

# IMLI *e*-News

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## THE IMLI 30TH ANNIVERSARY COMMEMORATIVE LECTURE DELIVERED BY PRESIDENT EMERITUS OF CMI

Dr. Patrick Griggs (President Emeritus, the Comité Maritime International (CMI)) visited the IMO International Maritime Law Institute (IMLI) between 8 and 10 April and delivered the Institute's 30<sup>th</sup> Anniversary Commemorative Lecture on 10 April 2019.



*Dr. Patrick Griggs (President Emeritus, the Comité Maritime International (CMI)) delivering the IMLI 30<sup>th</sup> Anniversary Commemorative Lecture*

Dr. Griggs began his presentation by looking at the life and profession of Professor Francesco Berlingieri whom he described as the third generation of an Italian family of distinguished maritime lawyers later to become the President of CMI in 1976 until 1991. He said that Professor Berlingieri was Titulary Professor of Maritime Law at Genoa University and, taught at IMLI for many years and has published several books including *Berlingieri on Arrest of Ships*.



*(R-L) Professor David Attard (Director, IMLI), Captain Joseph Zerafa (Maritime Safety Consultant) and Dr. Ann Fenech (Vice-President, CMI) among the audience*

Dr. Griggs gave an account of the initial efforts at the codification of international law which culminated in the establishment of the CMI in 1897 with its Headquarters in Antwerp. The CMI is described in its constitution as "...a non-governmental not-for-profit international organisation ...the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects."



*A cross-section of the audience*

On how CMI partner with IMO, Dr. Griggs said that through its national maritime law associations, CMI work together with IMO Secretariat to encourage States to ratify and implement relevant international conventions.

Dr. Griggs also explained the vital importance of IMLI, through its training programmes, in the constant search for uniformity of international maritime law.

This commemorative lecture is part of a series of events marking IMLI's 30 years in serving the rule of international maritime law and will culminate with an event at the IMO Headquarters on 25 June 2019.

**The full text of the Paper is attached for our esteemed readers.**

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## Unification of Maritime Law – the CMI, IMO and IMLI

This paper celebrates the 30<sup>th</sup> Anniversary of IMLI and is also offered as a tribute to Professor Francesco Berlingieri who died on March 6<sup>th</sup> 2018 at the age of 96 in Genoa. Francesco was the third generation of an Italian family of distinguished maritime lawyers all of whom were intimately involved in the work of CMI. Francesco attended his first CMI Conference in Rijeka in 1959 and became President in 1976 a post which he held until 1991. He was Titulary Professor of Maritime Law at Genoa University from 1954 and published several books including *Berlingieri on Arrest of Ships* –still the best book on the subject. His teaching skills were appreciated by generations of students not only at Genoa University but also here at IMLI where he continued to teach until recently. His importance to the world of maritime law in general and the CMI, in particular, will be explained later in my paper.

A quick look at the current IMLI LLM Programme reveals that the law in relation to almost every subject taught here is based on an international convention, a code of conduct or a set of international guidelines. There is nothing “modern” about the idea of unifying maritime law though early attempts such as the Lex Rhodia, the Laws of Oleron (1160) and Wisby (?1300) tended to be regional rather than international. The purpose of this talk is not to trace the complete history of efforts to harmonise international maritime law but to look at what has happened in the 20<sup>th</sup> and 21<sup>st</sup> centuries. In particular, I want to look at the roles played by CMI and IMO and the increasingly important role which IMLI is playing.

In a perfect world, shipowners would wish to find that when their ships, in the course of trading, pass from one jurisdiction to another the law in each jurisdiction is the same. It is that “perfect world” and the extent to which it has been possible to create it that I wish to talk.

In 1873 (or thereabouts) the International Law Association came into existence. Its stated aim was “...the study, clarification and development of international law, both public and private and the furtherance of international understanding and respect for international law.” The ILA is still in existence with its headquarters in London and with branches in 62 countries.

At some time in the 1880s, a group of Belgian politicians and lawyers got together to discuss and put before the ILA a proposal to codify the whole body of maritime law. This resulted in a diplomatic conference organised by the ILA and hosted by the Belgian Government in 1885. This conference failed to make much progress. A second conference was held in Brussels in 1888, and at this one, it was concluded that the full codification project was much too ambitious. After these two failed conferences the ILA rather lost interest in maritime law though it does seem to have been involved in the revision of the York/Antwerp Rules on General Average in 1890. However, the original group of Belgian politicians and lawyers was not to be denied and an agreement was eventually reached with the ILA that a specialist organisation would be formed to pursue the goal of uniformity of international maritime law.

This organisation came to be named the Comité Maritime International (CMI) and was formally constituted in 1897 with its headquarters in Antwerp. The CMI is described in its constitution as “...a non-governmental not-for-profit international organisation ...the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects.” Even before it was formally constituted the CMI sent out a circular letter dated July 2<sup>nd</sup> 1896 to potentially interested governments and industry parties stating that it

was the intention of CMI to promote the establishment of national associations of maritime law and to ensure a structured relationship between them. Importantly, the letter insisted that national associations should be open to the membership not only for lawyers but, most importantly, for mercantile and insurance interests, shipowners and all others concerned in maritime commerce. The letter announced that the first project for the newly formed group would be the codification of the law relating to collisions at sea. This was the CMI launched on a period of great creativity during which, as the sole organisation involved in the unification of maritime law, many of the maritime law conventions, which guide international maritime trade today, came into existence.

It is important to emphasise that the CMI is and always has been a non-governmental organisation. During the early part of the 20<sup>th</sup> century, the CMI was the only international organisation working on the unification of maritime law. Significantly its agenda was set by people and organisations within the maritime industries and not by governments. Often its projects were chosen because a particular incident had given rise to problems which demanded an international solution. Occasionally, the reason for starting work on a particular project was a fear that if the industry didn't produce a solution to a problem then governments might intervene and impose a less acceptable one.

It is all very well for a group of individuals involved in the maritime industries to get together and produce a set of rules on a particular aspect of maritime law but quite another to persuade national governments to ratify those rules and implement them in their national legislation. Here the involvement of senior Belgian political figures in the driving group which created the CMI was vitally important. They were able to persuade the Belgian Government to host Diplomatic Conferences which would be convened, when the CMI had produced a working text for a convention, with the object of finalising that text. Once the Diplomatic Conference had signed off on the text it was the hope and expectation of the CMI that Governments, having themselves been involved in the final drafting process, would sign, ratify and implement the convention - the greater the number of ratifications the greater the level of uniformity achieved.

The Belgian Government also agreed to act as a depositary for all instruments of ratification of conventions.

It is worth noting that the government delegations to the Brussels Diplomatic Conferences often consisted of the same individuals who had represented their countries at the CMI Conferences which had produced the original CMI draft – governments had the good sense to recognise that the real expertise lay within the shipping community including maritime lawyers.

As I have said, one of the tasks which CMI set itself was to encourage the creation of national maritime law associations. Setting a good example, the Belgian moving spirits involved in the creation of CMI, set up the Belgian Maritime Law Association in 1896 – one year before the CMI itself came, formally, into existence. Some nations were quicker at responding to the invitation to create a maritime law association than others. For example, the French MLA was formed in 1897, the German MLA in 1898 and the USMLA in 1899. It took us in the UK a little time to wake up, and our Association (the BMLA) was not formed until 1908. National associations continue to be formed - the most recent ones are the Cameroons, Tanzania and the re-formed Malaysian Association.

As I have already mentioned the first project for CMI was to be a convention on collisions at sea. This Convention would firmly establish the concept of proportional fault, place an obligation on a shipmaster to render assistance to the vessel with which his ship had been in collision and introduce a 2 year time bar on actions. The Collision Convention 1910 survives unchanged to this day. Not content with working on a collision convention, the CMI also decided to tackle, at the same time, the subject of maritime salvage. The work on these two projects proceeded in parallel and culminated in a Diplomatic Conference convened by the Belgian Government and held in Brussels in 1910. The texts of both Conventions were agreed at the Conference and with 85 ratifications the Collision Convention remains one of CMI's greatest successes. As far as the equally successful Salvage Convention is concerned you will know that in 1989, reflecting many changes in the salvage and marine insurance industries and after extensive behind the scenes work by CMI, a new Salvage Convention passed through the IMO International Conference process and has since been adopted by 69 states.

The general success of the conventions produced by CMI in the early 20<sup>th</sup> century owes everything to its method of work. Unification of maritime law is just that. It is not the creation of law in a vacuum but an attempt to produce a law which takes into account existing law on the subject. You cannot seek to unify maritime (or any other law) at an international level unless you have a clear idea of the existing law in individual jurisdictions. This is and always has been central to the thinking of those running CMI. Thus, the starting point for every project is the drafting and circulation of a questionnaire to all national maritime law associations designed to ascertain the national laws on the subject under review. This questionnaire will be prepared by a small International Working Group (IWG) appointed by the CMI Executive Council. Once responses have been received from national associations, it is then the task of the IWG to prepare the first draft of an instrument which, by seeking to accommodate as much of existing national laws as possible, stands a good chance of proving widely acceptable.

After getting salvage and collisions out of the way, CMI turned its attention to limitation of liability and carriage of goods by sea which resulted in the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1924 and the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, "Hague Rules" 1924. Both of these topics have, as you know, been re-visited in more recent years and in passing I should mention an intrinsic weakness in an otherwise sound system – every time a convention is updated some states will adopt the revised version but others will not. This produces a situation (particularly evident in the context of limitation of liability) where different versions of the convention will apply in different parts of the world thus destroying the uniformity introduced by the first convention and creating a happy hunting ground for maritime lawyers. There is no easy solution to this problem except to continue to encourage states to adopt the latest version of a convention.

The CMI continued its good work into the late '50s producing conventions on such diverse topics as Civil and Penal Jurisdiction for Collisions, Arrest of Ships, Stowaways, Carriage of Passengers by Sea, Maritime Liens and Mortgages. Not all these Conventions were as successful as those on collision and salvage – for example, the Stowaways Convention never entered into force.

I come now to the incident which nearly led to the demise of the CMI. On Saturday, March 18<sup>th</sup> 1967 the VLCC *Torrey Canyon*, carrying 120,000 tons of crude oil, struck the Pollard Rock

on the Seven Stones Reef mid-way between Land's End and the Isles of Scilly in England. In subsequent days much of this cargo escaped from the wreck causing severe pollution both in England and in France.

This accident highlighted the fact that national laws were inadequate to deal with the issues of liability and compensation arising from oil spills and that there was no international law which applied. I was myself involved with the *Torrey Canyon* case. As a young lawyer, I assisted my father who acted for the London Market Excess Liability Cover which bore the brunt of the claims. For the 70<sup>th</sup> Anniversary of the *Torrey Canyon* in 2017 the IMO hosted an event at its Headquarters in London. For that event, I was able to find a number of photographs of the ceremony in London at which settlement cheques were handed to representatives of the UK and French Governments. My father featured in these photographs.

Less than a month after the *Torrey Canyon* incident the British Government submitted a Note to the Inter-Governmental Maritime Consultative Organization (IMCO – now IMO) calling for changes in the law relating to liability for spillages of oil and other chemical substances. The IMCO Council agreed to look into the subject and referred the matter to a newly created Legal Committee which, in its turn, appointed Working Groups I and II – the first to look at issues of public law and the second to look at liability and compensation. At much the same time CMI appointed an International *Torrey Canyon* Sub-Committee to work on the private law aspects of liability and compensation in cooperation with IMCO. This Sub-Committee was chaired by Lord Devlin – a member of the Judicial Committee of the UK House of Lords and President of the British Maritime Law Association. Following its usual procedures, the CMI sent out questionnaires to its national maritime law associations. On the basis of the responses received the Sub-Committee prepared a preliminary draft convention. This draft convention was considered by the CMI Conference held in Tokyo in March/April 1969. (Interestingly the only amendment of substance introduced at the Tokyo Conference was a provision requiring a ship to carry evidence of the existence of financial resources sufficient to meet claims for pollution. This has since become an essential feature of all liability conventions.)

The CMI draft convention was submitted to the IMCO Legal Committee for consideration at its meeting in May 1969. The Legal Committee was divided on a number of issues – should liability be strict or fault-based, should liability be channelled to the shipowner, should proof of financial responsibility be compulsory and what should be the basis for deciding on the jurisdiction for claims? In the event, it was agreed to submit both the CMI and the Legal Committee drafts to an International Legal Conference scheduled to take place in Brussels in November 1969. At this Conference, a Committee of the Whole under the chairmanship of Dr. Walter Muller (incidentally at that time the Sec. General of CMI) was able to agree on the final text of a convention which was to be known as The International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC 1969).

I mentioned earlier that a maritime disaster often leads to a quick response from the shipping industry itself which is intended to stop the introduction of national legislation or an international convention to deal with the problem. A case in point is the oil industry's response to the *Torrey Canyon* incident. Stimulated by public opinion and political concern, seven major oil companies with large fleets of tankers, recognising that laws were likely to be imposed upon the industry in relation to pollution, devised a scheme in which tanker operators

undertook voluntary liability for the consequences of oil spills. Thus the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP) came into existence. The terms of the TOVALOP Agreement were agreed on January 7<sup>th</sup> 1969 and came into force in October 1969 and it is clear that drafting of the CLC was influenced by the terms of the TOVALOP Agreement. I am sure that you will be familiar with these industry agreements and understand how they fitted into the general scheme for oil spill compensation.

I said earlier that the “*Torrey Canyon*” incident nearly led to the demise of the CMI. How should this be? It was decided by IMCO, following the success of CLC 1969, that the Legal Committee should remain in existence with a mission to find other areas of maritime law where harmonisation would benefit the maritime industry thus, effectively, taking over the role of the CMI.

The rest is history. The Legal Committee has gone on to produce numerous liability conventions and to review and update several existing CMI ones. Whilst there have been one or two instances of conventions which have failed to attract sufficient support to pass the entry into force threshold, the Legal Committee can look back with some satisfaction on what it has achieved. If it can finally “put to bed” the HNS Convention 2010 (4 ratifications to date and several in the pipeline) it will have achieved its aim of covering all areas of ship operations which can give rise to issues of liability and compensation.

Why does CMI still exist if all responsibility for harmonisation of maritime law has now been taken over by the IMO Legal Committee?

I emphasised earlier that CMI is a Non-Governmental Organisation (an NGO) and has always prided itself on producing instruments which are seen to be for the general benefit of the shipping industry as well as for the governments of ratifying nations. Inevitably, the Legal Committee, which has taken over the role of CMI, is now political in nature. This has changed the dynamics of the way in which international conventions are developed. All new projects now have to be sponsored by governments and if an NGO comes up with an idea for a new instrument it must first “sell” it to one or more governments and persuade them that it is worth putting their names to it. This, of itself, is not a bad thing but, as I’ve said, it has changed the dynamics.

That said, CMI does still have other useful roles to play. When it became clear to maritime lawyers that the 1910 Salvage Convention was no longer fit for purpose it was the CMI which took the initiative and began work on a draft which was eventually finalised by the IMO Legal Committee as the 1989 Salvage Convention. Similarly, CMI did much of the preparatory work on the 1976 Limitation Convention. When the time came to update the Hague and Hague/Visby Rules, CMI found that IMO was not interested. It, therefore, had to find another international organisation that was interested. Hence, the Rotterdam Rules were jointly developed over several years with UNCITRAL rather than with the IMO Legal Committee. Likewise when the CMI, in recent years, proposed that the Legal Committee should consider producing a convention on the international recognition of Judicial Sale of Ships the idea was rejected on the basis that there was no “compelling need” for such an instrument. Again, CMI went elsewhere and it now seems that UNCITRAL recognises the importance of this subject and will work with CMI to produce an international instrument. (Incidentally, this instrument will ensure that the forced judicial sale of a ship in one jurisdiction will give a good title to the purchaser which title will, in turn, be recognised by the courts of all contracting states.)



For the past few years, a CMI International Working Group has been studying the practical and legal consequences of the introduction of automated ships operating without crews. In a report produced in 2017, the IWG reviewed all the international maritime conventions to determine which ones would need to be amended to accommodate unmanned ships. Initially the CMI and several sponsoring nations and NGOs approached the IMO's Maritime Safety Committee (MSC) as a result of which it was decided that there should be a so-called "scoping exercise" to establish which existing maritime law conventions would need to be adapted to cope with the problems presented by ships operating without a crew on board. A submission on the same subject was made by the CMI jointly with 7 states, ICS, and the P. & I. Clubs to the 105<sup>th</sup> Session of the IMO Legal Committee (LEG 105/11/1) in the April 2018. After some discussion, it was decided that this subject should also be added to the Legal Committee's Work Programme. An Intersessional Correspondence Group was set up to advance the scoping exercise and has been instructed to complete its work by 2022. (CMI is hoping to persuade IMO to offer an internship to an IMLI graduate to conduct research at IMO on this important subject.)

You need only to look at the excellent CMI website to understand that the "*Torrey Canyon*" did not "kill off" the CMI. Far from it. Just to list a few of the International Working Groups currently operating gives you an idea of how busy we are. Wrongful Arrest of Ships and its Consequences, Liability of Classification Societies where a ship "in class" is involved in an incident, lenders chasing moveable assets after a bankruptcy (otherwise known as Cross Border Insolvency), Acts of Piracy and Maritime Violence, Cybercrime as it affects ship operations, Places of Refuge for Ships in Distress, Fair Treatment of Seafarers following a Maritime Incident, Pollution from Offshore oil and gas exploration/exploitation, the definition of a "ship". We also continue to monitor developments in the field of Limitation of Liability and Oil Pollution from Tankers. In conjunction with the IMO Secretariat, we are, through our national maritime law associations, encouraging states to ratify and implement international conventions. We have a long term project to create, with the assistance of Singapore University, a database of judicial decisions involving interpretation of international conventions – potential a useful resource for courts faced with cases involving international conventions. CMI will also be involved in a project, adopted into the Legal Committees Work Programme at its 106<sup>th</sup> Session to develop a "Unified Interpretation" of the test for breaking the owners' right to limit liability under conventions which contain the right to limit. So, here is why CMI still has a useful role to play in the field of international maritime law, and it is why I would encourage you all, when you arrive home, to identify your national maritime law association and see whether you might be able to join and participate in the work of the CMI.

In retirement, I have had the privilege of representing CMI at meetings of the IMO Legal Committee for the past 20 years. The NGOs and other bodies whose representatives sit on the back benches at Legal Committee meetings contribute their practical experience and knowledge to the Committee's debates. It is certain that without this input many of the instruments which have been introduced would have been flawed. Again, the CMI is able to contribute, along with other NGOs, to the process of drafting conventions that work.

Another excellent example of the CMI's continuing backbench role involved the 2007 Wreck Removal Convention. This subject was first considered by the Legal Committee at its meeting in October 1995 based on a submission from the UK, Netherlands and Germany to which was attached a draft convention. As drafted it was designed to apply only to wrecks outside the

territorial waters of contracting states. The CMI was, perhaps, a little slow in getting involved. However, an IWG was set up to look at the subject generally and the text of the draft in particular. Adopting its usual procedure of consulting member national associations about the state of their national laws on wreck removal the IWG produced a report (submitted to the Legal Committee in October 1996) in which it reported that national laws on wreck removal appeared to be so similar that it would make sense to make this a more ambitious project and seek to unify the law relating to wreck removal so as to embrace wrecks both inside and outside territorial waters. The 3 sponsoring states were strongly resistant and found general support within the Legal Committee for a convention relating only to wrecks outside territorial waters. As the convention was developed over the next few years, the CMI (and others) kept reminding the Committee that the opportunity of introducing a universal wreck removal regime was being missed. It was not until the meeting of the Legal Committee in Paris in the autumn of 2006 (less than one year before the Nairobi Conference at which the final text of the Convention was adopted) that the wisdom of extending the scope of the convention was finally accepted. However, at this late stage in drafting the only practical way of extending the convention to cover wrecks within territorial waters was to provide an “opt-in”. In other words, states, when ratifying the convention, could give notice that they would be applying the convention to wrecks within their territorial waters. At last, sense had been seen! Having said that the hastily drafted “opt-in” provision has, perhaps not surprisingly, created problems for ratifying, opt-in states when drafting their implementation legislation. My lecture earlier this week on the WRC will have alerted you to these problems.

So, I hope that I have demonstrated that the CMI does, indeed, have a role to play. The members of our national associations are generally people “in the trade” whose practical contributions are vital to making IMO conventions “fit for purpose”.

I have said nothing so far about the vital importance of IMLI in the constant search for uniformity of maritime law. As I said earlier, much of the IMLI curriculum is devoted to the understanding of the many international maritime law conventions, but an important element in the course is learning how to implement those conventions by incorporating them in national laws – the so-called drafting exercise. It is self-evident that conventions are of no use unless states ratify and implement them. It would be interesting to know how many conventions have come into force in how many states as the result of an IMLI student going back to his or her home country armed with the product of their “drafting exercise” and involving themselves in drafting implementation legislation. That and the remarkable number of IMLI graduates attending meetings of the IMO Legal and other committees tells you just how important IMLI has become in the continuing search for unification. At the 106<sup>th</sup> Session of the IMO Legal Committee in March this year I was not at all surprised to find that the delegation from Thailand included Mr. Watchara Chiemanukulkit who graduated from IMLI last year having won the Secretary General’s Prize for the Best Dissertation entitled “*Legislative Techniques for the Implementation of IMO Instruments into Domestic Legislation.*”

He was but one of the many IMLI graduates who regularly make the rapid transition from graduate to national delegate at IMO meetings.

As I said at the outset, this paper is offered as a tribute to Professor Francesco Berlingieri. During the period of his Presidency, CMI was still in its post-*Torrey Canyon* phase when it had lost its position as the only organisation concerned with the unification of maritime law.

Throughout his life of service to CMI, he remained persuaded of the continuing importance of its work. But for him, the CMI would probably have ceased to exist. So, we who have come after him (including members of national delegations to the Legal Committee and IMLI students) have much to thank him for.

**P.J.S. Griggs CBE.**

**Past President CMI.**

April 2019.