

# INTERNATIONAL LAW: CURRENT ISSUES AT CMI

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## The Comité Maritime International (CMI)

The CMI was established in 1897. The late 19th Century was a period during which much was done to codify and rationalise the law, both domestically and internationally. A paper given by Chief Justice Allsop in 2009 celebrated the Centenary of the *Marine Insurance Act 1909* (Cth) and honoured the memory of Sir Mackenzie Chalmers, who was responsible for three major pieces of commercial legislation in the United Kingdom: the *Sale of Goods Act 1894*, the *Bills of Exchange Act 1902* and the *Marine Insurance Act 1906*.

At the same time the International Law Association embarked on a project to codify international maritime law. Out of those failed endeavours emerged the CMI, whose founders were Belgian lawyers, marine insurers and a politician. Thereafter Maritime Law Associations were formed, first in Belgium, then France, Germany, Norway, Sweden, Denmark, Italy and the US before the turn of the century. The Maritime Law Association of Australia was formed in 1973 and it was in 1977 that the New Zealanders came on board as well.

Since its early formation, the CMI has been responsible for drafting all the major International Conventions that concern our every day practices. To list just a few: Collision, Salvage, Hague Rules, Limitation, Arrest of Ships and many others. Between 1910 and 1979 there were 13 Brussels Diplomatic Conferences on maritime law that gave effect to the work that had been done by the CMI.

There are some 50 National Maritime Law Associations that are part of the CMI family.

As its Constitution states it was formed for the purpose of unification of maritime law in all its aspects. It promotes the establishment, and encourages the activities, of National Maritime Law Associations which are the constituent voting members of the CMI. Its seat remains Antwerp, where it was founded.

It commences work on any project by appointing an International Working Group (IWG), which would then usually start its work by sending out a questionnaire to the National Maritime Law Associations to ascertain what the law in their jurisdiction is on the particular subject being studied. Thereafter it might convene an International Sub-Committee (ISC) meeting to which interested bodies (such as the International Chamber of Shipping, the International Union of Marine Insurers, the International Salvage Union etc), and individuals who have a particular interest in the topic, are invited. A draft instrument (whether it be a proposed Convention, Guidelines or Rules) is prepared by the IWG and debated, as in an international diplomatic conference, at a Conference of the CMI, which only takes place every four years. In between the Conferences, Colloquiums or Symposiums are held every year or two.

## The Present Work of the CMI

### **(a) Review of the Salvage Convention and Recognition of Foreign Judicial Sales of Ships**

The two principal topics which were discussed at the Beijing Conference in October 2012 were a Review of the Salvage Convention and Judicial Sale of Ships. The former had been carried out as a result of a request made to CMI by the International Salvage Union who have been very unhappy with the Convention for many years. Sadly, for the Salvage Union, the CMI was not convinced that there was a 'compelling need for reform'. That is the International Maritime Organisation's (IMO) requirement before it will consider a new agenda item.

Work on the topic of Judicial Sale of Ships started on the initiative of Chinese lawyer Henry Li who was concerned that the absence of a Convention in this area meant that sales of ships by order of the Courts in one jurisdiction were not always being recognised in other jurisdictions. There were further discussions on this topic in Dublin at an International Sub-Committee on 28 and 29 September 2013 and the project will, hopefully, be

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concluded in Germany in June 2014. Both those topics were classic CMI projects, that is, IWG's working on wordings for an international instrument before a Conference and then for it to be debated over a number of days at a Conference in sessions that have much in common with a diplomatic conference.

### **(b) Review of the Rules on General Average**

The CMI is the Custodian of the York Antwerp Rules and initiated in October 2012 a major review of those Rules by appointing a new IWG under the chairmanship of Bent Neilsen. Amendments made in 2004 to the York Antwerp Rules at the CMI Vancouver Conference have not received widespread support. The main reasons the 2004 Rules were unacceptable to the shipping community were that salvage (Rule VI) was excluded from General Average and crew wages in ports of refuge (Rule XI) were abolished. There were additional provisions but those appear to be the primary concerns. The Questionnaire which was sent out to Maritime Law Associations on 15 March 2013 raises those issues but also seeks to know whether General Average should be abolished, whether the Rules need amendment in the light of the Rotterdam Rules, whether the Rules should attempt to define terms used, whether they should incorporate provisions relating to arbitration or mediation in relation to disputes, whether they should incorporate key documents such as average guarantees and average bonds, whether changes are needed to further assist in relation to absorption clauses (where hull insurers pay general average in full up to a certain limit), whether express wording is needed in the Rules to deal with the payment of ransoms, as well as detailed questions posed in relation to particular Rules. The current Rules, which are most in use, are the 1994 Rules drafted in Sydney at the CMI Conference in 1994.

The hope is that work on this topic will reach finality in New York at a CMI Conference in 2016.

### **(c) Offshore Activities - Pollution Liability and Related Issues**

Another topic which was debated at Beijing in 2012 was 'Offshore Activities'. CMI sent a draft instrument to the IMO after the Rio de Janeiro Conference in 1977. It did not come up for consideration by the IMO Legal Committee until 1990 when it asked the CMI to consider whether any revision needed to be made of its 1977 document. At the 1994 CMI Conference in Sydney a revised version of the 1977 Rio Draft Convention on Off-Shore Mobile Craft was adopted. At the same time CMI established a working group to 'further consider and if thought appropriate draft an International Convention on offshore units and related matters'. The Sydney draft was considered by the IMO Legal Committee in 1995 but it became apparent that it did not commend itself to the Legal Committee and the CMI was encouraged to pursue its efforts to draft a comprehensive treaty. The work done by that IWG can be seen in the CMI Yearbooks 1996 and 1997.<sup>401</sup> That history was brought up to date by the late Richard Shaw in a report he prepared for the Beijing Conference in 2012 which is also reproduced in the CMI Yearbook 2011-2012 Beijing 1.<sup>402</sup> He noted that the CMI had submitted a report to the IMO Legal Committee in 1998 containing a review of the subject, with a survey of the principal legal issues which should, in the view of the CMI International Sub-Committee, be covered by such a Convention. In 2001 the Canadian Maritime Law Association produced a draft framework document for an International Convention on Offshore Activities, which was published in the CMI Newsletter in 2004. As Richard Shaw noted in his Beijing report:<sup>403</sup>

The need for an international Convention to clarify the application of legal principles relating to subjects such as registration, mortgages, salvage, limitation of liability and liability for oil pollution appears to be widely recognised, although it would not be right to overlook the view expressed in certain quarters, notably by the International Association of Drilling Contractors and the E&P (Exploration and Production) Forum (now known as the International Association of Oil and Gas Producers), that there is no need for such a Convention.

Since the Deepwater Horizon and Montara disasters, some States, especially Indonesia, have argued that something needs to be done in this area. Justice Steven Rares of the Federal Court of Australia has written eloquently on the subject<sup>404</sup> and believes that an international Convention modelled on the Civil Liability Convention (dealing with oil pollution) should be prepared. A new IWG (Offshore Activities - Pollution Liability and related issues) has been set up by the CMI. A questionnaire was sent out to National Maritime Law

<sup>401</sup> See for CMI Yearbooks, Newsletters and work produced by the CMI: Comité Maritime International, *Publications* (4 April 2014) Comité Maritime International <<http://www.comitemaritime.org/Publications/0,275,1532,00.html>>.

<sup>402</sup> Comité Maritime International, *Yearbook 2011-2012 Beijing I* (4 April 2014) Comité Maritime International <[http://www.comitemaritime.org/Uploads/pdf/Yearbook\\_2011\\_12.pdf](http://www.comitemaritime.org/Uploads/pdf/Yearbook_2011_12.pdf)> 302.

<sup>403</sup> *Ibid* 304.

<sup>404</sup> Justice Steven Rares, 'The Need for an International Convention to Deal with Off-shore Hydrocarbon Leaks' (Paper presented at the 2011 Biennial Mini-Conference of the Maritime Law Association of Australia and New Zealand, Katoomba, NSW, 11 March 2011).

Associations in July 2013. This seeks to collect information about existing regional and bilateral agreements on trans-boundary oil pollution from offshore activities.

Tabetha Kurtz-Shefford has pointed out, in a paper published last year:<sup>405</sup>

..It is obvious that there is little appetite for a global regime. The probability of one arising within the near future is very low, especially without the support of some of the more influential nations and organisations. Although it will never be explicitly cited as a reason for failure, it is almost certain that such a regime faces strong resistance from the main oil and gas entities within the industry. ...The subject has now turned from the establishment of a global regime to the shape regional guidelines might take.

#### **(d) Fair Treatment of Seafarers**

This IWG is chaired by Olivia Murray of Ince & Co in London. Its mandate is to review relevant rules, such as under UNCLOS and MARPOL, and guidelines relevant to fair treatment issues, prepare pertinent submissions to the IMO Legal Committee or other relevant organisations and to monitor and encourage the recognition of and adherence to the IMO Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident. For more information on the work being done by this IWG I refer to the paper written by Olivia Murray on 'Fair Treatment of Seafarers International Law and Practice'.<sup>406</sup>

#### **(e) Acts of Piracy and Maritime Violence**

This IWG is being chaired by Andrew Taylor of Reed Smith in London. The role played by this IWG is really to monitor and become involved where it thinks it can assist other international organisations. It did produce, in 2007, Draft Guidelines for National Legislation on Maritime Criminal Acts which it forwarded to the IMO Legal Committee (LEG 93/12/1). That work had originated 10 years earlier when the CMI invited a group of concerned international organisations to join together to examine the rapidly expanding plague of international piracy. Its first work was a Model National Law on Acts of Piracy and Maritime Violence, but its work was overtaken by the events in New York of 9/11/2001 and other terrorist/piratical acts which caused the IMO to produce wide ranging amendments to the 1988 Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) Convention, which occurred in October 2005.

For a more detailed history of those events and subsequent activities I direct your attention to the CMI website where you can see more recent papers that have been written by Andrew Taylor and Patrick Griggs on CMI's activities in this area.

#### **(f) Marine Insurance**

Whilst the CMI has had some involvement in the topic of marine insurance in the past, particularly work done by an IWG chaired by Professor John Hare of South Africa, the current IWG which is being chaired by Dr Dieter Schwampe of Hamburg is looking at 'mandatory insurance under international conventions' and a questionnaire, on that topic, has been sent out to National Maritime Law Associations, to ascertain whether guidelines could be developed to assist in the formulation and proper implementation of national law on this topic. The Liability Conventions to which that work is directed are those such as the CLC of 1992, the HNS of 1996, the Bunkers Convention of 2001, the Nairobi Wreck Removal Convention and the Athens Protocol of 2002, all of which require shipowners to carry liability insurance and to have evidence of the existence of such insurance, or a bank guarantee, on board.

The questionnaire has sought information concerning the procedural steps that need to be taken in different jurisdictions as to the licensing of insurers, the recognition of certificates issued to insurers in other jurisdictions, the availability of direct action claims against insurers under national laws and the particular requirements of any such national laws, as well as whether the national laws provide for the liability of the State where it issues a certificate which turns out to be misleading: for example, where there is no insurance contract at all, where the contract is inconsistent with the provisions of the Convention or that the insurer is not financially stable and cannot satisfy direct claims.

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<sup>405</sup> Tabetha Kurtz-Shefford, 'Liability for Offshore Facility Pollution Damage after the Deepwater Horizon? What happened to the Global Solution?' (2012) 18 *Journal of International Maritime Law* 453.

<sup>406</sup> CMI, above n 3, 312; (2012) 18 *Journal of International Maritime Law* 150.

### (g) Cross-Border Insolvency

This IWG is being chaired by Chris Davis of New Orleans and Dr Sarah Derrington is his Rapporteur. This project is becoming more and more topical as cases come before the courts all around the world which seek to balance the conflicting interests of ordinary creditors of shipowners under the principles of the UNCITRAL Model Law and those who have rights to arrest vessels in order to obtain security and/or seek to attach the proceeds of any sale of a vessel under admiralty jurisdiction.

A good example in our own jurisdiction was the decision of Buchanan J in *Yu v STX Pan Ocean Co Ltd (South Korea)*.<sup>407</sup> The facts in that case were that the plaintiff, who was appointed receiver of STX Pan Ocean Co Ltd ('STX') on 17 June 2013, applied for recognition as a 'foreign representative' of STX and for recognition of proceedings commenced in Korea as a 'foreign proceeding' under the *Cross-Border Insolvency Act 2008* (Cth), which Act gives effect, from 1 July 2008 to the Model Law on Cross-Border Insolvency of UNCITRAL. The Judgment sets out all the relevant provisions of the Model Law. Orders were made that the rehabilitation proceedings by which the plaintiff was appointed should be recognised as a foreign proceeding, that the plaintiff should be recognised as a foreign representative and a further order that 'any application for the issue of a warrant of arrest in Australia of any vessel owned or chartered by the defendant be dealt with by a judge of this court and these reasons for judgment be drawn to the attention of the court at the time any such application is made'. Orders had been sought pursuant to Article 21 of the Model Law to the effect that 'no proceeding in any court against the defendant, or in relation to any of its property, may be begun or proceeded with' and that 'no enforcement process in relation to property of the defendant may be begun or proceeded with.' Such orders would clearly have precluded any arrest of any of the defendant's ships visiting Australian ports. In his judgment his Honour said:<sup>408</sup>

[39] A criticism has been made of the terms of the Model Law by reason of its failure to recognise and take appropriate account of international maritime law and the operation in Australian jurisdictions of the Admiralty Act. I do not propose to take up those matters in the present Judgment, but those criticisms draw attention to the fact that, for centuries, international maritime law developed its own security regimes for reasons which remain generally observed around the world, including in Australia.

His Honour continued:<sup>409</sup>

[41] I can see no reason at present why an *action in rem* to enforce a maritime lien would not fall within the operation of s471C of the *Corporations Act*, as contemplated by Article 20(4) of the Model Law. I can see no basis, either, for extinguishing or modifying at the present time any recourse to s471B of the *Corporations Act*. Those potential rights may require assessment according to the circumstances of particular cases but, to take a simple example, there may be a very good reason why a claim for seamen's wages, normally enforceable as a maritime lien, should not be affected by recognition of the foreign main proceedings.

[42] I see no reason at present either to curtail or foreclose the exercise of rights which are recognised by the model law itself. The terms of Article 20 of the Model Law will take effect automatically, but I see no reason why the arrest of a ship owned or operated by the defendant which is Australian waters could not be sought in appropriate circumstances, without having to overcome an order such as proposed order 5. Whether an arrest warrant would issue would depend on the circumstances, the reason why the arrest was sought and the interests sought to be vindicated by the *action in rem*. Such an application could be made to a Judge of the Court rather than to a Registrar. Full disclosure should be made to the Court that the foreign proceedings have been recognised under the *Cross-Border Insolvency Act 2008* (Cth) and the terms of this judgment should be drawn to the attention of the Judge at the time any such application is made.

A questionnaire which CMI sent out in 2012 has sought to ascertain which jurisdictions amongst National Maritime Law Associations have given effect to the UNCITRAL Model Law, how those jurisdictions deal with the question of foreign creditors or a foreign insolvency administrator where cross-border maritime insolvencies occur, and the procedures to be followed in such situations. The topic is very much more complicated than that, as is the questionnaire, but once again I direct you to the CMI website if you would like more information on it.

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<sup>407</sup> [2013] FCA 680 (11 July 2013).

<sup>408</sup> Ibid [39].

<sup>409</sup> Ibid [41]-[42].

### **(h) Rotterdam Rules**

This IWG is chaired by Tomotaka Fujita, the Professor of Law at the University of Tokyo. The role of this IWG is principally to monitor developments in the ratification process and the CMI website contains up to date information on what is going on in that regard. We are also keeping an eye on continuing work being done by UNCITRAL in relation to proposed Model Laws Concerning Electronic Documents.

When I visited the United States in April 2013 I had a meeting at the State Department in order to seek to persuade the US Government Agency which is in charge of the ratification process to move as quickly as possible to secure ratification, as I considered that a number of countries are hanging back to await developments in the US. I attended that meeting with Chet Hooper, a former President of the US Maritime Law Association, who had been instrumental in the mid 1990s, during his Presidency, in work done within the US Maritime Law Association to seek to reform the United States COGSA legislation. Happily, since our visit, Chet Hooper has been informed that what is described as the 'Transmittal Package' was close to finality and would then be sent to other government agencies before being signed off by the Secretary of State and sent to the White House. Once it is signed off by the President it is then sent to the Senate at which point the ratification process can be completed. A number of countries have indicated that they will be ratifying the Rotterdam Rules Convention, but are awaiting developments in the United States. Only two countries have thus far ratified, Spain and Togo.

### **(i) Arctic and Antarctic Issues**

This IWG is being chaired by the former Secretary-General of the CMI, Nigel Frawley. As a former submariner, he is well qualified to lead such an interesting topic. He put this topic on the program of the CMI because of the growing interest in the polar regions, largely due to climate change and new technologies. Because it is not a topic in which there is the potential for conflicts of laws amongst the entire membership of the CMI, it has not been the subject of a questionnaire, although that is not to say that there are not a number of countries (eg in the Arctic: Canada, Denmark, Norway, the Russian Federation and the United States of America) who have a deep interest in that region. As Nigel Frawley has pointed out, however, the legal framework in the Antarctic is comprehensive, unlike the Arctic, where sovereignty is a major issue, spurred on by the discovery of new oil and gas fields that may contain as much as 30% of the world's undiscovered gas and 13% of the world's undiscovered oil. It is also believed to be rich in gold, silver and diamonds, as he pointed out in a paper that he gave at the CMI Colloquium at Buenos Aires in 2010. There are a number of papers on the CMI website, including one given by Donald Rothwell in relation to the Southern Ocean.

### **Promotion of Maritime Conventions**

A new initiative launched at the Beijing Conference was the setting up of a Standing Committee to investigate the possibility of joining with the International Chamber of Shipping (ICS) and IMO to seek to have more Conventions ratified. This has now occurred. It is believed that National Maritime Law Associations could do much (in conjunction with the ICS worldwide membership) to educate States about the Conventions that they have not ratified. A brochure has been published listing the Conventions upon which a major focus is sought to be addressed.<sup>410</sup>

### **CMI/MLAANZ: Canberra Meeting - 20 June 2013**

On 20 June 2013 I visited Canberra with Matthew Harvey, the President of the Maritime Law Association of Australia and New Zealand (MLAANZ) and we met with officers of the Department of Infrastructure and Transport. Rachael Davis (the Section Head, Maritime Economic Regulation, Maritime & Shipping Branch, Department of Infrastructure and Transport) and a number of her colleagues were present. I explained my role as President of the CMI and its history, and in particular the work being done by the CMI Standing Committee together with the ICS on the Promotion of Maritime Conventions, which it is hoped will enliven relationships

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<sup>410</sup> They include: Protocol of 1997 to MARPOL (Annex VI - Prevention of Air Pollution from Ships); International Convention for the Safe and Environmentally Sound Recycling of Ships (Hong Kong), 2009; Convention on the Facilitation of International Maritime Traffic (FAL), 1965; Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims (LLMC), 1977; Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL), 1974; International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996, and Protocol of 2010; Nairobi International Convention on the Removal of Wrecks (Nairobi WRC), 2007; Maritime Labor Convention (MLC), 2006; Seafarers' Identity Documents Convention (Revised) (ILO 185), 2003; and United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), 2009.

between National Maritime Law Associations, the International Chamber of Shipping Member in their country and Government employees involved in international maritime treaties.

Rachael Davis welcomed that initiative and explained the difficulty which the Department has in advising government on the regulatory impacts of international conventions. While she recognised that the department has had a long relationship with the Australian Shipowners' Association (ASA), it does not have such relationships with, for example, charterers, who would be affected by a convention such as the HNS Convention. Angela Gillham (of ASA) did however note that the Australian shipping industry is small and is stretched in terms of resources.

There are many stakeholders in relation to some of the conventions which were listed on the agenda for the meeting which are outside the traditional relationships of the Department. The Government needs to have a sophisticated conversation about the cumulative impact of conventions such as the Limitation Convention, the Athens Convention, the HNS Convention and the Nairobi Convention. They are good examples of Conventions in which the department needs to understand the impacts on stakeholders.

There was discussion concerning the Cape Town Convention 2007. A Convention that I knew nothing about until recently on International Interests in Mobile Equipment 2001 and its three protocols relating to aircraft, railways rolling stock and space assets. It seems that UNIDROIT is giving consideration to incorporating ships within that Convention. This was opposed by the CMI and the IMO, when it was first raised, in the 1990s and it looks as if we are going to have to re-debate that issue over the coming months. I expressed regret that the department appeared to have taken a view on the benefit of incorporating shipping in this convention without any consultation with MLAANZ (or perhaps any other stakeholder) when there was resistance to such inclusion within both the IMO and the CMI in the 1990s. I referred to the significant differences between ship registration, the national registries, the tradition of maritime liens, the arrest and liens and mortgages conventions etc.

The meeting therefore noted that for conventions like Rotterdam, HNS, Athens, and Nairobi, it would be helpful for the government to receive preliminary advice which discusses the background to the development of the convention, what benefits would flow to stakeholders and who would be affected by the ratification of the convention. In so far as other government departments are concerned, the Department of Trade may have relationships with some of the potential stakeholders and the Attorney-General's Department has a role to make sure that any new convention will comply with existing arrangements. The policy agenda, however, sits with the Department of Infrastructure and Transport, which provides advice to the portfolio minister. The HNS Convention falls within the responsibility of the liability team. There have already been good discussions with industry in relation to recycling and ballast which have involved AMSA and environmental departments.

As a result of that meeting I am hopeful that MLAANZ will be in a position to provide assistance to the department when it is putting together ministerial submissions for Australia to put in train steps to ratify Rotterdam Rules, HNS, Wreck Removal and Athens Conventions. Dr Sarah Derrington has put in train steps to produce material. I have posed the question to MLAANZ whether Australia should revisit the Arrest Convention (1999), the Maritime Liens & Mortgages Convention (1993) and debate whether there is anything in these Conventions which would benefit Australia (and New Zealand).

## **Handbook on Maritime Conventions**

CMI has in the past worked with a publisher to produce a handbook containing the most significant Maritime Conventions. With the assistance of Frank Wiswall and IMLI in Malta, work is being done to produce a new edition. At the same time consideration is being given to having that material posted on the CMI website. In recent years the CMI website has been considerably upgraded.

## **Jurisprudence Database**

A further initiative which the CMI took in 2013 was to employ somebody to gather together important decisions worldwide on international Conventions, which would be available on the CMI website. Francesco Berlingieri has already worked on this for some years voluntarily but has been reliant on volunteers around the world sending him decisions, but it is thought that someone working full time on such a project for a six month period could assemble very much more material and establish a more committed network of volunteers around the world to gather such material in future. The services of a French lawyer have been retained to take on this role for six months. A volunteer within MLAANZ will need to be identified to assist her in gathering together

Australian jurisprudence on the specified Conventions, such as Salvage, Limitation, Hague/Hague-Visby Rules and Admiralty.

### **Young CMI**

Thanks to the initiative of the President of the Dutch MLA, Taco Van de Valk, there is now a CMI group on LinkedIn: <[http://www.linkedin.com/groups/comit%C3%A9-Maritime-International-CMI-4752946?trk=myg\\_ugrp\\_ovr](http://www.linkedin.com/groups/comit%C3%A9-Maritime-International-CMI-4752946?trk=myg_ugrp_ovr)>. I urge all young lawyers with an interest in maritime law to join that group and keep abreast of developments.

### **Future CMI Meetings**

There is Conference in Hamburg in June 2014; a Colloquium in Istanbul in 2015 and a Conference in New York in May 2016.

### **Conclusion**

Whilst there seems to be a lack of interest in the IMO Legal Committee to develop new Conventions (about which the shipping community will no doubt sigh with relief), I hope I have demonstrated that maritime lawyers both within our own jurisdiction and internationally are still doing much work seeking to unify maritime law. I look forward to the MLAANZ continuing to play its part in the ongoing work of the CMI.