003] 2 159.

<sup>3</sup> Ports of Refuge [2003] 5 JIML Issue 5 at 486.

<sup>4</sup> Conference details can be found at [www.CMI2004.org](http://www.CMI2004.org).

<sup>5</sup> <http://www.comitemaritime.org>.

<sup>6</sup> Advocate at Antwerp, Belgium: Senior Lecturer at the University of Antwerp.

state has an absolute right to refuse access to its waters by *any* vessel, whatever its condition. A possible compromise theory involves balancing the interests of each side, and he suggests that this theory is reflected in Article 20 of the European Traffic Monitoring Directive,<sup>7</sup> which provides that:

Member States, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority.

He warns, however, that this balanced approach, while superficially attractive, does in fact leave the distressed vessel at the mercy of the state doing the balancing, and suggests that a more sophisticated version of this theory is preferable, in which there is a *presumed* right of access and one which can be refused only when the coastal state can demonstrate that there are insuperable objections. In other words, the burden of justifying refusal to admit a ship in distress would lie on the coastal state which denied such a ship access to a place of refuge in its waters. At present, however, no such presumption exists, apart from the tentative wording of para. 3.12 of the IMO Guidelines, which provides as follows:

When permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible.

Professor van Hooydonck therefore concludes that 'the ideal solution would be an international convention on ports of refuge and ships in distress.'

#### *Insurance and financial security*

- (a) Is the existing legal regime sufficient?
- (b) Should additional insurance/security be established?
- (c) What exactly should insurance/security cover?
- (d) Should financial security (existing in advance or established *ad hoc*) be a permissible condition for allowing entry of a distressed ship to a place of refuge?

The existing regime is clearly unsatisfactory, although on closer examination the position is not as confused as it may first appear. The ships which have caused the major problems of late have all been tankers. All the histories summarised in my previous article<sup>8</sup> concerned laden tankers, which were covered by the liability and compensation regime enacted by the 1992 Civil Liability and IOPC Fund Conventions. True, the *Castor* was carrying a cargo of gasoline, which is not itself a persistent oil within the definition provided in these conventions, but she also had on board a substantial quantity of fuel oil bunkers, which would have caused serious pollution damage if they had been allowed to leak from the vessel.

The ships carrying hazardous and noxious cargoes are not at present covered by an equivalent regime, and the 1996 Convention on pollution by such vessels is still far from the point of entry into force. The IMO Legal Committee has a Special Correspondence Group on the implementation of this convention, which held an important meeting in Ottawa in June 2003, and John Wren (UK), chairman of the group, reported to the October 2003 meeting of the Legal Committee that prospects for entry into force of this convention are now improving.<sup>9</sup> The International Group of P&I Clubs continues to maintain that they will

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<sup>7</sup> Directive 2002/59/EC of 27 June 2002.

<sup>8</sup> See n. 2.

<sup>9</sup> A full report is in IMO Document LEG 87/11/1.

respond to claims arising from pollution by such vessels, but at the present time such claims will be subject to the relevant rules of limitation of liability, such as the 1976 LLMC Convention applying to general claims, as distinct from the much larger limitation funds available under the HNS Convention regime.

Pollution claims arising from ships not carrying oil or HNS cargoes such as container ships and bulk carriers, are still subject to no unified international regime. Such claims will be covered by the 2001 Bunker Pollution Convention<sup>10</sup> when it enters into force. However that is still a distant prospect, and while that convention will introduce strict liability and direct action against insurers, there will be no limitation fund greater than the ship's LLMC fund available to meet claims. The modest comfort to such claimants is that the 1996 Protocol to the 1976 LLMC Convention<sup>11</sup> enters into force on 13 May 2004 so that the limits in states where that Protocol applies will be significantly higher. Until the Bunker Convention receives the 18 ratifications<sup>12</sup> necessary for entry into force, claimants will still have to establish the legal liability of the owner of the polluting vessel.

In all of the circumstances cited above there is not only an acknowledged strict liability independent of the need to prove negligence, but also a regime of compulsory insurance with a direct right of action by the victim against the insurer, and a system of mandatory documentation to ensure the existence of that insurance. In the case of almost all merchant ships over 1,000 tons the insurance is provided by one of the P&I Clubs which are members of the International Group. These organisations, most of which are established on a mutual, non-profit-making basis, share the risks covered by each of them among the members of that organisation, with a pooling of large claims, currently over US\$5 million, through the International Group.

This system has generally been found to function satisfactorily. P&I Clubs have not sought to evade the payment of claims properly falling within their coverage, although the existence of the 'pay to be paid' rule has caused some difficulties where a shipowner has become insolvent.<sup>13</sup> The IOPC Fund is obliged to settle pollution claims where the shipowner's cover is non-existent or inadequate.<sup>14</sup> In recent years this has drawn the Fund into involvement in a greater number of small cases than was probably anticipated when it was created in 1971.

The satisfactory performance of the Clubs in the International Group in terms of their cover and claims handling has been reflected in the wording of the 1999 'IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims',<sup>15</sup> which recommend that all ships should have liability insurance arrangements of the type currently provided by members of the International Group of P&I Clubs.

The point has been made on many occasions by the delegate of the International Group at meetings of the IMO Legal Committee and of the IOPC Fund that the Group Clubs are the only organisations with the resources and experience to provide legal liability cover in the ever increasing sums demanded by governments. The structures of the Clubs, the International Group, and their reinsurance arrangements are unique. During the debates in the 2002 IMO Diplomatic Conference to adopt the Protocol to the Athens Convention on Passenger Liabilities it was suggested by certain delegations that if the Clubs did not provide the cover required by the Protocol, the insurance market would move in to provide it. Since

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<sup>10</sup> Document 6–4 in the CMI Handbook.

<sup>11</sup> Document 5–7 in the CMI Handbook.

<sup>12</sup> Including five states with ships whose combined gross tonnage is not less than 1,000,000.

<sup>13</sup> See the *Fanti* and *Padre Island* decision of the House of Lords [1989] 1 Lloyd's Rep 239.

<sup>14</sup> Article 4(1)(b) of the 1971 and 1992 Fund Conventions.

<sup>15</sup> Adopted by the Legal Committee in April 1999. The text is available on the web site of the UK Maritime and Coastguard Agency as the annexe to the Marine Guidance note MGN135 (M) <https://www.mcga.gov.uk/public/c4/mld/section03/Mgn0135.pdf>.

then the number of companies which provided fixed premium P&I Cover has diminished significantly, and the asbestosis and pollution claims in the United States have had a powerful deterrent effect on the companies providing legal liability cover generally. It would be unwise to assume that the International Group of P&I Clubs will be able to provide still higher limits of cover in the future, or that the insurance market will be able to provide that cover.<sup>16</sup>

### *Designation of places of refuge*

(a) Should places of refuge be designated in advance or not?

The answer to this question is not as obvious as it might at first seem. Clearly, as a matter of ordinary prudence every coastal state should have some contingency plans to deal with the threat of a marine disaster, particularly one involving a threat of pollution by oil or, probably worse, by hazardous and noxious substances which may threaten the health of the civilian population. The 1990 OPRC Convention<sup>17</sup> requires every state party to establish a national system for responding promptly and effectively to oil pollution incidents (Article 6), and the 2000 Protocol extends this to HNS, but there is no equivalent obligation with respect to pollution by other substances.

An assessment of the suitability of ports and other sheltered havens for the admission of distressed vessels will necessarily involve a wide range of criteria, many of which are now set out in the IMO Guidelines adopted by the IMO Assembly in November 2003.<sup>18</sup> No two marine casualties are, however the same, and while factors such as depth of water, suitable anchorage, shelter and availability of shore facilities will be common matters for consideration in every case, the requirements of the particular vessel and the nature of her distress will always be different.

There appears therefore to be no general obligation in international law on coastal states to designate places of refuge in their waters, but specific provisions in the European regional regime and international rules relating to oil pollution do contain general obligations which would necessarily involve such a requirement.

(b) If not, should there exist any criteria in the contingency plans of the coastal state for determining the place of refuge in a specific case?

It will always be necessary for Coastguards and Maritime Safety Officers to balance conflicting interests in deciding whether or not to allow a distressed vessel to enter the waters under their control. The IMO Guidelines recognise the difficulties, and it is to be hoped that they will help to ensure that decisions are taken by coastal states in a commonsense and consistent manner.

In doing so, the officers concerned will be obliged to make a balanced assessment of the prospects of a successful outcome to the salvage operation. Only if there is a reasonable chance of success will the risks of pollution damage to the immediate vicinity of the place of refuge be justified. It must also be recognised that the salvor working on a 'no cure – no pay' basis has a substantial financial interest in a successful outcome to the salvage operation, and that there is a risk that the salvor's own reports as to the chances of success may be coloured by this. Arguments in this vein were advanced in the press at the time of the *Prestige* incident.

There are more popular misconceptions in the field of salvage than in any other field of maritime law, and the complexity of salvage law will make it even more difficult for the coastal state to make the balanced judgment required. Apart from the IMO Guidelines, probably the

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<sup>16</sup> See also document LEG88/12/2 submitted by the International Group to the April 2004 meeting of the IMO Legal Committee, which repeats this.

<sup>17</sup> Document 6-11 in the CMI Handbook.

<sup>18</sup> See especially sect. 3, 'Guidelines for actions expected of Coastal State'.

best analysis of the problems in this field is the Report of Lord Donaldson's 'Review of Salvage and Intervention and their Command and Control' published by the UK Government in 1999.

The key requirement of any such criteria is that they must lead to an objective assessment of the risks involved, and if possible in all the circumstances to the ordering of the ship in distress to a place of refuge suited to her needs. The IMO Guidelines appear to provide the best collection of principles, expressed in straightforward comprehensible language, to guide any such assessment.

(c) If places of refuge are determined in advance, should such places of refuge be publicised or not?

This is probably the most contentious issue in this field. The initial publicity on the European Traffic Monitoring Directive indicated that publication of the location of such places of refuge to the world at large was a necessary element. However it quickly became apparent that there were differing views among the member governments of the European Union on this issue. The Scandinavian countries tended to favour a published list, while the United Kingdom and Eire were concerned that such publicity might attract the 'maritime lepers' of the world to their ports, and would also probably provoke hostile reactions from local interests in the places listed.

The difference is, on mature consideration, more apparent than real, since the physical and economic characteristics of most potential places of refuge are published in considerable detail in pilot books and sailing directions, which are an essential part of the navigation equipment of every ship. The competent mariner therefore has at his disposal enough information to make a reasoned choice as to the most suitable place of refuge, given the position of their ship and the nature of the casualty.

Only factors such as the readiness of pollution combat equipment and the attitude of local authorities will remain unknown. This latter is likely to be a significant element, and probably tips the balance in favour of keeping confidential the location of government-designated places of refuge.

#### *Mechanism of decision-making*

Should coastal states establish in advance a mechanism for objective decision-making about:

- (a) allowing or refusing entry to a distressed ship,
- (b) determining a specific place of refuge, and
- (c) the measures to be taken generally concerning salvage, protection, etc?

The collective answer to these questions must be 'yes', but of course the more difficult answer is as to how these decisions should be made and implemented.

The essential thrust of the IMO Guidelines, set out in para. 3.5, is that the assessment should be an objective one, weighing all the factors and risks in the balance, and, in para. 3.14, that the coastal state should give shelter whenever reasonably possible. The relevant factors to be taken into consideration are listed at length in Appendix 2 to the Guidelines.

Communication with a ship in distress in a storm may well be difficult, and it may be simply impracticable to put an inspector on board to conduct a survey of the ship's condition. Misconceptions as to salvage law and salvage techniques may put in question the acceptance of reports received from salvors. Different government departments may have differing agendas, and each may wish to put their own man on the casualty to conduct a survey. This led, in the case of the *Sea Empress* in 1996, to an army of nearly 30 outside personnel finding themselves on board the ship when a decision was made on safety grounds to evacuate her.

The UK Government, concerned that this should not happen again, commissioned an enquiry

led by Lord Donaldson, who recommended the appointment of one individual who should represent the public interest in such a situation, and who was sufficiently trained and informed on all relevant issues to be able to make rapid informed objective decisions.<sup>19</sup> The officer concerned is called the Secretary of State's Representative and is known by the acronym 'SOSREP'. The powers exercised by SOSREP derive from the Merchant Shipping Act 1995, itself a codification of legislation going back to the Merchant Shipping Act of 1894, and no special legislation was necessary to make this appointment. However the Marine Safety Act 2003 re-enacted, with some minor modifications, the relevant legislative provisions. The powers of the Secretary of State, which are of course delegated to SOSREP, are set out in a new Schedule 3A (entitled 'Safety directions') to the 1995 Merchant Shipping Act, which also contains details of the criminal sanctions imposed on those who do not comply with the reasonable directions of the Secretary of State or of his representative. There is, however, no express provision granting SOSREP immunity from suit, criminal or civil.

The present SOSREP has now been in post some three years, and the common view is that the system is working well. He has, during the quiet times between casualties, got to know the all major players in the field of casualty management and pollution control, including the major professional salvors, and a relationship of confidence has been built up. He will be a hard act to follow.

A comparable appointment has been made in South Africa. In the United States the US Coastguard appoints three area commanders with similar powers respectively covering the Atlantic, Gulf and Pacific coasts. France has its *préfets maritimes*. Other states are known to be studying the role and its relevance to their coastlines.<sup>20</sup> Geography is bound to be a major factor. States as large as Australia and the United States are simply not going to be able to cover their entire coastline with one person. However the case for one individual, or a limited number of individuals, who can make informed decisions to protect the public interest on the basis of an objective assessment of all relevant factors and of the relative risks involved, is a compelling one.

#### *Civil liability*

Who has the liability for damage caused by a pollution incident after a place of refuge has been granted or refused?

- (a) Will the ship in distress be responsible for pollution damage caused and under what conditions once a place of refuge has been granted?

Subject to the implementation and entry into force of the HNS and bunkers liability regimes on which conventions already exist, and the continuance of the International Group of P&I Clubs to provide cover and to settle claims covered by those conventions, it is unlikely that a new convention could usefully add to the existing remedies.

- (b) Will the state allowing entry to a vessel in distress have any liability?

Mr Stuart Hetherington of Australia, Chairman of the CMI Working Group, has written several papers on this subject and the section of the CMI Report is his personal handiwork. It contains a comprehensive review of the relevant answers received to the second CMI questionnaire, and indicates that most respondents considered that in the absence of proof of negligence by an officer of the state allowing entry, it was most unlikely that a liability on such a state would exist. He also highlights the provision in Article III(4)(e) of the 1992 Civil Liability Convention that '... no claim for compensation for pollution damage under this

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<sup>19</sup> Cm. 4193, HMSO, 1999.

<sup>20</sup> See the Donaldson Report at 71. The states include Australia, Belgium, Canada, Germany, The Netherlands, Norway, and Sweden.

Convention or otherwise may be made against ... any person taking preventive measures'. Preventive measures are defined as '... any reasonable measures taken by any person after an incident occurred to prevent or minimize pollution damage'. Provided therefore the actions of the state allowing entry were reasonable in all the circumstances, they would be protected from giving rise to legal liability.<sup>21</sup> The IMO Guidelines will provide a valuable yardstick as to what is reasonable.

(c) Will the state denying a place of refuge to a distressed ship have any liability?

This is a particularly difficult question, touching sensitive areas of the *Prestige* case. No report has yet been published establishing definitively what steps were taken by the Spanish authorities to investigate what were the real risks of her breaking up or foundering, or of pollution, if she had been admitted to a sheltered bay instead of being ordered out to sea as in fact happened. Legal proceedings are pending in Spain and the United States, and these are issues which will no doubt be investigated in detail in those proceedings. What is however clear is that no delegate to the IOPC Fund raised the possibility of the casualty having been brought about by the negligence of the claimant within Article III(3) of the CLC 1992<sup>22</sup> when a request from the Spanish Government for a substantial payment on account was being considered during the October 2003 meeting of the Fund. This payment was made in December 2003.

It is therefore clear that both the CLC and Fund Conventions foresee the possibility of negligence on the part of the government claimant being raised as a defence to a claim for compensation for pollution damage. The use of the words 'wholly or partially' in both the Liability and Fund Conventions shows that this may be a complete defence in an appropriate case, but also that a defence of contributory negligence, leading to an apportionment of liability, may apply. However the CLC, Fund and HNS Conventions all contain provisions giving immunity from suit to any person taking preventive measures.<sup>23</sup>

This section would not be complete without a mention of the 1969 Intervention Convention in cases of oil pollution casualties and the 1973 Protocol concerning intervention in cases of marine pollution by substances other than oil. These confer on coastal states the right to take measures on the high seas to prevent, mitigate or eliminate *grave and imminent danger* to their coastline or related interests. Article V requires that the measures taken shall be *proportionate to the damage actual or threatened*, and shall not go beyond what is *reasonably necessary*, and Article VI provides that a state taking measures in contravention of these provisions shall be obliged to pay compensation for the damaged caused (*emphasis added*).

In practice, however, the Intervention Conventions are unlikely to have a major influence on the debate over places of refuge, since the steps taken or not taken to allow a ship in distress entry to a place of refuge, or to refuse her entry, are likely to take place when she is within the limits of the state's territorial sea, where the ship is within the jurisdiction of the coastal state. Since, however, the governments of France and Spain have issued laws purporting to order single hulled tankers laden with persistent oil cargoes to sail beyond 200 miles from their coasts, the application of the Intervention Convention to such circumstances, or to the consequence of a breach of such orders, may indeed be a material issue.

<sup>21</sup> It is noteworthy that the HNS Convention contains an equivalent provision, but that the Bunkers Convention does not, despite strong arguments from many NGOs, including the CMI, that this was a serious omission.

<sup>22</sup> 'If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or *from the negligence of that person*, the owner may be exonerated wholly or partially from his liability to such person' (*emphasis added*). A similar provision appears in Article 4(3) of the IOPC Fund Convention 1992.

<sup>23</sup> Art. 4(4)(e) of the 1992 CLC Convention, Art. (3) of the 1992 Fund Convention, Art.7(5)(e) of the 196 HNS Convention. There is no equivalent provision in the 2001 Bunkers Convention.

(d) What are the responsibilities of salvors?

When a ship is in distress it is probable that she will be in need of salvage assistance, and it is equally probable, therefore, that many ships seeking entry to a place of refuge will already be the subject of salvage services. In those circumstances the party actually requesting admission to the place of refuge will be the salvor.

This is not a new concept, and indeed it was the concerns expressed by the professional salvage industry that led to the inclusion in the 1989 Salvage Convention of Article 11 which provides:

Co-operation of Contracting States

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations *such as admittance to ports of vessels in distress* or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general (*emphasis added*).

This is in fact the only international instrument<sup>24</sup> which contains a reference to the question of places of refuge for ships in distress, but alas it does not really assist in resolving the current debate. If anything it demonstrates the reluctance of national governments to grapple with this thorny problem except by pious expressions of promises to co-operate.

The salvage business is not for the fainthearted. A salvor must order his tug-masters to take their craft into places where the ordinary prudent mariner would not dare to tread – close manoeuvring in heavy weather to connect a towline to a drifting ship, into shallow inshore waters to assist a ship aground, or alongside a burning ship which may explode at any moment – and all for a reward which may be generous for the work done but which gives no assurance as to when the next job will come along.

It was established by the decision of the English House of Lords in the case of the *Tojo Maru*<sup>25</sup> that a salvor working on 'no cure-no pay' terms enjoys no special immunity from liability if he fails to exercise professional care and skill appropriate to the task in hand. A court will look leniently on him, as on any person working under necessarily difficult circumstances, in deciding whether there has indeed been a breach of the duty of care which he owes, but once such a breach is established, liability for the direct consequences will follow. Since the vast majority of salvage services are rendered on the terms of Lloyd's Standard Form of Salvage Agreement, which is expressly governed by English law, the *Tojo Maru* principles apply to most salvage services. Article 8 of the 1989 Salvage Convention effectively applies the same principles internationally.<sup>26</sup>

The salvor rendering services, whether on the terms of Lloyd's Form of Salvage Agreement or on a common law basis, is in a unique position in that his remuneration will directly reflect the success of the operation, and he therefore has a direct financial interest in ensuring that success. The benefits of remuneration on this basis go some way to compensating him for running the risks set out in the previous paragraph, and there is clearly a public policy motive to encourage him to run those risks in future operations. However this motivation can come into conflict with the interests of coastal states anxious to minimise the risks of pollution damage to their coastlines, and that conflict is clearly set out in Article 9 of the Salvage Convention, which provides:

<sup>24</sup> Apart from a passing reference in Article 18 of UNCLOS in the context of innocent passage.

<sup>25</sup> [1971] AC 242; [1971] 1 Lloyd's Rep 341.

<sup>26</sup> In particular in Article 8(1)(a): 'The salvor shall owe a duty to the owner of the vessel and other property in danger to carry out the salvage operations with due care.'

Nothing in this convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a marine casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal state to give directions in relation to salvage operations.

This wording was itself a compromise achieved at the 1989 Diplomatic Conference between those states who wanted to have the power to take over a salvage operation where they saw their interests threatened, and those who considered that it was inappropriate to introduce public law issues into what was essentially a private law convention.<sup>27</sup> The ability of a coastal states to intervene in a salvage operation is in any event limited by jurisdiction issues. The Intervention Convention 1969 does give rights to intervene outside the territorial sea but only in limited circumstances. The overriding requirement is that the 'measures taken by the coastal state shall be proportionate to the damage actual or threatened to it',<sup>28</sup> and it is this balancing act which lies at the heart of the decision-making as to whether or not to admit a distressed ship into a place of refuge.

Salvage, it has been said, is a balance of art and science, and it is never easy for those who are not familiar with salvage techniques to make a reasoned judgment as to the prospects of success of a salvage operation. There is always a risk that the salvor personnel may 'walk off the job' if they consider that unwarranted interference by those who do not understand salvage techniques may put their lives in increased danger.<sup>29</sup> It was for this reason that Lord Donaldson recommended the creation of the post of SOSREP, with a specific brief to become familiar with salvage techniques, and the leading salvage companies, and to advise the government as to when intervention should be necessary, and when it is better to leave well alone.

*Are there monetary incentives which can be offered by way of compensation schemes for ports accepting ships in distress?*

- (a) Insurance/security?
- (b) Establishment of a fund or even a voluntary fund?

There can be no doubt that a harbour master will not want to have a wrecked ship blocking the fairway into his port, nor will he wish to expose his harbour authority to massive claims for damages if negligence by a pilot or port employee leads to a major disaster.<sup>30</sup> A wrecked ship has, by definition, no residual value. If she is owned by a single ship company the prospects of attaching another asset of her owner are distinctly doubtful. It is therefore recognised that some means of ensuring that legitimate claims for damages will be met is an essential ingredient in persuading ports to welcome ships in distress. We have already seen how oil pollution claims from tankers carrying persistent oil are already secured by the CLC and IOPC Fund system. When, as seems likely, the 2003 Supplementary Fund Protocol enters into force, making available compensation up to 750 million SDR, port authorities in states which are party to the Supplementary Fund (membership is optional, but all EU Member States have been urged to join) need have no fears that their claims will be recoverable. It will

<sup>27</sup> See Professor N Gaskell's commentary on the Salvage Convention in *Current Law Statutes* (Merchant Shipping Act 1995) at page 21–395, and the article by the author, 'The 1989 Salvage Convention and English Law' [1996] LMCLQ 202 at 213.

<sup>28</sup> Article V(1).

<sup>29</sup> This possibility is discussed in the MAIB Report on the *Sea Empress* casualty at paras 14.11 to 14.17 and in Lord Donaldson's Review at para. 3.4.

<sup>30</sup> It was reported at the February 2004 meeting of the IOPC Fund that the 1971 Fund had received £20 million from the Milford Haven Port Authority in settlement of the Fund's recourse action.

no doubt be necessary to embark on a training programme to ensure that the structures and working of the CLC/Fund system is well understood by them, so that ignorance does not provide an incentive for them to send such ships away.

Likewise states which make the political decision that due to their lower labour costs the cost of cleaning up a major oil spill is unlikely to exceed the 200 million SDR limit of the 1992 CLC/Fund regime, should also be satisfied with the financial security which that scheme offers. Similar considerations will apply when the HNS Convention and Bunker Pollution Convention enter into force.

Nevertheless, there always remains the possibility of claims arising which are outside the scope of these conventions, such as claims for wreck removal, damage to port installations, and claims for environmental damage outside the scope of 'reasonable measures of reinstatement'. The legal right to recover the cost of such damage will depend on the precise provisions of the local law, and since such claims are likely to arise following accidents inside the internal waters of the state concerned, or at most in the territorial sea, they will not generally be governed by international convention.

The possibility of some form of security being provided is foreseen in the IMO Guidelines on Places of Refuge, and in particular in para. 3.14 which provides:

3.14 The action of the coastal State does not prevent the company or its representative from being called upon to take steps with a view to arranging for the ship in need of assistance to proceed to a place of refuge. As a general rule, if the place of refuge is a port, a security in favour of the port will be required to guarantee payment of all expenses which may be incurred in connection with its operations, such as: measures to safeguard the operation, port dues, pilotage, towage, mooring operations, miscellaneous expenses, etc.

The putting in place of a suitable guarantee to satisfy this requirement may well take time, particularly if the figures put forward by the port as estimates of the expenses likely to be incurred are seen to be extravagant. This is a problem that any ship manager dealing with port agents will be familiar with, but in the heat of a crisis, and with limited possibilities of going elsewhere, the practicalities will no doubt take some effort to resolve. It would however be as well to bear in mind the existence of the IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims. If as in the United Kingdom these are part of the administrative framework of merchant shipping, their terms should be taken into account by those formulating a demand for such security.

Mr Hetherington's paper on the CMI website contains a draft wording for a letter of guarantee which might be provided by the P&I Club of a distressed vessel, assuming that a reasonable figure can be agreed. It is noteworthy that this form is expressed to be subject to the reservation of the right of the owners and or bareboat charterers of the ship concerned to limit liability in accordance with the applicable law. Since the right of the entered shipowner member to limit liability in accordance with such law is an essential ingredient in the liability cover provided by all P&I Clubs, the issue of a letter of guarantee in excess of that limit is exceedingly unlikely.

The possibility of creating a special fund to indemnify ports in such circumstances has been raised in the discussions of the CMI. A voluntary agreement on the lines of TOVALOP has also been considered. It was thought that the lack of homogeneity among the owners of ships which might seek a place of refuge would render this suggestion unfeasible, but it will no doubt be discussed further.

A novel approach was suggested by Dr Eric Van Hooydonck in a paper presented at an international workshop on places of refuge held at Antwerp on 11 December 2003, and developed in his contribution to the CMI papers on the website. He suggests that port authorities should be encouraged to accept distressed vessels by conferring on them a right

to claim salvage to the extent that the admission of the casualty has enabled her to be saved from danger. The incentive argument fits well into the history and evolution of the right to claim salvage remuneration, by encouraging parties with no legal obligation to do so to go to the assistance of ships and other property in danger at sea.

The principal problem in the way of this proposal emerges from the last sentence above. It is an essential requisite of a claim for salvage at law that the claimant should not be under any pre-existing duty to assist the salvaged property,<sup>31</sup> and this would normally prevent port authorities, fire brigades etc from claiming salvage. A specific provision to reverse this would therefore have to be included in any convention or other international instrument dealing with this subject.

More fundamental, however, would be the problems caused by the underlying insurance arrangements. Contributions to salvage remuneration are invariably covered by the hull and cargo policies for marine risks. Those policies always exclude liability for pollution, which is a risk covered by the P&I Clubs. There is no equivalent cover for cargo. To the extent, therefore, that the salvage payments suggested by Dr Van Hooydonck are intended to encourage admission of ships in distress to places of refuge in order to avoid or minimise the threat of pollution damage, they would be an unwelcome addition to the potential liabilities of hull and cargo insurers. True, the 'Montreal compromise' which preceded the 1989 Salvage Convention allows 'the skill and efforts of the salvors in preventing or minimizing damage to the environment' as one of the criteria for fixing a salvage award, but this was an exceptional concession by the property insurers, and there would no doubt be considerable reluctance to extend their exposure in this direction.

#### *Penal liability*

- (a) Should there be such liabilities? If so, in what circumstances?
- (b) Which courts should have jurisdiction?

The question of penal sanctions on those who are involved in marine accidents is a topical one. In the Queen's Speech<sup>32</sup> in November 2003 the British Government announced that it would be introducing legislation to create a crime of 'corporate manslaughter'. Previous attempts to prosecute seafarers for matters other than technical offences have been conspicuously unsuccessful, as for example in the case of the Master of the *Herald of Free Enterprise*. It is interesting that on 19 March 2004 the captain of the dredger which collided with Hythe Pier in Southampton Water while he was over three times above the legal limit of alcohol permitted for car drivers was sentenced to eight months in gaol. This is not the place to discuss the wider policy issues raised by this question, but there are undoubtedly many problems associated with such prosecutions, especially when the defendant is a corporation as distinct from an individual. The Privy Council case of *Meridian Global Funds Management v Securities Commission*<sup>33</sup> demonstrated the delicate enquiries necessary to establish which individual can be identified as standing in the shoes of the company for the purposes of the criminal law. The Judicial Committee report studies the cases on 'actual fault or privity' in the context of limitation of liability and concludes that the old 'directing mind and will'<sup>34</sup> test may not now be appropriate. Instead the court should look for 'rules of attribution' in the relevant statute or convention to establish which is the individual in the corporate organisation whose act (or knowledge or state of mind) was for this purpose intended to count as the act etc of the company.

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<sup>31</sup> See F. Rose (ed.), *Kennedy and Rose on Salvage* (6th edn), Sweet and Maxwell, 2002, at 327–330.

<sup>32</sup> In which the government of the day announces its legislative programme for the coming parliamentary year.

<sup>33</sup> [1995] 2 AC 500.

<sup>34</sup> Sometimes expressed as *alter ego*.

It appears unlikely that criminal sanctions will provide a disincentive on ships' Masters from seeking shelter in times of stress, nor is it any more likely that such sanctions would encourage coastguards to welcome such ships into sheltered waters under their control.

In the case of the British SOSREP, the general criminal law will apply as to any other British citizen, but it seems unlikely that, having found an individual with the skills, both technical and interpersonal, to cope with a major casualty, the British Government would prosecute him if one of the risks he was paid to take should prove to be the wrong one in all the circumstances.<sup>35,36</sup>

#### *Reception facilities for ships in distress*

- (a) Should there be a requirement for the establishment of large (private or public) land or floating (salvage/environmental) docks to receive a distressed ship for salvage purposes and for confining risks of pollution?
- (b) Alternatively, should states designate areas within a place of refuge where a sinking or unstable casualty can be beached as part of salvage operations? (Related issues are the incentives for private docks and/or funding of private/public docks, and the size limitation on tankers.)

This section of the CMI papers was prepared by Dr Gregory Timagenis,<sup>37</sup> who begins his study by emphasising the fact that compensation for pollution damage is a secondary solution, and that governments owe a duty to seek a primary solution by keeping the ship in question in one piece and the cargo inside her. He draws an analogy with the provision of oil reception facilities into which tankers can discharge tank washings, thus avoiding the temptation to pump them into the sea.

He suggests that it would be in the interests of the ship- and cargo-owning industries to fund the creation of sheltered harbours with suitable locations for beaching a sinking or listing ship, or even a network of large floating docks which can be towed to meet a casualty and support her before she breaks up or sinks.

Such docks would necessarily impose constraints on the size of tankers which could enter them, but Dr Timagenis believes that such size limitation on tankers may well be environmentally commendable, and cites the acceptance of MARPOL rules and the introduction of double hull tankers as examples of the shipping industry adapting to requirements imposed politically.

The cost of providing such facilities would no doubt be a serious impediment, but when it is compared to the cost of cleaning up the pollution resulting from casualties such as the *Amoco Cadiz*, *Erika* and *Prestige*, it is relatively modest.

#### *The European perspective*

The *Erika* casualty encouraged the European Union to put in place measures both to try to prevent major pollution incidents and also to improve the compensation regime available in Member States of the EU. The most obvious result of this was the Traffic Monitoring Directive.<sup>38</sup> The impact of the *Prestige* casualty has continued to provoke repercussions in the

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<sup>35</sup> For an interesting study of criminal liability for marine pollution in the United States see Colin de la Rue and Charles Anderson, *Shipping and the Environment*, LLP, 1998, ch.25.

<sup>36</sup> The section of the CMI report on Criminal Liability and Jurisdiction will be written by Dr Frank Wiswall, Vice President of CMI and distinguished American maritime lawyer. At the time that this article was written his contribution was not available.

<sup>37</sup> Maritime lawyer, Piraeus, Greece.

<sup>38</sup> See n. 6 above.

European Union, and in particular in the new European Maritime Safety Agency (EMSA). Two meetings of the European Group of Experts have been held, the latter meeting in May 2003 under the chairmanship of the recently appointed head of EMSA Mr Willem de Ruyter (Netherlands). At these meetings a difference of approach has been noted between certain states, in particular Denmark and Norway (the latter attending the meetings by invitation although not a member of the EU) who prefer an open public declaration of the places of refuge in their territory, and those who would prefer to prepare an inventory of such places but not to disclose them publicly for fear of provoking either an outcry from the local authorities of the areas concerned, or a flotilla of decomposing ships heading towards them.<sup>39</sup> The United Kingdom supports this latter view.

Previously the European Commission had charged Member States with preparing, not later than February 2004, an inventory of suitable places of refuge on their coastlines. However, the Ministers in the Transport Council subsequently advanced this deadline to 1 July 2003, but it is noteworthy that, while they required Member States to forward details of the inventory to EMSA, they did not specify whether the list should be made public. The deadline has long passed, but it is still evident that many European states, while they may well have identified sheltered waters to which a distressed vessel may be directed, are still reluctant to publish the identity of those locations to the world at large.

In March 2004 a workshop was convened by EMSA at which Member States outlined the measures which they had put in place in respect of places of refuge. It was interesting that, despite the extended<sup>40</sup> deadline of 5 February 2004 by which time Member States were to inform the Commission of the measures taken in response to the Traffic Monitoring Directive, only Denmark, Greece and the United Kingdom had done so. It was particularly interesting that informal reports from this meeting, which was limited to government representatives, indicated that despite hostility in some quarters when the Danish Government initially announced the identity of their places of refuge, this died down very quickly. The representatives of the Member States did not agree on a common policy on publishing or not publishing this information.

The issues of liability and compensation were also discussed at length at this meeting, although, in view of the existing regime in place for oil pollution compensation, and the prospects of early entry into force of the Supplementary Fund for almost all Member States of the EU, these issues were not considered to be among the most urgent aspects of the problem. It would appear that encouraging Member States to ratify the HNS Convention was also considered to be a priority objective.

No doubt the European states will be looking forward with keen interest to the results of the debates on this issue at the CMI Conference in Vancouver. Recent statements by both the outgoing Secretary General of the IMO, Mr William O'Neill, and his successor Mr Thimios Mitropoulos, have emphasised the importance of seeking global, rather than regional solutions to problems in the field of safety at sea and marine pollution. It is undoubtedly more difficult for an organisation with over 170 member states to achieve consensus on new international instruments than for one with 15 members. The enlargement of the EU will certainly increase its problems in this respect, even if many of the new members of the EU are in fact land-locked, and will therefore have fewer concerns about coastal pollution.

In the field of places of refuge, however, the signals coming recently from Brussels do suggest a greater willingness to work towards global solutions. The IMO Guidelines have demonstrated that a new international instrument, even if it is only 'soft law', can be

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<sup>39</sup> See the article in *Lloyd's List*, 4 August 2003.

<sup>40</sup> Or perhaps more accurately 'reinstated' – a sign of growing realism in the EU?

produced quite speedily if the will is there, and the European Traffic Monitoring Directive expressly recognises the validity of these Guidelines. There are signs that both the EU and the IMO are looking to the CMI to come up with a significant proposal to deal with the outstanding issues. It is to be hoped that, with the wide range of skills and experience at its disposal, the CMI will rise to this challenge at the Vancouver Conference.



# INTERNATIONAL AND REGIONAL ORGANISATIONS

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### THE PROPOSED EC PORT SECURITY DIRECTIVE

*Dr Vincent J G Power\**

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#### **Introduction**

Some port interests must worry about the month of February. It seems as if the European Union publishes some of its more radical and burdensome proposals on ports during the month of February.<sup>1</sup> It was no different in 2004 when the European Commission published its proposal for a directive of the European Parliament and of the Council of Ministers on enhancing port security.<sup>2</sup>

#### **Need for security in ports**

There has always been a need to ensure security at ports given their strategic significance, the high volume of passengers and the type of cargoes passing through ports such as oil, chemicals or gas. This need for security has become all the greater since the terribly tragic events of 11 September 2001. There is a need to protect people passing through or working in a port as well as the infrastructure, equipment, cargoes and means of transport in ports. The Commission made this present proposal because 'terrorist attacks in ports can easily result in serious disruptions to transport systems and trigger knock-on effects on the surrounding industry as well as directly harming people in the port and the neighbouring population'.<sup>3</sup>

#### **Background**

Before examining the detail of the proposal, it is useful to review the legal background. First, it is worth recalling that this proposal is not the first EU measure in the area. There have been other measures such as the Commission's Communication on Maritime Security in May 2003<sup>4</sup> as well as

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<sup>1</sup> Eg the proposed Port Services Directive was published in February 2001. On EC ports and shipping law generally, see Chlomoudis and Pallis, *European Union Port Policy: The Movement Towards a Long-Term Strategy* (2002); Power, *EC Shipping Law* (2nd edn, 1998); and Van Hooydonk (ed.), *European Seaports Law: EU Law of Ports and Port Services and the Ports Package* (2003).

<sup>2</sup> COM (2004) 76 final, 10 February 2004. See also IP/04/212, 17 February 2004.

<sup>3</sup> COM (2004) 76 final, at n. 2.

<sup>4</sup> COM (2003) 229 final.

the Agreement between the European Parliament and the Council of Ministers on a European System of Maritime Security. In this context, the EU is in the process<sup>5</sup> of adopting a regulation on enhancing ship and port facility<sup>6</sup> security.<sup>7</sup> The current proposal would complement that one and lead to a regime covering the entire port. The third recital of the proposed directive recalls that the proposed regulation 'constitute[s] only part of the measures necessary to achieve an adequate level of security throughout maritime linked transport chains. [The proposed] regulation is limited in scope to security measures onboard vessels and the immediate ship/port interface.'<sup>8</sup> The proposed directive complements the proposed regulation by going beyond the ship/port interface to protect the port and ensure security measures at ports.<sup>9</sup> Secondly, it is also worth recalling that the EU is not alone in adopting measures in this area; the UN has also been involved. In this context, the International Maritime Organisation (IMO) has been active in the development of the SOLAS<sup>10</sup> and ISPS<sup>11</sup> Code. This non-binding code is being brought into legal effect in EC law by the 2003 Communication. This February 2004 EU measure is being adopted despite an IMO-International Labour Organisation Working Group working on a Code of Practice on Port Security because it would be unlikely to adopt any measure in the near future and it would not in any case be legally binding.

It is also worth reviewing the commercial background. There are differences in the size of ports ranging from the very large ones to the very small ones. There are differences in ownership between ports. It is also clear that there are some port security regimes in place so the proposed directive would allow them to continue in being provided they are compatible with the directive.

### **Purposes of the proposal**

The proposed directive would involve an EU-wide framework to enhance port security. There is a need to ensure a co-ordinated approach so as to avoid inconsistencies between ports. The proposed directive is aimed at harmonising implementation and equal conditions throughout the EC while not creating differences for the commercial port users. It would consist of (a) the setting of common basic rules on port security measures; (b) the setting up of an implementation mechanism for these rules; and (c) setting up of appropriate compliance monitoring mechanisms.<sup>12</sup>

### **Legal basis for the proposal**

The Commission has indicated that the legal basis of the proposed directive would be 'Article 80(2) of the EC Treaty, without prejudice to Member States' national security legislation and any measures that might be taken on the basis of Title VI of the Treaty on European Union'.<sup>13</sup> This means that the proposed directive will not be the sole measure and may well be complemented at the Member State level.

### **Scope of the proposal**

Article 2 of the proposed directive outlines the scope of the proposed directive. The proposed directive would apply to any port<sup>14</sup> located in the territory of a Member State in which one or more

<sup>5</sup> See COM (2003) 229 final generally.

<sup>6</sup> The term 'port facility' means a 'location where the ship/port interface takes place; this includes areas such as anchorages, waiting berths and approaches from seaward, as appropriate'.

<sup>7</sup> Art. 4 of the proposed Regulation provides that Member States must ensure that port security measures introduced by the directive are closely co-ordinated with the proposed regulation in this area.

<sup>8</sup> The term 'ship/port interface' means the 'interactions that occur when a ship is directly and immediately affected by actions involving the movement of persons, goods or the provisions of port services to or from the ship'.

<sup>9</sup> See the Communication on Enhancing Maritime Transport Services (COM (2003) 229), 2 May 2003.

<sup>10</sup> Safety of Life at Sea.

<sup>11</sup> International Ship and Port Facility Security.

<sup>12</sup> Art. 1(2).

<sup>13</sup> COM (2004) 76 final, art. 5.

<sup>14</sup> The term 'port' or 'seaport' is defined by Art. 3(1) as *meaning* (note, the term is defined in a precise and definitive way rather than an inclusive manner so the definition is comprehensive) 'an area of land and water made up of such works and equipment as to permit principally, the reception of ships, their loading and unloading, the storage of goods, the receipt and delivery of these goods, and the embarkation and disembarkation of passengers'.

port facilities are situated which are covered<sup>15</sup> by the proposed regulation which means 'a location where the ship/port facilities interface takes place' and this 'includes areas such as anchorages, waiting berths and approaches from seaward, as appropriate'.<sup>16</sup> This could prove quite difficult to apply in the case of ports which are based in urban or industrial areas because of the need to decide where the port and non-port areas divide. Thus Article 2(3) provides that Member States must 'identify for each port the boundaries for the purposes of this directive, appropriately taking into account the information from the port security assessment'.

### **Port security authority**

The directive provides that there should be a port security authority<sup>17</sup> which would be responsible for the identification and implementation of appropriate port security measures. A port security authority may be appointed for more than one port so a Member State might, for example, appoint one authority for all the ports in a country. The authority would be responsible 'for the identification and implementation of appropriate port security measures by means of port security assessments and plans'.<sup>18</sup>

### **Port security assessments**

Member States would be obliged under the directive to ensure that port security assessments are undertaken for the ports specified by the directive.<sup>19</sup> These assessments would decide what security measures are required as well as where and when such measures would be required. The EU believes that Member States 'should rely upon detailed security assessments to identify the exact boundaries of the security-relevant port area, as well as the different measures required to ensure appropriate port security. Member States may also appoint the "competent authority for maritime security" under the proposed Regulation as the port security authority'.<sup>20</sup> The proposed Directive sets out in Annex I very detailed criteria for carrying out the assessment. Such measures shall be different according to the security level in place and will reflect differences in the risk profile of different sub areas in the port'. The port security assessments lead to the port security plan.

### **Port security plans**

Under the directive, ports would have to establish a port security plan which would outline all measures and details for enhancing port security. These plans would 'thoroughly transpose the findings of the port security assessment. The efficient working of security measures also requires clear task divisions between all parties involved as well as regular exercise of measures. The retention of task divisions and exercise procedures in the format of the port security plan is considered to contribute strongly to the effectiveness of both preventive and remedial port security measures'.<sup>21</sup> Annex II of the proposed directive outlines the detailed criteria for the establishment of the port security plans. The port security plans are the result of port security assessments. The 'port security plans should adequately address the specificities of different sections of a port and shall integrate the security plans for the port facilities within their boundaries'.<sup>22</sup> In particular, the port security plans shall identify, for each of the different security levels, the procedures to be followed, the measures to be put in place and the actions to be undertaken.

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<sup>15</sup> Art. 2(2).

<sup>16</sup> Art. 2(11) of the draft Regulation as initiated.

<sup>17</sup> The term 'port security authority' is defined as Art. 3(5) as meaning the 'authority responsible for security matters in a given port'.

<sup>18</sup> Art. 5(2).

<sup>19</sup> Art. 6(1).

<sup>20</sup> One could see the value, in terms of efficiencies and effectiveness, of combining the respective bodies into one institution so as to eliminate inconsistencies.

<sup>21</sup> Recital 7.

<sup>22</sup> Art. 7(1).

### Port security officer

The proposed directive contemplates that a port security officer would be designated for each port.<sup>23</sup> This officer would co-ordinate security measures and act as the point of contact for port security-related issues. Each port must have a different port security officer<sup>24</sup> but 'small adjacent ports'<sup>25</sup> may have a shared security officer.

### Security levels

The proposed regulation also contemplates that there could be different security levels distinguishing between normal, heightened and imminent threats. Article 8 obliges Member States to introduce a system of port security levels. Security level 1 would mean the level for which minimum appropriate protective security measures shall be maintained at all times. Security level 2 would mean the level for which appropriate additional protective security measures shall be maintained for a period of time as a result of heightened risk of security incident. Security level 3 would mean the level for which further specific protective security measures shall be maintained for a limited period of time when a security incident is probable or imminent, although it may not be possible to identify the specific target.

### Conclusions

There is no doubt that there is a need for enhanced security at seaports given the possibility of serious terrorist threats on transport facilities. There is a risk that the proposed directive may be administratively burdensome and complicated. For example, there is a port security authority, a port security officer and a port security committee.

The proposed directive will not be the only measure dealing with security in ports and there may be measures adopted at the Member State level as well.<sup>26</sup> There are some limitations on what Member States may adopt because there are elements of a security regime which could only be adopted at an EC level.<sup>27</sup>

The proposed directive contains a very curious provision in the 11th recital stating that the proposed directive 'respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union'. This perhaps hints at the possibility that there may be some challenge to the operation of the directive from the perspective of human rights.

The proposed directive would be implemented not later than a year after its adoption. Member States will need that time to implement it.

It may be more useful if this proposed measure were to be joined as one document with the regulation which is currently going through the EU process. While the two measures are different in nature (one is a regulation while the other is a directive), there is a value to having a single regime.

There is no doubt that the proposed measure is welcome in enhancing the structure of legislative regime dealing with security threats from terrorists but whether it will prevent terrorist attacks in ports may be quite a different matter, and only time will tell.

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<sup>23</sup> Art. 9.

<sup>24</sup> Art. 9(1).

<sup>25</sup> Art. 9(1).

<sup>26</sup> Recital 5.

<sup>27</sup> Recital 13 provides: 'Since the objectives of the proposed action, namely the balanced introduction and application of appropriate measures in the field of maritime transport and port policy, cannot be sufficiently achieved by the Member States and can therefore, by reason of the European scale of this directive, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity set out in Article 5 of the [EC] Treaty. In accordance with the principle of subsidiarity set out in that Article, this directive is limited to the basic joint standards required to achieve the objectives of port security and does not go beyond what is necessary for that purpose.'

## SELECTED RECENT DEVELOPMENTS IN EC MARITIME LAW

*Dr Vincent J G Power*

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### **Maritime safety: over-promise and under-deliver? (Part one)**

The sinking of the *Erika* resulted in Member States supporting the adoption of tough new marine environmental legislation. This legislation, the *Erika I* legislative package,<sup>1</sup> entered into force on 22 July 2003. Given the politicians' public support for such measures, one would have expected that all of the Member States would have implemented the legislation well ahead of the entry into force of the EC measures. Instead, the European Commission had to institute proceedings against ten Member States for failing to implement the legislative package.<sup>2</sup> The seriousness of a failure to implement the *Erika I* package was that, according to EC Transport Commissioner Loyola de Palacio, the *Prestige* incident could have been avoided (at least in terms of it occurring in EC waters). Instead, the ship inspection and survey organisation and port state control measures had only been implemented in five states (ie Denmark, France, Germany, Spain and the UK). This meant that proceedings were being instituted by the Commission against Austria, Belgium, Finland, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Sweden.<sup>3</sup>

### **Maritime safety: over-promise and under-deliver? (Part two)**

On 26 February 2004, the Commission announced that it was warning 12 Member States for failing to transpose a key maritime safety directive.<sup>4</sup> All Member States other than Denmark, Germany and Spain received letters formally notifying them that they had failed to implement the 2002 EU legislation on vessel traffic monitoring and information systems. All Member States should have implemented the Directive by 5 February 2004.

### **Maritime safety: new tasks to be assigned to EMSA**

The European Parliament<sup>5</sup> decided that new tasks should be allocated to the European Maritime Safety Agency (EMSA). EMSA welcomed the decision.<sup>6</sup> First, EMSA will need to develop an operational capability in oil pollution response in collaboration with Member State authorities and interests. This was to ensure that a system is strengthened in EC waters so as to enable rapid response to emergencies. Secondly, EMSA's maritime training tasks have been expanded to include quality control in non-EU Member States. Thirdly, the Parliament decided to allocate some responsibilities to EMSA relating to maritime security.

### **Cabotage: the Italian saga and Greek odyssey go on**

Maritime cabotage is the right to operate maritime services between two ports in one and the same Member State. A prohibition on such services can act as a form of protectionism for shipping companies based in those states because foreign shipping companies may not enter into the market. Some states were unwilling to surrender their cabotage regimes so Regulation No 4055/86 did not extend the freedom of maritime services regime to cabotage. It was not until Regulation No 3577/92, adopted six years later, that there was EC legislation to open up the cabotage regime, and even then Greece (the strongest opponent to liberalising cabotage) obtained a 12-year partial exemption.

Despite this exemption for Greece, on 3 February 2004 the Commission had to send a letter of formal notice to Greece for incorrect application of Regulation No 3577/92.<sup>7</sup> The allegation was

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<sup>1</sup> This package involved the directive strengthening port state inspections in the EU, the directive strengthening the monitoring of the activities of classification societies and the regulation proposing an accelerated timetable for the withdrawal of single-hulled tankers.

<sup>2</sup> IP/03/1116, 25 July 2003.

<sup>3</sup> Some of these states had implemented some (but not all) of the measures.

<sup>4</sup> IP/04/268, 26 February 2004.

<sup>5</sup> The Parliament was working largely through the Parliament's Regional Policy, Transport and Tourism Committee.

<sup>6</sup> IP/04/219, 12 February 2004.

<sup>7</sup> IP/04/159, 3 February 2004.

that Greece adopted legislation in 2001 which was in conflict with Regulation No 3577/92 and that the market should have been liberalised on 1 January 2004. While the Commission objected in 2001, the matter became pressing with the liberalisation of the market this year. The Commission objects to a requirement that all non-Greek crew members should hold a certificate proving their knowledge of the Greek language; such a requirement is unjustified, according to the Commission.

On 3 February 2004, the Commission announced its acceptance of Italy's extension of social security reductions for maritime cabotage services. Italy had extended its scheme to reduce employers' social security contributions in the maritime cabotage sector. The scheme had been originally approved by the Commission in 1999–2001 and was approved again in 2002 and 2003. The Commission believed that the reduction was within the Community guidelines on state aid to maritime transport.

## JURISDICTION AND ILLEGAL STRIKE ACTION BY SHIPPING TRADE UNION

Jason Chuah

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*Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation*  
Case C-18/02 , ECJ, 5 February 2004

In this case *DFDS Torline A/S v SEKO Sjöfolk Facket för Service och Kommunikation* the ECJ had occasion to deal with the relevance of the flag state where the claimant shipowner purports to bring an action within the scope of Article 5(3) of the Brussels Convention. The *Tor Caledonia* was registered in the Danish international ship register and was subject to Danish law. She was owned by DFDS Torline A/S and served the route between Göteborg (Sweden) and Harwich (United Kingdom). DFDS had employed a crew of Polish nationality. The crew was employed on the basis of individual contracts, containing terms consistent with a framework agreement between a number of Danish unions on the one hand, and three Danish associations of shipping companies on the other. Those contracts were expressed as being governed by Danish law.

The Polish crew was represented by a Swedish trade union, Sjöfolk Facket för Service och Kommunikation (SEKO). SEKO made a demand on DFDS for a collective agreement which DFDS rejected. SEKO then served a notice of industrial action by fax instructing its Swedish members not to accept employment on the *Tor Caledonia*. The fax also stated that SEKO was calling for sympathy action. The Svenska Transportarbetareförbundet (Swedish Transport Workers Union)(STAF) gave notice, upon receipt of the fax, of sympathy action and made plain that they would refuse to engage in any work whatsoever relating to the *Tor Caledonia*. That meant the ship was very likely to be prevented from being loaded or unloaded in Swedish ports.

DFDS brought an action before the Danish Arbejdsret (Labour Court) for an order that the industrial action and the sympathy action were unlawful. Very soon after the hearing but *before a decision was made*, SEKO and STAF decided to terminate industrial action. However, in the meantime, DFDS had had to remove the *Tor Caledonia* from serving the Harwich-Göteborg route and to use a leased vessel instead. DFDS thus brought action against SEKO before another Danish court claiming that the defendant was liable in tort for giving notice of unlawful industrial action and inciting another Swedish union to give notice of sympathy action, which was also unlawful. The damages sought were for the loss allegedly suffered by DFDS as a result of immobilising the *Tor Caledonia* and leasing a replacement ship.

There were a number of very significant private international law questions that had to be answered before that claim could be dealt with. They were so important that representations were made not only by the parties, but also Sweden, Denmark, the United Kingdom and the Commission. The position under Danish law was that the Arbejdsret had no jurisdiction to order compensation.

SEKO's argument was thus that DFDS could not rely on Article 5(3) of the Brussels Convention<sup>1</sup> to bring its claim in Denmark. Article 5(3), it might be recalled, states that in matters relating to a tort, delict or quasi-delict, the defendant may be sued in the courts for the place where the harmful event occurred. On the other hand, if Article 5(3) did not apply, DFDS would be required to sue SEKO in Sweden, the place where SEKO was domiciled. SEKO's argument was supported by the Swedish Government, whilst Denmark and the United Kingdom took the opposing view. The Arbejdsret thus referred the matter to the ECJ for a preliminary ruling.<sup>2</sup>

The ECJ held that the fact that Denmark had a system whereby a ruling on the legality of industrial action may be made by a court not competent to hear claims for consequential damage was not a bar to the application of Article 5(3). The ECJ saw the argument by SEKO as one which operated against the principles of sound administration of justice and practicality.<sup>3</sup> If SEKO's argument was correct, it would mean that if the claimant wished to obtain compensation for damage *occurring in Denmark*, the claimant would have had first to sue SEKO in Sweden for a ruling that the action was illegal and then subsequently, bring an action for damages before a Danish court. The court relied on the recent case of *Italian Leather*<sup>4</sup> in reiterating that the object of the Brussels Convention was not to unify the procedural rules of the Contracting States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in intra-Community relations. It would be quite contrary to the principle of legal certainty where the plaintiff is inconvenienced by a restrictive reading of Article 5(3). It should also be noted that the intention in Article 5(3) was clearly to offer the plaintiff a convenient forum to claim damages at the place where the harm or loss occurred. Artificially separating the two limbs of the action, the legality and the right to compensation, would not serve this purpose at all.

In this connection it might also be noted that Article 5(3) has in the past been given an expansive reading by the ECJ. In *Mines de Potasse d'Alsace*<sup>5</sup> one of the first ECJ decisions on Article 5(3), the court stated that by its comprehensive form of words, Article 5(3) of the Convention covers 'a wide diversity of kinds of liability'. Similarly in *Kalfelis*<sup>6</sup> the court asserted that the concept of matters relating to tort, delict and quasi-delict 'covers all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1)'. SEKO, however, emphasised that the Arbejdsret had no jurisdiction to order compensation for harm done, whatever the nature of the harm. Although there is some force in that argument, the general tenor from ECJ case law is that the specificity of competence of the national court in question is not material when applying the jurisdictional rules of the Convention. Moreover, it has been recently established that even where no financial compensation is claimed as remedy, Article 5(3) can apply (*Henkel*,<sup>7</sup> a judgment delivered after the present reference was made). There, the court had allowed the consumer protection organisation seeking an injunction to prevent a trader from using unfair consumer contract terms to rely on Article 5(3).

SEKO stressed that there was no absurdity in its contention because it was possible that following a ruling by the Arbejdsret that the industrial action was unlawful, it, SEKO, could withdraw the unlawful action thereby causing no damage to DFDS. That reasoning was not acceptable. As far as the ECJ was concerned, 'it was not possible to accept an interpretation of Article 5(3) of the Brussels

<sup>1</sup> The Brussels Convention has now been replaced by Regulation 44/2001 with effect from 1 March 2002. As the Danish court, the Arbejdsret, made its application for a preliminary ruling on 29 January 2002, this case pre-dates the new Regulation. That said, Denmark has exercised an opt-out of the new Regulation and is thus still governed by the Convention.

<sup>2</sup> An earlier preliminary issue was whether the Arbejdsret had the competence even to make a reference to the ECJ. That objection was overruled by the ECJ which stated that although the Arbejdsret was not mentioned in the 1971 Protocol's list of Danish courts empowered to make such an application, it was clear that the Arbejdsret had exclusive jurisdiction over certain disputes in employment law and as such, was a court of first and last instance.

<sup>3</sup> See also Case C-269/95 *Benincasa* [1997] ECR I-3767, paragraph 26.

<sup>4</sup> Case C-80/00 [2002] ECR I-4995.

<sup>5</sup> Case 21/76 [1976] ECR I735.

<sup>6</sup> Case 189/87 [1988] ECR 5565.

<sup>7</sup> Case C-167/00 [2002] ECR I-8111.

Convention according to which application of that provision is conditional on the actual occurrence of damage.<sup>8</sup> Furthermore, the ECJ has also held that the finding that the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence, is equally relevant whether the dispute concerns compensation for damage which has already occurred or relates to an action seeking to prevent the occurrence of damage.<sup>9</sup>

A second question of some interest was that of causation. The Arbejdsret sought clarification as to whether if it was necessary for the application of Article 5(3) in the present context that 'the harm caused must be a certain or probable consequence of the industrial action itself or whether it was sufficient that that industrial action was a necessary condition of sympathy action which may result in harm'.<sup>10</sup> The question was important as it was established in *Mines de Potasse d'Alsace* that liability in tort, delict or quasi-delict can only arise when there is a causal connection between the damage and the event from which the damage originates. It is clear from the facts that as DFDS had only employed Polish sailors on the ship in question, the SEKO industrial action in calling its Swedish members not to accept jobs on the ship in question, on its own, would not have caused harm to DFDS. Be that as it may, without that industrial action there would not have been any sympathy action by dock and port workers which in turn led to the cancellation of that route and the leasing of a substitute vessel. The chain of causation had thus not been broken.

The final question for the ECJ is one of particular interest to maritime lawyers. It was whether Article 5(3) must be interpreted as meaning that the damage resulting from industrial action taken by a trade union in a Contracting State to which a vessel registered in another Contracting State sails can be regarded as having occurred in the flag state, the result being that the shipowner can bring an action for damages against that trade union in the flag state. In short, the Arbejdsret wanted to know from the ECJ whether the damage could be regarded as having occurred in Denmark so that proceedings might be brought there when it was clear that the notification of industrial action emanated in Sweden, not Denmark.

There are three possible solutions: DFDS and the Danish Government submitted that the question should be answered in the affirmative; SEKO and the Commission took the contrary view. The United Kingdom considered that the question must be answered on the basis of the applicable national law determined in accordance with Danish rules of private international law. DFDS *in part* based its conclusion that the place where the damage occurred was Denmark on the ground that the object of the proposed industrial action was to change the conditions of employment on board the *Tor Caledonia*, which was registered in Denmark and was hence to be regarded as Danish territory. The Danish Government also considered it relevant that the event giving rise to the damage was intended to produce its effects and influence the other party's conduct where the ship affected by the action is registered and where the important decisions concerning the conditions of employment were taken, namely on board the ship. The United Kingdom and the Commission, in contrast, did not regard the nationality of the ship as relevant to determining the place where the damage occurred within the meaning of Article 5(3) of the Convention. SEKO and the Commission argued, however, on the basis of *Marinari*,<sup>11</sup> that the phrase 'place where the harmful event occurred' should not include the place where the victim claimed to have suffered financial damage following initial damage arising and suffered by him in another state. Those parties conclude that in the circumstances of the present

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<sup>8</sup> Paragraphs 46, 48 of *Henkel (ibid.)*.

<sup>9</sup> *Ibid.*

<sup>10</sup> See paragraph 29 of the judgment.

<sup>11</sup> In Case C-364/93 *Marinari* [1995] ECR I-2719, the claimant claimed damages against the defendant bank alleging that the negligence of the bank's employees in one country had resulted in his imprisonment in that country and also financial loss in another. The court ruled that the term 'place where the harmful event occurred' could not be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere; consequently, the term could not include the place where the victim claimed to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.

case the place where the harmful event occurred could not therefore be Denmark but Sweden.

In dealing with the somewhat complicated issue, the ECJ first reiterated the time-honoured rule that the place where the harmful event occurred in Article 5(3) includes both the place where the damage occurred and the place of the event giving rise to it. The claimant thus has a choice as to where the defendant should be sued where these two places are different (*Shevill and others*<sup>12</sup>). It then went on to find that the natural forum was Sweden where the industrial action notice was given and publicised and where SEKO had its head office. However, it did not rule out the possibility that harm could have been sustained in Denmark. It held that the damage was financial loss arising from the withdrawal of the *Tor Caledonia* from its normal route and the hire of another ship to serve the same route. As far as the court was concerned, it was for the national court to inquire whether such financial loss could be regarded as having arisen at the place where DFDS was established. The issue of the flag state was less relevant. However, unlike the somewhat entrenched view taken by the United Kingdom and the Commission, the ECJ considered that in the course of that assessment, it was permissible and indeed, appropriate, for the national court to take the flag state (or nationality of the vessel) into account. That factor however is only one of many factors the national court should accommodate in ascertaining the place where the harmful event took place. It should of course be noted that the ECJ does not make findings of fact when giving a preliminary ruling; it will be for the Arbejdsret to decide whether the harm was suffered in Denmark where DFDS has its registered office.

It should however be observed that the nationality of the ship is highly relevant where the damage or harm suffered is alleged to have been sustained on board. In the present case, it would follow that if the union had been able to mobilise the Polish crew into taking industrial action on board the *Tor Caledonia*, the flag state should be able to assume civil and commercial jurisdiction. Although the court was careful not to make too much of the relevance of the ship's nationality, this is an interesting development in that nationality is generally irrelevant in the application of the jurisdictional rules of the Brussels regime, but here the court has ruled that, in the case of ships, nationality may be taken into account when determining where the harm was sustained for the purposes of civil action.

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<sup>12</sup> Case C-68/93 [1995] ECR I-415; in that case the court held that the victim of a defamatory statement originating in one country but circulated in another can choose to sue the defendant publisher in either of those countries.

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## COMITÉ MARITIME INTERNATIONAL

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### NEWS FROM CMI – 38TH INTERNATIONAL CONFERENCE 2004

*Richard Shaw*

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The various subcommittees and working groups of the CMI have been working hard of late to put the finishing touches to their paperwork in preparation for the major CMI conference which will be held in Vancouver, British Columbia between 30 May and 4 June 2004.<sup>1</sup> The principal topics on the conference programme are:

- 1 Transport law – the CMI/UNCITRAL Draft Instrument
- 2 General average – revision of the York-Antwerp Rules
- 3 Maritime security – ISPS and SUA
- 4 Pollution of the marine environment – possible revision of the CLC and Fund Conventions
- 5 Marine insurance – a modern approach
- 6 Places of refuge for ships in distress.

Other subjects of discussion are maritime security, criminal offences on the high seas, treatment of bareboat charterers as shipowners in international instruments such as the Athens Convention, and the implementation of the Salvage Convention 1989.

The CMI has also been represented, as usual, as an observer at the meetings of the International Oil Pollution Compensation (IOPC) Fund which took place in October 2003 and February 2004. Both these meetings were dominated by the aftermath of the *Prestige* casualty. Pollution damage from this disaster has affected not only the coasts of Spain, but also those of Portugal, France and the UK. Total claims could reach as much as €1,100 million (about £780 million) and there is no realistic possibility that the total claims could fall within the limit of 135 million SDR (£121m) payable at the time by the IOPC Fund. In November 2003 this ceiling was raised to 202 million SDR (£175m), but this increase was not retrospective and will not therefore apply to the *Prestige* claimants. The Executive Committee of the IOPC Fund therefore decided in May 2003 that the Fund's payments should be limited to 15 per cent of the loss actually suffered by the respective claimants.

The Government of Spain has adopted legislation in the form of a Royal Decree (Real Decreto-Ley) under which it made available funds to settle all proved Spanish claims in full, and to take rights of subrogation from the claimants. It was significant that this law expressly provides that the assessment of claims would be made following the criteria used by the IOPC Fund to settle claims under the CLC and Fund Conventions.

At the October meeting the Spanish delegation to the IOPC Fund made a very unusual request. It asked that the Government of Spain be paid on account of the Fund's potential liabilities to Spanish claimants a sum representing 15 per cent of not only the claims actually assessed, but also of the claims which could reasonably be foreseen based on an objective appraisal by the Director of the Fund. Some delegations were reluctant to authorise such an unusual development, which is not provided for expressly in the Fund Conventions of 1971 and 1992. However it was pointed out that such a scheme was permitted by the framework of the Fund's working methods, and after some

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<sup>1</sup> The detailed programme of the conference, and many of the working papers, may be found on the CMI website at [www.comitemaritime.org](http://www.comitemaritime.org) or on the conference website at [www.CMI2004.org](http://www.CMI2004.org).

intense discussions the Director was authorised to make such a payment against a bank guarantee for repayment in case this proved necessary. At the February 2004 meeting it was announced that the Director had indeed made two payments to the Spanish Government of €16 million and €41.5 million respectively. The total figure of €57.5 million represents 15 per cent of the general assessment made by the Director that the total Spanish claims arising from this incident will not be less than €383.7 million. A bank guarantee to secure refund of any overpayment has been provided to the Fund.

The *Erica* case continues to progress. Since the French Government and Total Fina Elf, charterers of the *Erica*, have agreed to 'stand last in the queue' of claims against the Fund, the remaining claimants have been able to receive 100 per cent of their assessed claims. In addition, a payment of €10.1 million has been made to the Government of France on account of its subrogated claims in respect of payments made to claimants in the tourism sector.

Meanwhile the working group for the review of the working of the Fund Compensation System held an important meeting in February 2004, under the able chairmanship of Mr Alfred Popp QC (Canada). Working papers had been put in by several delegations (these are available at [www.iopcfund.org](http://www.iopcfund.org)) on a variety of topics, but the two most important were the possibility of an increased contribution by shipowners and their insurers (the P & I Clubs) to the compensation regime, and measures to reduce the number of sub-standard ships.

The Supplementary Fund Protocol of 2003 shows every possibility of entry into force in late 2004, and this will increase the compensation available in participating states to SDR750 million (£650 million). This, like the existing Fund, will be paid for by contributions from the oil industry in member states in proportion to the tonnage of persistent oil imported by each company in those states. While however, the oil industry generally was content to see the Supplementary Fund established quickly, particularly in view of pressure from the European Commission, it made no secret of its view that the shipowning sector should be prepared to make a contribution substantially greater than at present. An initial move in this direction has come from the P & I Clubs in a proposal for a form of a voluntary agreement called STOPIA, which would increase the CLC liability of the carrying ship to cover all pollution claims up to a figure equivalent to the CLC liability of a ship of 40,000 tons. However the delegates, led by the observer delegation of the Oil Companies International Marine Forum (OCIMF) made it clear that more was expected. To the surprise of some, the delegate of the International Group of P & I Clubs announced that he had received from the boards of the member clubs authority to engage in negotiations to make shipowners take a fair share of the Supplementary Fund. This would be in substitution for the STOPIA scheme. No figures (or percentages) were mentioned and we shall look forward to further news from the Clubs.

On the question of sub-standard ships the views were more divided. Again the OCIMF delegation led the way, with a radical proposal that it should be easier for claimants against the owners of such ships to 'break' the owner's right to limitation of liability. Others, notably the leading flag states, the P & I Clubs and the International Chamber of Shipping, cautioned against such an approach, arguing that a compensation regime was not the place in which to introduce regulatory measures, which were the responsibility of governments under schemes such as SOLAS and MARPOL.

The number of unsafe ships has reduced very considerably over the last 10 years (see the latest Annual Report of ITOFF), notably with the establishment of the Port State Control system, now operating world-wide, and the implementation of the ISM Code. No-one can defend unsafe ships, but if the right to limit liability is to be removed from the owner of a polluting ship, it cannot be removed from his liability insurers. Ships causing major pollution damage are usually so badly damaged (if not sunk) that they have virtually no residual value. They are frequently owned by a one-ship company. If the victims of such an incident are able to obtain judgment for unlimited damages against an assetless company, that will not improve their prospects of recovering fair compensation, and the IOPC Fund may well be left to pick up the bill.

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## UNCTAD/UNCITRAL

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### CONTAINER SECURITY: MAJOR INITIATIVES AND RELATED INTERNATIONAL DEVELOPMENTS: NEW UNCTAD REPORT PUBLISHED

*Dr Regina Asariotis\**

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Following the events of September 11 2001, safety and security considerations have been at the forefront of international concerns and a variety of different unilateral and multilateral security measures, regulations and legislative initiatives have been developed or are under consideration. Given that world trade is largely dependent on maritime transport, much of the focus has been directed at enhancing maritime transport security and at addressing the particular challenges posed by containerised transport. The different sets of rules and measures, which have been implemented or are being considered internationally, need to be properly understood and their potential impacts on trade and transport need to be assessed.

Against this background, the UNCTAD secretariat has recently published a report<sup>1</sup> which provides a first step in this direction. It focuses on the main measures relevant to maritime container security, namely those initiated by the US, and by presenting the most important international developments in context. The report provides an overview of the new security environment and offers some preliminary analysis of the potential impacts for the trade and transport of developing countries. Throughout, an effort has been made to provide references, which allow the reader to obtain further and more detailed information.

The main US initiatives relevant to maritime container security considered in the report are the following.

#### **The Customs-Trade Partnership Against Terrorism (C-TPAT)**

This is a joint government-business initiative aimed at building 'co-operative relationships that strengthen overall supply chain and border security'.<sup>2</sup> It is intended to enhance the joint efforts of both entities in developing a more secure border environment, by improving and expanding existing security practices. C-TPAT operates on the basis of individual 'non-contractual voluntary agreement' to implement certain recommendations. Participants are thus expected to use their *best endeavour* to comply with the C-TPAT recommendations and to enhance the security throughout their supply chain, without, however, incurring liability in case of errors or non-compliance. Initially, importers, carriers (air, rail and sea) as well as US Port Authorities/Terminal Operators and certain foreign manufacturers are eligible to participate in the program, but it is envisaged to broaden participation to include actors of all international supply chain categories.<sup>3</sup>

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<sup>1</sup> *Container Security: Major Initiatives and Related International Developments* (UNCTAD/SDTE/TLB/2004/1), available on the UNCTAD website ([www.unctad.org](http://www.unctad.org)) at [http://www.unctad.org/en/docs/sdtetlb20041\\_en.pdf](http://www.unctad.org/en/docs/sdtetlb20041_en.pdf).

<sup>2</sup> For more information, see <http://www.cbp.gov>.

<sup>3</sup> For eligibility requirements, see <http://www.cbp.gov>.

### The Container Security Initiative (CSI)

The focus of this initiative is on establishing partnership relations between US Customs (CBP) and foreign ports. CSI is based on the premise that the security of the world's maritime trading system needs to be enhanced and that it will be more secure if high-risk cargo containers are targeted and screened before they are loaded. The initiative aims at facilitating detection of potential problems at the earliest possible opportunity and is designed to prevent the smuggling of terrorists or terrorist weapons in ocean-going cargo containers. CSI is a four-part program, which involves:

- (a) establishing security criteria to identify high-risk containers based on advance information;
- (b) pre-screening those containers identified as high-risk before they arrive at US ports;
- (c) using technology to pre-screen quickly high-risk containers, including radiation detectors and large-scale x-ray and gamma ray machines;
- (d) developing secure and 'smart' containers.

To implement CSI, and in particular its second aspect, US Customs have been entering into bilateral agreements or partnerships with foreign governments. The agreements provide for the deployment at foreign ports of US officers who, in co-operation with their host nation counterparts are to target and pre-screen US bound cargo containers before they are shipped.

### 'The 24-Hour Advance Vessel Manifest Rule' or 'The 24-Hour Rule'

Whereas C-TPAT and CSI are partnership-oriented programs, other security initiatives focus on the collection of information, in particular cargo-related information. The main such initiative of relevance to maritime container transportation is the so-called '24-Hour Rule', which is closely connected to CSI. US customs regulations now require detailed manifest information in relation to US bound cargo to be provided 24 hours before loading at the foreign port.<sup>4</sup> According to the new requirements, which entered into force in early 2003, all vessels carrying containerised cargo to the US need to file manifests, including detailed cargo declaration forms, with US Customs (CBP) 24 hours before the loading of the cargo at the foreign port.<sup>5</sup> More recently, the relevant customs regulations were further amended so that all manifests need to be submitted electronically via the US Vessel Automated Manifest System (AMS).<sup>6</sup> The 24-Hour Rule, more than any of the other security measures, has direct and immediate cost implications for all involved in container shipments to the US.<sup>7</sup> In fact, as the rule also applies to so-called 'Foreign Cargo Remaining on Board' (FROB), ie cargo from outside the US and destined for a port outside the US, but shipped on board a vessel calling at one or more US ports, the 24-hour Rule may, indirectly, even affect parties who have no business with the US at all.

Also considered in the report are related legislative developments in the US<sup>8</sup> and elsewhere, for instance in Canada and the European Union and some of the most important developments at the IMO (International Maritime Organization), ILO (International Labour Organization), World Customs Organization (WCO) and OECD (Organization for Economic Cooperation and Development).

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<sup>4</sup> The final rule, effecting changes to 19 CFR Part 4 was published in the US Federal Register/Vol 67, No 211/ 31 October 2002, p. 66318. Some of these provisions have later been revised and others added as a result of new regulations under the Trade Act of 2002, which entered into force within 90 days of their publication on 5 December 2003. For the text of these regulations, see US Federal Register/Vol 68, No 234/ 5 December 2003/p. 68140. All relevant Federal Register Notices, including comments by industry on the proposed rulemaking and responses by CBP, may be accessed online on the CBP website (<http://www.cbp.gov>, under 'legal').

<sup>5</sup> The rules do not apply to bulk shipments and, in the case of break-bulk shipments, exceptions may be made upon application, on a case-by-case basis.

<sup>6</sup> See reference in n. 4 above to regulations under the Trade Act of 2002. Importantly, these regulations also introduce equivalent rules for all modes of transport and will apply to both inbound and outbound cargo.

<sup>7</sup> See only OECD Report 'Security in Maritime Transport: Risk Factors and Economic Impact', July 2003, available on the OECD website, [www.oecd.org](http://www.oecd.org).

<sup>8</sup> Such as the Maritime Transportation Security Act of 2002 and the Public Health Security and Bioterrorism Preparedness and Response Act of 2002.

In particular, the report presents in some detail the recent amendments to the 1974 Safety of Life at Sea Convention (SOLAS) including the new *International Ship and Port Facility Security Code (ISPS Code)*.<sup>9</sup> This new security regime enters into force in July 2004 and its timely implementation is mandatory for all SOLAS Member States, without any distinction as to their level of development. Due to its central importance for all involved in maritime transport, the main requirements of the new regime imposed on governments, vessel-owning and/or operating companies, as well as port facilities are presented in overview and cost implications as well as some other potential impacts are briefly discussed.

The full report *Container Security: Major Initiatives and Related International Developments* is available on the UNCTAD website.<sup>10</sup>

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<sup>9</sup> See also O Özçayır, 'The ISPS Code', *Journal of International Maritime Law* 9 [2003] 6, 578.

<sup>10</sup> See n. 1 above.

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## INTERNATIONAL MARITIME ORGANISATION

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### IMO CONVENTIONS: THE TACIT CONSENT PROCEDURE AND SOME RECENT EXAMPLES<sup>1</sup>

*Dr Z Oya Özçayır*

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One of the most important tasks allocated to IMO when it met for the first time was to develop international standards which would replace the multiplicity of national legislation which then existed. Over the years, most international conventions, protocols, codes and resolutions concerning safety of ships, prevention of pollution from ships and other areas related to the operation and facilitation of maritime traffic have been adopted under the auspices of IMO.

IMO has six main bodies concerned with the adoption or implementation of conventions. The Assembly and the Council are the main organs and the committees involved are the Maritime Safety Committee, the Marine Environment Protection Committee, the Legal Committee and the Facilitation Committee. In general, developments in shipping and other related areas are discussed by the member states in these bodies. Proposals for a new convention, or amendments to existing conventions, can be made by a state, a group of states or an international organisation. As the committees meet more frequently than the main organs, proposals are generally drawn up by them. The proposal is examined by the working group or sub-committee and if it is well founded it goes to the Council and, as necessary, to the Assembly. If the Assembly or the Council, as the case may be, authorises the work to proceed, the sub-committee or the working group asks the states and international organisations which have consultative status at IMO for any relevant advice or opinion in order to draw up a draft instrument.

The final draft is sent to the Council or Assembly with a recommendation that a conference can be convened to consider the formal adoption of the proposed provisions. The time needed to draft a convention can vary depending on the subject of the convention and on the time needed to obtain a consensus.<sup>2</sup> In the case of the 1978 STCW Convention five years was needed to draft the Convention. However, when the Organisation is called upon to respond to emergencies, the time needed for the completion of the draft convention gets much shorter. The 1978 SOLAS and MARPOL Protocols were prepared in eight months following the *Argo Merchant* incident.

When IMO convenes a diplomatic conference to consider the draft convention for formal adoption, invitations to attend such a conference are sent to all the IMO and UN member states, and specialised agencies. All governments participate on an equal footing and are treated equally. Intergovernmental and non-governmental organisations are also invited to send observers to the conference in order to provide expert advice to the representatives of governments. Before the conference, the draft

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<sup>1</sup> General information on the tacit acceptance procedure is taken from the website of the IMO <http://www.imo.org/conventions> and Z. Oya Özçayır, *Port State Control*, ch. 2, 'The International Maritime Organization (IMO)', LLP, 2001 (2nd edn forthcoming 2004), at 35–60.

<sup>2</sup> The consensus system means that every IMO member state has the opportunity to put forward its point of view. This is important because measures adopted by the Organisation must achieve as much support as possible.

convention text is sent to the invited governments and organisations for their comments. Proposals for amendment to the draft convention are considered in order to produce a draft acceptable to all or the majority of the states attending the conference. When the convention has been agreed, it is adopted by the conference and deposited with the Secretary-General who sends copies to governments.

The adoption of a convention can be considered as the first step in a long process. Before the convention comes into force it has to be accepted formally by individual governments. If certain conditions are laid down in the convention which have to be met before it enters into force, these conditions have to be fulfilled as well. The crucial issue is the number of ratifications required by the convention. In general, these conditions are different but they get more stringent depending on the complexity of the document.<sup>3</sup> If the convention affects a few states or deals with less complex matters then the entry into force requirements may not be so stringent.<sup>4</sup> In any case, it is necessary for the convention to be accepted and applied by a large section of the shipping community.

In general, the convention is open for signature for a specific period. Most states' constitutions will require that the convention be presented before either the Executive or Parliamentary branch of government before it becomes binding on the state. Then, if the government agrees, that state will deposit an Instrument of Accession with the IMO Secretary-General. Those states that were not represented at the conference can still be included as parties by depositing an Instrument of Accession. Only when a certain specified number of members become parties to a convention, often with the proviso that those states should represent a certain percentage of the world's shipping tonnage, does the convention come into force. Although it is in force internationally and members are bound to uphold the provisions, states usually have to enact the provisions of the convention into national law, creating offences and penalties, before the provisions of the convention can be enforceable in the state, within its national waters, on board ships flying its flag and foreign ships within its ports.

With these stringent provisions in place, it was difficult enough to bring conventions into force, let alone amendments to conventions. The amendment procedures contained in the first conventions to be developed under the auspices of IMO were so slow that some of the amendments adopted have never entered into force.

For instance, the SOLAS Convention could not respond to lessons learnt from major disasters and keep in line with technical developments because of the nature of the amendment procedure adopted at the 1960 conference. The amendment procedure incorporated in the 1960 Convention stipulated that an amendment would only enter into force when it had been accepted by two-thirds of contracting governments. Therefore contracting governments were required to take positive action to accept the amendment. This procedure was satisfactory when it was adopted. Most of the international treaties were ratified by a small number of countries. When the SOLAS Convention was adopted it had to be accepted by only 15 countries, seven of which had fleets consisting of at least 1 million gross tons of merchant shipping. However, during 1960s the membership of the UN and international organisations like IMO started to grow. Consequently, the number of parties to the SOLAS Convention grew steadily. By the late 1960s, the number of parties to the SOLAS Convention had reached 80 and the total was rising all the time. This increase affected the number of ratifications required to meet the two-thirds target needed for the entry into force of the SOLAS amendments. In many cases the acceptance was delayed for so long because it took governments

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<sup>3</sup> The International Convention for Safety of Life at Sea 1974 provided that entry into force requires acceptance by 25 states whose merchant fleets comprise not less than 50 per cent of the world's gross tonnage; for the International Convention on Tonnage Measurement of Ships 1969, the requirement was acceptance by 25 states whose combined merchant fleets represent not less than 65 per cent of world tonnage.

<sup>4</sup> The Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material 1971, came into force 90 days after being accepted by five states; the Special Trade Passenger Ships Agreement 1971, came into force six months after three states (including two with ships or nationals involved in special trades) had accepted it.

much longer to accept amendments than it did to ratify the parent convention. Parties to the convention were supposed to signify their acceptance of the amendment by submitting an appropriate legal instrument to IMO. This usually involved some form of parliamentary procedure by the government concerned. Depending on the interest of the relevant government in maritime affairs this could take years. It became clear that it would take so long for many amendments, including those to SOLAS, to enter into force and become international law, that, by the time the process was complete, the amendment itself would probably be out of date.<sup>5</sup> This situation had serious implications for IMO and for the shipping industry. IMO was in the situation that it could adopt treaties that became out of date within a few years, but could not amend them according to changes in the shipping world.

By 1968, the 20th anniversary of the adoption of the IMO Convention, many of the member states were not happy with the progress that had been made up to then.<sup>6</sup> During the 20th session of the IMO Council in May 1968, Canada submitted a paper stating that 'the anticipations of 20 years ago have not been fulfilled' and also complaining about the effort required by the member states in attending meetings and dealing with technical problems raised by IMO. During this period, IMO's workload was constantly increasing. The paper was discussed by the Council and a working group, established to work on the objectives of IMO, outlined the list of activities which the Organisation could undertake in the field of maritime transport. These were much broader than the programmes undertaken by IMO in the past. The working group reported to the Council again at its 22nd session in May 1969 and made proposals for improving IMO's working methods. The most important of these concerned procedures for amending the various conventions that had been adopted under the auspices of the IMO. As explained above, the main problem facing IMO was that most of its conventions could only be updated by using the 'classical' amendment procedure. The Council approved the working group's proposal about undertaking a comparative study of the conventions for which IMO is depositary and similar instruments for which other members of the UN are responsible. The study showed<sup>7</sup> that these organisations were able to amend technical and other regulations. These amendments became binding on member states without further act or ratification. Acceptance was not required either. The main problem for IMO was that, according to Article 2 of the IMO Convention, IMO's functions were to be 'consultative and advisory'. Therefore, IMO had no authority to adopt or to amend conventions.

Following discussions at the seventh Assembly in 1971, Resolution A.249(VII) was adopted. The resolution referred to the need for an amendment procedure and called for the Legal Committee and Maritime Safety Committee (MSC) to prepare draft proposals for consideration by the eighth Assembly.<sup>8</sup> The amendment procedure was discussed by the MSC at its 25th session in 1972. The same year, the Legal Committee established a working group to consider the subject and prepared a preliminary study on the basis of the working group's report which referred to the disadvantages of the classical amendment system. The study also stated that:

... the remedy for this, which has proved to be workable in practice, in relation to a number of conventions, is what is known as the 'tacit' or 'passive' acceptance procedure. This means that the body which adopts the amendment at the same time fixes a time period within which the contracting parties will have the opportunity to notify either their acceptance or their rejection of the amendment, or to

<sup>5</sup> See IMO, 'SOLAS: the International Convention for the Safety of Life at Sea, 1974', *Focus on IMO*, October 1998.

<sup>6</sup> See IMO, *Focus on IMO*, September 1998, at 8 to 13.

<sup>7</sup> The Council examined the procedures of four other UN agencies: the International Civil Aviation Organisation (ICAO), the International Telecommunications Union (ITU), the World Meteorological Organisation (WMO), and the World Health Organisation (WHO), *ibid.*, at 9.

<sup>8</sup> There was an urgent need for the revision of the amendment procedure. IMO was preparing a number of new conventions for adoption during the next few years and they all needed an easier amendment procedure rather than the 'classical amendment procedure'. Conferences to consider a new Convention on the International Regulations for Preventing Collisions at Sea and an International Convention for Safe Containers were both scheduled for 1972; a convention dealing with the prevention of marine pollution from ships was scheduled for 1973 and a conference to revise the SOLAS Convention was scheduled for 1976.

remain silent on the subject. In case of silence the amendment is considered to have been accepted by the party...<sup>9</sup>

The idea of tacit acceptance quickly became popular. The International Chamber of Shipping, which had consultative status with IMO, gave non-governmental support to the idea. When the Legal Committee met for its 14th session in September 1972, it was generally accepted that the tacit acceptance procedure was the best solution.<sup>10</sup> Under the new procedure, an amendment to a convention enters into force on a specified date unless it is rejected by one-third of contracting parties or by contracting parties whose combined fleets represent 50 per cent of world tonnage. In other words, instead of contracting governments taking positive action to accept an amendment, it is assumed that governments are in favour of the amendment unless they take positive action to make their objection known. This procedure had advantages both for the governments and for the shipping industry. Apart from speed, tacit acceptance means that everyone involved knows exactly when an amendment will enter into force. Under the old system it was not possible to know the date until the final acceptance was actually deposited with IMO. Without tacit acceptance, it would not have been possible to keep the conventions up to date. IMO's stature would be reduced to that of an organization which could adopt treaties but not amend them according to changes in shipping world. This procedure enables IMO to respond promptly to urgent matters at the international level.

The tacit acceptance procedure<sup>11</sup> has now been incorporated into the majority of IMO's technical conventions and has been extended to some other instruments as well. The effectiveness of the procedure can be seen most clearly in the case of the SOLAS 1974 Convention. Article VIII states that the amendments to the chapters (other than chapter I) of the Annex, which contain the convention's technical provisions, shall be deemed to have been accepted within two years (or a different period fixed at the time of adoption) unless they are rejected within a specified period by one-third of contracting governments or by contracting governments whose combined merchant fleets represent not less than 50 per cent of world gross tonnage. SOLAS 1974 has been amended on many occasions since then. During the amendment process some chapters have been updated more than ten times and completely new chapters have been added. These amendments have usually entered into force around two years after being adopted. However, the 1988 (April) amendments to SOLAS, which were adopted as a result of the *Herald of Free Enterprise*<sup>12</sup> ferry disaster, entered into force in October 1989, only 18 months later. This was the first time that the procedure had been used to reduce the period before entry into force to less than two years. In terms of MARPOL 73/78, the Convention allowed for the amendments to the certification and survey requirements to be accepted by the tacit acceptance procedure. As a result, MARPOL 73/78 was amended on 16 March 1990 to introduce the harmonised system of survey and certification, with the proviso that the amendments enter into force at the same time as the entry into force date of the 1988 SOLAS Protocol and the 1988 Load Lines Protocol.

Like SOLAS and MARPOL 73/78 amendments, over the years numerous amendments to various technical conventions have been adopted and entered into force under this procedure; some recent developments include the following.

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<sup>9</sup> LEGXII/8 Annex II Page 8. Cited in IMO, 'IMO 1948–1998: a process of change', *Focus on IMO*, September 1998, at 11, n. 13.

<sup>10</sup> During the Legal Committee's 12th session, the Secretariat prepared a paper and analysed the entry into force and amendment processes of various IMO conventions. The paper referred to two possible methods for speeding up the amendment procedure. Alternative I was to revise each convention so that greater authority for adopting amendments might be delegated to the appropriate IMO organs. Alternative II was to amend the IMO Convention itself and give IMO the power to amend conventions.

<sup>11</sup> For a detailed discussion on the use of tacit acceptance procedure see Shi, Lei 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' *University of San Francisco Maritime Law Journal*, 1988–1999, at 300–331.

<sup>12</sup> In March 1987 the roll-on/roll-off passenger ferry *Herald of Free Enterprise* capsized and sank shortly after leaving Zeebrugge in Belgium. The accident occurred because the bow door was left open when the ship left port allowing water to enter and flood the car deck. Shortly after the accident the United Kingdom came to IMO with a request that a series of emergency measures be considered for adoption. Most of these consisted of proposed amendments to the SOLAS 1974 Convention.

### **The 2002 Protocol to the 1974 Athens Convention**

The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 was adopted on 13 December 1974 in Athens in order to consolidate and harmonise two earlier Brussels Conventions dealing with passengers and their luggage and adopted in 1961 and 1967, respectively. The Convention establishes a regime of liability for damage suffered by passengers carried on a seagoing vessel. It declares a carrier liable for damage or loss suffered by a passenger if the incident causing the damage occurred in the course of the carriage and was due to the fault or neglect of the carrier. However, unless the carrier acted with intent to cause such damage, or recklessly and with knowledge that such damage would probably result, it is possible to limit liability. For the death of, or personal injury to, a passenger, this limit of liability is set at 46,666 Special Drawing Rights (SDR) (about US\$63,000) per carriage. For loss of or damage to luggage the carrier's limit of liability varies, depending on whether the loss or damage occurred in respect of cabin luggage, of a vehicle and/or luggage carried in or on it, or in respect of other luggage. The Convention has been in force since 1987. At present, 28 states are party to it.

A Protocol to the Convention, with the same provisions as in the Protocols to the 1971 Fund Convention and the 1969 Liability Convention, was accordingly adopted in November 1976, making the unit of account the SDR and entered into force on 30 April 1989.

The 1990 Protocol to the 1974 Convention was adopted on 29 March 1990 with the condition of entering into force 90 days after being accepted by ten states. The main aim of the Protocol is to raise the amount of compensation available in the event of deaths or injury at 175,000 SDR (around US\$235,000). Other limits are 1,800 SDR (about US\$2,400) for loss of or damage to cabin luggage and 10,000 SDR (about US\$14,400) for loss of or damage to vehicles. However, this Protocol has never entered into force.

The slow rate of acceptance of the 1974 Convention, ratification by 28 states, has been largely attributed to the low level of the limits of liability set in the original convention and in its 1990 Protocol.

The 2002 Protocol introduced a new procedure for amending the limits of liability under the convention, so that any future raises in limits can be achieved more readily. Under the 1974 Convention, limits can only be raised by adopting amendments to the convention which require a specified number of acceptances to bring the amendments into force. This has meant, for example, that the 1990 Protocol, which was intended to raise the limits, has not yet entered into force and indeed is being superseded by the 2002 Protocol.

The 2002 Protocol therefore introduced a tacit acceptance procedure for raising the limits of liability. A proposal to amend the limits, as requested by at least one-half of the parties to the Protocol, would be circulated to all IMO member states and all states parties and would then be discussed in the IMO Legal Committee. Amendments would be adopted by a two-thirds majority of the states parties to the convention as amended by the Protocol present and voting in the Legal Committee, and amendments would enter into force 18 months after its deemed acceptance date. The deemed acceptance date would be 18 months after adoption, unless within that period not less than one-fourth of the states that were states parties at the time of the adoption of the amendment have communicated to the IMO Secretary-General that they do not accept the amendment.

The Protocol raises limits of liability for passenger claims and also introduces other mechanisms to assist passengers in obtaining compensation, based on well-accepted principles applied in existing liability and compensation regimes dealing with environmental pollution. The fault-based liability system is replaced with a strict liability system for shipping-related incidents and the carrier is required to take out compulsory insurance to cover these potential claims.

The limits contained in the Protocol set a maximum limit, empowering, but not obliging, national courts to compensate for death, injury or damage up to these limits. The Protocol also includes an 'opt-out' clause, enabling states parties to retain or introduce higher limits of liability (or unlimited liability) in the case of carriers who are subject to the jurisdiction of their courts.

The liability of the carrier for the death of or personal injury to a passenger is limited to 250,000 SDR (about US\$325,000) per passenger on each distinct occasion. The carrier is liable, unless the carrier proves that the incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or was wholly caused by an act or omission done with the intent to cause the incident by a third party. If the loss exceeds the limit, the carrier is further liable, up to a limit of 400,000 SDR (about US\$524,000) per passenger on each distinct occasion, unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

For the loss suffered as a result of the death of or personal injury to a passenger not caused by a shipping incident, the carrier is liable if the incident which caused the loss was due to the fault or neglect of the carrier. The burden of proving fault or neglect lies with the claimant. The liability of the carrier only includes loss arising from incidents that occurred in the course of the carriage. The burden of proving that the incident which caused the loss occurred in the course of the carriage, and the extent of the loss, lies with the claimant.

States which ratify the 2002 Protocol are required to denounce the 1974 Convention and its 1976 and 1990 Protocols, if they are party to the 1974 Convention and those Protocols.

### **The 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims**

On 13 February 2004 Malta became the tenth state to deposit its instrument of accession to the 1996 Protocol, which was the trigger to bring the Protocol into force 90 days after that date. The 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims ('LLMC') will enter into force on 13 May 2004.

The new Protocol:

- increases the amount of compensation payable under the LLMC (see the tables below),
- changes the lower limitation tonnage (see the tables below), and
- introduces the tacit acceptance procedure for updating these amounts.

Under the present system a minimum number of ten contracting states had to lodge instruments of accession. This meant that the Protocol would not be coming into force until eight years and ten days after it was adopted, ie accepted. Under the tacit acceptance system the date of entry into force of future protocols is set when the Conference votes on acceptance and the protocols will enter into force on that date unless a certain percentage of contracting states explicitly reject the protocol. For future LLMC protocols, unless the conference decides otherwise, the date of entry into force will be 18 months after acceptance. By the tacit acceptance procedure contracting states will have to lodge an objection to future protocols rather than having to lodge instruments of accession.

For claims of loss of life or personal injury the new limits are:

<b><i>New limits as from 13 May 2004</i></b>	<b><i>Old limits</i></b>
	For ships not exceeding 500 gross tons: 330,000 SDR
	For each ton from 501 to 3,00 gross tons: 500 SDR
For ships not exceeding 2,00 gross tons: 2 million SDR	
For each ton from 2,001 to 30,000 gross tons: 800 SDR	For each ton from 3,001 to 30,000 gross tons: 333 SDR
For each ton from 30,001 to 70,000 gross tons: 600 SDR	For each ton from 30,001 to 70,000 gross tons: 250 SDR
For each ton in excess of 70,000 gross tons: 400 SDR	For each ton in excess of 70,000 gross tons: 167 SDR

For any other claim:

<b>New limits as from 13 May 2004</b>	<b>Old limits</b>
	For ships not exceeding 500 gross tons: 167,000 SDR
For ships not exceeding 2,000 gross ton: 1 million SDR	
For each ton from 2,001 to 30,000 gross tons: 400 SDR	For each ton from 501 to 30,000 gross tons: 167 SDR
For each ton from 30,001 to 70,000 gross tons: 300 SDR	For each ton from 30,001 to 70,000 gross tons: 125 SDR
For each ton in excess of 70,000 gross tons: 300 SDR	For each ton in excess of 70,000 gross tons: 83 SDR

### Amendments to SOLAS

Following a Diplomatic Conference in London in December 2002, the IMO has made a number of far-reaching amendments to the SOLAS Convention to strengthen maritime security. After the conference the MSC 76 instructed the FSI Sub-Committee to give preliminary consideration to:

- (1) the review of the procedures for port state control (Resolution A. 787(19) as amended by Resolution A.882(21)) and, if found necessary, the development of appropriate amendments thereto; and
- (2) the need for, and, if necessary, the development of, any other guidance or guidelines to ensure the global, uniform and consistent implementation of the provisions of SOLAS Chapter XI-2 or Part A of the ISPS Code.

In order to assist the effective implementation of mandatory instruments to prevent and suppress acts of terrorism against ships, three parts of the SOLAS Convention were amended as follows.

SOLAS Chapter V (Safety of Navigation) was amended to provide a new timetable for the fitting of Automatic Identification Systems ('AIS'). Ships of between 300 GT and 50,000 GT, other than passenger ships and tankers, will be required to fit AIS no later than the first safety equipment survey after 1 July 2004 or by 31 December 2004, whichever is the earlier. This accelerates the previous compliance dates. For the smallest vessels, the timetable has been brought forward by three years.

The existing SOLAS Chapter XI (Special measures to enhance maritime safety) was re-numbered Chapter XI-1 and entitled 'Special measures to enhance maritime safety and security' consisting of two parts: Part 1 on special measures to enhance maritime safety, and Part 2 on special measures to enhance maritime security. SOLAS Chapter XI-1 requires ships' identification numbers to be permanently marked in a visible place on either the ships' hull or superstructure. The markings of passenger ships should be on a horizontal surface visible from the air. All ships must be also be marked with their numbers internally. The compliance date for existing ships will be no later than the first scheduled dry-docking after 1 July 2004. In addition, from 1 July 2004, vessels are to be issued with a Continuous Synopsis Record ('CSR') to provide onboard record of the vessel's history. The CSR must be issued by the vessel's flag administration. The information in the CSR will include the vessel's name, the flag state, the date of registry with that state, the port of registry, the vessel's identification number and the name and address of the registered owner. Any changes in this information are to be recorded in the CSR in order to ensure that an up-to-date record and history of the changes is maintained onboard the vessel.

A new Chapter XI-2, 'Special Measures to Enhance Maritime Security enshrines the International Ship and Port Facilities Security Code' ('ISPS Code'). The Code enters into force on 1 July 2004 and

applies to passenger ships of any size, cargo ships and high speed cargo craft of 500 gross tonnes and upwards, and mobile offshore drilling units. Part A of the Code is mandatory and contains detailed requirements for ships, companies, port authorities, flag administrations and governments. Part B of the Code is advisory and contains guidelines on how to comply with Part A.

This new maritime security regime, the ISPS Code and amendments to the SOLAS Convention, are brought quickly into effect under the tacit acceptance procedure. The IMO is able to implement technical amendments to SOLAS and the Marine Pollution (MARPOL) Conventions under the tacit acceptance procedure. With this arrangement, unless a certain number of IMO member states representing a certain percentage of global merchant tonnage object to the new measures within a particular time period, the measures will enter into force on the appointed date. As the requisite number of maritime nations had not objected to the amendments to SOLAS, including the new Chapter XI-2, and the ISPS Code by 31 December 2003, the measures are considered to have been accepted on 1 January 2004, and they will enter into force as planned six months later on 1 July 2004. SOLAS signatories are obliged to have national laws in place mandating compliance with the new maritime security requirements by the appointed date.

## BOOK REVIEW

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### Law and Practice of Marine Insurance in Canada

George R Strathy and George C Moore

Lexis Nexis Canada Inc, 2003, 481p and xxxix  
(including tables of contents and cases, appendices and  
index), h/b, ISBN 0-433-44007-4, CAN\$135.00

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This introductory text to marine insurance law and practice will be welcomed in both Canada and other common law jurisdictions. It is declared by the authors, (sadly George C Moore died before publication), to be aimed at legal and insurance professionals in the marine insurance field, but it is suspected that a wider readership will discover the utility of the book. It provides a very comprehensive introductory survey to the subject, with the text presented with clarity and intelligently structured. Consequently it is a very readable book, with its utility further advanced by a collection of appendices setting out pertinent source materials. The book is also likely to make a contribution to the jurisprudence in Canada where, in contrast to recent developments in the UK, modern specialist writing on the subject of marine insurance law does not appear to have been abundant. With the notable exception of Fernandes', *Marine Insurance Law of Canada*, published in 1988, most contributions have assumed the form of specialist chapters in general treatises on insurance law.

The book spans 25 chapters organised into four parts which address (i) the principles of marine insurance, (ii) particular types of marine insurance, (iii) general average, and (iv) marine insurance practice. Virtually all the major and minor aspects of the subject are covered, though out of understandable necessity the degree and depth of comment varies considerably. Many topics receive little more than an acknowledgement while greater attention is given to the major principles on which the subject is constructed, such as the construction of marine policies, insurable interest, duty of utmost good faith, warranties, insured perils, recoverable losses and charges, sue and labour, subrogation and double insurance. The range of the various marine insurance covers are also included – cargo, hull and machinery, P & I, and others – and with the principal covers addressed in reasonable detail. Further, the book attempts to strike a balance between law and practice in a way which is not always evident in other texts within the same genre, but which nonetheless represents a vital context to the operation of the law. Individual chapters are devoted to marine brokers and surveyors, and also more generally to issues of practice and procedure. The only puzzlement that arises from a reading of the text concerns the failure to give particular attention to salvage and its insurance dimensions, particularly since general average has been isolated for special attention. Salvage is considered solely in the context of the discussion of partial losses. It could even be that Part III of the book,

devoted to general average, might usefully be enlarged to embrace what is often described today as 'saving losses', and so include in addition salvage and sue and labour.

The book also provides a succinct and helpful reminder of the history of the development of marine insurance law in Canada and in particular of the divide between the federal and provincial sovereigns in the development of specialist legislation and the distribution of jurisdiction. The subject now appears to have been effectively federalised with the enactment of the Canadian Marine Insurance Act 1993 and the decision of the Supreme Court of Canada in *Zavarovalna Skupnost Triglav (Insurance Community Triglav Ltd) v Terrasses Jewellers Inc* [1983] 1 S.C.R. 283, though some grey areas appear to survive. The federal statute of 1993 continues to be based on the English codification effected by the Marine Insurance Act 1906, subject to some changes of presentation and language, and for this reason a contemporary account of developments in Canadian law is of interest within all legal systems which follow whether fully or to a limited degree the English law. Within the common law world, including the USA, the notion of the persuasive force of foreign precedents on marine insurance law is long and firmly established. This fact the authors themselves expressly acknowledge and accept in the discussion of the construction of marine policies.

The immediately preceding comment emphasises the internationalism of marine insurance law within the common law world, and it is essential to consider and analyse the subject in this wider context. It is in this regard that the authors falter slightly, even after making allowance for the intent underlying the publication of the text and the targeted readership. Admittedly some relevant foreign sources and caselaw are cited, but the book in its generality conveys little or no notion of the serious reconsideration of marine insurance law which is being debated in many common law jurisdictions, particularly in Australia and England and Wales. Topics such as insurable interest, the duty of good faith, fraudulent claims and warranties are presented in a fashion that suggests a settled state. Whereas in truth they are, at least in certain other jurisdictions, in a state of tormented flux, and it is difficult to believe that these same debates will not eventually permeate into the development of Canadian jurisprudence. When the topic merits, the adoption of a broader and comparative perspective would help the book to become a more realistic and perspicacious statement of where the law is presently located and its possible or likely future course within the Canadian jurisdiction.

Notwithstanding this isolated reservation, the book is certain to be found a very useful text by Canadian lawyers and those involved in the marine sectors of the Canadian insurance markets. It will also be of assistance to comparative lawyers, providing them with a very accessible introductory glance into the Canadian jurisprudence.

DRT

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