

CMI CONFERENCE REPORT

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The four yearly CMI Conference took place in Athens in October 2008. It was attended by Fraser Hunt, Andrew Tulloch, Paul Myburgh and the writer. As is customary at CMI conferences, some of the sessions involved drafting documentation. They were the Places of Refuge and Procedural Rules Relating to Limitation of Liability sessions to which further reference will be made.

The Places of Refuge sessions considered a draft Instrument which has been in the course of preparation by the International Working Group and two meetings of the International Sub-committee of CMI in recent years. CMI first became involved in this project when, following the difficulties experienced by the "Castor" in 2001 the IMO Legal Committee invited CMI to assist it. Questionnaires were sent to national Maritime Law Associations. Although the IMO Legal Committee lost interest in taking the matter any further in 2005, CMI decided to complete the task upon which it had embarked in seeking to produce a document which had some teeth and was not merely representative of soft law, such as the Guidelines which the IMO had promulgated.

At the Athens Conference, panel presentations were made by the principal stakeholders including the International Group of P&I Clubs (Andrew Bardot), the International Salvage Union (Archie Bishop), the International Association of Ports and Harbours (Franz Van Zolan), and the International Union of Marine Insurers (Fritz Stabinger). In addition, the former President of the USMLA, Liz Burrell, explained recent documentation issued by the Coastguard in the United States and Eric Van Hooydonk explained the current status of EU legislation in relation to the "Erika" package.

The Draft Instrument applies what has been described as a rebuttable presumption that Port Authorities and States will allow vessels to enter a Place of Refuge unless the authorities having conducted a detailed assessment can establish that more harm is likely to be done than good if the vessel is allowed in. A controversial issue during the discussions at the conference related to the role that any security required from the ship owner by the Port Authority or State was to apply in the decision making process. The question was whether a Port Authority or State could be said to be acting reasonably in refusing access because no security is provided by a shipowner.

In the event the draft text which was approved at the Plenary session of the conference and at the Assembly has introduced three optional provisions. One extreme position adopted by one of the options is to provide that refusal of a Port of Refuge cannot be justified because no security is available from the shipowner. The other extreme position contained in a further option is to provide that the absence of security can justify refusal to grant a Place of Refuge; and the compromise option position is that although an assessment can have regard to the existence or otherwise of security, it cannot relieve an authority from carrying out an assessment and the absence of any security does not by itself justify a refusal to grant a Place of Refuge.

The other controversial provision, also related to questions of security, concerned the amount of any security that can be requested. Again, the text which was approved at the conference adopted three options. One option is to limit the amount of guarantee which can be requested to the ship's entitlement to limit liability under the 1976 Limitation Convention (as amended) from time to time. Another option is to permit the Port Authority or State to seek security up to any reasonable amount which it considers appropriate in the light of the assessment which it has carried out. The compromise option in relation to this issue is to permit the security to be requested up to the 1976 Limitation amount (as amended) and also any further reasonable amount which the Port Authority or State considers appropriate to take into account the likelihood of wreck removal expenses being incurred in circumstances in which States have removed such claims from the ambit of the 1976 Limitation Convention when giving effect to that Convention under their National law.

Subject to those matters, the draft that was prepared in advance of the CMI Conference was largely left intact by delegates at the conference. The content of the Draft Instrument will be available on the CMI website in the near future. It contains recital provisions, definitions, immunity from liability for a Port Authority or State where access is granted, the creation of liability in the Port Authority or State where access is unreasonably refused, the meaning of reasonable conduct (in the context of considering whether a Port Authority or State has acted

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reasonably), a requirement that States or Port Authorities draw up plans and also a requirement that a State identify the competent authority.

The Resolution passed at the Plenary session of the conference was as follows:

CMI approves the text of the Draft Instrument on Places of Refuge for submission to the IMO Legal Committee, noting that it contains options in two Articles for alternative provisions to be adopted in any text which that Committee may consider appropriate at some future occasion.

The other topic which was the subject of drafting by delegates at the conference was that dealing with Procedural Rules Relating to Limitation of Liability. The draft set of rules deals with such topics as the establishment of a limitation fund, the procedures to be adopted when challenging the establishment of a limitation fund, the registration and proof of claims, time limits, the consequences of late participation and the enforcement of limitation in other jurisdictions. Once again the finalised document at the Conference will be available on the website in the near future.

Other topics discussed at the Conference and in respect of which papers were presented included:

- (a) the *UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*. At the conclusion of the Conference the following resolution was passed:

Believing that the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea generally achieves a fair balance among the various interests in the shipping industry, even though some delegates consider that it contains provisions that they do not find wholly satisfactory; and

Recognizing that the Draft Convention offers a unique opportunity to unify and update maritime law and practice on a global basis,

Adopts the Report on the UNCITRAL program, and

Endorses the UNCITRAL Draft Convention.

Since the conclusion of the Conference the UN General Assembly Sixth Committee (Legal Committee) has met. Everything appears to be on track for UN approval of the Convention in November.

Susan Downing, the representative from the Attorney-General's office who attended many of the UNCITRAL meetings as part of the Australian delegation, sent out an email on 31 October 2008 which contains some useful information in relation to the Convention and also the ongoing process. It identified the general aims of the Convention as being to:

- end the multiplicity of regimes (ie the 1924 Hague Rules, the 1968 Hague-Visby Rules, the 1978 Hamburg Rules and the various regional arrangements)
- receive widespread international support
- reflect modern transport and shipping practices (eg e-commerce), and
- achieve a limited network liability regime or 'maritime plus' regime.

It also contained the following comments about the Convention:

The Convention will introduce a new legal liability regime for the international carriage of goods where there is an international sea leg. It is based on a 'maritime plus' concept¹ but it is not intended to be a multimodal Convention.

¹ UNCITRAL press release of 7 July 2008.

The draft Convention is lengthy and ambitious. Complex issues are covered including: electronic communication; the period of responsibility; the obligations and liability of the carrier; the obligations and liability of the shipper; freight; transfer of rights; jurisdiction and arbitration; and rights of suit. Some of these topics have never been comprehensively dealt with in an international treaty before. Signatories to the Convention would not be able to opt out of most of its provisions.

Finally, Susan Downing made the following comments about 'future timing' and the Australian position:

Future Timing

The Convention has been adopted by the UNCITRAL Commission and transmitted to the United Nations General Assembly. It is expected that the General Assembly will adopt the Convention, meaning that it may then be opened for signature and ratification. The Government of the Netherlands has offered to host a signing ceremony for the Convention in Rotterdam if approved.

The Convention requires 20 States to ratify it before it enters into force.

Will Australia Become a Party?

Like any international convention, the draft text contains a number of compromises made by the Working Group to accommodate the tensions between competing interests. There are some provisions which may improve the existing law and others which could be considered less desirable. The Australian Government would need to make an overall assessment as to whether or not it is in Australia's interest to become a party to the Convention. This would be done in consultation with industry and other relevant stakeholders.

- (b) Non-technical measures to promote quality shipping.

This was originally the brain child of the 1992 IOPC Fund. It involved the P&I Clubs and raised issues concerning the exchange of information between Clubs and insurers which gave rise to questions in relation to competition law, data protection law and defamation. Questionnaires were sent to national Maritime Law Associations and responded to by a number of them. In the meantime, the IOPC Fund has lost interest in the topic. CMI is likely to do some further work on the topic, if only to produce a summary of the questionnaire responses and will determine whether any guidelines or other document can usefully be prepared.

- (c) The Wreck Removal Convention which had been agreed in Nairobi in 2007 was also the subject of a further paper.

- (d) Some papers were also given on the draft Convention on the Recycling of Ships which has been drafted by the IMO Environment Committee. As Nigel Frawley (the Secretary General of the CMI) said in his introduction to the subject in the CMI Yearbook:

This Convention will impact on all stages of construction, ownership and recycling of ships. It will add significantly to the obligations of owners and others with respect to management of hazardous materials. It is a useful step forward to an effective legal regime and provides some protection of recycling operations from political interference. Importantly, it offers owners a degree of certainty about contractual arrangements. The Convention is expected to be adopted in Hong Kong in October, 2009.

Michael Stockwood and Charlotte Breide, both of Ince & Co, gave presentations on this topic. At the heart of the Convention is the monitoring and disposal of hazardous material at the end of a ship's life. Ultimately, whether it makes any difference, will depend on the attitude taken to the Convention by countries such as India, Pakistan and Bangladesh.

- (e) The Charterer's Right to Limit Liability is a topic that Patrick Griggs has been interested in for some time. The topic derives from English Court decisions in the "Aegean Sea" (in which Thomas J held that a charterer could not limit liability in claims brought against it by the owner), and the "CMA Jakarta" in which both arbitrators and Sheen J followed Thomas J, but the Court of Appeal found that charterers could limit in principle but on the facts of this case they could not limit in respect of claims brought against them by the shipowner in respect of the loss or damage to the ship itself, as Article 2 of the Limitation Convention did not include such claims. Similarly the charterer could not limit in respect of amounts claimed by the owner which it had to pay for salvage, arising from the charterer's instruction to send the vessel to an unsafe Port, as such claims were also not subject to limitation. However, a claim for an indemnity by an owner against a charterer in respect of a cargo claim, which the owner had paid, would be subject to limitation.

CMI considers that there is scope for amending the Convention in order to clarify these matters.

- (f) Henry Li, an executive councillor, presented an excellent paper pointing out some of the difficulties which had been experienced arising from the Judicial sale of Ships, particularly in relation to recognition by one jurisdiction of a sale in another. He also drew attention to the other circumstances in which ships are sold by authorities (ie non-judicial sales) and suggested that a study could be made of this topic by CMI to see if greater uniformity could not be achieved. Some of the problems he has drawn attention to are caused by the lack of uptake of the 1967 and 1993 Liens and Mortgages Convention. He queries whether a standalone convention which makes clear what types of sale are envisaged, what processes need to be followed, such as what notices need to be given of sales, the methods of valuation, the conditions for bidding and the conduct of the auction etc.
- (g) Implementation and Interpretation of Conventions is a matter about which Francesco Berlingieri (the ex-president of CMI) has been studying for many years. He has pointed out that there are many varied ways in which countries give effect to conventions which often has a bearing on how they are then interpreted. As one of the rationales of CMI is to seek to bring as much uniformity as possible to maritime law, this is an area worthy of continued study.

The conference gave emphasis to an issue which concerns many national maritime law associations and that is the diminishing number of young lawyers practising maritime law. To this end, a breakfast meeting at which papers were given by a French, US and Japanese delegates was held as well as social activities involving young lawyers. These sessions were all well attended and will be encouraged at future CMI events.

Turning next to administrative developments within the CMI at the conference, it can be reported that a new President, Karl-Johan Gombrii has been elected. Johanne Gauthier was elected a new Vice-President and Andrew Taylor and Louis Mbeffano were elected to the Executive Council. Sadly Indonesia was expelled as a member of the CMI as it has not paid its subscriptions for many years and has not participated in any of the recent CMI events or responded to questionnaires.

A Steering Committee consisting of the writer, Nigel Frawley, Secretary-General and Karl Johan Gombrii (in his role as Vice-President), issued a report during the year for the CMI Executive Council. A copy of the report will be available on the CMI website. One of the principal aims of the report is to improve the CMI website and to make relationships between CMI and individual members of National Maritime Law Associations more direct. It is also proposed that executive councillor terms be reduced from four to three years.

Since the Athens conference there have been two further developments which may impact on the work programme of CMI over the next year or two. The topic of Piracy, upon which CMI has previously worked (in 2001 CMI drafted a Model Law on Piracy and Acts of Maritime Violence and in 2007 submitted "Draft Guidelines for National Legislation Concerning Maritime Criminal Acts" to the IMO), has been given considerable publicity in the last few weeks and is again being looked at by the IMO. On 7 November 2008 the new CMI President wrote to the Secretary-General of the IMO offering CMI's services to assist in any way it can.

Secondly, as a result of discussions which took place during the course of the Places of Refuge topic there is considerable interest in seeking to advance discussions concerning the possibility of amending the Salvage

Convention in certain areas and also debating further the concept of "environmental salvage" which the International Salvage Union has been publicizing in recent years.

The next meetings of the CMI are as follows:

- There will be an Assembly meeting in Rotterdam in September 2009 to coincide with the UNCITRAL Convention signing which is likely to be in the period 21 to 23 September 2009.
- There is a colloquium planned to take place in Chile in October 2010 and the next conference is likely to be in Beijing in late 2012.