

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

COMITE MARITIME INTERNATIONAL

NO. 3 - SEPTEMBER/DECEMBER 2003

This Issue Contains:

News from the CMI

- Minutes of the meeting of the Executive Council held in London on 18th November 2003
- Report of the seventh meeting of the International Sub-Committee on issues on Transport Law held in London on 27th - 28th February 2003
- Report of the eight meeting of the International Sub-Committee on issues on Transport Law held in London on 17th November 2003

News from Intergovernmental and International Organizations

News from UNCITRAL

- Draft Instrument on the Carriage of Goods Wholly or Partly by Sea, Twelfth session of the Working Group, by Francesco Berlingieri

NEWS FROM THE CMI

MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL HELD IN LONDON ON 18th NOVEMBER 2003

Attending:

<i>President:</i>	Patrick GRIGGS
<i>Vice-Presidents:</i>	Karl-Johan GOMBRII Frank L. WISWALL, Jr.
<i>Councillors:</i>	Jose Maria ALCANTARA Johanne GAUTHIER José Tomás GUZMAN SALCEDO John E. HARE Stuart HETHERINGTON Henry H. LI Thomas M. REME Gregory TIMAGENIS
<i>Secretary General:</i>	Marko PAVLIHA
<i>Treasurer:</i>	Benoît GOEMANS
<i>Administrator:</i>	Wim FRANSEN
<i>Assistant Administrator:</i>	Pascale STERCKX
<i>Publication Officer:</i>	Francesco BERLINGIERI
<i>Others:</i>	Jean-Serge ROHART

Patrick Griggs opened the Meeting by welcoming the attendants. He proposed to conclude the meeting by no later than 4:15 p.m. in order to prepare for the annual BMLA Dinner.

1. Apologies for absence

(a) Patrick Griggs informed the members of the Executive Council that Allan Philip could not come to the meeting because of his involvement in arbitration.

(b) *Approval of the Minutes of the Executive Council Meetings held in Bordeaux on June 10 and 13, 2003*

The Minutes of the Executive Council Meetings in Bordeaux on June 10 and 13, 2003 were approved.

(c) *Matters arising. Action list "Things to do" prepared following June 10 and 13, 2003 meetings in Bordeaux*

Patrick Griggs went through the list "Things to do". Most of the items were part of the Agenda and would be considered there.

2. Finances

(a) *Report from Treasurer*

Benoît Goemans reported on financial statements and budgets of CMI for the period of 1 January 2003–30 September 2003. These figures were not audited yet. The period 1 January 2003–31 December 2003 will be audited. All figures are in euro.

Income

Total income out of subscriptions amounted to 271,687. This amount shows the subscription invoiced, not the subscription actually cashed. For the next quarter there will be no significant invoicing of subscriptions.

Taking into account an increase of the provision for unpaid subscription, in the amount of 15,000 (subject to verification at year end), the total revenue, including the proceeds of the sale of publications, the recovery of mailing costs, etc. amounts to 266,170.

The item conference profit will be dealt with later in the meeting.

Expenses

The expenses amounted to 119,181. The 2003 budget provided for expenses in the amount of 262,475. These two figures cannot really be compared since the first covers 9 months and the 2003 budget one year. Nonetheless, it is obvious a reduction of charges was achieved in travel

expenses, thanks to a general drop of air fare prices and to a variety of petty savings.

Result

Therefore, the surplus for the period is 146,989. This surplus will drop substantially by year end since for the last quarter of 2003 there will be no significant revenues, while the expenses will carry on. Also, at year end, Benoît Goemans advised to be in a better position to estimate more precisely the provision for unpaid subscription. Nonetheless, Benoît Goemans anticipated that there will be a surplus and that such surplus is likely to be in excess of the surplus budgeted, i.e. 8,357. If that comes true, he suggested that it would be the recommendation to the General Assembly in Vancouver (June 2004) not to adapt the amount of the subscriptions to currency erosion. Or, to put it otherwise, the subscription amount would be maintained in nominal terms, which means a reduction in real terms.

Assets and liabilities

According to the practice no writing off was done at the occasion of this intermediary financial reporting, and therefore, a separate full reporting on the assets and liabilities makes no sense at this stage. This reporting is reserved for the General Assembly meeting in Vancouver (June 2004). This being said, the main asset being liquidities on current and deposit accounts with banks, Benoît Goemans reported on the amount so available, i.e. 223,465.55. He periodically draws up a liquidity plan. The 30 September 2003 plan shows funds are available to sustain anticipated expenditures up to 31 August 2004 if no fresh cash is generated. The next significant fresh cash will be caused by the next subscription invoices to be sent out in spring 2004. Bearing these elements in mind, the position is safe without there being excessive reserves.

(b) *Unpaid Contributions*

Karl-Johan Gombrii and Benoît Goemans reported on the list of unpaid subscriptions for 2002 and previous years. It was suggested that 30 countries on the list owing 189.150,97 euro were to be warned by two possible sanctions: 1) appearing publicly on the "black" list", 2) being expelled from CMI.

Patrick Griggs met Professor Adamazir from Poland attending the IMO legal Committee who was apparently also a member of the MLA of Poland and could assist in solving the financial problem regarding his Association.

Stuart Hetherington referred to the agreement in Bordeaux that all members of the Executive Council would receive a document showing the amount of subscription of each NMLA. Pascale

Sterckx confirmed that the document had been distributed in Bordeaux but she would send another copy.

There were various suggestions and ideas how to solve the never-ending problem of unpaid contributions, e.g. payment in instalments (Gregory Timagenis), termination of Titulary Membership of a member whose MLA was expelled (Francesco Berlingieri), etc. It has been agreed that all correspondence regarding the unpaid subscriptions should be copied to the councillor who is responsible for a particular country (region).

Frank Wiswall informed the members of the Executive Council that he had met a person willing to found a new MLA of Morocco.

(c) Expenses of offices of Treasurer and Secretary General

Patrick Griggs recalled that the former Secretary General had a budget for office expenses in the amount of 13.000 euro per annum. Further to his suggestion it was agreed that approximately the same sum would be split between Treasurer and new Secretary General, each receiving 7.500 euro in two instalments (3.750 euro in November and the same amount in May).

(d) Bordeaux Colloquium - financial results

Jean-Serge Rohart reported that unfortunately there was still no certainty about the final financial result and profit of the Bordeaux Colloquium, although the organisers had been contacted many times. He apologised for organisational problems in Bordeaux, but he was assured by all members of the Executive Council that the event was a great success, especially insofar as the working program was concerned. It was noted that the net surplus amounted to 4.800 euro but it would probably decrease.

3. New Constitution and legal status of CMI

Benoît Goemans reported the civil servants in charge of this file, finally approved the request for personification. A draft Royal Decree was forwarded to the minister. He was told by the civil servants that the Minister and the King were anticipated to sign the Royal decree within a few weeks.

Benoît Goemans further reported that the Belgian Act of 25 October 1919 on International Associations with as philanthropic, religious, scientific, artistic, or pedagogic goal has been replaced by articles 46 to 58 of the Act of 2 May 2002. This does not affect the further progress of the personification of the CMI, but may compel the CMI to amend certain provisions. Benoît

Goemans suggested that the Constitution Subcommittee be called in due time to look into this issue.

4. Next meeting of the Executive Council

Next meeting of the Executive Council will coincide with the 38th CMI International Conference and will be held in Vancouver on Sunday, May 30, 2004 starting at 12:00 and ending at 4:00 p.m. There will be also a short meeting after the CMI Assembly on Friday, June 4, 2004, starting around 5:30 p.m. and concluding at 6:30 p.m.

5. Assembly 2004

Next meeting of the CMI assembly will be in Vancouver on Friday, June 4, 2004 at 2:00 p.m. (after lunch).

6. Nominating Committee: seeking nominations from NMLAs

Patrick Griggs stated that the terms of Stuart Hetherington and Gregory Timagenis would expire in May 2004, but they would be both eligible for a second 4-year term. They will receive an official letter in this respect.

According to Article 15 of the CMI Constitution, the chairman of the Nominating Committee shall forward its nominations to the administrator in ample time for distribution not less than 120 days before the annual meeting of the Assembly meeting at which nominees are to be elected.

Patrick Griggs also mentioned that it was decided during the recent meeting with Marko Pavliha in London, which files would be transferred to the latter in a due course.

Finally, he raised the possibility that professor Lebedev from Russia would become a member of the Executive Council at some future date. It was suggested that non-payment of dues by the Russian Federation could be an obstacle.

7. Conference Programmes:

(a) 38th International Conference – Vancouver May/June 2004

Patrick Griggs reported on the proposed programme of the Conference which was very professionally prepared. The main topic will be transport law (the CMI/UNCITRAL Draft Instrument), general average (revision of the York-Antwerp Rules 1994), places of refuge for ships in distress, criminal acts on the high sea and marine

insurance. With respect to one of the key initially proposed topics, i.e. pollution of the marine environment (proposed revision to CLC and Fund Conventions), Patrick Griggs made reference to the e-mail of November 13, 2003 sent from Colin de la Rue to CMI International Working Group to review the CLC and Fund Conventions. It follows from this letter that it will not be clear before next February (the next meeting of the IOPC Third Intersessional Working Group – WGR.3) whether a revision of the Conventions is to take place so it remains uncertain for the time being to what extent the topic will be dealt with at the Vancouver Conference.

It has been agreed that the CMI IWG should continue with its work and Jean-Serge Rohart should talk to Colin de la Rue in this regard.

Furthermore, a draft program of the conference was discussed and agreed in its final form (see *Appendix A*).

(b) Possible Colloquium in South Africa

John Hare put forward the official invitation from the MLA of South Africa to host the next Colloquium in February 2006.

The invitation was accepted by the Executive Council but it was too early to discuss appropriate topics.

(c) Possible Conference in Greece

CMI has received an official invitation dated November 6, 2003 from Professor Anthony Antapassis, President of the Hellenic MLA, to host the 39th International Conference in Greece. The invitation was accepted by the Executive Council, suggesting that the Conference should take place in September 2007.

8. CMI Charitable Trust

Patrick Griggs informed the members of the Executive Council that after 2006 the annual income of Charitable Trust will have to be spent each year.

9. Publications

(a) Yearbooks, Newsletters and Website

Francesco Berlingieri reported that the majority of MLAs were in favour of Alternative III, i.e. the electronic format of the CMI Yearbook. It has been agreed that for the period preceding the Vancouver Conference, the whole Yearbook will be in the PDF format and 750 copies of Part II will be available in printed form to be distributed to 70 NMLAs and personally to the participants in Vancouver. It is necessary to explore the costs of

CD ROM. The situation will be reviewed thereafter.

The papers of the Bordeaux Colloquium will be available at the CMI Website shortly.

(b) CMI archives

Frank Wiswall reported on a contract for publishing a new edition of the Handbook on Maritime Conventions, which was negotiated with LexisNexis on very favourable terms for CMI. The contract was executed by President Patrick Griggs.

Francesco Berlingieri has kindly offered to provide photocopies of his own publications which are not available in the CMI archives. Frank Wiswall suggested that it would be perhaps convenient, as well as cheap to engage one of the universities to scan the publications.

10. Work in progress

(a) Transport Law: CMI/UNCITRAL Draft Instrument

At the beginning Patrick Griggs expressed his satisfaction that Alexander von Ziegler would continue to represent CMI at UNCITRAL with respect to the above Instrument.

Francesco Berlingieri and Karl-Johan Gombrii informed the members of the Executive Council about the meeting of the CMI International Subcommittee on Transport Law under the chairmanship of Stuart Beare (U.K.), which was held at 10:00 a.m. on Monday, November 17, 2003 at the offices of Clyde & Co. in London. The meeting was attended by some 25 participants from almost as many NMLAs.

The work was based on the revised Draft Instrument contained in Working Paper No. 32 prepared for the Vienna Meeting in October 2003. The tone of deliberations in Vienna was positive and fruitful. Although not many firm conclusions were reached, the meeting in Vienna nevertheless gave basis for a certain optimism regarding the further development of the Instrument. After some hesitation during previous sessions, the notion of a new door-to-door, “maritime plus” instrument seems now to have been accepted by the participants of the UNCITRAL Working Group in a very constructive manner.

The following core issues were discussed in London:

- (1) Scope of application,
- (2) Basis of the carriers liability,
- (3) The liability of performing parties,
- (4) Limitation of liability,
- (5) Freedom of contract and OLSAs (Ocean Liner Service Agreements).

Most of these core issues are well known, but the heading of the last one may require a few explanatory words. It covers *inter alia* the treatment in the Instrument of charterparties and similar agreements as well as so called service agreements or volume contracts in the liner trade. The basic question as to the OLSAs is whether the Instrument should apply to them in a non-mandatory fashion. As to charterparties and similar agreements the question is whether they should be excluded in a traditional way from the scope of application of the Instrument, or whether they should be included but on a non-mandatory basis. No conclusions were reached, but it was proposed that an unofficial round table conference be held on these issues before the next meeting of the Working Group. It has subsequently been decided to organise such a conference on February 20, 2004 in London in the offices of Ince & Co by invitation from the CMI and Ince & Co. Italy will play the role of "lead country" in this informal group, and Francesco Belingieri, who was heading the Italian delegation at the UNCITRAL meeting, has already started preparations, including the agenda of the meeting.

The discussion of core issues is expected to continue at the next session of the Working Group for two weeks in New York in May 2004. Finally, there was a discussion on the issue of jurisdiction, arbitration and choice of forum. The draft provisions thereon in the Instrument, which are based on the Hamburg Rules, have not been addressed by the UNCITRAL Working Group. One problem in that context is that the Working Group members who are also EU member states are for internal reasons prevented from taking a unilateral position on jurisdictional matters. In the ISC, however, whose participants had no such restrictions, there was a lively exchange. Most felt that there was a scope and need for improvement and it was also noted that the CMI might assist in that regard.

(b) UNESCO: Draft Convention on Underwater Cultural Heritage

No developments were reported.

(c) International Interests in Mobile Equipment

No developments were reported.

(d) Arrest Convention 1999

With respect to the 1999 Arrest Convention, Francesco Berlingieri said that regretfully the status of ratifications has remained the same: only 2 countries have reportedly ratified or acceded to the Convention. He wondered whether something should be done by IMO with a view to encourage

States to ratify. Perhaps the CMI could make some suggestion to IMO in this respect and offer its cooperation.

(e) Issues of Marine Insurance

John Hare (South Africa) reported on the meeting of the CMI International Working Group on Marine Insurance, which was held under his chairmanship at 10:00 a.m. on Monday, November 17, 2003 in London. Present were Thomas Reme and Sarah Derrington (by invitation) and Malcolm Clarke and John Hare.

The purpose of the meeting was to get together informally to review progress of the IWG to date, and to discuss the way forward to the Vancouver conference in June 2004.

It was confirmed that the four issues investigated by the group since the Oslo meeting in 1998 *viz* the requirement of good faith, the duty to disclose, alteration of risk and warranties, would remain the focus of the group's attention for Vancouver. At this stage, expanding into any other issues of marine insurance is not envisaged, although Prof. Trine-Lise Wilhelmsen's latest research paper expands her original paper (See Singapore I at 332) and deals with misconduct of the assured and identification. It was also confirmed that the group would aim to bring its work to an end at the Vancouver conference.

It was noted that the USA has revived its intention to prepare a marine insurance act for the USA and that Graydon Staring serves on the USA drafting committee, in which capacity he would report to the CMI.

The new International Hull Clauses released by the IUA on 5 Nov 2003 were tabled and discussed. Simon Beale reported that the process of the IUA in preparing these clauses was influenced by the work of the group, and by the call for reform in the London market - particularly in relation to warranties. The IUA has all but removed reference to the English 'warranty' from the hull clauses. The navigational limits clause is no longer referred to as a warranty, and the consequences of its breach are now spelled out - in a way similar to the change of class/management clauses. The effect of a breach of navigational limits clauses is now *suspension* of cover for the duration of the breach (even in relation to loss or damage not caused by the breach of warranty) but cover is restored on remedy of the breach.

Methods of reform were then discussed, including the feasibility of the group making any recommendations for legislative intervention (in the case of countries having no marine insurance act) or legislative reform in countries where legislation is already in place. It was recognised that members of the group should be able to have

differing views, either on the content of any presentations put to the Vancouver conference, or on the way forward. All however agreed that there was no prospect of preparing any formal international instrument to table at Vancouver.

The group proposed that for Vancouver John Hare will prepare a 'wrap-up' paper dealing with the work of the group, summarising the papers, and particularly the recommendations in relation to the four issues researched. He will circularise a draft of his wrap-up paper to the group in the new year for input. The paper will point to ways in which problem areas have been addressed (especially since the group began its activities – for example the IHC 2003), and may well still make recommendations for reform, legislative or otherwise. If the group is not unanimous on any recommendation, members would be at liberty to put up contrary views. This paper will not be ready for publication in the Vancouver 1 Yearbook (due date end of 2003) but will be ready for circulation to member associations well before the conference, and will be made available to registrants.

John Hare pointed out that the research papers are already complete. Although not yet on the CMI website, they will be put up on the site as soon as Francesco Berlingieri can organise the update with the site managers.

John Hare will look into the cost of putting all the group's research material, including the questionnaires and their replies and the papers, onto a searchable CD Rom for sale at the Vancouver conference.

(f) Criminal Acts Committed on Foreign Flag Ships

A report was received from Frank Wiswall and it was confirmed that this topic would be dealt with as a part of the Maritime Security topic at the Vancouver Conference.

(g) Implementation and Interpretation of International Conventions

Francesco Berlingieri reports that he regretfully has received very little co-operation, if any, by NMLAs. In fact almost none of them (one exception is Japan) has reported to him judgements in which the implementation and interpretation of maritime conventions is considered, so that he has to collect such judgements from other available sources, i.e. websites and maritime journals. This has, however, greatly limited the scope of the research. So far he has been able to collect and place on the website 138 judgements, out of which 5 relating to the implementation of conventions, 59 relating to the Hague-Visby Rules, 2 relating to the Hamburg

Rules, 6 relating to the CLC and Fund Conventions, 19 relating to the LLMC Convention, 40 relating to the Arrest Convention, 2 relating to the 1910 Salvage Convention and 4 relating to the 1989 Salvage Convention from Courts of Australia, Belgium, Canada, England, France, Greece, Israel, Italy, Japan, New Zealand, Portugal, Scotland, South Africa, Spain and the United States.

It is not possible for him to extend his own research to countries where there do not appear to be maritime journals or whose language he is unable to understand.

(b) General Average

Patrick Griggs briefly reported on the meeting of the CMI General Average International Sub-Committee chaired by Bent Nielsen (Denmark), which was held on Monday, November 17, 2003 at 10:00 a.m. at the offices of Ince & Co in London. The question is whether the number of changes of the 1994 York-Antwerp Rules the ISC is proposing warrants a new set of those Rules.

(i) Places of Refuge

The International Sub-Committee ("ISC") on Places of Refuge met under the Chairmanship of Stuart Hetherington (Australia) with Gregory Timagenis (Greece) acting as Deputy Chairman and Rapporteur, at 10:00 a.m. on Monday, November 17, 2003 at the offices of Thomas Miller in London.

The meeting was attended by representatives of National Maritime Law Associations (Australia and New Zealand, Belgium, Greece, Ireland, Italy, The Netherlands, Norway, Singapore, South Africa, Spain, Sweden, UK, USA), Inter-Governmental organisations and Governments (IMO, IOPC Fund) and of the industry (International Association of Ports and Harbours, International Chamber of Shipping, BIMCO, ITOPI, International Group of P&I Clubs, Members of the Executive Council of CMI also attended.

The ISC had before it a Discussion Paper prepared by Stuart Hetherington and three annexes containing extracts of existing relevant Conventions. The Chairman welcomed delegates and introduced the topic by providing a brief summary of the Discussion Paper and, in particular, how CMI became to be involved in the topic and what work had been done to date by CMI. He tabled the Discussion Paper and identified the three essential questions for the meeting to discuss as being:

- (1) Is there something for CMI to do to assist in this area?
- (2) If so, should CMI begin work on an

International Convention, a Protocol to an existing Convention, a model law, guidelines or some other Instrument?

- (3) If so, what should be the content of any such Instrument?

In summary, the answers which emerged from a day of discussion were that there is work that CMI could do, and there may be some areas in which a formal Instrument (whether Convention or Protocol) might be needed, and others in which, for example, a model law might be appropriate. In order to identify the content of any such Instrument, the meeting identified the eight issues which are listed in *Annex B* to these Minutes.

(j) Revision of CLC/Fund Conventions

There was no meeting of the International Working Group which has been set up under the chairmanship of Colin de la Rue (U.K.) to review the CLC/Fund Conventions, due to the reasons explained under Section 7 (a) of these Minutes.

(k) Bareboat Chartered Ships

José Maria Alcantara reported that he had received replies from 15 MLAs only.

(l) Collision Regulations

Frank Wiswall reported no developments in this field.

11. Management Reports

(a) Young CMI Prize Competition

John Hare will send to the members of the Executive Council Draft Guidelines regarding the Young CMI Prize Competition.

(b) National Associations – monitoring

It has been agreed that Johanne Gauthier and John Hare are going to prepare guidelines for monitoring the MLAs.

John Hare also informed the Councillors that Algeria became very active. He will also write to Mr. Erik Ogolo from Kenya, offering him a Provisional Membership under Article 3 (c) of the CMI Constitution.

As already mentioned under Section 2 (b) of these Minutes, Frank Wiswall informed the members of the Executive Council that he had met a person willing to found a new MLA of Morocco. He would be delighted to assist her in this endeavour. Henri Li has suggested that each MLA should designate a person who will be a contact person for CMI in all matters. Francesco Berlingieri will mention that in his letter regarding the CMI publications.

12. Various

(a) Planning Committee

It was suggested that members of the Planning Committee might think more creatively at a special meeting which should take place in Vancouver on Sunday, May 30, 2004 at 4:30 p.m. in the Conference hotel to put the finishing touches to a report which will be delivered on Friday, June 4, 2004 either at the Plenary Session in the morning or at the Assembly Meeting in the afternoon. In the meantime, the members cannot afford to be idle and should come up with their thoughts.

(b) List of those performing CMI management functions, members of International Working Groups, International Sub-Committees

Patrick Griggs went through the current list of the above functions and made various amendments.

(c) Liability of Classification Societies

The subject is coming active again but there are no reports at the moment.

The meeting of the Executive Council was closed at 4:00 p.m.

APPENDIX A

CMI CONFERENCE PROGRAMME

VANCOUVER 2004

Sunday

- 10:00 – 11:00 Organising Committee meeting
12:00 – 16:00 Executive Council meeting

Monday

- 09:30 – 10:30 Opening Ceremony
(classroom style)
10:30 – 11:00 **Coffee**
(split rooms into 2 classrooms)
11:00 – 12:30 “A” – Transport Law
“B” – General Average
12:30 – 14:00 **Lunch**
14:00 – 15:30 “A” – Transport Law
“B” – General Average
16:00 – 16:30 **Coffee/tea**
16:30 – 17:30 “A” – Transport Law
“B” – General Average

Tuesday

- 09:00 – 10:30 “A” – Transport Law
“B” – General Average
10:30-11:00 **Coffee**
11:00 – 12:30 “A” – Transport Law
“B” – General Average
12:30 – 14:00 **Lunch**
14:00 – 15:30 “A” – Transport Law
“C” – Maritime Security
(ISPS)
15:30 – 16:00 **Coffee/tea**
16:00 – 17:30 “A” – Transport Law
“C” – Maritime Security
(SUA)

Wednesday

- 09:00 – 10:30 “D” – Pollution of the Marine
Environment
(Seminar Session)
“E” – Marine Insurance
10:30 – 11:00 **Coffee**
11:00 - 12:00 “D” – Pollution of the Marine
Environment
“E” – Marine Insurance
p.m. Tour

Thursday

- 09:00 – 10:30 “F” – Places of Refuge
10:30 – 11:00 **Coffee**
11:00 – 12:30 “F” – Places of Refuge
12:30 – 14:00 **Lunch**
14:00 – 15:30 “F” – Places of Refuge
“C” – Maritime Security
(Criminal Offences on
the High Seas)
15:30 – 16:00 **Coffee/tea**
16:00 – 17:30 “F” – Places of Refuge
16:00 – 16:45 “G” – Athens Protocol –
Bareboat Chartered Vessels
16:45 – 17:30 “H” – Implementation of Salvage
Convention 1989

Friday

- 09:00 – 10:30 Plenary
(Room as for opening Ceremony)
10:30 – 11:00 **Coffee**
11:00 – 12:30 Plenary
12:30 – 14:00 **Lunch**
14:00 – 15:30 A.G.M.
15:30 – 16:00 **Coffee/tea**
16:00 – 17:30 A.G.M.
17:30 – 18:30 Executive Council meeting

APPENDIX B

1. **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?

2. **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?

3. **Designation of places of refuge:**

- (a) Should places of refuge be designated in advance or not?
- (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?
- (c) If places of refuge are determined in advance, should such places of refuge be publicized or not?

4. **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.

5. **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?
- (b) Will the State allowing entry to a vessel in distress have any liability?
- (c) Will the State denying a place of refuge to a distressed ship have any liability?

(d) What are the responsibilities of Salvors?

(Related issues: Conditions of liability, potential claimants, channeling of liability, limitation of liability, insurance, (general or specifically granted) immunity of State accepting a distressed ship vis-à-vis the ship).

6. **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?

7. **Penal Liability:**

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

8. **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: incentives for private docks and/or funding of private/public docks, size limitation of tankers).

* * *

In preparation for the Vancouver Conference of CMI, papers will be prepared and circulated to national associations on each of the eight issues, so that delegates to the CMI Conference in Vancouver can determine:

- (a) Which of the above issues, which are not covered by existing Conventions are appropriate to be covered by a Treaty, guidelines, code or model law?
- (b) For those issues which are appropriate for incorporation into a Treaty or Protocol, which Instrument would be most appropriate:
 - (i) A new Treaty?
 - (ii) Amendments to one or more existing Treaties or Protocols?
 - (iii) Which are the most appropriate Treaties from the point of view of subject matter and/or from the point of view of quick and effective methods of amendment?

REPORT OF THE SEVENTH MEETING OF THE INTERNATIONAL SUB-COMMITTEE ON ISSUES OF TRANSPORT LAW HELD IN LONDON ON 27th-28th FEBRUARY 2003

The International Sub-Committee on Issues of Transport Law held its seventh meeting in London at the offices of Clyde & Co. on 27th and 28th February 2003.

Representatives from ten national member associations and six industry organizations attended the meeting. (The attendance list is attached as Annex I.) Mr. Bartaletti of Argentina sent his regrets, explaining that he was unable to attend due to a conflict at the IMO. Mr. Alcántara sent his regrets and provided written comments on behalf of the Spanish Maritime Law Association.

Preliminary Matters

The International Sub-Committee first approved (1) the report of its sixth meeting (Madrid, 12-13 November 2001), which had been published as a draft report in the 2001 Yearbook at pages 305-356, and (2) the proposed agenda for the current meeting, which Mr. Beare had circulated in advance. Prior to the meeting, Mr. Beare had also circulated a list of documents that had been prepared in conjunction with the work of the United Nations Commission on International Trade Law (UNCITRAL), and which related to the work of the International Sub-Committee. All of these documents are available on the UNCITRAL website at www.uncitral.org.

Update from UNCITRAL

Mr. Sorieul, from the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), and the secretary of the UNCITRAL Working Group on Transport Law, reported to the International Sub-Committee on the current status of the project at UNCITRAL. The next meeting of the UNCITRAL Working Group will be held at United Nations Headquarters in New York from 24 March to 4 April 2003. The first week will be devoted to a continuation of the detailed “first reading” of the provisions of the Draft Instrument, which began at the first meeting in New York in April 2002 and continued at the Vienna meeting in September 2002. Mr. Sorieul hoped that it would be possible to finish the “first reading” at next month’s meeting, but recognized that this might not be possible. The Secretariat’s plan is to prepare a new draft of the Instrument after the first reading is completed.

The three working days during the second

week of next month’s meeting (i.e., 31 March to 2 April) will be devoted to a detailed discussion of the scope of the Draft Instrument. After next month’s meeting, the next meeting of the UNCITRAL Working Group has been tentatively scheduled (subject to approval by the Commission) for 6 to 17 Oct. 2003 in Vienna.

Mr. Sorieul explained that the Secretariat’s only interest was to produce a document that will be widely adopted. For this to happen, the text must be convincing on its own merit. The convention could not be imposed on anyone. He recognized that this would take time – maybe another two or three years, maybe even five years. Of course, if the project were taking too long, that might be a sign that it had failed and should be terminated.

The Draft Instrument’s provisions on electronic commerce may require the attention of a special group that will focus on that subject.

Mr. Sorieul concluded with the observation that the Secretariat’s background paper on the Draft Instrument’s scope of application (A/CN.9/WG.III/WP.29) was essentially a compilation of various contributions that had been furnished to the Secretariat. As the project progressed, he hoped that the Secretariat would be able to make a stronger intellectual contribution to the work. The Secretariat had no wish to impose its views on anyone, but it hoped to be able to assist in the task of building consensus.

Scope of Application of the Draft Instrument

Door-to-Door versus Port-to-Port Coverage

The International Sub-Committee proceeded to the principal subject on its agenda a discussion of the scope of the Draft Instrument, beginning with the question whether coverage should be on a door-to-door rather than a port-to-port basis. Most of the delegates saw no need for another port-to-port convention. Ultimately, all but one of the national Maritime Law Associations agreed that the Draft Instrument should facilitate door-to-door carriage (while still applying port-to-port, or even tackle-to-tackle, when the parties contract on a port-to-port or tackle-to-tackle basis). The carrier organizations also supported door-to-door coverage. FIATA, on the other hand, preferred a solution based on the UNCTAD-ICC Rules, but would not be inflexible regarding a door-to-door system.

The Draft Instrument's Limited Network Solution

Prof. van der Ziel opened the discussion of the network system with a brief explanation of the current text. Draft article 4.2, which gives effect to the conclusions reached at the 2001 Singapore Conference, was designed to create only a "limited" network system. Draft article 4.2.1 had been drafted as a conflict-of-convention provision in light of the English court of appeal decision in *Quantum Ltd. v. Plane Trucking Ltd.*, [2001] 2 Lloyd's Rep. 133, which adopted an expansive view of CMR coverage. Draft article 4.2.1 was also limited to liability issues in order to avoid such problems as transforming a negotiable instrument into a nonnegotiable instrument when the goods are transferred from a vessel to a truck.

A wide range of views was expressed on the limited network solution. Several delegates commented that the network system was inelegant, but that it was effective in practice. A few delegates questioned the correctness of the English *Quantum* decision, but there was no consensus on the appropriate response. Several delegates expressed the view that *Quantum* was inapposite because the Draft Instrument would operate on a different level. Under this view, CMR would operate between the contracting carrier and its European road carrier sub-contractors, but the Instrument could operate between the shipper and the contracting carrier under the door-to-door contract. Other delegates rejected this view. Yet others suggested that *Quantum* was distinguishable because in that case the Warsaw Convention (the alternative to CMR) had not been compulsorily applicable to the relevant leg.

A number of specific suggestions were made. One delegate mentioned that it might be appropriate to have an exception for situations in which a long road voyage was combined with a short sea voyage, such as crossing the English Channel. A few delegates suggested that the problem should be resolved by amending the other unimodal conventions (such as CMR), in conjunction with the preparation of the Draft Instrument, in order to coordinate coverage.

In the end, no firm conclusions were reached on this issue. But it was agreed that confusion has arisen because different people have used the term "network system" to mean different things, and that the CMI could help to clarify this confusion. The Draft Instrument's network system is a "limited" one. It applies only to liability issues, for example, and it recognizes other liability regimes only when their source is a mandatory international convention. Some use the term "network system" more broadly when they express support for the concept. The

Swedish proposal (A/CN.9/WG.III/WP.26) supports the network system, but would extend the coverage to include mandatory national law. Some would base the inland liability rule on the contracting carrier's rights against the performing inland carrier under their actual contract, while others would base it on the rights that the cargo owner would have had against the performing inland carrier under a hypothetical contract that they might have concluded if they had contracted directly for the inland carriage. A network system that gave effect to any national law and looked to actual contracts could have the effect of eliminating a carrier's liability completely (if the national law permitted freedom of contract).

Options Based on the Treatment of Performing Parties

The UNCITRAL Secretariat's background paper on the scope of application (A/CN.9/WG.III/WP.29) described three options (paragraphs 159-185). During the International Sub-Committee's discussion, none of these three options received the support of a clear majority. Although no one advocated the distinctive aspect of option 2 – using the Draft Instrument to preempt actions against performing parties that would otherwise be available under national law – several delegates expressed the view that the Draft Instrument should not create new causes of action against performing parties that did not currently exist under national law.

Several delegates spoke favorably of option 1. Prof. Berlingieri noted that it was similar in many ways to the Italian proposal (A/CN.9/WG.III/WP.25), which also called for the uniform coverage of the Instrument on a door-to-door basis as between the contracting parties, and in actions against the maritime performing parties. He suggested that it might be possible to permit cargo interests to proceed against performing carriers (on a network basis) by using some form of subrogation, whereby the cargo interests obtained the same rights against the carrier's subcontractors as the carrier could have asserted. This idea would need to be studied in more detail if the basic concept is accepted.

Some national Maritime Law Associations and all of the carrier interests supported a variation of option 2 in which the Instrument applied on a network basis and the only cause of action recognized under the Instrument was against the contracting carrier. Unlike option 2, these delegates recognized that direct actions against other performing parties would continue to be governed by national law.

There appeared to be a wide consensus for the concept of uniform coverage within the port-to-port area. Several delegates expressed the view that the final Instrument must be a door-to-door convention when appropriate, but that it must also be the unimodal convention for the maritime mode. Thus this Instrument should provide the governing rules in all actions involving maritime performing parties. There was also some dissent, at least at the margins. One delegate suggested, for example, that States should be allowed to opt out of coverage for pilots.

Mixed Contracts of Carriage and Forwarding

It was agreed that confusion has arisen because people have misunderstood the purpose and effect of draft article 4.3. The CMI should help to clarify that article 4.3.1 is not a mechanism for a carrier to escape its liability for the agreed carriage of the goods. It instead provides legitimate protection, which the carrier can already obtain under current law if it structures the transaction appropriately, and at the same time enables the carrier to accommodate the commercial needs of the cargo interests.

No one doubts that a carrier can agree to transport goods only as far as an ocean port, leaving the cargo owner with the responsibility for arranging transport from the port to the desired inland destination. If a cargo owner wishes to move goods from the Far East to Calgary, for example, it may contract with an ocean carrier to take them as far as Vancouver, and then contract with a road or rail carrier to transport them from Vancouver to Calgary. Similarly, current law would permit this same cargo owner to contract with the ocean carrier to move the goods to Vancouver, and then – in a separate contract – to retain the ocean carrier (acting as its agent) to arrange the inland carriage with the road or rail carrier.

For commercial reasons, many shippers prefer to structure the transaction in this way (with the ocean carrier acting as the principal for the ocean voyage and merely as an agent to arrange the inland carriage), but to have a single document evidencing both of the carrier's two independent obligations. Draft article 4.3.1 accommodates this desire and provides the legal framework to clarify the parties' rights and obligations.

The risk of structuring the transaction in this way, with a single document evidencing two independent obligations, is that an innocent third party might fail to recognize the separate obligations, and instead conclude that the carrier was responsible for the performance of both legs

of the journey. Paragraph 56 of the commentary accordingly stresses the importance of the parties' "express" agreement to this type of arrangement. Of course, it will still be necessary to decide exactly what should be required to satisfy this requirement, but it would clearly be something more than a standard-form clause on the back of a bill of lading.

Freedom of Contract and the Application of the Instrument to Charter Parties and Other Types of Contracts

Article 3.3.1 of the Draft Instrument recognizes the possibility that the traditional charter party exception of the Hague and Hague-Visby Rules might be extended to "contracts of affreightment, volume contracts, or similar agreements." It has also been proposed that these agreements between sophisticated parties (other than charter parties) might be dealt with under chapter 17, which addresses freedom of contract. Under this proposal, contracts of affreightment, volume contracts, and similar agreements would be subject to the Instrument as a default rule, but the parties would have the freedom – as between themselves – to derogate from the Instrument in whole or in part.

The majority of delegates who spoke on this issue favored the total exclusion of these agreements under chapter 3 rather than the freedom of contract solution under chapter 17. Mr. Larsen was particularly concerned by the possibility that addressing the issue under chapter 17 would gradually lead to the coverage of charter parties under the Instrument. There was also wide support for the proposition that any solution to this problem should not adversely affect third parties. Just as bills of lading issued under charter parties must comply with the Hague and Hague-Visby Rules, so third parties who acquire rights under transport documents should be protected by the new Instrument.

The Swedish Proposal

Several issues were raised by the Swedish proposal (A/CN.9/WG.III/WP.26). Perhaps the most prominent was the proposed extension of the network system to preserve mandatory national law (in addition to mandatory international conventions). A wide range of views was expressed. Some were concerned that such a recognition of national law would too greatly undermine uniformity. A possible solution to this concern would be to preserve mandatory national law that was directly based on a mandatory international convention. This would be adequate

to address the needs of European countries (such as Sweden) with domestic legislation modeled on CMR. Others, in contrast, suggested that political constraints might require the preservation of all national law, not just mandatory national law. In the United States, for example, railroads and truckers might well object to the mandatory coverage of the Instrument.

Several delegates felt that the Italian proposal (A/CN.9/WG.III/WP.25) would be adequate to protect the legitimate interests addressed by the Swedish proposal. The Italian proposal would give Swedish cargo claimants (or indeed any cargo claimants willing to come to Sweden to bring suit) the ability to recover from road carriers in Sweden on the basis of the Swedish CMR-style legislation. The only cargo claimants that would not be protected would be those that were unwilling to sue in Sweden, and it was hard to see what interest Sweden would have in protecting these foreign parties.

The Swedish proposal to calculate compensation based on the value of the goods at the place of receipt rather than the place of delivery was criticized by every delegate who addressed the issue.

Finally, the Swedish proposal advocated, in cases when the place of damage cannot be established, that the limitation amount should be

based on the highest amount that might govern. This proposal was also criticized by every delegate who addressed the issue.

Concluding Issues

The International Sub-Committee decided that it would probably be unnecessary to hold another meeting until after the fall UNCITRAL meeting in Vienna. It was thought that the next meeting should be held after a new draft was available, that this would not happen until the UNCITRAL Working Group had finished its "first reading" of the entire Draft Instrument, and that this was unlikely to happen at the New York meeting this spring. Mr. Beare noted that the Working Group would need to decide when it was appropriate to reconvene the International Sub-Committee, but added that these views would certainly be considered.

Mr. Beare reminded the International Sub-Committee that a CMI Colloquium would be held in Bordeaux in June, and that Issues of Transport Law was on the agenda for Thursday morning, 12 June, at 9:00 o'clock. He invited delegates to make suggestions as to the subjects that should be covered at this session.

Finally, Mr. Beare thanked Clyde & Co. for their hospitality and logistical support during the International Sub-Committee's deliberations.

ANNEX I

Attendance List

S.N. BEARE	Chairman of the International Sub-Committee	snb@richardsbutler.com
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REPORT OF THE EIGHTH MEETING OF THE INTERNATIONAL SUB-COMMITTEE ON ISSUES OF TRANSPORT LAW HELD IN LONDON ON 17th NOVEMBER 2003

The International Sub-Committee on Issues of Transport Law held its eighth meeting in London at the offices of Clyde & Co. on 17th November 2003.

Representatives from sixteen national member associations and four industry organizations attended the meeting. (The attendance list is attached as Annex I.)

Preliminary Matters

The International Sub-Committee first approved (1) the report of its seventh meeting (London, 27-28 February 2003), which Prof. Sturley had circulated prior to the meeting, and (2) the proposed agenda for the current meeting, which Mr. Beare had circulated in advance. The International Sub-Committee agreed that the report of this meeting should be in the same format as the report of its seventh meeting.

Chairman's Report on the 12th Session of UNCITRAL Working Group III

Mr. Beare reported that Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) had held its 12th session in Vienna the previous month, 6-17 October. He had attended the first week of this session and Mr. von Ziegler had attended the second week as representatives of the CMI. He noted that Prof. Berlingieri, Prof. van der Ziel, Mr. Gombrii, and Prof. Sturley had also attended the meeting as delegates of Italy, the Netherlands, Norway, and the United States, respectively.

The official report of the session will in due course be published on the UNCITRAL website <www.uncitral.org>.¹ The official documents prepared for the session were the revised Draft Instrument (A/CN.9/WG.III/WP.32), the proposals of the Netherlands (A/CN.9/WG.III/WP.33) and the United States (A/CN.9/WG.III/WP.34), and an addendum to A/CN.9/WG.III/WP.28. Italy and the Netherlands circulated an unofficial statement supporting paragraphs 5-7 of WP.34 and the United States circulated papers on Proportionate Fault and Cargo Value. A number of revised draft provisions were also circulated. These will be set out in UNCITRAL's report of the session.

On the proposal of Finland, supported by the Scandinavian countries, the Working Group agreed to discuss core issues rather than to debate WP.32 article by article. The following core issues were accordingly discussed:

1. Performing Parties. Strong support was expressed for the general principle in paragraphs 5-9 of WP.34. Non-maritime performing parties will thus be excluded from the liability regime. New definitions have been proposed. They will provide a basis for further discussion.
2. Non-localized damage — Article 18(2). Opinions were divided and article 18(2) will therefore remain in square brackets pending the consideration of article 18(1).
3. Scope of application — Article 1(a) (the definition of “contract of carriage”) and Article 2(1). It was agreed by most delegations that the scope of the Draft Instrument should be further 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. This had been a minority view in New York (A/CN.9/526 at para. 243) but it was reflected in variant C of Article 2(1). There was considerable debate as to how this general policy decision should be reflected in a re-draft to replace Variants A, B, and C. In the end, the Secretariat was instructed to prepare a revised draft. In general, the majority view appeared to be that the carrier must undertake in the contract of carriage to carry the goods by sea from a place in one state to a place in another state.
4. Freedom of contract and Ocean Liner Service Agreements (“OLSAs”) — Article 2(3) and paragraphs 18-29 of WP.34. No firm conclusions were reached, although some sympathy was clearly expressed for the U.S. proposal. Two days will be set aside for continuing the debate at the Working Group's 13th session in New York in May 2004. Meanwhile, it is proposed that a seminar be held on these issues in late February 2004.
5. Basis of the carrier's liability — Article 14. This topic was discussed at length and a number of re-drafts to replace Variants A, B, and C were considered. Mr. Beare did not attempt to summarize the discussion, but referred the International Sub-Committee to the official report. The UNCITRAL Secretariat will prepare a revised draft. Further discussion has been adjourned until the 14th session (which is tentatively scheduled to be held in Vienna 29 November to 10 December 2004) to allow a full year for consultation.
6. Seaworthiness — Article 13(1). The Working Group decided to remove all the square brackets. This means that the seaworthiness obligation will be a continuing one, applying throughout the voyage.
7. Sacrifice of goods — Article 13(2). This

¹ The official report of the session has now been published as A/CN.9/544 (16 December 2003).

provision will be retained in square brackets.

8. Liability of performing parties — Article 15. Broad support was expressed for Variant A of article 15(1) and for the substance of article 15(2), which should be restricted to maritime performing parties. Article 15(6) should also be restricted to maritime performing parties. Broad support was also expressed for the substance of article 15(3), the structure of which should be reflected in article 15(4). Time was called before article 15(7) could be discussed. With the possible exception of article 15(7), further debate on article 15 has been adjourned until the 14th session.

The discussion of core issues is expected to continue in New York in May 2004. It should include the remaining issues relating to the carrier's obligations (articles 10, 11, and 12) and liabilities (articles 16-24), the shipper's obligations (chapter 7), forum selection, jurisdiction, and arbitration (chapters 15 and 16 and paragraphs 30-35 of WP.34), delivery (chapter 10), and rights of control (chapter 11). This agenda sounds ambitious, particularly as two days will be allocated to freedom of contract. Past experience, however, indicates that such agendas are far from fixed.

At the conclusion of his report, Mr. Beare invited Mr. Sorieul to add anything that he thought might be relevant. In response to questions, Mr. Sorieul explained that there was no plan to take two days from a regular session to discuss e-commerce (as some had proposed). He suggested that it would be preferable to have an Experts Group meeting on the subject between Working Group sessions. He added that it was unlikely that there would be a joint session for Working Groups III and IV in the near future. He noted that Working Group IV has already proposed articles 16 & 17 of the Model Law. Moreover, Working Group IV does not currently have transport law specialists but rather electronic commerce specialists. The transport law specialists with relevant expertise were already active in Working Group III. Thus there seemed to be little point in involving Working Group IV in this project at this time.

February 2004 Seminar on Freedom of Contract

Mr. Beare reiterated his comment that the UNCITRAL Working Group had agreed that it would be helpful to hold a seminar to address freedom of contract and Ocean Liner Service Agreements ("OLSAs") in late February 2004. He invited Prof. Berlingieri to discuss this seminar.

Prof. Berlingieri explained that the idea for this seminar arose in conjunction with the bracketed language in article 2(3) and the U.S. OLSA proposal. Both relate to the more general question of freedom of contract. In view of the support for the seminar that had been expressed in Vienna, the

Italian government had agreed to support the proposal of Prof. Berlingieri who will therefore act as host and issue invitations. The meeting would be held on 20th February 2004 in London at the offices of Ince & Co. Although supported by UNCITRAL, it would be a private initiative (meaning that attendees would come as private individuals, not necessarily as government delegates). Prof. Berlingieri promised that invitations would go out soon, although the agenda would be distributed sometime later. All delegates and observers will be invited, but he suggested that it would be even more important to have industry representatives. Speaking personally, he felt the meeting should also be open to national maritime law associations whose governments were not represented at UNCITRAL, but he would need to check with Rome on this.

Mr. Sorieul added that the UNCITRAL Secretariat would be happy to cooperate in any way possible (although they could not take the initiative in planning the seminar because it would not be an official UNCITRAL meeting).

A general discussion followed on topics that might be included in the seminar. Mr. Larsen, for example, suggested that charter parties should not be discussed. The rules governing charter parties were a commercial matter, not something that should be addressed in an international instrument. Several others disagreed, saying that this seminar would be an excellent opportunity to discuss the extent to which charter parties should be in or out of the new Instrument.

Article 2(1) — Scope of Application

Mr. Beare opened a discussion of some of the provisions of the revised Draft Instrument (WP.32) with a more detailed explanation of article 2(1), which addressed the scope of application. He described how article 2(1) of WP.32 had three variants, labeled A, B & C. Variant A follows the CMI draft. Under this version, international carriage is covered without regard to the internationality of any one leg. So long as the overall carriage is international, even the sea leg could be domestic. Variant B follows the Swedish proposal to address a possible conflict of conventions. The Working Group generally agreed that this issue should be addressed elsewhere. Finally, Variant C follows a minority view expressed during the New York session that the sea leg must be international. In Vienna, Working Group III appeared to agree that the sea leg must be international. But it was still unclear how the new provision should be drafted. A small drafting group prepared a new draft, combining variants A & C. In Vienna, Mr. Beare had also raised the issue of "optional contracts," under which the carriage could be performed by sea or land. He suggested that it would be unwise to

restrict the convention unduly. At the end of the discussion on this issue in Vienna, the Secretariat was instructed to prepare a new draft (which might be different from any of the versions we have yet seen).

Mr. Diamond had prepared a paper expressing his personal views, and he described his approach to the scope of application issue. He noted the conflict-of-convention problem and suggested that no successful solution is possible. He proposed a “maritime plus” convention in order to reduce the conflict. This would mean a maritime convention with inland extensions. Defining the scope would still be a problem. The Hague and Hague-Visby Rules’ “tackle-to-tackle” approach is outdated, while the Hamburg Rules approach is vague. On the “optional contracts” issue, he agreed that the new convention should apply whenever the goods are in fact carried by sea. For inland carriage, the nature of the contract is key. He endorsed the U.S. proposal’s treatment of maritime performing parties and non-maritime performing parties, and its treatment of subcontractors operating in a unimodal context. He would extend the network exception to minimize conflicts, but prefers not to include “national law” as part of the network exception.

A general discussion on the issue followed. Several delegates expressed the strong view that the Instrument must provide door-to-door coverage. If it applied only on a port-to-port basis, it would be better to retain the Hague-Visby Rules.

There was sharp disagreement on whether the Instrument should ever look to what actually happens, or whether coverage should be based solely on the type of contract. Some argued that a contractual approach was necessary; otherwise it would not be known what rules applied until after the contract had been performed. Others argued that it would be absurd to ignore what actually happened when goods are in fact carried by sea but the contract did not specify any mode of transportation. One solution to the theoretical difficulty was suggested: Although coverage could be based on the type of contract, if the contract was unclear on its face whether carriage by sea was contemplated then it would be permissible to consider how the contract was in fact performed in order to ascertain the parties’ presumed intent at the time of the contract. This would avoid the absurdity of allowing the parties to avoid the mandatory application of the Instrument simply by failing to specify that goods would be carried by sea.

In the end, the discussion was inconclusive. There was strong support for the view that the Instrument should cover at least the sea leg when the cargo is in fact carried partially by sea, even if

the full multimodal shipment might not be covered. There was also strong support for the view that the Instrument should apply on a door-to-door basis when the intent to carry the goods at least partially by sea could be implied in the door-to-door contract, even if sea carriage was not mentioned explicitly. In addition, a number of practical problems were raised. For example, it will sometimes be clear that a sea leg must be included but it will not be clear whether that sea leg will be international or domestic. A contract to carry a container from Vancouver to Honolulu could go directly from Vancouver to Honolulu by sea (thus attracting the Instrument’s coverage) or it could go from Vancouver to Seattle by road and then from Seattle to Honolulu by sea (thus lacking an international sea leg).

Jurisdiction and Arbitration

Mr. Beare opened the discussion of jurisdiction clauses with the suggestion that a discussion of arbitration clauses should follow. He observed that chapter 15 of WP.32 has two variants. Variant A follows the Hamburg Rules; variant B follows Prof. Berlingieri’s final report for the CMI’s International Sub-Committee on Uniformity.

Several questions were raised about whether either approach was appropriate. It was even questioned whether the Instrument should address this subject at all. In response, Prof. Sturley suggested that the Hamburg Rules approach – in either its original form (variant A) or a modified form (variant B) – was a compromise between two extreme positions under current law. When forum selection clauses in bills of lading are not enforceable, the cargo claimant has an almost unfettered choice of forum. A carrier may be sued in any court that will take jurisdiction over the case, whether or not it has any connection with the transaction at issue. When forum selection clauses in bills of lading are enforceable, on the other hand, the *carrier* has an almost unfettered choice of forum. The carrier may be sued only in the court that it has specified in its own bill of lading. The Hamburg Rules approach gives the cargo claimant a choice of reasonable forums that have a connection with the transaction at issue, but still protects the carrier by limiting the cargo claimant’s choice to that list of reasonable forums.

Several delegates expressed views on the list of acceptable forums. Mr. De Orchis, for example, felt that it was good to include the places of receipt and delivery on the list, but argued that it was more important to recognize the ports of loading and discharge. They will often be where the witnesses are located.

Several delegates recognized the need for mandatory rules to protect cargo interests, particularly third-party consignees, from

unreasonable forum selection clauses in many cases, but argued that sophisticated parties with relatively equal bargaining power should have freedom of contract. These delegates generally supported the U.S. proposal on the treatment of forum selection clauses under OLSAs. Other delegates argued that third parties should always be protected by mandatory rules.

Several delegates raised important questions that need to be considered as the work progresses. For example, how should performing parties be treated? What if a stevedore damages the cargo in a port of transshipment, perhaps in a state that has not ratified the Instrument. Would the Instrument's terms apply in an action against that stevedore? Moreover, it was important to consider how this chapter would relate to the doctrine of *forum non conveniens*. Finally, several delegates recalled the aspect of the U.S. proposal that addressed declaratory judgment actions. Should the mandatory rules protect a carrier who seeks a declaration of non-liability (thus initiating an action as the "plaintiff")? Those delegates who addressed this subject agreed that the mandatory rules should protect cargo claimants, not "plaintiffs" more broadly.

There was much less support for including a Hamburg-like approach for arbitration clauses. Several delegates felt that an agreement to arbitrate in a particular jurisdiction involved an agreement for a particular type of arbitration. It did not imply consent to arbitrate in another forum – even one that was closely connected to the transaction at issue – that would have completely different rules, and thus a different type of arbitration. Some delegates observed that if arbitration clauses were not treated under a Hamburg-like approach in the new Instrument, then it would be necessary to give cargo claimants the option to avoid arbitration entirely. Otherwise, arbitration clauses could become a means of indirectly accomplishing the goals of impermissible forum selection clauses.

The Vancouver Conference

Mr. Beare reminded delegates that the CMI's next conference would be in Vancouver, 30 May – 4 June, 2004, and that Issues of Transport Law may have two days on the agenda. He announced that Alfred Popp had agreed to chair our sessions in Vancouver. He invited delegates to express ideas for the topics that should be included on the Vancouver agenda.

Articles 14 & 15 were mentioned. Some thought that this subject might be too complicated to discuss in a large group. Others thought that it would be strange not to address these provisions, as UNCITRAL had allowed a full year for consultation on the subject. Article 13 might also be included in this discussion.

Another delegate suggested jurisdiction and arbitration. Some wondered if this would be fruitful in the absence of a new draft. Others thought that the CMI should provide an opportunity to address this subject because many European countries might be constrained not to participate as government representatives in a discussion at UNCITRAL.

Other subjects that were mentioned included transport documents, rights of suit, rights of transfer and control, delivery, and "any issue on which the draft differs from the Hague and Hague-Visby Rules."

Other Topics

Mr. Beare invited delegates to raise whatever other issues they were particularly anxious to discuss.

During a short discussion of hazardous cargo and shippers' liability, Prof. van der Ziel explained that the shipper would be strictly liable under its obligation to furnish information. There would be fault-based liability (with a reversed burden of proof) for damage caused by shipper's cargo. He concluded that the practical effect would not be that different from the Hague-Visby Rules.

There was no agreement on how to define the word "dangerous" in this context. Some argued that even milk could be dangerous if the carrier spilled enough of it. Others felt that an open-ended definition would simply lead to expensive litigation. They argued that the special treatment for "dangerous cargo" should be limited to those cargoes that have specifically been identified as "dangerous cargo" by inclusion on a recognized list.

Some delegates objected to the treatment of shippers' misstatement under the final proposal in WP.34. They described the proposal as punitive, and argued that there must be a causation requirement to justify the harsh treatment.

Mr. Kragic suggested that the clause in article 15(4) making a performing party responsible for the acts and omissions of any person to whom it has delegated performance of the contract should be deleted because it was inconsistent with the narrowed definition of "performing party." He also argued that the word "negotiable" should be deleted in article 2(4).

Concluding Issues

The International Sub-Committee decided that it would probably be unnecessary to meet again as an International Sub-Committee prior to the Vancouver conference.

In conclusion, Mr. Beare thanked Clyde & Co. for their hospitality and logistical support during the International Sub-Committee's deliberations.

ANNEX I

Attendance List

S.N. BEARE	Chairman of the International Sub-Committee	snb@richardsbutler.com
KARL-JOHAN GOMBRII	Norway; Vice-Chairman of the International Sub-Committee	kjgombrii@nordisk.no
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SARA BURGESS	International Group of P&I Clubs	sara.burgess@gard.no
RENAUD SORIEUL	UNCITRAL Secretariat	renaud.sorieul@uncitral.org

NEWS FROM UNCITRAL

DRAFT INSTRUMENT ON THE CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA, TWELFTH SESSION OF THE WORKING GROUP

The twelfth session of the Working Group III on Transport Law was held in Vienna from 6 to 17 October.

A preliminary matter discussed was the title of the instrument. It was agreed that the current title – “Draft Instrument on the Carriage of Goods [wholly or partly] by Sea” – should be provisionally retained.

Following the suggestion of the Scandinavian countries, the Working Group decided to proceed with the discussions by grouping matters into core issues and agreed that a first group should include the definition of contract of carriage and the scope of application of the Instrument, the liability regime applicable to the carrier and that applicable to maritime performing parties.

Definition of contract of carriage and scope of application.

It was decided to consider jointly draft articles 1(a) and 2(1).

The most relevant aspect of the discussion consisted in the so-called “maritime-plus” aspect of the draft instrument that was already implied in the requirement that the carriage should include a sea leg. It was further suggested that the internationality aspect be related to the sea leg.

A new draft of the definition of contract of carriage was prepared, on the request of the Working Group, by a small drafting group and, after discussion, amended as follows:

(a)[(i)] Contract of carriage means a contract under which a carrier against payment of freight undertakes to carry goods by sea from a place [port] in one state to a place [port] in another state; such contract may also include an undertaking by such carrier to carry the goods by other modes prior to or after the carriage by sea.

[(ii)] A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage under paragraph (i), provided that the goods are actually carried by sea.]”

After discussion, it was decided to keep subparagraph (i) in article 1(a) and to relocate subparagraph (ii) always in square brackets, outside the definition. The Secretariat was then requested to prepare a revised draft in which the various views should be reflected.

Article 2(1), of which there appeared three variants in WP.32, was redrafted by the small drafting group on the basis of Variant A, which had received greater support, but with the exclusion of the place where the contract is made as one of the connecting factors.

The Working Group then agreed by a considerable majority to include within the scope of the Instrument only maritime performing parties. This entailed the need for new definitions of both maritime and non-maritime performing parties. As regards the first of such definitions it was accepted that a geographical approach should be adopted and the following definition was proposed by one delegation:

“(f) ‘Maritime performing party’ means a performing party who performs any of the carrier’s responsibilities during the period between the arrival of the goods at the port of loading [or, in case of trans-shipment, at the first port of loading] and their departure from the port of discharge [or final port of discharge as the case may be]. The performing parties that perform any of the carrier’s responsibilities in land during the period between the departure of the goods from a port and their arrival at another port of loading shall be deemed not to be maritime performing parties.”

That delegation drew the attention of the Working Group to the fact that the situation where an inland transportation takes place between two sea legs should also be covered. The definition of performing party in general should be maintained because the carrier is responsible for the acts and omissions of any performing party, whether maritime or not.

Still in respect of the scope of application, in connection with the traditional exclusion of charter parties contained in article 2(3), where the exclusion is tentatively extended to “contracts of affreightment, volume contracts or similar agreements”, and with the U.S. proposal that ocean liner service agreements should be covered, but on a non-mandatory basis, the general problem of freedom of contract was discussed. The discussion is thus summarised in the Report of the Secretariat (document A/CN.9/544, § 77):

77. There was broad agreement in the Working Group that certain types of contracts either should not be covered by the draft instrument at all, or should be covered on a non-mandatory, default basis. Such contracts

would include those that, in practice, were the subject of extensive negotiation between shippers and carriers, as opposed to transport contracts that did not require (or where commercial practices did not allow for) the same level of variation to meet individual situations. The latter generally took the form of contracts of adhesion, in the context of which parties might need the protection of mandatory law.

At the end of the debate the proposal was made by the Italian delegation to hold a round table on the subject of freedom of contract. The round table will take place in London on 20 February 2004, in the offices of Ince & Co., 11 Byward Street, London EC3R 5EN. The letter of invitation and the attached preliminary list of issues for consideration at the round table are annexed hereto.

Liability regime applicable to the carrier and to the maritime performing parties.

Obligations of the carrier (Art. 13)

The issue of whether the obligation of the carrier to exercise due diligence to make the ship

seaworthy, to properly man, equip and supply the ship and to make the holds fit and safe for the reception, carriage and preservation of the goods should be a continuing obligation was again discussed and the Working Group agreed that it should.

Liability of the carrier

Strong support was expressed for the view that the nature of the liability in draft article 14 should be based on presumed fault. The Working Group was also in agreement with the approach that the carrier should be responsible for unexplained losses occurring during its period of responsibility.

With respect to the three variants of article 14 appearing in WP.32, after strong support had been expressed for variant A, the Working Group requested a drafting group to prepare a redraft of that article. Two redrafts were prepared.¹

The discussions of the Working Group on such redrafts is summarized as follows in the Report of the Secretariat (§ 103):

103. There was general agreement in the Working Group that, like the first redraft of

¹ The second of such redrafts is quoted below.

"1. The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the [shipper] proves that

"(a) The loss, damage, or delay; or

"(b) The occurrence that caused [or contributed to] the loss, damage, or delay "took place during the period of the carrier's responsibility as defined in chapter 3, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person mentioned in article [15(3)] caused [or contributed to] the loss, damage, or delay.

"2. [The carrier is not liable under paragraph 1 if [and to the extent] it proves that the loss, damage, or delay was caused by] [It is presumed that neither the carrier's fault nor that of any person mentioned in article [15(3)] has caused the loss, damage, or delay, if [and to the extent] the carrier proves that the loss, damage, or delay was caused by] one of the following events:

"(a) [Fire]; or

"(b) ...; or

"... [Insert all the remaining items to be included on the lists here.]

"unless [and to the extent] the [shipper] proves that

"(i) The fault of the carrier or a person mentioned in article [15(3)] caused [or contributed to] the event on which the carrier relies under this subparagraph; or

"(ii) Any event other than those listed in this subparagraph contributed to the loss, damage or delay.

"3. To the extent that the [shipper] proves [that there was] [that the loss, damage, or delay was caused by],

"(i) The unseaworthiness of the ship;

"(ii) The improper manning, equipping, and supplying of the ship; or

"(iii) The fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for the reception, carriage, and preservation of the goods,

"then the carrier is liable under paragraph 1 unless it proves that,

"(a) It complied with its obligation to exercise due diligence as required under article 13(1). [; or

"(b) The loss, damage or delay was not caused by any of the facts mentioned in (i), (ii) and (iii) above.]

"[4. In case of concurring causes that each have caused part of the loss, damage or delay, then the court shall determine the amount for which the carrier is liable in proportion to the extent to which the cause attributable to its fault has contributed to the loss, damage or delay.] [The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis.]"

article 14, no firm decision could be made with respect to this second redraft before further consideration and consultations had taken place. However, a widely-shared view was that this second redraft represented an improvement on previous drafts, and that it would be appropriate for the Working Group to use it as a basis for future work on article 14. One drafting observation made with respect to the redrafted article as a whole was that the phrase “shall be liable” and “is liable” were both used, and that consistency should be sought in this regard.

The discussion then focused on the question whether the excepted perils should constitute exonerations or presumptions of absence of liability, and terminated when one delegation made a compromise proposal (the third proposal) which was well received. After various drafting improvements, the wording of paragraph 2 of such third redraft was as follows:

2. *[Without prejudice to paragraph 3] If [and to the extent] the carrier, alternatively to proving the absence of fault as provided in paragraph 1 proves that the loss, damage or delay was caused by one of the following events:*

(i)

then the carrier shall be liable for such loss, damage or delay if [and to the extent] the claimant proves that:

(i) *the fault of the carrier or of a person mentioned in article 14bis caused or contributed to the event on which the carrier relies under this paragraph; or*

(ii) *an event other than those listed in this paragraph on which the carrier relies contributed to the loss, damage or delay; in this case liability is to be assessed in accordance with paragraph 1.*

The conclusion of the discussion is thus summarized in the Report of the Secretariat:

110. As with the previous drafts of article 14, there was general agreement in the Working Group that, while no firm decision could be made before further consideration and consultations had taken place, the third

proposal represented a strong basis for bridging the gap between the preferred approaches to take with respect to the list of “excepted perils”. Unanimous support was expressed that the third redraft (in respect of paragraphs 2 and 4) and the second redraft (in respect of the remainder of draft article 14) should form the basis for future work on article 14(2), subject to those drafting suggestions indicated below.

As regards paragraph 3 of the second redraft, at the end of the discussion it was decided to provisionally leave the text unaltered, with such two alternatives: one according to which the provisions of the sub-paragraph were triggered by the simple proof by the claimant that the vessel was unseaworthy, the other according to which the claimant has the burden of proving that the unseaworthiness had caused the loss or damage. Finally, the text of the third redraft of paragraph 4, covering the case of loss or damage due to concurring causes, was the following (the last sentence in italics was added subsequently):

4. *In case the fault of the carrier or of a person mentioned in article 14bis has contributed to the loss, damage or delay together with concurring causes for which the carrier is not liable, the amount for which the carrier is liable, without prejudice to its right to limit liability as provided by article 18, shall be determined [by the court] in proportion to the extent to which the loss, damage or delay is attributable to its fault. The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis.*

Responsibility of the maritime performing parties

It was agreed that paragraph 3, relating to the responsibility of the carrier for the acts and omissions of any performing party, whether maritime or not, should be moved to a separate article, provisionally numbered 14bis.

It was also suggested that paragraph 4, regulating the responsibility of maritime performing parties for the acts or omissions of their employees, sub-contractors and agents, should mirror the present paragraph 3.

FRANCESCO BERLINGIERI

LETTER OF INVITATION

Genoa, 9th December 2003

Dear Sir,

Round Table on Freedom of Contract - London, 20 February 2004

During the last session of the UNCITRAL Working Group on Transport Law held in Vienna from 6 to 17 October 2003, the delegation of Italy suggested that a seminar/round table should be held with a view to thoroughly considering the problem of freedom of contract in relation to the preparation of a draft instrument on the carriage of goods wholly or partly by sea. In particular, it was suggested that the issue of freedom of contract should be examined in connection with the problem of excluding from the scope of application of the Instrument charter parties and other contracts, such as contracts of affreightment, tonnage agreements and similar agreements. In addition, it was proposed that there should be consideration of the inclusion within the scope of the Instrument of ocean liner service agreements, in respect of which, however, the Instrument should not be mandatory.

In view of such suggestions having been very favourably received by the Working Group, I deemed it convenient, after some preliminary consultation, to take the initiative of organizing the aforesaid Round Table. Such initiative has received the full support of the Italian Ministry of Foreign Affairs.

The Comité Maritime International kindly offered its assistance and obtained the availability of the Seminar Room of the law firm Ince & Co. in London on 20 February 2004.

The round table will therefore take place in London, on 20th February 2004, in the Seminar Room of Ince & Co. at Knollys House, 11 Byward Street, London EC3R 5EN. The meeting will start at 10.00 A.M. and will continue until about 05.00 P.M. on that day.

While this Round Table is being held with the support and encouragement of UNCITRAL and with a view to furthering the work of the Working Group on transport law, it is of an informal nature. As such, the Round Table will be conducted in English only, without interpretation, and any documents will be available only in their original language. Further, there will be no official UNCITRAL report prepared of the proceedings.

All delegates and observers who were present at the various sessions of the Working Group are cordially invited to participate in the Round Table and to contribute to the study of the problem of freedom of contract. It is hoped that the exchange of views that will take place may facilitate reaching a consensus on that problem during the forthcoming New York session of the UNCITRAL Working Group from 3 to 14 May 2004.

A tentative list of issues that may be considered at the meeting in London is annexed hereto.

I shall greatly appreciate if all those who wish to attend the Round Table would kindly inform me, possibly by 15 January 2004, at the following address:

Francesco Berlingieri
10, Via Roma
16121 Genoa, Italy
Fax no.: +39 010 594805
E-mail: slb@dirmar.it

Kind regards,
FRANCESCO BERLINGIERI

ROUND TABLE ON FREEDOM OF CONTRACT

List of issues on which views may be exchanged

I

- a) Whether the contract evidenced by a charter party is a contract of carriage, as defined by art. 1(a) of the Draft Instrument.
- b) Whether the documents evidencing contracts of affreightment, volume contracts, slot agreements and similar contracts may be qualified as charter parties or not.
- c) If bareboat charter parties and deep sea towage contracts may fall under the general definition of charter party.
- d) Whether volume contracts and similar contracts may be clearly distinguished from Ocean Liner Service Agreements (OLSA) as described in paragraph 29 of WP.34.

II

- a) Advantages and disadvantages, from both a legal and commercial standpoint, of including within the scope of the Draft Instrument all types of contracts of carriage, irrespective of the type of document by which they are evidenced, and irrespective of whether the carriage is performed by a tramp ship or by a liner, but granting freedom of contract in respect of contracts that are not contracts of adhesion, i.e. of contracts freely negotiated, including OLSAs.
- b) In case certain types of contracts (i.e. charter parties) were excluded from the scope of the Draft Instrument, whether it would be possible and useful to define with sufficient clarity the characteristics of such contracts.
- c) In case all types of contracts were included within the scope of the Draft Instrument and freedom of contract were granted in respect of contracts freely negotiated,
 - (i) whether it would be possible to provide a satisfactory definition of such contracts and whether in relation thereto, it would be useful to utilize (and to define) terms such as “liner service”, “breakbulk service” and “container service”;
 - (ii) what would be the possible practical difficulties of adopting an “opt out” system for charter parties, based along the lines of art. 6 of the Vienna Sales Convention and whether such difficulties, if any, would exist also in respect of other types of contract of carriage evidenced by documents that do not fall under the notion of charter party;
 - (iii) whether the rule presently set out in article 2(4) should be extended to all contracts in respect of which freedom of contract would be granted;
 - (iv) whether and to which extent freedom of contract should be granted in respect of the obligations of the shipper.