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Sayın Üyemiz,

Uluslararası Deniz Ticaret Odası (ICS) tarafından gönderilen 10 Eylül 2020 tarihli ve MLC(20)28 sayılı yazıda, ICS Hukuk Komitesi'nin talebiyle Uluslararası Koruma ve Tazmin Kulüpleri Grubu koordinasyonunda hazırlanan, "Denizde Konteynerlerin Kaybı- Yükümlülükler ve Sigorta Düzenlemeleri" taslağına yer verilmektedir.

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Saygılarımla,

İsmet SALİHOĞLU
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Ek:

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10 September 2020

MLC(20)28

TO: MARITIME LAW COMMITTEE

Copy: All Full and Associate Members (for information)

CONTAINERS LOST AT SEA - LIABILITY AND INSURANCE ARRANGEMENTS

Action required: The attached draft information paper on liability and insurance arrangements for containers lost at sea has been prepared at the request of the Maritime Law Committee. Comments will be invited at the Committee meeting on Monday 14 September, and any written comments would be welcomed by 28 September with a view to having the paper finalised by the end of the month.

Further to MLC(20)27 of 25 August (the agenda and notes for the Maritime Law Committee meeting on Monday 14 September), the attached draft information paper has been prepared in connection with agenda item 3a on containers lost at sea. It will be recalled from the notes on this item that, in order to assist members with any future discussions with their governments on this subject, an information paper on containers lost at sea and the applicable liability regimes was requested by the Committee at its February meeting.

The attached initial draft has been produced in cooperation with the International Group of P&I Clubs, who are providing further input and consulting their members also.

Members' comments will be invited at the Committee meeting, and any written comments would be welcomed by 28 September with a view to having the paper finalised by the end of the month. ECSA, the Asian Shipowners' Association and the World Shipping Council will also be invited to comment, and to add their names should they wish to do so.

Kiran Khosla
Secretary, Maritime Law Committee

DRAFT

[ICS, ECSA, International Group of P&I Clubs]

Containers Lost at Sea - liability and insurance

Summary

To ensure that claimants have access to compensation for the costs associated with the recovery of containers lost overboard from ships at sea, and damage arising from the containers or their contents, governments that have not already done so are encouraged to ratify and implement the following international conventions agreed by IMO:

- the 2007 Nairobi Wreck Removal Convention (WRC) and, importantly, to elect to extend the geographic scope of application to wrecks located in their territorial waters;
- the 2010 HNS Convention; and
- the 1996 LLMC.

Background

The shipping industry's goal is to eliminate accidents, and ship losses have declined significantly over the years due to improved ship design and safety on board as a result of effective regulation by IMO. However, the sea remains an unpredictable and at times dangerous place to operate. Proper packing, stowage and securing of containers and reporting of correct weight are very important to the safety of a container ship, its crew, and its cargo, to shore-based workers and equipment, and to the environment. However, even with proper packing of the cargo into the container, correct container weight declaration, and proper stowage and securing aboard ship, a number of factors ranging from severe weather and rough seas to more catastrophic and rare events like ship groundings and collisions can result in containers being lost at sea. According to the latest survey prepared by the World Shipping Council, approximately 226 million containers were transported internationally by sea in 2019 and the percentage of containers lost overboard was less than one thousandth of 1%. Nevertheless, further preventive measures that would be effective and practical are being explored with governments and other stakeholders to enhance container ship safety and try and bring container losses as close to zero as possible.¹

Although the amount of containers lost overboard at sea as a percentage of those carried each year is infinitesimal, significant incidents where large numbers of containers have been lost in a single event have sometimes resulted in costly efforts to

¹ © World Shipping Council Containers Lost at Sea 2020 Update, <http://www.worldshipping.org/>

recover the lost containers and mitigate damage arising from the containers or their contents.

Recent incidents where large numbers of containers were lost overboard in heavy seas include the *MSC Zoe* in January 2019 affecting Germany and the Netherlands, and the *Yang Ming Efficiency* in June 2018 off Australia. Response operations to recover the lost containers and their contents for the safety of navigation and protection of the marine environment and related interests, including fishing and tourism, were lengthy and costly. It has been apparent from the media reports of those and similar significant incidents that there may be some confusion and misconception about the shipping industry's liability for the response costs, and the extent of a shipowner's third party liability insurance cover for such costs.

The IMO international liability and compensation regime

A comprehensive framework of strict liability and compensation conventions has been adopted under the auspices of IMO to ensure that the valid claims of third parties for pollution and other damage from ships are met swiftly and without need for time consuming and costly legal action. The conventions have been developed and agreed by the IMO Legal Committee and are tailored to particular risks. The conventions include: CLC, Fund, Supplementary Fund (oil pollution damage from tankers); Bunker oil Convention (oil pollution damage from fuel carried on board clean tank and non-tank vessels e.g. passenger ships, bulk carriers and container ships); HNSC (pollution and other damage from cargoes of prescribed dangerous goods and chemicals); and Wreck Removal Convention (locating, marking and removing hazardous wrecks).²

All of the liability conventions provide for strict liability (i.e. regardless of fault) and compulsory insurance, with rights for claimants to bring their claims directly against the insurer to an amount which is guaranteed by the insurer and certificated by States Parties.

The amounts of compensation are prescribed in the conventions, or for claims under Bunkers and WRC, by reference to the LLMC. The amounts are reviewed by IMO when necessary to ensure they remain at levels that are sufficient to meet the vast majority of valid claims.

It is important that governments subscribe to the latest up to date conventions (e.g. LLMC 96, CLC 1992, Athens Convention 2002, HNSC Protocol 2010) to ensure that claimants will have access to the highest levels of compensation that have been agreed by IMO.

Specifically in relation to containers lost at sea and damage arising from the containers or their contents, governments should be encouraged to ratify the following conventions:

2007 WRC - the Wreck Removal Convention entered into force internationally in 2015

² [Full titles of conventions, including LLMC]

and established a regime of strict liability for shipowners for the costs of locating, marking and removing hazardous wrecks. Shipowners are required to maintain insurance to cover liability under the convention, and claims for costs can be brought directly against insurers.

“Wreck” is broadly defined as, following a maritime casualty, a sunken or stranded ship or any part or any object from a sunken or stranded ship. The definition includes any object that is lost at sea from a ship that is stranded, sunken, or adrift, such as lost containers. It also includes ships that may be reasonably expected to sink or strand.

“Hazard” means any condition or threat that poses a danger or impediment to navigation, or is likely to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.

The WRC applies only within the exclusive economic zone of a State Party. However, States can elect to extend the application of certain provisions to wrecks located within their territory, including the territorial sea. Many incidents that could trigger the WRC occur in territorial waters and coastal areas and include groundings in shallow or inshore waters resulting in restrictions to the approaches to anchorages, ports and harbours. Regrettably, maritime accidents often result in costly and time-consuming operations whether that is to remove a wrecked ship or recover cargo that has entered the water.

Therefore, the application of the WRC in the territorial sea is strongly recommended to ensure the following benefits:

- Wider geographic scope of application of the internationally agreed provisions on wreck removal as contained in the Convention and therefore greater uniformity and certainty of law; and

- Compulsory insurance cover for shipowners, and direct action against insurers, in respect of measures taken under Articles 7, 8 and 9 of the Convention (locating, marking and removal of wrecks) in a State’s EEZ, territory and in territorial sea.

1996 LLMC – the shipowner’s liability under the WRC may be limited under the LLMC or any applicable limitation regime. The limits of the 1996 LLMC were increased by 51% in 2012, with effect from 2015. A number of States Parties to the 1976 and/or 1996 LLMC have made a reservation to remove the right of a shipowner to limit liability for certain types of claim, including for wreck removal claims in those states and they have notified IMO accordingly. This has the effect of negating an important principle that was established in the CLC (on which the WRC and other IMO liability conventions are modelled) that limitation of liability is the *quid pro quo* for the shipowner’s acceptance of strict liability with very few defences. Nevertheless, the reservation is permitted under the 1996 LLMC, and does not affect pollution damage claims to which the CLC, HNS or Bunker oil conventions apply. In addition, the WRC requires owners

of ships >300gt to maintain insurance or other financial security to cover removal costs up to the limits of liability in the LLMC.

2010 HNSC – damage from hazardous and noxious substances in containers, such as the hundreds of substances listed in the IMDG Code, would be covered under the 2010 HNSC. However, the convention is not yet in force. The following types of damage would be covered: loss of life or personal injury on board or outside the ship if it is caused by the HNS cargo; loss of or damage to property outside the ship; economic losses resulting from contamination, e.g. in the fishing, mariculture and tourism sectors; costs of preventive measures, e.g. clean-up operations at sea and onshore; and costs of reasonable measures of reinstatement of the environment. Claimants in States Parties to the HNSC would benefit from the higher levels of compensation available from the shipowner/insurer, and from the HNS Fund for claims that exceed the shipowner's limit. The HNS Fund will be financed by cargo interests to supplement the compensation that would be available from the shipowner in major incidents, up to the convention limit of SDR 250 million.

It is important to note that access to compensation is available for claimants in States that have not ratified the above conventions; marine liability insurance (protection and indemnity) for over 90% of the world's ocean-going tonnage is provided by the International Group of P&I Clubs. The rules on cover for all thirteen clubs in the IG include risks for wreck-related liabilities and pollution damage.

In addition, the IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims (IMO Resolution A.898(21)) recommends that shipowners should ensure that effective liability insurance is in place for maritime claims under the LLMC up to the limits of the convention. In the EU, this is a mandatory requirement for all ships >300gt due to the Insurance Directive (Directive 2009/20/EC on the Insurance of Shipowners for Maritime Claims).

However, claimants in States that have not ratified the WRC, HNSC and LLMC may have to rely on any applicable domestic laws to establish liability for claims (which may not be as broad as those under the WRC and HNSC) and may have to prove that there was fault on the part of the shipowner (or other parties). In addition, they would not be able to bring claims directly against the insurer for a guaranteed amount.

Conclusion

In order to benefit from a comprehensive liability and compensation regime for the reasonable and proportionate costs of operations to recover containers lost at sea and damage arising from the containers or their contents, governments are encouraged to ratify and implement the 2007 Nairobi Wreck Removal Convention (WRC), the 2010 HNS Convention, and the 1996 LLMC, and to elect to extend the scope of application of the WRC to wrecks located in their territorial waters.

September 2020