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## The legal and practical implications of the Draft Convention on Wreck Removal (DWRC)

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**WORLD MARITIME UNIVERSITY**

Malmö, Sweden

**THE LEGAL AND PRACTICAL IMPLICATIONS  
OF A DRAFT CONVENTION ON WRECK REMOVAL ( DWRC )**

By

**ZHONGZHOU FAN**

**The People's Republic of China**

A dissertation submitted to the World Maritime University in partial  
Fulfilment of the requirements for the award of the degree of

**MASTER OF SCIENCE**

In

**MARITIME AFFAIRS**

**(MARITIME ADMINISTRATION)**

2006

## DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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## **ACKNOWLEDGEMENTS**

My study at the World Maritime University (WMU), participation in the Maritime Administration course and subsequent preparation of this dissertation would not have been possible without the support and help of the following people.

I would like to express my sincere gratitude to the Dalian Maritime University and the Ministry of Communications of the People's Republic of China and my donor-The Republic of Korea Fund, who nominated me to join the MSc course at the World Maritime University.

My special thanks goes to the dean of navigation college Professor Zhengjiang Liu and former dean, Professor Dong Fang, who offered me such a good opportunity to attend the 17-month course of study, and to all the staff of WMU, who have taught me to learn such real and valuable knowledge of the latest maritime developments, especially the staff members of the library of the University. This thesis could not have been completed so smoothly without their great and patient assistance.

My gratitude also goes to Professor Jan Ake Jönsson, my supervisor, who has greatly encouraged me and offered his assistance and recommendations on my research at all times. Also to Professor Proshanto, Mukherjee, who has directed me to gather useful reference material in completing this dissertation.

Finally, but not least, I would like to dedicate this humble piece of work to my wife and parents, who have supported and encouraged me through my studies at WMU.

## **ABSTRACT**

**Title of Dissertation:**      **The Legal and Practical Implications of A Draft  
Convention on Wreck Removal (DWRC)**

Degree:                              **MSc**

This dissertation is a study of the Legal issues of the Drafted Wreck Removal Convention.

The characteristic of a wreck, as well as its public and private interest, is introduced and discussed. The relationship between wreck and salvage is examined. The central issue relating to a wreck concentrates on the wreck owner's liability as well as the liability limitations. The Draft Wreck Removal Convention and salient features are discussed.

Recent cases involving wreck removal are analysed to make the essence of this dissertation more practicable. Some suggestions are given to the Maritime Administration for considering during future policy making.

The driving force to join the WRC is decided by the political and economical factors of the Coastal States. The DWRC is attempting to bring wreck removal claims within the province of limitation, although facing the awkward condition that most contracting States exercise the right of reservation and avoid the Convention's application of limitation of liability in wreck removal claims.

**KEYWORDS:** Drafted Wreck Removal Convention, wreck, liability, salvage, Maritime Administration

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## LIST OF ABBREVIATIONS

DWRC	Drafted Wreck Removal Convention
MSA	Maritime Safety Administration
COLREGs	Convention on the International Regulations for Preventing Collisions at Sea, 1972
UNCLOS	U.N. Convention on the Law of Sea
LOF	Lloyd's Open Form
SCOPIC	Special Compensation of P&I Clubs
ISU	International Salvage Union
SALVCON	Subcontract Lumpsum Agreement
LLMC	Limitation of Liability for Maritime Claims
CLC	International Convention on Civil Liability for Oil Pollution Damage
HNS	Hazardous and Noxious Substances
IMO	International Maritime Organisation
EEZ	Economic Exclusive Zone
MOC	Ministry of Communications
P & I	Protection and Indemnity
ISC	International Ship Consultants Ltd
CMI	International Maritime Committee
OSLTF	Oil Spill Liability Trust Fund



SAR	Search and Rescue
SOLAS 1974	International Convention for the Safety of Life at Sea, 1974
MLA	Maritime Law Association of the United States

## **INTRODUCTION**

### **Present status of the international law concerning removal of wrecks.**

No specific convention exists concerning the removal of wrecks whether they are located in the territorial sea or beyond, nor does the United Nations Convention on the Law of the Sea (UNCLOS) which was concluded at Montego Bay in 1982 and which entered into force on 16 November 1994, specifically refer to wrecks. However, it does contain a number of relevant provisions conferring certain powers on coastal States, which enable such States to remove wrecks which contribute a serious threat to the safety of ships navigating in the territorial sea or to the marine environment therein, and specifically recognises in Part XII on Protection and Preservation of the Marine Environment, the obligation of all States to protect and preserve the marine environment from all sources of pollution (Articles 192 and 194).

Although not all States are party to UNCLOS, over 100 States have now ratified or acceded to it and, as it was negotiated on the basis of consent, it is now generally regarded as representing the customary international law on these aspects, and, as such, thus binding also on non-parties. However, UNCLOS does not define wreck and certain aspects of the relevant provisions are not without ambiguity. Moreover, the status of a coastal State's potential powers of intervention in relation to foreign vessels varies according to the jurisdictional zone in which a wreck is found. UNCLOS recognises, establishing seven forms of jurisdictional zone: internal waters; territorial sea; contiguous zone; exclusive economic zone; continental shelf; archipelagic waters; and "the Area" (the seabed and ocean floor beyond national jurisdiction). In addition coastal States are given powers in international straits, akin

to those in the territorial sea, to protect the marine environment and ensure safety of navigation for vessels in transit.

The consequences of a shipping casualty were seen to be more than just a potential loss of the ship and its cargo. A casualty could result in severe damage to the marine environment, and large compensation claims from people who depended on it for their living. The shipowner could face enormous liability claims arising out of pollution from a casualty.

Traditionally, if a ship could not be salvaged it was left to sink or lie wrecked upon some beach. The property insurer paid their claims, the P & I Club paid the crew's shipwreck compensation claims and the wreck was left to rust in peace.

Nowadays there is an increasing trend for coastal states to require that any shipwrecks be removed from their waters, or at least to require that any oil, or hazardous materials are removed from the wreck and the wreck is cut down to make it safe for navigation.

It is noteworthy that the subject of wreck removal has been introduced to, and is under study by the International Maritime Organization. As a result, the IMO Legal Committee is presently discussing a Draft Convention on Wreck Removal that is to be recommended to an IMO Diplomatic Conference in 2007. The latest draft of October, 2005 is a scaled down version of an earlier draft without the complex and controversial provisions on financial liability and on reporting requirements. A recent IMO report indicates that there appears to be some consensus on matters such as definition of wreck, reporting and location of wrecks, rights and obligations to remove hazardous wrecks, financial liability for locating, marking and removing wrecks, and contributions from cargo interests. The draft convention is designed to create an international regime, under IMO auspices, that would govern wreck removal for wrecks outside territorial seas globally. However, a number of

difficulties still have to be overcome. Amongst these are ensuring that the convention complements the relevant provisions of the United Nations Convention on the Law of the Sea, 1982, and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969; ensuring that the reporting and locating of wrecks is consistent with the provisions of the International Convention on the Safety of Life at Sea, 1974 (SOLAS), the International Convention for the Prevention of Pollution from Ships 1973/1978 (MARPOL 73/78) and the International Convention Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC 1990); developing a satisfactory regime under which shipowners are required to provide a comprehensive report to coastal states about any vessels that have been wrecked; and, developing mechanisms that would ensure that shipowners would be required to demonstrate financial security for wrecks that threaten navigation and/or the coastlines of states. It remains to be seen how this convention will be further developed.

### **Objectives of the study**

Wreck removal is a hot topic since the last decade; there are various dimensions of a legal, political, security, economic and environmental nature underlying the problem. The legal issues stem from general international law, the Law of the Sea and international maritime law (including marine insurance, collisions avoidance, salvage, wreck, carriage of goods, general average and liability generally). The focus here is primarily on the legal aspect of wreck removal, and the position of coastal states in particular, and some aspects of maritime law that relate to the Draft Wreck Removal Convention, and in particular, the relationship between the DWRC and other international conventions, including the Salvage Convention and the Intervention Convention.

It is hoped that the findings and outcome of this study will provide a helpful start to those concerned with the DWRC, and hopefully it will be useful in the assessment

and possible revision of the existing regulatory framework, policies and regulations for Maritime Administrations. The conclusions are based on the discussion regarding the DWRC as well as recent cases.

## CHAPTER 1 Characteristics of a Wreck

### 1.1 What is a Wreck?

In the maritime context the word “wreck” has several meanings. It usually refers to the remains of a ship that has suffered a major maritime disaster.

In its most ancient sense, the description “wreck” was limited to those portions of ship and cargo which were cast up on land. The location of the property was important because, as in the case of all salvage, it would seem that the former Admiralty jurisdiction over a wreck was, at least by the end of the nineteenth century, restricted to wrecks cast up abroad where no prohibition was issued.

In English law, the principal statutory provision for wreck is currently the Merchant Shipping Act 1995, Pt IX, Chap. II, which provides that in that Part of the Act, unless the context otherwise requires, “wreck” includes<sup>1</sup> jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water. So far as the legislation relating to hovercraft is concerned, “wreck” generally includes any hovercraft or any part or cargo thereof found stranded or abandoned in or on any navigable waters, or on or over the foreshore, or place where the tide normally ebbs or flows.<sup>2</sup> Fishing boats or fishing gear lost or abandoned at sea and either found or taken possession of within the territorial waters of the United Kingdom or found or taken possession of beyond those waters and brought within them are treated as “wreck” for the purposes of Part IX of the Merchant Shipping Act 1995.<sup>3</sup>

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<sup>1</sup> “Includes” does not mean “shall be confined to”: *ex p. Ferguson* (1871) L.R. 6 Q.B.280,290, per Blackburn J.

<sup>2</sup> Hovercraft (Application of Enactments) Order 1972 (S.I. 1972 No. 971), Art. 8(1). See *post*, 257-259.

<sup>3</sup> See Fisheries Act 1968, s.17, as amended by MSA 1995, s.314(2) and Sched. 13, para. 43(b).

This definition is still found in the national legislation of several common law jurisdictions. It is notable that the definition of “wreck” in the draft convention is consistent with the notion of jetsam, flotsam, lagan and derelict being included as “wreck”.

French law considers those ships as wrecks which are unseaworthy and abandoned; it further distinguishes floating wrecks from those which are not afloat, and decrees that only the latter can become objects of “sauvetage”, while those wrecked ships which, although abandoned and unseaworthy, are still afloat are for this purpose equated with ships and can be objects of “assistance” only.<sup>4</sup>

In German law, if a ship is temporarily deprived of one of its characteristics (e.g., where there has been a temporary sinking of a vessel which can be salvaged and repaired), it does not thereby become a wreck. In such cases ships can be treated as wreck for certain legal purposes (e.g., collision damage). On the other hand, if a ship is incapable of being repaired it is considered a wreck and is subject to civil law, this even in spite of the fact that it is still entered in a register of ships. Although not identical, the German concept comes close to that of the English Merchant Shipping Act, 1894(s.158) and the Merchant shipping Act 1925.<sup>5</sup>

The meaning of “wreck” in the Draft Wreck Removal Convention is defined as:

- (a) a sunken or stranded ship; or
- (b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or
- (c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or
- (d) a ship that is about, or may reasonably be expected, to sink or to strand, where an act or activity to assist the ship or any property in danger is not

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<sup>4</sup> Branimir Luksic. Limitation of liability for the Raising and Removal of Ships and Wrecks: A Comparative Survey. *Journal of Maritime Law and Commerce*, Vol12, No.1. Oct,1980 P48

<sup>5</sup> Ibid

already underway.

The appearance of wreck in definition (d) is obviously one of the ostensible features of DWRC even though it needs detailed explanations.

## **1.2 Two aspects of wrecks**

There are essentially two aspects to the law of wrecks: the private law aspect in relation to “wreck” being maritime property,<sup>6</sup> and the regulatory law aspect given that a wreck is often a potential navigational and environmental hazard. The private law aspect pertains to possession and ownership of “wreck”, and the rights and liabilities arising out of those proprietary interests. The regulatory aspect is two-fold: dealing with protecting the wreck as property, usually administered through a government official such as a Receiver of Wreck, and addressing the question of responsibility for the removal of a wreck that poses a safety or environmental hazard.<sup>7</sup>

The term casualty includes collision with another vessel, collision with a wharf, bridge, dock, loading jetty, or other shore structure, grounding, fire, explosion, mechanical failure, or any other accident that affects the entered vessel or cargo carried on board such vessel. The actual measures required to prevent a vessel, part of a vessel or its cargo, becoming an obstruction or hazard to navigation will vary greatly. For example, a grounded vessel may only require the lights and shapes required by the COLREGS. On the other hand, a vessel submerged in or near an area used by other vessels may require speedy removal or even destruction. In cases where total removal or destruction is not possible, the local authorities may require

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<sup>6</sup> Maritime property consists of vessel, cargo and freight. The wreck of vessel and cargo, Le., flotsam, jetsam and lagan is also maritime property per Lord Esher in *Wells v. The Gas Float Whitton No.2* [1896] 42 at 63-64. See also Edgar Gold, Aldo Chircop and Hugh Kindred, *Maritime Law* (Toronto, Irwin Law Inc., 2003), 599-600.

<sup>7</sup> See, e.g., sections 231 to 255 of the *Merchant Shipping Act 1995* (UK) 1996, c. 20, sections 269 to 287 of the Cayman Islands *Merchant Shipping Law*, 1997, similar legislation in other jurisdictions.



that certain under keel clearance for other navigation be achieved in the removal efforts. Coverage for parts of a vessel is interpreted widely. It includes not only the ship's hull and machinery, but also other parts, such as navigational and cargo equipment and lifeboats. Similarly, cargo would include cargo on board as well as cargo lost overboard or separated from the vessel, including cargo inside containers and the containers themselves.

As already indicated above, most coastal states will today demand the removal of any wreck that is considered an obstruction or hazard to navigation. This demand will, generally, be in the form of a legally binding removal order or directive. Even where the wreck is not causing this type of problem, removal may be demanded.

### **1.3 Title holder of a wreck**

Who owns a wreck is determined by the legal system applicable to the area where the wreck is found. For example, Swedish law is generally applicable only to Swedish territorial waters and not to the economic zone or continental shelf outside of the territorial waters.<sup>8</sup> However, correspondingly to other systems there are substantive provisions applicable to the situation where a vessel has salvaged property under way in whatever waters and brought the property into safety in Sweden. Conversely, while claims such as those of the US to eternal ownership to naval vessels might be respected out of comity, it seems doubtful that this would be recognized in a situation raising conflict with a salvor.<sup>9</sup>

Rules on ownership of wrecks in most countries in the world are far from clear, and it is necessary to search for guidance from the few law provisions available as well as

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<sup>8</sup> Cf. UNCLOS articles 56 for the economic zone and 77 for the shelf.

<sup>9</sup> See the Supreme Court decision NJA 1965 p. 145.

a sparse case-law and some views expressed by legal scholars. There seem to be no useful indications in any legislative preparatory works.

Different laws apply to different wrecks. In some countries, the water area where the wreck was found is very important. Still take Sweden as an example, The *Sea Finds Act* applies to salvage of vessels and goods at sea and in navigable waters, which should be understood as waters reachable from the sea. Wrecks found in other waters are dealt with in the Lost Property Act. The Sea Finds Act deals with “abandoned” vessels and “shipwrecks”, it also covers appurtenances and goods from such vessels. Depending on the location, finds are described as “bottom finds, floatfinds and shorefinds”. For all three there exists a duty to report the find, whereupon a public summons shall be issued in the Swedish Maritime Administration’s “Notices to Mariners,”<sup>10</sup> and if appropriate also in other manners for the owner to make himself known within a stated period. Neglect of the reporting duty is punishable.

If the owner gives notice within the stated deadline, he can reclaim the property against payment of salvage costs and other expenses. This shows that title to the find is not lost through the abandonment, as it used to be, but survives. If no owner reports in time, the property devolves on the salvor, and the summons are thus “preclusive”.

Sometimes a vessel may become ownerless, three situations are introduced in Brækhus & Hærem's book on Norwegian Property<sup>11</sup>, the first situation is described as one where the property is lost, for example a ship sunk in waters so deep that it cannot be retrieved. The second ground for loss of property would be dereliction by express declaration. The period may be relatively short if the vessel was known to

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<sup>10</sup> *Underrattelser for Sjöfarande* (DfR) are published weekly, and an English language version “Notices to Mariners” is issued monthly on pdf file, see the Administration's home page. [www.sjofartsverket.se](http://www.sjofartsverket.se).

<sup>11</sup> Brækhus & Hærem, *Norsk Tingsret*, p. 622

be lying accessibly in shallow water but longer if she was originally regarded as “unsalvageable”<sup>12</sup>

According to this analysis, a wreck may therefore become ownerless either by being irrevocably lost by the standards of existing technique, or by express declaration of dereliction, or by the passage of a long time without any manifestation of ownership.

This exposition seems strained in several respects. If a vessel has sunk in very deep water, it might later become accessible through new techniques.<sup>13</sup> Has then the lost title been resuscitated? If the title may be lost by an express dereliction declaration, how can such a declaration reach every person that might raise a claim to the vessel? And if title is lost through prolonged passivity, according to what criteria should the length of the period be determined?

For other property than wrecks, Lindskog in a Festschrift article 56<sup>14</sup> has proposed a rather more comprehensible model. Transferred to vessels it would describe the owner's title as retained until taken over by an occupant. The owner may be seen to declare dereliction to the finder, and this becomes a kind of offer accepted by the occupation of the wreck. The method relieves us of having to imagine a notification to all and sundry. It also avoids the paradox of a resuscitated title when diving techniques improve, for to the extent the owner would have abandoned his title when the ship sank at unfathomable depth or in otherwise inaccessible water, this abandonment is viewed as a declaration to the aspiring salvor in today's situation. Long-term passivity also becomes a kind of declaration; if the prospective occupant must conceive that the owner of such an old and low-value wreck cannot reasonably be taken to insist on ownership in such a place, he may assume it to have been left to him as the finder. Thus there arises a kind of implied contract, where the occupier

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<sup>12</sup> Brækhus in TfR 1975 P 513

<sup>13</sup> Such as Titanic. At a depth of 2 ½ miles, is now accessible to underwater vehicles.

<sup>14</sup> Festschrift for Sveriges Advokatsamfund (Stockholm 1991) pp 343-364.

accepts the offer by going to the trouble of raising the wreck. In all such situations, the acquisition becomes "derivative" from the owner, not extinctive.

The title may however also be lost by the dissolution of a company owning the wreck, often an insurance company, where its owners cannot be traced. An occupation of such a wreck clearly establishes an extinctive acquisition. As the "preclusive" summons for the wreck owner cannot be issued until the wreck has been inspected and therefore, as a rule, raised. Thus the finder will have to undertake salvage operations at the risk of gaining only a salvage award though he may wish to become the owner. If the vessel is raised and no owner responds to the summons, the salvor has gained his title. If a pretending owner turns up, the finder may challenge his right. It should be noticed here that if the wreck is a US State vessel, it could not under US law fall to the finder, because flag-law legislation declares that the State does not abandon ownership. If the finder happens to know of this, he cannot assume a contract under which the US relinquishes its ownership. Still a lot of finders would not know of the matter. However, the question of their acquisition should not be forgotten here. Generally, the vessel would have some identification mark as a US State vessel, and the embassy would then be notified and would claim the vessel upon payment of salvage and other expenses. If there is no such indication, the find will be advertised, and the US might not report to claim the property. A court seized of the matter would then have to award the vessel to the finder according to principles mentioned previously. If the wreck is expected to be over 100 years, it becomes the property of Sweden. A court of law must so decide, although the Swedish State might out of comity cede the vessel to the USA.

If the vessel was found in international waters and brought to ones territorial sea by a National finder, there arises a conflict of rules. The US rule states that as US Government property the wreck retains its immunity, which would have been violated by the finder bringing it to ones country. As in the case described before, ones court might apply the national law to the discomfiture of the US claim.

However, under UNCLOS article 149 such objects found in the Area must be preserved for the benefit of mankind with particular regard to preferential rights of the State of origin, which imposes a duty on the national courts to observe.

#### **1.4 Historic or Cultural wrecks**

A further issue mentioned above which will continue to be discussed here is that wrecks, especially historic or cultural wrecks, may be more appropriately dealt with by a specific regime rather than as common wrecks. It will be seen from the foregoing that there may sometimes be public and sometimes private vested interests in the fate and recovery of a "wreck". Those interests may frequently conflict: a salvor may wish to recover commercially valuable historical artifacts or relics for sale, but the historian or archaeologist may wish them to remain undisturbed or consigned to a museum.

What has occurred in recent years is an unprecedented advance in technology enabling recovery craft and equipment to be assembled in deeper and deeper waters and in ever more remote areas. Means of detection enable wrecks to be identified with precision although submerged or embedded.

The development of commerce and technology results in the interest in wrecks having a substantial international element. A non-historic laden cargo ship, whether in national waters or on the high seas, may be the subject of salvage or recovery services by salvors operating internationally and the parcels of cargo may be owned or insured in different parts of the world. With historic wrecks, salvors may operate internationally and there may be great commercial and scientific interest in the artifacts recovered. Even with historic wrecks much may be known about ownership and insurance. Difficult questions of title may arise. This has been apparent from nineteenth century wrecks recovered off the American coasts or in the Great Lakes. Thus London Underwriters claiming title to submerged vessels or their cargoes are directly affected by American concepts of the retention or abandonment of title.

The U.N. Convention on the Law of Sea grants coastal states authority over “archaeological and historic objects found at sea” in the band of the contiguous zone, twenty-four nautical miles from the coastal baseline. Moreover, the law of salvage and finds under admiralty and maritime law is explicitly preserved.

## **Chapter 2 The interrelationship between “salvage” and “wreck”**

### **2.1 “Wreck” in salvage regime**

According to the Supreme Court of the UK, only maritime property can be the object of an act of salvage. No adequate definition of maritime property has been formulated. Traditionally, the maritime properties have always concerned vessels and their cargoes and appurtenances if the property has been in danger, but the 1989 Salvage Convention widens the notion to comprise also other property in danger in waters.

There may also be a relationship between wrecked property and property that has been deliberately and, often, illegally dumped at sea. In such cases a legal conflict may arise as to what legal regime would be applicable. While the rules relating to wreck may also apply to dumped items, the London (Dumping) Convention may also be applicable; this convention is principally concerned with the protection of the marine environment, while the wreck provisions are more concerned with the saving and preserving of maritime property.

In British Shipping Laws, for salvage purposes it is an extended feature of the identity of “wreck”; that is the wrecked property previously was or formed part of property which was within the classification of subjects of salvage, principally a vessel, its apparel or cargo. Thus, where planks of timber had been moored in a river above a harbour and had accidentally come adrift and floated down to the sea, the Court of Exchequer held that, as a matter of construction of the statute this was not a case where Parliament had given jurisdiction to justices to make an award for salvage

of “wreck” under the Merchant Shipping Act 1854.<sup>15</sup> However, Martin B. also referred to “the well known meaning of flotsam, as stated in the *Termes de la Ley*, it refers to goods having been at sea in a ship and separated from it by some peril.”<sup>16</sup> Similarly, a gas float moored as a beacon which had got adrift was held not to be wreck within the same Act in *The Gas Float Whitton No.2*.<sup>17</sup>

The Salvage Convention 1989 does not mention “wreck”, thereby avoiding, but not resolving, controversy during negotiations leading to the Convention whether or not “wreck” was, or should be, covered by it.<sup>18</sup> It is not a major practical concern for professional salvors, who normally operate on floating or stranded casualties; wrecks are likely to attract difficulties in dealing with local authorities and to require great expense for little reward, so that it is better to render services on a contractual<sup>19</sup> rather than a salvage basis.

A further issue is that wrecks, especially historic or cultural wrecks, may be more appropriately dealt with by a specific regime rather than as part of the law of salvage. In some countries wreck recovery is not part of the general law of salvage; and historic or cultural wrecks raise wider issues than the commercial ones normally arising in salvage cases. The Convention itself, in Article 30(1) (d), authorised signatories to disapply the Convention to maritime cultural property of prehistoric, archaeological or historic interest which is situated on the sea-bed. However, the United Kingdom has not availed itself of this power.

English law has traditionally included wrecks within subjects of salvage. The Convention is generally inclusive, and does not provide for the exclusion of wrecks; consequently, if as a matter of construction wrecks fall within the terms of the Convention, it will apply to them. The Convention applies generally to any property

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<sup>15</sup> *O. Palmer v. Rouse* (1858) 3 H. & N. 505.

<sup>16</sup> *Palmer v. Rouse* (1858) 3 H. & N., 510.

<sup>17</sup> [1897] A.c. 337. See *ante*, §§ 154-157.

<sup>18</sup> See Gaskell, 21-376 10 21-377.

<sup>19</sup> For a daily rate or lump sum, such as Wreckcon 1993.



which is not permanently and intentionally attached to the shoreline.<sup>20</sup> It can therefore confidently be asserted that it applies to vessels or goods which are afloat. Property which has sunk and become attached to the shoreline should also be covered since, even if it has become permanently attached, it is unlikely to have become so attached intentionally. Of course, the fact that wreck falls within the description of property to which the Convention applies does not answer all difficulties. For example, the property must also be in danger<sup>21</sup>; and questions of ownership may have to be settled.

## 2.2 Wreck removal or salvage

The most popular current view, and the one adopted in a number of international instruments and national laws, is that the ship to be saved is essentially in danger, although this danger need not be an imminent one. Such danger is not ordinarily present when a ship is sunk or when it becomes a wreck, although cases are conceivable in which the raising and removal of a vessel could be considered salvage in the strict meaning of the term. So, for example, the removal of a stranded ship could be, under certain circumstances, a form of salvage because of the danger to which it is or may become exposed if not removed or refloated in time.<sup>22</sup> Some national laws strictly observe this distinction, e.g., the Yugoslav Law on Maritime and Internal Navigation, which considers the raising of a vessel as salvage and therefore subject to the relevant salvage regulations, only if the raising is undertaken while the salvage operations are still in course, or while the danger in which the ship was found immediately before the beginning of the salvage operations still exists.<sup>23</sup> In German law, to cite but another example, the raising of a sunken ship (or its

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<sup>20</sup> Article 1(C) of Salvage Convention 1989

<sup>21</sup> In some jurisdictions, property which has come to rest is not regarded as being in danger; and some property (e.g. bullion) may patently be in no, or minimal, danger of deterioration at rest on the seabed. However, English law has traditionally regarded sunken property, of whatever nature, to be in a position of danger.

<sup>22</sup> Branimir Luksic. Limitation of Liability for the Raising and Removal of ships and wrecks: A Comparative Survey. *Journal of Maritime Law and Commerce*, Vol. 12, No.1, Oct, 1980. P 50

<sup>23</sup> Art. 784 of the Yugoslav Law on Maritime and Internal Navigation.

cargo) is a case of salvage only when the distress or the danger in which it was found still continues, or if there is an additional danger of the ship being broken or further damaged by other passing vessels.<sup>24</sup>

### **2.3 Salvorial negligence and its consequences**

The decision of the House of Lords in *The Tojo Maru* settled the matter of liability for salvorial negligence when it confirmed that a salvor owned a duty of care to exercise professional skill in carrying out the salvage operation and ruled that owners were entitled to counter-claim damages for negligence, and that the damages were not restricted to the amount of the salvage award which would be made<sup>25</sup>.

In cases governed by English law, which include those where the services are rendered on Lloyd's Open Form of Salvage Agreement, there is nothing to prevent a salvor from incurring liability to the owners of the property at risk for the consequences of any negligence in performing the salvage operations; and it is no answer to such a claim that the operations have been successful in that part of the property, at least, has been salvaged.<sup>26</sup>

There is no reason why a salvor should not be held liable to compensate the shipowner when damage occurs as a result of the salvor's negligence. Although claims against salvors are in certain circumstances excluded by international compensation regimes, these expressly preserve any rights of recourse which the owner may have.<sup>27</sup>

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<sup>24</sup> See Abraham, *op.cit.* 255.

<sup>25</sup> [1971] 1 Lloyd's Rep.341(H.L.).

<sup>26</sup> C DE LA RUE, C.B. Anderson, *Shipping and the Environment* London: Lloyd's Press, 1998 c.14. P 602

<sup>27</sup> See Civil Liability Conventions 1969 and 1992, Art.III.5; Hazardous and Noxious Substances Convention 1996, Art.7.6.

Whether the salvor has, in fact, been negligent in carrying out the salvage operation will depend on the facts. The shipowner has to prove that the loss was due to the salvor's negligence which as a professional salvor should not have failed. As a result, the court may reduce the reward in calculating according to Art.13 of 1989 Salvage Convention. That is one option. However, as was done in the *Tojo Maru*, The shipowner has the option to counterclaim and the court may impose liability that may reduce the salvor's reward to zero. On top of that, he may liable further, so that he goes out of pocket. This is the concept of the "sword" as opposed to the "shield".<sup>28</sup>

## 2.4 "Contract" Salvage

The most common salvage contract is the Lloyd's Open Form. It was first used in 1890, and has been revised and amended on several occasions, most substantially in 1980, 1990, 1995 and again in 2000. The latest edition is LOF 2005.

The US Open Form is a single-page standard agreement. It allows the parties to choose the method of computing the salvage award. In many cases, the US Open Form may represent a less costly alternative to the lengthy and complex LOF. It is expected to be widely used, at least for US salvage operations, once it becomes well known in the salvage community.<sup>29</sup>

In contrast to "pure salvage" where there is no pre-existing agreement between the parties, in contract salvage, the salvor acts to save maritime property after entering into an agreement to use "best endeavours" to do so. Such a contract is within admiralty jurisdiction, although the most popular standard salvage contract, Lloyd's Open Form (LOF) 2000, provides for arbitration of salvage contract disputes, and this provision will be given effect by the courts. If a contract is made while the vessel

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<sup>28</sup> D.R. Thomas, *Salvorial Negligence and its Consequences & Court or appeal decision in the Tojo Maru*

<sup>29</sup> C DE LA RUE, C.B. Anderson, *Shipping and the Environment* London: Lloyd's Press, 1998 c.14. P 609

was in an *extremis* situation, the courts will give it close scrutiny and may set it aside if the compensation is grossly exorbitant or if the salvor took unfair advantage or was guilty of fraud.

If the contract was bargained and fairly consented to, however, the court or arbitrators will enforce its terms. Cargo will also be bound by an agreement signed by the master of the vessel on the ground that he is an “agent of necessity”. The LOF standard agreement provides that the contract salvor is engaged on a “no cure, no pay” basis, by which he is entitled to compensation only if he is successful in whole or in part. However, the salvor can become entitled to “special compensation” as an exception to the “no cure, no pay” rule by incorporating a “Scopic”(special compensation of P&I Clubs) clause into LOF2000. This allows the salvor to choose, by written notice to the owners of the vessel, to be compensated based upon time and materials rather than “no cure, no pay”. The salvor can also invoke Article 14 of the 1989 International Convention on Salvage relating to special compensation for preventing or minimizing damage to the environment.

## **2.5 Wreck Removal Contracts**

The "SALVCON" Agreement is intended to be used by a Salvor working under Lloyd's Form, or similar contract, who wishes to engage additional assistance, but on a Lumpsum, non-award sharing basis. It is different from the widely used ISU Award Sharing SubContractors Agreement, or the alternative Daily Hire SubContract Agreement "SALVHIRE 2005".<sup>30</sup>

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<sup>30</sup> Sub-contract lumpsum Agreement Salvcon 2005. International Salvage Union.

## Chapter 3 Central issues relating to wreck removal

### 3.1 Wreck Owner Liability

The question of who is the owner of the wreck is always being discussed by those parties concerned at the beginning of a lawsuit. Sometimes it is easy to find, but sometimes it is extremely nervous for the plaintiff. It is although the prerequisite of the owner's liability rest on. In most cases, wreck owners want to escape liabilities through various ways, but in court, the only standard of decision making will be based on whether the owner can or can not get rid himself of the wreck.

Wreck vessel liabilities, in this author's opinion, include vessel owner liabilities and liabilities as owner. Vessel owner liability is prevalent and some countries place liability arising from many other types of event upon the operator, who may be, but is not necessarily, the owner of the vessel. The sufficiently proximate consequences of the event that caused the ship's wreckage are the deciding factors to distinguish the difference.

Wreck owner liabilities are the owner's liability for damages caused by the wreck as such. This burden is always on the shipowner's shoulders and the situation can not be changed for the time being. It may arise after the hull insurer has paid for a total loss of the vessel.

Wreck liabilities also cover costs for the removal of wrecks that obstruct shipping or may cause environmental or other damage.

The representative wreck owner liability could be consulted through the US Wreck Act. It should be noted that the United States can assert the following *in personam*

rights with respect to the wreck of a vessel in violation of Section 409<sup>31</sup>: the United States can obtain declaratory and injunctive rulings allocating responsibility for the wreck on the basis of negligence, and requiring the responsible parties to remove the wreck or reimburse the United States for the removal costs; alternatively, the United States may remove the wreck and recover the removal costs in a maritime tort action against anyone whose negligence proximately caused the wreck. Moreover, while the Wreck Act imposes the duties of marking and removal only upon the owners of wrecked vessels, the Supreme Court in *Wyandotte* recognized the right of the United States to assert the aforementioned *in personam* remedies against negligent non-owners as well as negligent owners. Subsequent lower court decisions have recognized the right of wreck owners to obtain reimbursement of marking and removal expenses from third parties whose negligence caused or contributed to the wreck.<sup>32</sup>

The US Supreme Court has expressly avoided deciding what remedy if any the government would have for a non-negligent sinking, but what happens if the shipowner is non-negligent? Several *post-Wyandotte* decisions of the lower federal courts have held, or assumed, that a non-negligent owner is not liable for removal expenses.<sup>33</sup> It should be remembered, however, that these cases are apparently relying on the old decisions which were supposed to authorize exemption of an owner from liability after he abandoned the ship. The Supreme Court, in *Wyandotte*, said that the old cases were “not good authority” and “illusory non-statutory law”, because they rested on a 1798 English case which referred to criminal indictment rather than civil liability. This criticism by the Supreme Court does not permit absolute confidence that even non-negligent owners may not some day be held

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<sup>31</sup> The Wreck Act is part of the Rivers and Harbors Act of 1899

<sup>32</sup> *Nunley v. M/V Dauntless Colocotronis*, note 11 *supra*; *Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 934 (5th Cir. 1979) (dictum); *Western Transportation Co. v. Pac-Mar Service, Inc.*, 547 F.2d 97 (9th Cir. 1976); *Complaint of Chinese Maritime Trust, Ltd.*

<sup>33</sup> *Jones Towing Co. v. U.S.*, et ai, *supra*; *U.S. v. Moran*, 409 F.2d 961 (CA. 4,1969); *In Re Marine Leasing Services, Inc.* 328 F.Supp. 589 (D.C. La. 1971).

civily liable *in personam*; and two post-Wyandotte cases have held that *any* negligence by an owner will render him liable.<sup>34</sup>

In reality, the non-existence of negligence is a rare occurrence and vessels ordinarily go down as a result of their own unseaworthiness or someone's lack of proper care.<sup>35</sup>

### **3.2 Limitation of liability in respect of salvor and shipowner**

#### **3.2.1 The salvor's limitation of liability**

The 1976 Limitation Convention makes a further step in the extension of the circle of persons who may limit their liability by granting this right for the first time to the salvor. The need to extend this protection to the salvor became especially apparent during the *TOJO MARU* accident. It should be added here that claims for salvage services in the proper sense of the word are excepted from limitation because they cannot exceed the value of the salvaged vessel and the salvor has a maritime lien for them.

The salvor may operate from his ship, or he may render the service of raising and removing a sunken, wrecked or stranded ship by operating outside any ship whatsoever (e.g., from a helicopter, or from land), or he may operate solely on the salvaged ship. According to the 1976 Convention he may limit his liability in any of these cases as long as he is rendering services in direct connection with salvage operations. In each of these cases the limit of his liability will be different. When he does not operate from any ship, or when he conducts his operations solely from the salvaged vessel, the limits will be calculated according to a tonnage of 1,500. In such a case the number of units of account or monetary units to which this tonnage will be applied will depend upon the nature of the claim, (i.e., whether it is a claim for loss

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<sup>34</sup> *Humble v. Crochet*, supra; *In Re Marine Services*.

of life or personal injury, or whether it is another type of claim), but the 1,500 tons will be the upper limit with respect to any type of claim. However, since the text of the Convention does not make it clear whether the 1,500 tons are to be multiplied by the number of units of account or monetary units applicable to loss of life and personal injury claims, or by those applicable to other claims, where there are both kinds of claim it remains uncertain how incompletely satisfied loss of life and personal injury claims can be satisfied from the limitation fund pertinent to such other claims.<sup>36</sup>

Within the meaning of the 1969 International Convention on Civil Liability for Oil Pollution Damage, as is well known, the 1969 Civil Liability Convention imposed strict liability on the shipowner for these specific claims (Arts. I,3). It could therefore be argued that the salvor may limit his liability in accordance with the provisions of the 1976 Limitation Convention, even for claims in respect of any pollution damage caused by oil escaping or discharged from the ship or wreck which is being raised or removed, because his liability is not mentioned in the 1969 Civil Liability Convention. Consequently, if the ship being raised or removed is a giant supertanker and the salvor is operating from it, or from any ship whatsoever, his liability for ensuing oil pollution would be limited to the 1,500 tons, multiplied by the number of units of account or monetary units for those claims called by the Convention 'other claims'.<sup>37</sup> Yet it is evident that this limit becomes grossly inadequate if one takes into account the possible extent of such damage. On the other hand, by setting the figure of 1,500 tons as his upper limit when he operates outside any ship, or solely on the ship to be salvaged, the 1976 Convention puts the salvor in these cases in a much worse position than he would find himself in if operating from his vessel, because salvage vessels are usually of considerably smaller tonnage; and when they are of less than 300 tons, they may be subject to a more favorable system of limitation of

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<sup>35</sup> Ray, "The Wyandotte Decision-Its Significance to Maritime Interests." *Insurance Counsel Journal* 230 (1971)

<sup>36</sup> P.K. Mukherjee.(2006, Feb) "Salvage". WMU presentation, Malmo, Sweden.

<sup>37</sup> Art. 6 (I) (b) (ii) and Art. 8 (2) (b) (ii) of the LLMC1976.



liability than the one established by the 1976 Convention by specific provisions of national law. For these reasons it may be doubted that, unless modified, the provisions of the 1976 Limitation Convention regarding the salvor's liability will find general acceptance in national legislation; a fact to be regretted, because for the time being the salvor cannot avail himself of this benefit, under the provisions of either the limitation conventions presently in force or those of internal legislation.

In some instances international conventions governing liability for pollution from ships have the effect of excluding liabilities which a salvor might otherwise incur. This protection is contained in the so called “channelling” provisions which are designed to direct claims toward the owner of ship. However, this protection is, in general, confined to incidents falling within the CLC 1992 and the HNS 1996.

CLC 69 provides less protection to a salvor in respect of oil pollution damage than is the case under CLC 92. The channelling provision of the 1969 Convention provides simply that no claim for pollution damage under the Convention or otherwise may be made against the servants or agents of the owner. It is possible that in some situations certain activities of a salvor might be regarded as taken on behalf of the owner with the result that the protection applies, but in general a salvor would normally be considered an independent contractor rather than a servant or agent of the owner. A significant feature of the 1992 CLC is that it contains much wider channelling provisions than those of CLC 69. The 1992 Convention provides that no claim for pollution damage under the Convention or otherwise may be made against various parties including the following: “any person performing salvage operations with the consent of the owner or on the instructions of a competent public authorities”.<sup>38</sup> This protection is lost only if the damage results from a personal act or omission, is committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.<sup>39</sup>

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<sup>38</sup> CLC 1992, Art.3(4)

<sup>39</sup> Ibid

### 3.2.2 The shipowner's limitation of liability

The shipowner's right to limit his liability is always a hot topic for not only shipowners, but also for underwriters of ships and P & I clubs concerned. There still remain a number of different limitations of liability systems in regard to the shipowner's right to limit his liability, in spite of the provisions of the international limitation regime. First, some countries like in the former German system which is abandoned now<sup>40</sup> limit the shipowner's liability to his marine property, which consists of the ship in question and the outstanding gross freight of the current voyage; this is still effective in Turkey for example and still exists in some countries whose legal systems totally avail such a limitation, Other systems which are very popular in the world envisage the shipowner's personal liability for certain strictly enumerated claims, even though they are different in the ways in which this personal liability can be limited. The English system which is now adopted by the e.g. Scandinavian countries, Switzerland, the Netherlands, France and Germany, automatically limits this liability for each distinct occurrence to a determinable sum corresponding to the tonnage of the ship.<sup>41</sup> The traditional French system allows the shipowner's personal liability to be restricted, under certain circumstances, for each voyage to the "*patrimoine de mer*";<sup>42</sup> This abandonment in kind, as a *facultas alternativa* of the shipowner, does not by itself transfer to the creditor the marine property, but only gives him the right to be indemnified from it. The French system is now in force, e.g., in Spain, Peru, Chile, Brazil and Mexico. The relevant law of the United States combines the French conception of abandonment with the English system of fixed sums for death and bodily injuries and adds certain differences, such as taking the post-casualty value of the ship instead of following the former English practice of using the pre-casualty value.<sup>43</sup> Finally, some countries (Poland, Greece)

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<sup>40</sup> By introducing, on June 21, 1972, its *Seerechtsänderungsgesetz* (which came into force on April 6, 1973) the Federal Republic of Germany adopted the provisions of the 1957 Convention.

<sup>41</sup> Cf. The Merchant Shipping Acts, 1894 (ss. 502, 503), 1906 (ss. 69, 71), and Inl (s. 1b), and the Merchant Shipping Act (Liability of Shipowners and Others), 1958 (ss. 2, 3).

<sup>42</sup> Cf. French Code de Commerce, Art. 216

<sup>43</sup> See Pallua, *Pomorsko Uporedno Pravo* (Comparative Maritime Law), 111 ff. (Rijeka, 1975) For

have retained the option, offered by the 1924 Limitation Convention, of abandoning the ship in kind or in value, while Italy has chosen the other alternative of abandoning the value of the ship together with its freight.<sup>44</sup>

The principle of unlimited liability for certain claims, with the right of the ship owner free of personal fault to limit his liability for others, has been adopted in the limitation conventions. The 1924 Limitation Convention includes the claims for which the benefit of limitation could be invoked those relating to the raising of sunken vessels. The 1957 and 1976 Limitation Conventions also include this right in respect of claims for the removal of wrecks and the raising, removal and destruction of a sunken, stranded or abandoned ship, including anything that might be on board such ship.<sup>45</sup> Although a large number of countries have similar regulations concerning the raising and removal of wrecks and ships, either by conforming their national law to the provisions of the 1924 or the 1957 Limitation Convention, or simply by incorporating the material provisions of these conventions into their own legislation, there are some countries which have taken advantage of the right given by the Protocol of Signature to the 1957 Convention and have excluded these claims from the benefits of limitation.<sup>46</sup> On the other hand, there are countries whose case laws seem to deny the right of limitation for the mentioned claims, although it is acknowledged by their statutory law.<sup>47</sup>

In those countries where the shipowner does not enjoy the right to limit his liability, as, for example, in Germany, he is usually liable for the removal costs only up to the value of the ship or wreck which is being removed or raised, this value being the one the object has at the end of such operations. However, the same principle applies as in the limitation convention; the shipowner who is personally at fault for the fact that

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more details

<sup>44</sup> Cf. Arts, 275, 276 of the Italian Code of Navigation.

<sup>45</sup> Cf. Art. 1(I)(c) of the 1957 Convention and Art. 2(1)(d) of the 1976 Convention.

<sup>46</sup> For example, the Federal Republic of Germany.

<sup>47</sup> E.g., U.S.A

his sunken or stranded vessel constitutes a navigational hindrance is not allowed to invoke the right of limitation.<sup>48</sup>

Although the 1957 Limitation Convention is silent about it, most national laws specifically exclude from this kind of limitation claims for oil pollution and for nuclear damage, because liability for these claims is subject to special international conventions<sup>49</sup> or national regulations. Therefore, if such damage occurs in connection with the raising, removal or destruction of a ship or wreck, the shipowner's liability will be subject to different limits. This is expressly stated in the 1976 Limitation Convention.

### **3.2.3 The Bar of shipowner's limitation of liability**

The long-lasting principle of maritime law that those entitled to limit their liability lose this right if personally at fault for the loss or damage serving as the basis of the claim still exist. However, different interpretations in theory and much uncertainty in practice will be encountered in real life.

It has been noticed that even the texts of the limitation conventions were intended to introduce a greater measure of uniformity in this matter. The 1957 Limitation Convention, speaks of "actual fault or privity", and similar terms are to be found in a number of internal legislations. Hence, the shipowner (or other persons identified with him in this respect) will not be allowed to limit his liability if he is personally culpable for the loss, e.g., because of his failure to use due diligence in making the ship seaworthy, having employed an unskilled and unqualified master. He will also

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<sup>48</sup> Cf. Abraham, op. cit. note 7 supra, 260-61. The limitation of the removal costs to the value of the raised ship or wreck is in some countries conditional upon the fact that the raising has been contractually stipulated with the owner and not ordered by the competent administrative authority. (See Art. 791, par. 4 of the Yugoslav Law on Maritime and Internal Navigation).

<sup>49</sup> It is now under the regime of CLC & Fund 1992(2000 amendments, the 2003 protocol), HNS 1996, and Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (NUCLEAR), 1971, etc. see [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=256](http://www.imo.org/Conventions/mainframe.asp?topic_id=256)

be deprived of this right if the loss was due to the negligence of his employees (“servants or agents”) to whom he had entrusted the performance of some of his non-delegable obligations. In this case the shipowner is answerable for his own fault, and not for another's fault, because a non-delegable obligation can be entrusted to another person for performance or execution, but if that person thereby negligently causes damage, personal and not vicarious liability of the principal is involved. In contrast to this, if the shipowner entrusts the performance of a delegable duty to his representative or employee and through the latter's negligence some loss is proximately caused, the shipowner will not be prevented from limiting his liability, provided, however, that he has exercised sufficient care in selecting and instructing his employee, in other words, that he is not personally at fault. For the same reason a defect of the vessel which renders it unseaworthy, and thereby causes damage, will not necessarily be attributable to the shipowner's personal fault, because it could conceivably be caused by the negligence of the master or crew after the ship has already started on its voyage. The shipowner, likewise, will not always be responsible for the fault of an independent contractor (e.g., a ship-repairer). However, in such cases the shipowner will not generally be able to avail himself of his right to limit his liability, not because he is liable for the acts and omissions of an independent contractor, but because very frequently he is personally at fault in not using due diligence to supervise and control the work of that contractor and thereby through his own fault has failed to make the ship seaworthy.

Although the 1957 Limitation Convention does not mention degrees of the shipowner's actual fault or privity, it is accepted that the term includes intentional fault, or *dolus*, and negligence, or *culpa*. It is when one considers what degree of negligence of *culpa* can bar the shipowner from limiting his liability that the difficulties arise. Some civil law countries require only gross negligence,<sup>50</sup> while others take into account even ordinary negligence.<sup>51</sup> The situation is more complicated in common law countries because of their peculiar doctrine of

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<sup>50</sup> Art. 275 of the Italian Code of Navigation.

negligence. According to this doctrine at least three different notions of the word "negligence" must be distinguished. First, we have negligence as a state of mind (as opposed to intention), then negligence as careless conduct, without reference to any specific duty to take care (in this sense the word is used in the phrase "contributory negligence"), and in this connotation it is the opposite of diligence, and finally, there is negligence considered as the breach of a duty to take care.<sup>52</sup> It is admitted that as a state of mind or as careless conduct negligence can have degrees, so that one can speak of gross, ordinary and slight negligence. The same applies in criminal law, where degrees of negligence are recognized. It is, however, firmly denied by the legal doctrine of the common law countries that negligence, as a specific tort in itself, that is, as the breach of a duty to take care, may be graduated.<sup>53</sup> Yet, some doubt concerning this may be permitted, because it appears that the breach of a contractual duty to take care is not, at least in English law, treated as the tort of negligence nowadays, but is considered a part of the law of contract and, in the sense of carelessness, can have degrees. Moreover, it seems that even a duty to take care imposed by decisional or statutory law may allow the gradation of negligence, at least in order to determine whether to grant the plaintiff compensatory or punitive damages. If, in analyzing personal fault, attention is turned to the text of the 1976 Limitation Convention, an even more restricted definition of this concept will be noted. There it is stated that the person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause the loss, or recklessly and with knowledge that such loss would probably occur.<sup>54</sup> This formulation has already been met in some of the international conventions.<sup>55</sup>

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<sup>51</sup> Art. 384, par. I (I) of the Yugoslav law

<sup>52</sup> Cf. Charlesworth on *Negligence* 10. If. (London. (977).

<sup>53</sup> Charlesworth.op. cit.

<sup>54</sup> Art 4 of LLMC 1976

<sup>55</sup> Notably the 1961 Passengers Convention, the 1967 Luggage Convention, the 1968 Hague-Visby Rules, and, going back even further, in the 1955 Hague Protocol

It seems to be the dominant view of the common law writers that "recklessness" does not come within the meaning of the term "wilful misconduct", since it lacks that complete and full intentionality peculiar to the latter notion.<sup>56</sup> On the other hand, it appears that "recklessness" cannot be taken as synonymous with "negligence", not even with "gross negligence", because recklessness implies a higher degree of carelessness, bordering on a semi-intentional act.<sup>57</sup> This peculiar definition is further compounded by the requirement that recklessness should be accompanied by knowledge that loss would probably result. One may be excused for asking why it was necessary to qualify recklessness with knowledge if it already denotes a semi-intentional act and therefore a state of mind which implies at least a vague knowledge of the consequences of the act. However, if these asseverations of the common law theory are taken at their face value, and if, therefore, recklessness means something more than even gross negligence, it would be difficult for the person liable not to be able to limit his liability where the provisions of the 1976 Limitation Convention were applicable. Even if the loss was due to the unseaworthiness of the ship, who could prove that the shipowner's failure to exercise due diligence in making the ship seaworthy was reckless, and not merely negligent.

Before closing this general survey on personal fault as a bar to limitation of liability, a brief comment should be added concerning the difference which the 1976 Limitation Convention introduced regarding the personal fault of the master. It is not unusual, especially when it is a question of smaller craft, that the master is owner, co-owner or operator of the vessel. According to the Art 6 (3) of 1957 LLMC, and the greatest number of national laws, in such cases the master has the right to limit his liability if his act, neglect or default was committed in his capacity as master. The 1976 Limitation Convention is more severe with such masters, because it allows no similar exception. Consequently, if the master of a sunken or stranded ship, who is at

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<sup>56</sup> Cf. Cadwallader, *The New Convention on Limitation of Liability*, in "ew Directions in Maritime Law 1978", pp.11 ff. (Dalhousie University, Halifax, Nova Scotia).

<sup>57</sup> For a different view see Bonelli, *Limitation of Liability of the Carrier*, II Diritto Marittimo (Jan.-March 1974) 81 ff, where recklessness is equated with gross negligence. A list of common law court cases is appended.

the same time its owner, co-owner, charterer, operator or manager, incurs some liability, for example, because of an act in connection with the raising or removal of his ship ultimately declared by a court to be intentional or reckless, he would not be allowed to limit his liability, even though the act related to the navigation or management of the ship.

### **3.2.4 Refusal to raise or remove wrecks which obstruct navigation**

Does the shipowner's refusal to raise or remove his stranded or sunk ship or wreck which obstructs navigation constitute his personal fault, prevents him from limiting his liability for the removal costs?

Some of the differing ways in which courts treat this matter will first be examined. As mentioned above, in some countries, claims for removal costs are subject to limitation to the value of the shipowner's interest in the vessel and its pending freight, if the loss, damage or forfeiture was done, occasioned or incurred without his privity or knowledge. According to other practice, however, the shipowner has the financial obligation to remove a wreck which is an obstacle to navigation, regardless of his personal fault. If he is innocent, he may seek recovery of his wreck removal expenses from the party at fault, but he may not take advantage of the limitation as against the Government or a government agency which performed the removal. This attitude is based on the assumption that the cost of removing wrecks from navigable waters is not a public charge, not even when the shipowner was not at fault for the casualty.

Until quite recently, the owner could abandon his sunk or stranded vessel to the Government and limit his liability if he was free from "privity or knowledge", with respect to the cause of the loss, in which case the Government could only proceed *in rem* against the vessel. Even if the proximate cause of the sinking or stranding was his personal fault, the owner was still allowed to abandon the vessel and was only



deprived of the benefit of limitation. But his practice experienced a change with the decision in *Wyandotte Transportation Co. v. United States*,<sup>58</sup> when the Supreme Court held that abandonment as an alternative to removal applied only to owners of vessels sunk or stranded without their fault or that of their employees, in other words, to those shipowners who did not cause the casualty or contribute to it through their intent or negligence.

In US, a culpable shipowner cannot limit his liability for removal expenses, and the other from the basic tenet of the maritime law institution of limitation of liability, as incorporated in the United States Limitation of Liability Act and in all the international conventions on this subject, which proclaims that a shipowner may always limit his liability if the loss was not caused through his personal fault. This was the decision in *In Re Pacific Far East Line Inc.*,<sup>59</sup> where both shipowners were jointly and severally liable for a collision and the ensuing sinking of their ships, and the court held that the owner of one which sank was not entitled to limitation under the Limitation of Liability Act because the mandatory duty of removal imposed by the Rivers and Harbors Act was his personal duty and the failure to remove was within his privity or knowledge. Travelling along this line of reasoning the United States courts appear to have reached new legal insights, whereby even the faultless owner's presumed knowledge, that it is his duty to remove his accidentally sunken ship if it obstructs navigation, would suffice to prevent him from limiting his liability for the removal costs.<sup>60</sup>

So if the law of a country permits limitation of liability for casualty claims, as does the law of the United States, then the shipowner should be denied this right only if he is personally at fault for the casualty which caused the stranding or sinking of his vessel. His refusal to remove the wreck should not constitute his personal fault for the existence of that wreck.

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<sup>58</sup> 389 U.S. 191, 1967 A.M.C. 2553 (1967).

<sup>59</sup> 314 F. Supp. 1339, 1970 A.M.C. 1592 (N.D. Cal. 1970).

Several courts have denied limitation on the basis that negligence in failing to mark or remove a wreck is within the owner's privity and knowledge, so as to preclude limitation under the terms of the Limitation Act. This is not reasonable in the legal aspect as the right of recovery in an action against third parties for removal costs, and in some actions between private parties, depends upon negligence in causing the wreck; such negligence will normally be of the kind for which, in collision cases, limitation of liability is frequently granted.<sup>61</sup> Privity and knowledge is therefore not a workable ground for denial of limitation in such actions.

Perhaps there is one conceivable exception to this, and it concerns the case, when the raising is made more costly by the fact that the owner had made a previous unsuccessful attempt to raise the ship and had thereby left it in a more inaccessible position. If this was due to the shipowner's personal negligence, he should perhaps be allowed to limit his liability only for the costs which would have been incurred in raising the ship had it remained in its former position, because the additional costs would obviously be due to the shipowner's personal fault.

### **3.3 Duty to mark and maintain proper marking of wrecks**

Generally speaking, the wreck owner's duties of marking and removal apply only to wrecks which are located in "navigable channels" and constitute obstructions to navigation or in water with navigable possibility. It could be found in most States' national laws that the phrase "navigable channels" is not only to include buoy-marked channels used by commercial vessels, but also includes such areas as pre-decided charted depth, shallow portions of navigable rivers which lie outside commercial channels but are nevertheless navigable by some classes of vessel, anchorage areas, and even waterways which are not navigable but were navigable in

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<sup>60</sup> Cf. *In re Chinese Maritime Trust, Ltd.*, 478 F.2d 1357, 1973 A.M.C. 1110 (2d Cir. 1973).

<sup>61</sup> *Wyandotte Transportation Co. v. United States*.

their natural state and can be rendered navigable by improvements. Artificial obstructions to navigation, such as bridges, do not prevent a waterway from being considered navigable.

Where a navigable waterway is obstructed by a wreck, the owner's marking and removal arises as soon as the owner is notified of the wreck. The owner must mark the wreck "immediately" upon receiving the wreck information despite the fact of whether or not he was negligent in causing the wreck. The term "immediately" is construed to mean within a reasonable time. It should be noted that reasonableness in this context is determined in light of the fact that other vessels can be damaged by colliding with the unmarked wreck at any time when navigating, so the wreck should be marked as soon as possible in whatever situation. If a collision occurs with a wreck which has remained unmarked for more than a few minutes, the negligence of the owner in failing to mark the wreck will be presumed. The owner will then have the burden of coming forward with concrete evidence to show that he exercised due diligence in attempting to mark the wreck. Many court decisions in the US indicate that the standard of care imposed on the wreck owner is very high.

The duty of marking the wreck by shipowners is generally construed as 'nondelegable'. However, there is an exception, that is when the so-called "receiver of wreck"<sup>62</sup> (e.g. Coast Guard or some administrations in the Commonwealth) marks the wreck, whether properly or not, the owner's duty to do so is relieved, and the State will bear the liability for any subsequent accident caused by improper markings. It is not sufficient, however, for the owner to notify "receiver of wreck" (e.g. Coast Guard) of the wreck and rely on him that the wreck will be marked. If we consult some court decisions in US, we can draw the conclusion that failure to verify the "receiver of wreck" has located and marked the wreck will render the owner liable in tort for any damage to third parties caused by failure to mark the wreck.

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<sup>62</sup> Edgar Gold, Aldo Chircop, Hugh Kindred. *Essentials of Canadian Law* Toronto: Irwin law 2003 P 620 2) Receiver of wreck

After marking the wreck, the owner must maintain the markings until the wreck is removed. If, because of necessity, the markings initially used by the owner do not meet the requirements outlined in the national Wreck Law, the owner must replace those markings as reasonably possible with markings which meet the statutory requirements. Still taking US for example, if the owner was not negligent in causing the wreck, and is therefore entitled to abandon the wreck without liability, abandonment will terminate the owner's duty to maintain the markings. If the owner abandons the wreck and is later found to have been negligent in causing the wreck, the marking costs incurred will undoubtedly be recoverable from the owner in an action by the State to recover wreck removal expenses.<sup>63</sup> The abandonment will also be a basis for holding the negligent owner liable to third parties damaged by collision with the wreck.<sup>64</sup>

### **3.4 Liability of the wreck owner to third parties for damage caused by the wrecked vessel**

It should be noted here that if the negligence of an owner in failing to mark or remove a wreck is the main reason for a third party in causing the collision or some other damages, the wreck owner will solely be liable to the loss and has to bear all the compensations. However, this appears to contravene the strong policy in favour of apportioning fault in admiralty cases. They have been construed by potentially negligent third parties to say that the failure of a wreck owner to mark or remove the wreck is, as a matter of law, the sole proximate cause of any collision involving the wreck and another vessel.<sup>65</sup> Such a construction has been repudiated by a line of decisions from the Fifth Circuit Court of Appeals,<sup>66</sup> which adheres for the most part

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<sup>63</sup> Wyandotte Transportation Co. v. United States applies to make the wreck owner liable to the United States for marking expenses if the owner's negligence was a cause of the wreck. See also In re Marine Leasing Services.

<sup>64</sup> Ibid

<sup>65</sup> This argument was made in Nunley v. M/V Dauntless Colocotronis, The Fifth Circuit Court of Appeals rejected the argument and declined to interpret so broadly the cases, on which it was based. 727 F.2d at 462, 463-467.

<sup>66</sup> Ibid

to the rule of apportioning liability according to fault among the wreck owner and other negligent parties in cases involving collision with a wreck. The Fifth Circuit decisions state the better view of this matter, and hold as follows: “As indicated previously, an owner who was not negligent in causing or failing to mark the wreck, and thereafter abandons it to the United States, will have no liability for damage suffered by third parties as a result of the wreck.”<sup>67</sup> An owner who is negligent in causing the wreck and failing to remove it, or negligent in failing to mark the wreck irrespective of negligence in causing it, will be liable to the third parties damaged but will be entitled to contribution from other joint tortfeasors whose negligence contributed to the damage.<sup>68</sup>

If the shipowner makes a diligent but unsuccessful attempt to mark or remove the wreck, after several years, a colliding accident happened. The shipowner still can not be relieved from liability because civil liability for removal expenses and damage by the wreck is based on the general principles of maritime tort, and should depend on the owner's negligence in causing the wreck as well as in failing to mark or remove it. The owner's diligence in attempting to mark or remove the wreck could be only one of the factors in the apportionment of fault among owner and other parties but not a factor which cuts off the owner's negligence in causing the wreck.

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<sup>67</sup> See *Jones Towing, Inc. v. United States*, 277 F.Supp. 839 (E.D. La. 1967); *Orrell v. Wilmington Iron Works*, 89 F.Supp. 418 (E.D.N.C. 1950).

<sup>68</sup> *Nunley v. M/V Dauntless Colocotronis*.

## **Chapter 4. The Draft Wreck Removal Convention and its salient features**

The intention of the Draft Wreck Removal Convention (“DWRC”) is to impose various rights and obligations on a State Party in relation to the removal of wrecks that are hazardous to either safe navigation or pose a potentially damaging threat to the marine and coastal environment. The DWRC would be applicable to wrecks in a State Party’s Exclusive Economic Zone or, if a State Party has not established such a zone, an area of equivalent breadth. As such, the DWRC, when adopted would represent an extension of coastal state jurisdiction over wrecks beyond the outer limit of the coastal states’ territorial sea (or, if claimed, contiguous zone) which is currently, in the absence of any special agreement, the limit of coastal state jurisdiction over foreign ships and nationals at the wreck site. The DWRC also identifies who would be responsible for determining whether a hazard exists when the wreck is beyond territorial waters, as well as reporting, locating and marking the wreck.

Under the draft wording, if the State Party considers that a wreck constitutes a hazard then it shall immediately inform the registered owner. At that stage the registered owner would still be at liberty to contract with any salvor. It would then be incumbent on the registered owner or other interested party to provide evidence of insurance or other financial security. This is to be equivalent to the limits of liability for the ship in question and that calculated under the Convention on Limitation of Liability for Maritime Claims, 1976. The State Party would then set a deadline for removal or if necessary take immediate action. If the deadline is not met, then the State Party may undertake the removal of the wreck, but only to ensure that the removal is consistent with safety and environmental concerns. The State Party would

then be able to recover costs from the registered owner, although it would be possible to limit liability under applicable national or international regimes. The DWRC obliges State Parties to take any appropriate measures under their national law to ensure compliance with the DWRC. This mechanism ensures that registered owners comply with its provisions by placing the obligations of the registered owners under the jurisdiction of the relevant States. By becoming a State Party to the DWRC, a state automatically gives its consent as a flag state to the State Party whose interests are threatened to act in the manner outlined above.

It is anticipated that the draft will be considered by a Diplomatic Conference scheduled to be held in the forthcoming biennium. The Secretary-General considers that the Convention will end the legal uncertainty concerning wreck removal. This remains to be seen and its success will, of course, depend on the number of accessions if the IMO adopts it. As in keeping with basic international legal principles, any resulting convention will only bind the parties to it, so coastal states will remain unable to take action against the wrecks of non-State Parties beyond the territorial sea (or where claimed the contiguous zone).

#### **4.1 The salient features of DWRC**

There are some salient features in the new submitted DWRC by the Netherlands which was the host country in October, 2005.

##### **4.1.1 Definitions in DWRC**

The draft WRC provides that "wreck" shall include "any object that is or has been on board" a ship. This gives rise to the possibility of a conflict between the WRC and the various liability regimes which have been agreed for certain cargoes (specifically oil and HNS) and are proposed for bunkers. This potential problem stems from the definition of "removal" and "hazard" (in particular the environment component of

that definition). The definition of “hazards” provides for the application of the WRC to wrecks which pose or threaten to pose danger to the marine environment or to the coast line or related interests, and the definition of “removal” includes prevention, mitigation and elimination of the hazard created by a wreck.

Under the 1992 CLC shipowners are liable for “pollution damage” caused by spills of persistent oil. In addition claims may be made for compensation for preventive measures. It should be noted that the 1992 CLC applies to spills of bunker oil from tankers in ballast.

It has been in great consensus that shipowners are liable for any “damage” caused by spills of persistent oil carried in the bunkers of all ships, except those falling within the scope of the 1992 CLC. “Damage” includes the costs of preventive measures.

#### **4.1.2 General principles and Scope of application**

According to article 2.1, States Parties may take measures established under this Convention in relation to the removal of wrecks posing a hazard in the convention area. “Convention area” actually means areas covered by EEZ according to the definition of Article 1.1.

In most countries the authorities can, under the present rules, take any appropriate action outside their territorial sea in pollution cases. Some countries, e.g. The Netherlands and Denmark, also take such steps outside their territorial waters if the wreck is a danger to surface navigation. This, however, seems to be restricted to waters where the authorities maintain marking of fairways or where there is seaborne traffic to and from ports in the country. Other countries, e.g. Germany, consider it impossible to take such steps and have faced difficult legal problems with the elimination of hazardous wrecks located beyond their territorial waters, and the



refund of costs. A convention on wreck removal relating to the waters beyond the territorial waters is therefore felt necessary in these countries.

It is obvious that the very broad application to all waters outside territorial waters creates much controversy, thus the P&I representative on the ISC stated that the industry would resist such a wide scope.

Another question to consider was if the national regimes for wreck removal within the territorial waters may have so many similarities that it is possible to include these areas within the scope of the WRC.

The replies to the CMI questionnaire indicate that this may very well be the case. Since the majority of wreck removal cases will relate to wrecks within the territorial sea, it would be important to obtain widespread international unification of the rules governing such wrecks. Articles 3.2 and 3.3 show that a state party has the right to decide whether or not to implement WRC in its territorial seas.

#### **4.1.3 Reporting wrecks**

Article 6.1 of Oct edition of DWRC says that State Party shall require the operator of a ship to report without delay a wreck to the affected states.

The definition of operator of the ship can be found in article 1.9, it means the owner of the ship or any other organization or person such as manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibilities imposed by the International Safety Management Code.

In view of the fact that penal sanctions are imposed for the failure to report, it seems

important clearly to define who is the responsible party. This would hardly be achieved by referring e.g. to operator of the ship, and perhaps therefore it would be preferable only to use the expression shipowner (being the registered owner). If one feels that this, in particular in cases of bareboat charter, is unsatisfactory, one could consider including also the master of the ship as the master is the best person to report.

The master or the operator of the ship's fulfilling the obligation to report wrecks has replaced the former wording since October, 2005.

Finally, one may consider to provide for certain basic points which shall be covered in the shipowner's report, e.g. details of the vessel, its cargo and bunkers, details of owners and their insurers, time and position of the occurrence, details of the occurrence and the vessel's condition, as well as any measures taken to salve the ship or prevent damage emanating from the ship or its cargo. All of this information has actually been included in Article 6.2.

#### **4.1.4 Determination of hazard**

The Affected State has to determine whether a wreck poses a hazard before the order of wreck removal. That consideration has been examined from article 7(a) to article 7(o). It is realized that the list of the criteria to be taken into account must be open ended and that this is made clear in clause (o) which says that regard shall also be taken to "any other circumstances that might necessitate the removal of a wreck". However, the clause as presently worded says much more, i.e. that removal shall be necessary. This may cause confusion. Firstly, it seems to lead to circular reasoning. Secondly, it would be required to mark many wrecks which are unnecessary to remove according to article 9.1. Since it is a condition for marking that there is a "hazard", one should not make it a condition directly to determine what is a "hazard" which necessitates removal.

The author holds the view that it could be amended as:

“any other circumstances that might be treated as “hazard” if necessary to mark and remove the wreck.”

It seems obvious that the state which determines that a hazard exists should have a duty to inform the shipowner. Since this decision may have very serious consequences, it seems necessary that it is made in writing and perhaps also appropriate that the grounds for the decision should be stated.

#### **4.1.5 The financial liability for locating, marking and removing wrecks**

Article 11.2 says the registered owner shall be entitled to limited liability under any applicable national or international regime.

This would mean that a state party which had limitation rules in its national law, but was not a party to an international convention in this field, e.g. the USA, could apply these national limitation rules. This would be highly welcomed by shipowners.

On the other hand, however, it may be very difficult to obtain international acceptance that one should provide for any rules of limitation of shipowner's liability outside the LLMC, the CLC and the HNS conventions. A possible solution which will be of some assistance for those who favour to provide for positive rules of limitation, would perhaps be to include a rule in the WRC that a state party which is also a party of the LLMC 1976, shall not make use of the possibilities to reserve the right to exclude claims for wreck removal from limitation in Art.18 in the LLMC 1976.

#### **4.1.6 Time Bar**

The present position with respect to the time-barring of owner's obligation to remove the wreck, alternatively to pay the costs for the removal, varies considerably. For example, Sweden has a 2 year time bar from the casualty while Ireland has probably no time-barring, not even under the general rule of limitation of time because a wreck may be considered as a continuing nuisance so that a new cause of action (for which a time-limit will run) would arise from day to day. The USA has pointed out that although there is no explicit time-limit, it is conceivable that an unreasonable delay in prosecuting the claim could bar recovery under the Doctrine of Laches. Supposedly, an unreasonable delay on the part of the authorities may have the same effect under similar rules in many other countries.

The shipping industry no doubt has a rather strong need for clear rules on time-barring. It is difficult to live for many years with an unresolved potential liability. Further, it should be noted that the P&I clubs normally only provide cover for the shipowner's wreck removal liabilities in 3 years after the casualty.

On the other hand, a state party (under the WRC) will know about the existence of a wreck immediately after the casualty. The state parties should therefore in all but a very limited number of extreme cases be able to analyse and decide if there is a hazard necessitating removal within a rather short period of time.

Given this background it is felt that the WRC should provide for a short time limit commencing at the date of the casualty after which all obligations of the shipowner under the WRC are time-barred. This time-limit should be fixed in such a way that there will be reasonable time for the authorities to investigate and consider if the wreck is a hazard that necessitates removal, to issue an order for wreck removal to the shipowner, to let the shipowner have a reasonable time (as appropriate) to arrange and effect the removal, to let the authorities thereafter have reasonable time

to arrange and effect the removal themselves. It although is a reasonable time to shipowner who fail to undertake the removal and to process and lodge the claim for costs against him.

It is felt that 3 years from the date of the casualty should give ample time for this and it is pointed out that however, in no case shall action be brought after six years from the date of maritime casualty that resulted in the wreck. Where this maritime casualty consists of a series of occurrences, the six-year period shall run from the date of the first occurrence.<sup>69</sup>

## **4.2 The compatibility of the DWRC with other conventions**

### **4.2.1 Relationship with Intervention Convention, 1969**

The right of the coastal state to intervene in a pollution casualty was one of the first matters to be addressed after the world's first major oil spill, the *Torrey Canyon* disaster in 1967. By its preamble the Intervention Convention 1969 recorded that the parties to it were “conscious of the need to protect the interests of their peoples against the grave consequences of a maritime casualty resulting in danger of oil pollution of sea and coastlines” and “convinced that under these circumstances measures of an exceptional character to protect such interests might be necessary on the high seas and that these measures do not affect the principle of freedom of the high seas”<sup>70</sup>

The precise form of state intervention naturally varies from case to case and also depends to some extent on the terms of national legislation. Here a distinction is to be drawn between intervention affecting the ship or its cargo, and oil spill combating operations. In most parts of the world national contingency plans envisage that public

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<sup>69</sup> Article 14 of DWRC. LEG 90/5 2 Oct 2005

<sup>70</sup> The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, done at Brussels, 29 Nov 1969.

authorities will take the leading role in operations of the latter kind, but response operations relating to the ship itself and its cargo have generally been regarded as the province of professional salvors. Normally measures taken in the commercial interests of saving property have also been regarded as those most needed in the public interest of avoiding pollution. Consequently, state intervention has generally been for the purpose of asserting a supervisory role, or of addressing occasional conflicts between these interests, and has “only rarely involved the use of force or other active steps which affect the ship”.<sup>71</sup>

Examples of state intervention involving progressively greater degrees of official activity can for convenience be grouped into the following four main categories:<sup>72</sup>

(i) The first involves government participation without formal intervention. Consultation between the governmental authorities involved and the shipowner, salvor, insurers and other parties has normally led to consensus on the best course of action, thereby obviating the need for any official order or discretion on the action to be taken. Co-operation of this kind is commonplace and often results in response operations being conducted without any exercise by the authorities of their legal powers.<sup>73</sup>

(ii) Sometimes a basic form of official intervention occurs in the form of general notice issued when the authorities first learn of an incident, and before it is clear what response measures the owner or any salvors propose to take. Such a notice may for example prohibit the private interests involved from undertaking salvage or other response operations without prior reference to the relevant government bodies, or until oil spill combating equipment has reached the scene of casualty.<sup>74</sup> Notices of this kind have often been followed by consultations which have made further intervention unnecessary.

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<sup>71</sup> See the *Donaldson Report* (n. 19 above), para. 20.27, where a list is set out of the six occasions on which intervention powers had been exercised by the British Government, both inside and outside territorial waters, the period up to the date of the Report in May 1994

<sup>72</sup> C DE LA RUE, C.B. Anderson, *Shipping and the Environment* London: Lloyd's Press, 1998 c.14. P 822

<sup>73</sup> Ibid

(iii) In cases where consultation has not been effective, or where it has not been practicable due to the urgency or gravity of the circumstances, authorities have sometimes identified specific measures which those in control of the ship were required to take or to refrain from taking. In some cases, for example, orders have been made prohibiting the master from bringing a stricken tanker into port, or entering territorial waters. Conversely there is precedent, for example, for salvors being notified of a positive order to tow a stricken tanker away from the coast,<sup>75</sup> or of shipowners being required to tranship cargo from a tanker with a leaking bulkhead.<sup>76</sup>

(iv) Exceptionally, such as where a vessel has been abandoned, or the appropriate measures have been beyond the resources of the private interests concerned, coastal state authorities had occasionally control of the ship and conducted operations with their own resources. The aerial bombardment of the *Torrey Canyon* in 1967, which led to the Intervention Convention, is perhaps the best known example. Another instance of this type of intervention by the UK was the deliberate sinking of the bow section of the *Eleni V*, which had broken into two following a collision.<sup>77</sup>

The DWRC is similar in its substance and effect to the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution, 1969, as amended in respect of HNS (the Intervention Convention). Although article 5 of the DWRC provides that the DWRC shall not apply to measures as described in the Intervention Convention, a State Party to both the DWRC and the Intervention Convention may find that in certain factual circumstances they could elect under which Convention to order the requisite measures.<sup>78</sup>

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<sup>74</sup> As for example in the *Peacock* incident on the Great Barrier Reef, Australia, in July 1996.

<sup>75</sup> As for example in the case of the *Atlantic Empress*, after her collision with the *Aegean Captain* off Trinidad and Tobago in July 1979.

<sup>76</sup> As in the *Cerra Colorado* incident (UK, 1992), where the order was made in order to secure co-operation from a crew who were on strike.

<sup>77</sup> See note 72

<sup>78</sup> Ibid

By virtue of the provisions of article 1.1, 1.4(a) and (b), the DWRC will apply primarily to a vessel which has already sunk or stranded. In many cases where a casualty has stranded, such a casualty will already be the object of the attention of tug operators and salvage companies whether under contract to the owner or as pure salvage. Article 10.4 of the DWRC provides that the registered owner may contract with any salvor or other person to perform the removal of the wreck determined to constitute a hazard on the owner's behalf. When such removal has commenced, the coastal State may intervene in the removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with safety and environmental considerations. However, article 10.4 still has to be construed along with the other provisions of article 10, as it essentially provides that the registered owner's obligations under article 10 can be performed by a salvor or other appropriate person.

#### **4.2.2 Conflict with the Salvage convention 1989**

##### **4.2.2.1 The position prior to the vessel stranding/sinking under the DWRC**

Article 1.4(d) of the DWRC includes in the definition of a "wreck" for the purposes of the Convention, "a ship that is about, or may reasonably be expected, to sink or to strand, where an act or activity to *effectively*<sup>79</sup> assist the ship or any property in danger is not already underway." It is understood that this sub-article was included to cover the position where a vessel has been abandoned and represents a hazard, and the words "... where an act or activity to effectively assist the ship or any property in danger is not already underway" were added to take account of circumstances in which salvage or other rescue services are in hand.<sup>80</sup>

There may be rare occasions when the casualty has not yet received any such assistance, and if the definition of "wreck" set out in article 1.4(d) were not included,

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<sup>79</sup> This word "effectively" has been added into the Oct edition of DWRC.

<sup>80</sup> Draft Convention on Wreck Removal: The compatibility of the draft convention on wreck removal with other international convention. LEG 90/5 2 Feb 2005



the coastal State would have no right to take action under article 10 and could make no subsequent claim under article 11 for compensation if its actions in removing the “wreck” successfully averted sinking or stranding. It follows that if there is a drifting, hazardous and unassisted casualty which is about, or may reasonably be expected, to sink or to strand, the relevant coastal State will determine whether it poses a hazard under article 7. If it so determines, the State will be entitled to rely upon the provisions of articles 10 and 11.<sup>81</sup>

In many cases, however, a casualty will already be receiving assistance whether under contract to the owner or as pure salvage. It is clear from the wording of article 1.4(d) that such a casualty can only begin to be classified as a wreck for the purposes of the Convention, if it is about to sink or to strand, or it may reasonably be expected to sink or to strand. If the casualty may reasonably be expected to sink or strand, but an act or activity to assist the ship in danger is already underway, the vessel is not to be classified as a wreck. It follows that if a salvor is in possession of a vessel which may reasonably be expected to sink or strand, and he is acting to assist the ship in danger, theoretically the casualty should not be classified as a wreck for the purposes of the Convention, and the coastal State should not be empowered to intervene under the terms of the Convention.<sup>82</sup>

However, in reality, if a casualty is drifting towards the coast of a State party and the salvor does not appear to be averting the danger, albeit that he is acting to assist the ship in danger, the coastal State may well wish to intervene and take action under the Convention on the basis that:<sup>83</sup>

- (i) the acts of the salvor are not in fact assisting the ship and the vessel is therefore a wreck on the true and proper construction of article 1.4(d); and
- (ii) the wreck poses a hazard pursuant to article 7.

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<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> Ibid

On the other hand, if prior to sinking or stranding, the vessel is being positively assisted and the salvor appears to be averting the danger of sinking or stranding, under the provisions of the present DWRC, the coastal State would appear to have no power to intervene under article 10 because the vessel would not be a wreck for the purposes of article 1.4(d), and therefore article 7 is never triggered.<sup>84</sup>

So, effectiveness is the central point of article 1.4 (d), but it would be subject to the explanation of Coastal States.

#### **4.2.2.2 The position post stranding/sinking under the DWRC**

However, article 10.4 still has to be construed along with the other provisions of article 10, as it essentially provides that the registered owner's obligations under article 10 can be performed by a salvor or other appropriate person. For example, the coastal State is still obliged to impose a reasonable deadline under article 10.6. Under article 10.5, before removal commences, the coastal State may still lay down conditions but only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with safety and environmental considerations. If the reasonable deadline is not met by the salvor, theoretically the salvor could be dispossessed by virtue of the action taken by the coastal State under article 10.7.<sup>85</sup>

From the above analysis, it can be seen that a salvor could find himself facing dispossession pursuant to article 10.7 if, for example, he does not refloat a stranded vessel by a deadline imposed by the coastal State pursuant to article 10.6.

Until the deadline has passed, article 10.4 appears to provide that once removal commences, the coastal State may intervene in the removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with safety and environmental considerations. However, if the coastal State considers that

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<sup>84</sup> Ibid

<sup>85</sup> Ibid

immediate action is required, even though a salvor is in possession, once the relevant notices have been given under article 10(6) and (8), presumably the coastal State has a right to undertake the removal by the most practical and expeditious means available, consistent with considerations of safety and protection of the marine environment. Again, the coastal State in such circumstances would have the theoretical right to dispossess a salvor, but only if dispossession allowed the most practical and expeditious means of removal to be employed, consistent with considerations of safety and protection of the marine environment.<sup>86</sup>

#### **4.2.2.3 Harmonizing DWRC and the Salvage Convention**

The Salvage Convention and the DWRC should be compatible in their workings, provided, as set out above:<sup>87</sup>

- (i) The coastal State behaves reasonably and fairly;
- (ii) The coastal State does not impose unreasonable conditions at the outset; and
- (iii) The coastal State does not intervene unreasonably after the removal has commenced.

If the coastal State lays down unreasonable conditions or makes unreasonable interventions thereafter, could a salvor find himself in breach of his obligations under article 8 of the Salvage Convention if he performs the “removal” as part of his obligations as a salvor? In this respect, there is a potential area of conflict between the two Conventions. This could be solved by incorporating into article 10.1 of the draft Convention appropriate consultative procedures of the type set out in article III of the Intervention Convention. The possibility of unfair dispossession might be dealt with by the inclusion of a compensation provision similar to Article VI of the Intervention Convention.<sup>88</sup>

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<sup>86</sup> Ibid

<sup>87</sup> Ibid

<sup>88</sup> Ibid

## Chapter 5 Cases involving wrecks: survey of recent cases

### 5.1 Survey of the '*Tricolor*' case.

The basic facts on the collision:<sup>89</sup>

1. On 14 December 2002 the *Tricolor* was overtaking the *Kariba*, on the *Kariba's* starboard side, in the w-bound lane of the traffic separation scheme out of Antwerp and Zeebrugge.
2. The *Kariba* turned Starboard and her bow hit and penetrated the '*tricolor's*' port side.
3. The collision damages to the *Tricolor* breached the watertight integrity of the hull and caused flooding of her holds, to the extent that she rolled over to rest with port side down on the seabed at a depth of about 34 m, about the same as her breadth.
4. All the crew evacuated safely and were picked up by nearby vessels, including the *Kariba*.

#### 5.1.1 Legal aspects of France to remove the '*Tricolor*' sinking

Although there were no immediate reports of pollution from the sunken vessel, it was considered that there was an imminent danger of pollution from about 2,155m<sup>3</sup> of bunker oil in the vessel. Regardless of the possibility of salvaging the vessel for repairs, or if she was a total loss beyond repair, it was established that the bunker oil had to be removed to avert the danger of pollution. A further concern was the fact that the position of the sunken vessel did constitute a severe danger to navigation in one of the world's busiest shipping lanes. The French Maritime administration as the coastal State had the legal right to force the shipowner of *Tricolor* to remove the wreck.

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<sup>89</sup> Ivar Brynildsen . The *Tricolor* . The collision, sinking and the wreck removal. *Maritime Risk International*. Nov, 2004 P20

Shortly after the collision and sinking of the *Tricolor*, it was agreed with the hull underwriters that the vessel was damaged beyond repair and thus to be declared a total loss. Soon after that, the French authorities by Premar issued an order addressed to Wilh. Wilhelmsen to have the wreck removed.

### **5.1.2 Marking the wreck**

The France Smit Salvage, who happened to have vessels in the vicinity, was contracted in the early hours of 14 December on SCOPIC terms to immediately start preparing for the oil removal. It was also instructed to temporarily guard the *Tricolor* with special regard to traffic in the vicinity and any possible escape of oil. The Wilh. Wilhelmsen ERT also coordinated with the French authorities to have the position properly marked and to issue navigational warnings. In spite of this, the wreck was actually hit by other vessels on three occasions. Wilh. Wilhelmsen and the Gard P&I Club then contracted two specially dedicated guard ships to protect and secure the position of the *Tricolor*. This proved to be a wise precautionary measure as later there were several near collisions that were averted by the interception of the guard vessels.

### **5.1.3 The wreck removal of ‘*Tricolor*’**

The actual pumping of the oil from the hull underway on 23 December, and was conducted by Smit Salvage under very difficult conditions with strong tides and winter weather. The oil removal operation was finished on 22 February. Out of a total of 2,155m<sup>3</sup> of bunker oil, 1,455 m<sup>3</sup> had then been recovered, and it was estimated that about 100 m<sup>3</sup> remained inside as clingage in the tanks, and that about 50 m<sup>3</sup> was trapped in slots from where it could not be pumped; 60 m<sup>3</sup> remained in inaccessible settling tanks in the engine room. The integrity of these tanks was, however, not in danger. Unfortunately, about 490 m<sup>3</sup> of heavy fuel oil was unaccounted for and thus may have escaped to the sea. Out of this 490 m<sup>3</sup>, it is

assumed that about 210 m<sup>3</sup> escaped during one unfortunate incident with a broken valve due to rough weather during the oil removal operation.<sup>90</sup>

Clean-up operations at sea and on the beaches were initiated as the oil started to emerge in different locations of the nearby waters and beaches. Extensive sampling analysis has later established, to a certain extent, what originated from the *Tricolor* and what did not. It is clear that part of the pollution came from unidentified sources and some came from the tanker *Vicky* that collided with the wreck on 1 January 2003. Some oil pollution in the area was also thought to be oil that had drifted from the tanker *Prestige* that had earlier sunk off the coast of Spain. There was further speculation that some passing vessels may have taken advantage of the situation and discharged some of their slop in the vicinity of the wreck, but this was never proven to be true.<sup>91</sup>

On 11 November 2003 the wreck removal operation had to be temporarily halted due to adverse weather. At this time all the necessary cutting of the wreck was finished, and roughly half of the wreck had been removed and landed at the reception and demolition plant in Zeebrugge.

The operation was again continued in May 2004 and finally completed in October 2004, by which time the wreck site had been thoroughly surveyed and found to be clean of wreckage and debris. The French authorities by Premar then promptly declared that the wreck removal order had been complied with and was thus lifted.<sup>92</sup>

#### **5.1.4 Aftermath of the wreck removal of ‘*Tricolor*’**

Following the collision, both insurers of *Tricolor* and *Kariba* were liable to pay 75 percent of the cost of:

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<sup>90</sup> Ibid P18

<sup>91</sup> Ibid

<sup>92</sup> Ibid P20

- loss or damage to another vessel,
- delay or loss of use of another vessel,
- contracted salvage of another vessel

The remaining 25 percent and expensed of wreck removal was covered by the owner's P & I clubs.

There are obviously a variety of legal matters to be dealt with that concern the monetary loss and liabilities that arise out of a case like this.

The table<sup>93</sup> below shows the monetary consequences of the loss on the *Tricolor* side only:

US\$

H&M total loss	24m
Hull & Freight interest	12m
Oil removal	5m
Wreck removal*	30m
Guard vessels	2m
Pollution claims	6m
Cargo value	90m

\* The wreck removal contract price is confidential but excess the IG of P&I clubs pooling arrangement of USD 30m

The various parties involved will have an obvious interest in looking for possible recourse wherever they can. At the same time there is a question of deciding on the apportionment of liability limitations available under international conventions and local laws.

This will in turn be important for the distribution and apportionment of the various claims between the involved parties.

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<sup>93</sup> Ibid

The *Tricolor-Kariba-Clary* case decided recently in a US district court ruled that Otal Investments, owner of the container ship *Kariba*, was solely liable for the collision and sinking of the car carrier *Tricolor* in December 2002. Otal's counsel had argued that the *Tricolor* was too close to the *Kariba* on a parallel course in the fog-bound English Channel when attempting to pass. He also insisted that the master on the *Tricolor* should have reacted more quickly to the *Kariba* Captain's starboard turn to avoid collision with another vessel, the bulker *Clary*. He further argued that the *Clary's* bridge was manned by a lone second officer, who created a close-quarters situation by not turning to avoid the *Kariba* in time.<sup>94</sup>

#### **5.1.5 Comment on the 'Tricolor' case based on DWRC**

As the wreck of *Tricolor* posed a navigational hazard and potential pollution resource to the coastal state in the EEZ of France, it in all aspects corresponded to the DWRC regime. As the French authority has the right to force the shipowner of *Tricolor* to remove the wreck under its national law, it also perfectly applies to WRC in all aspects when entering into force.

The shipowner of *Tricolor* had the responsibility to mark the wreck. In this case, the wreck was hit three times by vessels passing by. The third party responsibility is very clear now as analysed in Chapter 3. Only the vessel collided with the wreck could present enough evidence that the owner of the *Tricolor* had not marked the wreck well enough could the owner of the *Tricolor* take responsible for the outcome of collision. Most of the court is now in favor of apportioning fault in this situation. Obviously, if the owner of the *Tricolor* did not mark the wreck or failed to mark the wreck clearly, he would have to take full responsibility.

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<sup>94</sup> David Patraiko FNI. *Kariba* caused *Tricolor* sinking. *Seaways* Mar 2006 P 28



Like most people within, and for that matter also outside, the industry, Christen Guddal, VP of Gard P&I Club, was stunned when he learned about the third collision. “I couldn't believe what I was hearing,” he said after learning that the OBO carrier *Vicky* had collided with the wreck, despite the safety measures taken at the site. He was even more surprised when he learned that the master of the *Vicky* claimed he had seen the marker buoys, but did not know the meaning of them.<sup>95</sup> The marking of the wreck was not the only reason for the repeated collisions and near-misses with the *Tricolor* wreck, all of which occurred despite the presence of five illuminated buoys as well as a host of other emergency warning measures. Some experts said poor communications and poor seamanship, as well as human elements are the main factors of these accidents.<sup>96</sup>

In court, Judge Harold Baer held that the owner of the *Tricolor* was not responsible for the third party damage caused by the wrecked vessel.

Wreck removal claims are being adjudicated separately in Belgium, which has no limitation of liability on such claims. However, the proportions of fault decided in New York will apply in the Belgium trial.

In the future, if WRC applies, according to Art 11.2, the registered owner shall be entitled to limited liability under any applicable national or international regime. It looks as if WRC and LLMC also will be in favor of the shipowner, as otherwise a big disaster like the *Tricolor* could cause the shipping company to come to the verge of bankruptcy.

Nevertheless, it is possible that some coastal States will raise their wreck removal limitation to shipowners through national legislation. If we take a parallel comparison, for example, it is not strange for Japan to revise the minimum limit of

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<sup>95</sup> Human error behind *Tricolor* farce. *Fairplay*. March 13. 2003 P29

<sup>96</sup> *Ibid*

liability about the provisions of Article 39-5 Paragraph 3 of “the Law on Liability for Oil Pollution Damage,1975” from August 1, 2006, as activated in the Protocol of 1996 to amend “The Convention On Limitation for maritime Claims,1976”. The new minimum limit of liability should be raised from about 3 times to 6 times compared with the present minimum limit. When the WRC comes into force, it is still possible that liability limitation for wreck removal requested by some coastal States will be raised to a certain level through national registration.

## **5.2 The ‘*Selendang Ayu*’ (built 1998) case.**

### **5.2.1 The ‘*Selendang Ayu*’ as a wreck off the Unalaska coast**

The *Selendang Ayu* was carrying 60,000 tons of soybeans from Tacoma, Wash., to China when it encountered engine trouble and grounded off Unalaska, the hub of a prolific commercial fishery about 800 miles southwest of Anchorage. Thousand of tons of oil and diesel and tons of soybeans spilled from the ship after it split in half on a rocky shelf.<sup>97</sup>

After the ship broke in half on December 8, 2004, it spilled almost 1546 m<sup>3</sup> oil into waters of the Alaska Maritime National Wildlife Refuge. Oil smeared nearby beaches and dotted others dozens of miles away. More than 1,600 birds and six sea otters were found dead.

Salvage crews removed 646 m<sup>3</sup> of fuel remaining in the ship's tanks. Since January (2005), beach crews have collected nearly 200,000 garbage bags of oil patties and tarballs, oiled grass, trash and other debris.

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<sup>10</sup> *Oil cleanup in Selendang Ayu grounding continues in Unalaska* By JEANNETTE J. LEE, Associated Press Writer .Published: May 29, 2006 Last Modified: May 29, 2006 at 06:00 PM

The ship's owners, Singapore-based IMC Group, are responsible for cleaning up the spill, as well as removing the ship. “To date, about \$49 million has been spent, and the total could be twice that much.” Pearson said.<sup>98</sup>

The *Selendang Ayu* is not considered a navigational hazard. This summer (2005), workers will remove paint and other pollutants, strip all the hydraulic hoses and tanks that hold oil and pump the last fuel from the tanks.

The Aleutians are littered with shipwrecks, but since 1990 the state can require ship owners to remove their wrecks or face penalties equal to the cost of removal. Removing the entire wreck would dramatically boost the company's costs. Estimates run from \$70 million to \$100 million, though it would be covered by the ship's insurance.

“Allowing the *Selendang Ayu* to remain sets a bad precedent and sends the wrong message to shippers travelling the notorious waters of the North Pacific and Bering Sea.” as Pearson said.<sup>99</sup>

### **5.2.2 Examination of the ‘*Selendang Ayu*’ case**

Before IMO puts pen to paper to create a new instrument, it shall consult its member associations on current law. Thus, when the drafting team gets to work, it has a clear knowledge of domestic law in a large number of states. This firm base ensures, as much as skilful drafting concerns, that the resultant instrument like DWRC will be compatible with the domestic law of a substantial number of states. Nevertheless, this result can not be easily obtained. It is noteworthy that even when the WRC is adopted by most of member states, the confliction between states still exists and has a huge influence on the conventional shipping industry.

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<sup>98</sup> JOEL GAY. “State seeks shipwreck's removal”. Retrieved from Anchorage Daily News Published: June 4, 2005

In this case, it is obvious that the wreck of *Selendang Ayu* does not belong to the regime of WRC. Firstly, the wreck is now in the territory sea of coastal state, not in the EEZ, and the decision to remove it or not is up to the law of coastal state. Secondly, it is not a navigational hazard and potential pollution resource as the entire bunker and diesel oil has been removed.

The initiatives, proposed by some member states, that WRC could be implemented in Territory Sea are welcomed in IMO's negotiation. Even now, it is still a hot topic for member states to argue. However, we all know that coastal States have sovereignty in their territorial seas, so it is reasonable that the shipowner of *Selendang Ayu* should remove the wreck whenever the coastal state requests this under the time bar.

One of IMO's main initiatives is to harmonize national law with international law, if some States want to implement the WRC in their territorial seas; this will definitely be appreciated by the international maritime community.

### **5.3 The 'Everise Glory' case.**

Singapore and Malaysia have agreed that the wreck of Malaysian flagged general cargo ship *Everise Glory* should be completely removed. The wreck lies about seven n-miles north-east of the disputed islands of Pedra Branca and Pulau Batu Puteh. The ship sank after colliding with the Evergreen Marine container ship Uni Concord outside the Singapore Strait on 4 June 2005. The safety of international navigation was of primary consideration," said a joint statement from the two governments. The wreck is in the middle of one of the world's busiest sea lanes.<sup>100</sup>

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<sup>99</sup> Ibid

<sup>100</sup> Lloyd's Register-fairplay ltd 2005

A friendly discussion to remove the sunken vessel, *M.V Everise Glory*, set a precedent on wreck removal history. Both Malaysia and Singapore entered into discussions in the spirit of good neighbourliness and good faith, with close bilateral relations as the cornerstone of the discussions.

However, the move could not be interpreted as a change in the position of any party with regard to the sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge. The point was heavy traffic, the width of the sealane, the safety of the salvage operation, protection of the marine environment and the interests of the international maritime community.

If one consults the DWRC, article 10, the phrase “other states affected by the wreck” can be found. This raises the problem which is likely to arise in the Singapore Straits as well as in European coastal waters and in the Baltic and Mediterranean where several states may, potentially, be affected by the existence of an offshore wreck. This explains Article 10’s obligation placed on the Affected State to “consult ... other states affected by the wreck”. This is also why, in defining Affected State, it was decided to give the State in whose convention area, as defined in DWRC, the wreck is physically located the lead role in dealing with it, even though, in practice, it may turn out that the wreck is more of a threat to a state other than the one in which the wreck is located.<sup>101</sup>

From this case, we should understand that wreck removal sometimes is of common interest among coastal States. The initiatives of promoting cooperation among states to remove wrecks should also be encouraged.

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<sup>101</sup> “Draft Wreck Removal Convention (DWRC)”. Patrick Griggs, CBE January 2006

## **Chapter 6 Summary and suggestion**

### **6.1 The industry's view of DWRC**

#### **6.1.1 The insurers' main concerns**

First, of course, the insurer cares most about the type of damages which a shipowner will be held liable for in the event of a wreck:

Article 11 of DWRC:

Subject to article 12, the registered owner shall be liable for the costs of locating, marking and removing the wreck under articles 8, 9 and 10, respectively, unless the registered owner proves that the maritime casualty that caused the wreck.....

The costs of locating, marking, removing, and technical advice and services will add up to a huge figure without question. The victims can benefit from the inclusion of direct action in the Article 13.11 of the Draft Convention because those expenses will be paid directly by the vessel's insurers.

It should be pointed out here that there is no provision for a marine insurer to defend based upon breach of class requirements or other shortcomings on the part of the insured (short of outright willful misconduct) that may have caused the wreck in the first place. The insured apparently can neglect the upkeep of his ship with impunity and in the event of a wreck the marine insurers will still be responsible for paying the costs up to the applicable liability regime, because they cannot enforce such policy requirements by denying coverage by the terms of the policy.

The inclusion of marine wrecks in the list of hazards which require compulsory insurance could be seen as similar in kind to oil spills and chemical spills, in that this involves the leaving of waste upon the shores of an otherwise innocent nation that was left with the tab of cleaning up. However, the IMO apparently does not consider

strict liability and direct action against underwriters to be limited to such circumstances. It is with their proposed amendments to the Athens Convention, originally passed in 1974, that the delegates to the IMO Legal Committee have made clear their belief that everything under the sun should be subject to compulsory insurance with direct action and limited policy defenses.

### **6.1.2 The P & I clubs' view about DWRC**

Wreck removal is a growing business, and grows further as coastal authorities are becoming less tolerant of wrecks in their waters.

The amount of wreck removal business around the world is up almost 40% over the last five years, and there is no sign of the trend reversing. This has serious implications for P& I clubs and for salvors. P & I clubs generally find themselves footing the bill for wreck removal. Recently, coastal states have begun ordering the removal of wrecks even when they do not pose an direct hazard to navigation. A recent example is the *Castillo de salas*, which sunk 17 years ago and posed no threat to navigation. On the basis of a small environmental risk, it was ordered to be removed. Another good example was in May 2003, When Multraship began working in an equal joint venture with Titan Maritime UK to remove the remaining section of the wreck, which sank in 1986, in about 18 meters of water, near Gijon, in northern Spain.

The increasing obligations on P& I clubs mean that they must improve their knowledge of the techniques and resources available, and also find means to exert sensible control over expenditures. For example, P & I now uses SCRs to work with the wreck removers to ensure that the P & I club gets value for money.<sup>102</sup>

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<sup>102</sup> "When a ruin is a gain". P & I International July 2003 P21

Wreck removal can involve significant costs that may, in some cases, far exceed the value of the vessel and cargo. Although wreck removal is fortunately not a very frequent requirement, when it does arise it will involve major costs for P&I insurers.

The actual measures required to prevent a vessel, part of a vessel or its cargo, becoming an obstruction or hazard to navigation will vary greatly. For example, a grounded vessel may only require the lights and shapes required by the COLREGS. On the other hand, a vessel submerged in or near an area used by other vessels may require speedy removal or even destruction. In cases where total removal or destruction is not possible, the local authorities may require that a certain under keel clearance for other navigation be achieved in the removal efforts. Coverage for parts of a vessel is interpreted widely. It includes not only the ship's hull and machinery, but also other parts, such as navigational and cargo equipment and lifeboats. Similarly, cargo would include cargo on board as well as cargo lost overboard or separated from the vessel, including cargo inside containers and the containers themselves.

As already indicated in the first chapter, most coastal states will today demand the removal of any wreck that is considered an obstruction or hazard to navigation. This demand will, generally, be in the form of a legally binding removal order or directive. Even where the wreck is not causing this type of problem, removal may be demanded. In all cases, P&I clubs will cover the costs involved regardless of whether the marking, removal or destruction is undertaken by the member or charged to the member after being undertaken by the local authority. Although removal costs may be subject to the normal limitation of liability principles, it should be noted that a number of states have specified that liability for wreck removal shall be unlimited.<sup>103</sup> Although in most wreck removal cases the action is taken because of an obstruction or hazard to navigation, cases such as obstruction of a pipeline, bridge, sewage

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<sup>103</sup> Such as the United Kingdom and the United States. Under Par.3, Sched. 4, Part II, s.17 of the Merchant Shipping Act 1979, the UK made a reservation in respect of Art. 2(1)(d) of the 1979 Limitation Convention. Wreck removal in the US, involving the US Federal Government, is also not subject to limitation of liability.



outfall, or power or other communications cable or system would also qualify. In cases where the casualty occurs outside coastal jurisdiction, the member (shipowner) may still be obliged to ensure that the wreck does not cause a hazard to others, including other vessels, pipelines, fishing operations, offshore energy facilities, and undersea cables. In all cases involving wreck removal, the member must be in close consultation with the club. Where a member refuses to comply with a wreck removal order, or takes incomplete, delayed or inadequate action, the member would not only be subject to further legal action by the local authority, but any claim of a member against the Association under this Rule may also be jeopardised.<sup>104</sup> Most P & I clubs have these kind of rules.

In cases where the ship is wrecked or sunk, the member would normally claim a total loss under the hull policies. When there is an actual or constructive total loss, the member may attempt to abandon the vessel to the hull underwriters and claim a total loss. If the hull underwriters accept such abandonment they would assume title to and liabilities of the wreck and the P&I club would no longer be involved. However, hull underwriters rarely accept abandonment unless the realised value of the wreck exceeds the estimated wreck removal costs. Where the member undertakes wreck removal, the Club requires that any proceeds from the wreck, parts of the vessel, and cargo saved are to be credited to the Club or Association.

Nowadays there is an increasing trend for coastal states to require that any shipwrecks are to be removed from their waters, or at least to require that any oil, or hazardous materials are removed from the wreck and the wreck is cut down to make it safe for navigation.

So P&I Clubs have to cover owners for their liabilities for compulsory wreck removal. If the salvage is successful, then the P&I Club can avoid this exposure, and so P&I Clubs have a further reason to encourage salvage operations. If a salvage

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<sup>104</sup>According to Gard Rule 82.

claim fails, the P&I Club might be left paying salvors' costs under Scopic, and then paying significant costs for a wreck removal operation.<sup>105</sup>

## **6.2 Suggestions to the State Maritime Administration**

A set of international rules that govern limitation of liability as applied to maritime claims is established by the 1976 International Convention on the Limitation of Liability for Maritime Claims (LLMC), as amended by its 1996 Protocol. It is known to all that a limitation of liability was accorded to shipowners as an incentive to invest their money in maritime ventures without the risk of losing all their assets if their ship caused loss or damage. The shipowners continue to enjoy this privilege as they have no direct personal control over the daily operations and management of their ships while sailing at sea.

Still, the LLMC remains an important economic instrument to encourage ship ownership and shipping services to carry both passengers and cargo, domestically and internationally, particularly among major maritime nations such as some States which have a big fleet. The LLMC has been accepted by almost all maritime nations in different forms.

### **6.2.1 LLMC 1976 and its 1996 Protocol**

The LLMC, adopted by the International Maritime Organization (IMO) in 1976, came into force internationally in December 1986. The Convention was later amended by the 1996 Protocol, which came into force in May 2004. While some States have adopted the provisions of these two instruments, some States still hesitate to ratify both of them.

A state party may exclude the application of LLMC to “wreck removal claims” and to claims covered by the International Convention on Liability and Compensation for

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<sup>105</sup> Miller Bill Kirrane Thomas.SALVAGE AND WRECK REMOVAL- A P&I PERSPECTIVE P&I Ltd Dec 2005 in IMO presentation.

Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS) Convention.

### **6.2.2 The national Context and Legislation**

As mentioned above, most States are member states of LLMC 1976; few are member States of the 1996 Protocol. Thus, the main issue for consideration and to be decided at this stage is whether a state should ratify the LLMC Convention and its Protocol and whether it is a good time to make any of the reservations allowed under the Convention, either at the time of ratification, or at a later date.

### **6.2.3 National Policy Options**

#### **Option 1 – Refuse to ratify the LLMC or Protocol**

If this option is chosen, that means the LLMC or its Protocol would not be ratified but may continue to maintain the provisions of this regime in the national legislation. The only advantage is keeping the law stable in this regime. However, shipowners or claimants may suffer further losses because their States stand outside an international liability limitation regime and, in the absence of any treaty relationship with other states, foreign courts would not necessarily be bound to apply the LLMC when dealing with limitation actions.

#### **Option 2**

##### **a) Ratify the Convention and Protocol**

This option would be a better choice for most States. As stated previously, the LLMC is already exercised by most national laws and ratification would come at no additional cost. Moreover, by becoming a party to the Convention, States would contribute to the uniformity of international law, which would enable shipowners and claimants to rely on this Convention when dealing with limitation actions in other state parties and to benefit from the up-to-date limits of liability kept current by the tacit amendment procedure.

**b) Make a reservation or not for wreck removal claims and claims covered under the HNS Convention at the time of ratification or sometime thereafter**

In LLMC, it is provided that states may, at the time of signature, ratification, acceptance, approval or accession or at any time thereafter, reserve the right to exclude specifically wreck removal claims and claims within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, from the application of the Convention's limits.

The limits with regards to wreck removal claims provided under the LLMC seem to be enough at the present time. No argument for this until now. The Drafted Wreck Removal Convention (DWRC) is still in the wording phase. So, it might be more prudent not to make a reservation at this time and continue applying the LLMC to wreck removal claims until the IMO completes its work on the new WRC on 2007. States have their own options at that time to determine whether or not to adopt the new Convention and whether or not to proceed to make a reservation for wreck removal claims under the LLMC.

The 1996 HNS Convention was developed by the IMO in response to a need to provide separate limits of liability and compensation for HNS claims, irrespective of other claims that may arise from the same incident and that are subject to the LLMC limits. The regime serves to protect the interests of claimants involved in HNS incidents so that their rights to compensation are not adversely affected by other claims competing for the limitation amounts available under the LLMC. A reservation under LLMC for HNS claims would therefore allow interested states to achieve this objective.

#### **6.2.4 National Policy Recommendation**

In view of these factors, it is recommended that:

**The ratification of the 1976 LLMC Convention and its 1996 Protocol could be discussed by the Maritime Administrations of States according to the extent of conflicts between the national and international limitation regime.**

**A reservation under the LLMC for HNS claims could be decided only based on whether or not States will ratify the HNS Convention.**

**A reservation under the LLMC for wreck removal claims can not be made at this time and that this issue be reviewed again when the WRC is adopted in 2007.**

## Chapter 7 Conclusion

After all the foregoing discussion, it is now time to look at the present and future trend of WRC.

There will be another IMO legal Committee meeting in October this coming October to finalize the text of the Wreck Removal Convention. It is then anticipated that it will go to a diplomatic conference for final approval sometime in early 2007.

There remain areas of the Convention which need to be improved, For example, the inter-relationship between the rights and obligations of the owner, and the responsibility of the registered owner and the operator of the ship.

Looking around the world, it is possible that many of the maritime nations either will accede to or adopt the WRC. The United States may still be out of the convention regime as it has never been a party to any international conventions on limitation of liability. Since the United States is such a leading maritime nation, international uniformity will not be fully achieved without it becoming part of it.<sup>106</sup>

The 1976 Convention and its 1996 Protocol, however, are currently under consideration by a federal intergovernmental working group called the Maritime Law Association of the United States. It has adopted a position that “The MLA in the interest of uniformity favors the 1976 LLMC in principle and favors the 1996 Protocol’s increased limits”. The MLA is studying all the provisions of the 1976 LLMC to ascertain whether all of those provisions are compatible with U.S. domestic law”. The ultimate U.S position in this respect remains to be seen.<sup>107</sup>

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<sup>106</sup> Xia Chen “Limitation of Liability for Maritime Claims”. London Antony Rowe Ltd P151

It has to be noted here, however, that some influential contracting States of LLMC 76 have exercised the right of reservation and avoided the Convention's application of limitation of liability in wreck removal claims. For example, the UK and China are state parties to the 1976 LLMC, but have exercised the right to make a reservation in relation to wreck removal expenses with a result that shipowners are unable to limit in respect of wreck removal claims.

So in order to establish uniform rules for wreck removal operations in international waters, the draft convention is important in the context of encouraging states to offer refuge to ships in distress. As and when this convention comes into force, State Parties which are considering whether to permit a vessel to enter their waters should find added comfort in the knowledge that the removal of any subsequent wreck can be ordered and that insurance is available to cover the costs.<sup>108</sup>

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<sup>107</sup> Ibid

<sup>108</sup> Patrick Griggs, CBE “Draft Wreck Removal Convention (DWRC)”. Retrieved from: January 2006. [http://www.comitemaritime.org/Capetown/pdf/13.pdf#search=%22Patrick%20Griggs%2C%20CBE%20%E2%80%9CDraft%20Wreck%20Removal%20Convention%20\(DWRC\)%E2%80%9D%22](http://www.comitemaritime.org/Capetown/pdf/13.pdf#search=%22Patrick%20Griggs%2C%20CBE%20%E2%80%9CDraft%20Wreck%20Removal%20Convention%20(DWRC)%E2%80%9D%22)

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## **ANNEX Draft Wreck Removal Convention (DWRC)**

(October 2005)

Text approved by the Committee as was reflected in document LEG 90/5 appears in normal print.

The *amendments* discussed and approved by the Committee at LEG 90 are *italicised*.

**New proposals** developed by the Netherlands are marked in **bold**.

**Proposals** that require further study intersessionally following the discussions at LEG 90 are marked in bold and are **underlined**.

I. Preamble

II. Definitions

III. Objective and general principles

IV. Scope of application

V. General Obligations

VI. Financial Liability and Insurance Provisions

VII. Amendment Provisions

VIII. Final Provisions

## **I. Preamble**

## **II. Definitions**

### **ARTICLE 1**

For the purposes of this Convention:

1. "Convention area" means the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

2. "Ship" means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft, and floating platforms except when such platforms are on location engaged in the exploration, exploitation or production of sea-bed mineral resources.

3. "Maritime casualty" means a collision of ships, stranding or other incident of navigation or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or its cargo.

4. "Wreck" means following upon a maritime casualty:

(a) a sunken or stranded ship; or

(b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or

(c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or

(d) a ship that is about, or may reasonably be expected, to sink or *to* strand, where an act or activity to *effectively* assist *the ship* or any property in danger is not already underway.

5. "Hazard" means any condition or threat that:

(a) poses a danger or impediment to navigation; or

(b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States;

6. "Related interests" means the interests of a coastal State that is directly affected or threatened by a wreck, such as:

(a) maritime coastal, port and estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned;

(b) tourist attractions and other economic interests of the area concerned;

(c) the health of the coastal population and the well being of the area concerned, including conservation of marine living resources and of wildlife;

(d) offshore and underwater infrastructure.

7. "Removal" means any form of prevention, mitigation or elimination of the hazard created by a wreck. *The words "remove", "removed" and "removing" shall be construed accordingly.*

8. "Registered owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship, at the time of the maritime casualty. However in the case of a ship owned by a State and operated by a company which in that State is registered as the operator of the ship, "registered owner" shall mean such company.

9. "Operator of the ship" means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibilities imposed by the International Safety Management Code.

*10. "Affected State" means the State in whose Convention area the wreck is located.*

11. "State of the ship's registry" means in relation to a registered ship, the State of registration of the ship and in relation to an unregistered ship, the State whose flag the ship is entitled to fly.

12. "Warship" means a warship as defined in article 29 of the United Nations Convention on the Law of the Sea, 1982.

13. "Organization" means the International Maritime Organization.

14. "Secretary-General" means the Secretary-General of the Organization.

### **III. Objective and general principles**

#### **ARTICLE 2**

1. States Parties may take measures established under this Convention in relation to the removal of wrecks posing a hazard in the Convention area.

2. Measures taken in accordance with paragraph 1 by the Affected State shall be proportionate to the hazard.

3. Such measures shall not go beyond what is reasonably necessary to remove a wreck posing a hazard and shall cease as soon as the wreck has been removed; they shall not unnecessarily interfere with the rights and interests of *other States including the State of the ship's registry*, and of any persons, physical or corporate, concerned.

4. The application of this Convention within the Convention area shall not entitle a State Party to claim or exercise sovereignty or sovereign rights over any part of the high seas.

5. *States Parties shall endeavour to cooperate when the effects of a maritime casualty resulting in a wreck affect a State other than the Affected State.*

#### **IV. Scope of application**

##### **ARTICLE 3**

Except as otherwise provided in this Convention, this Convention shall apply to wrecks in the Convention area.

##### **ARTICLE 4**

1. This Convention shall not apply to any warship or other ship owned or operated by a State and used, for the time being, only on Government noncommercial service, unless that State decides otherwise.

2. Where a State Party decides to apply this Convention to its warships or other ships as described in paragraph 1, it shall notify the Secretary-General thereof specifying the terms and conditions of its application.

##### **ARTICLE 5**

This Convention shall not apply to measures *taken under* the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution



Casualties, 1969, as amended, or the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973, as amended.

## **V. General Obligations**

### **ARTICLE 6**

#### **Reporting wrecks**

1. *A State Party shall require the master and the operator of the ship flying its flag to report to the Affected State without delay, when a maritime casualty involving that ship has resulted in a wreck. To the extent that the reporting obligation under this article has been fulfilled by the master or the operator of the ship, the other of them shall not be obliged to report accordingly.*

2. Such reports shall include *the name and the principal place of business of the registered owner and all the relevant information necessary for the Affected State to determine whether the wreck poses a hazard in accordance with the factors in article 7, including, inter alia:*

- (a) the precise location of the wreck;
- (b) the size, type and construction of the wreck;
- (c) the nature of the damage to, and the condition of, the wreck;
- (d) the nature and quantity of the cargo, in particular any hazardous and noxious substances; and
- (e) the amount and types of oil, including bunker oil and lubricating oil, on board.

### **ARTICLE 7**

#### **Determination of hazard**

When determining whether a wreck poses a hazard, the following *factors*, as appropriate, and without regard to the order in which they are presented, *should be taken into account* by the Affected State:

- (a) size, type and construction of the wreck;
- (b) depth of the water *in the area*;
- (c) tidal range and currents in the area;
- (d) particularly sensitive sea areas identified and, as appropriate, designated according to guidelines adopted by the Organization, or a clearly defined area of the exclusive economic zone where special mandatory measures were adopted pursuant to article 211, paragraph 6, of the United Nations Convention on the Law of the Sea 1982;
- (e) proximity of shipping routes or established traffic lanes;
- (f) traffic density and frequency;
- (g) type of traffic;
- (h) nature and quantity of the wreck's cargo, the amount and types of oil (such as bunker oil and lubricating oil) on board the wreck and, in particular, the damage likely to result should the cargo or oil be released into the marine environment;
- (i) vulnerability of port facilities;
- (j) prevailing meteorological and hydrographical conditions;
- (k) submarine topography of the area;
- (l) height of the wreck above or below the surface of the water at lowest astronomical tide;
- (m) acoustic and magnetic profiles of the wreck;
- (n) proximity of offshore installations, pipelines, telecommunications cables and similar structures; and
- (o) any other circumstances that might necessitate the removal of a wreck.

## **ARTICLE 8**

### **Locating wrecks**

1. Upon **becoming aware** of a wreck the Affected State shall use all practicable means, including the good offices of States and organizations, to urgently warn mariners and the coastal States concerned of the nature and location of the wreck.

2. If the Affected State has reasonable cause to believe that a wreck poses a hazard, it shall ensure that all reasonable steps are taken to establish the precise location of the wreck.

## **ARTICLE 9**

### **Marking of wrecks**

1. If a wreck is determined by the Affected State to constitute a hazard, that State shall ensure that all reasonable steps are taken to mark the wreck. 2. In marking the wreck, all practicable steps shall be taken to ensure that the markings conform to the internationally accepted system of buoyage in use in the area where the wreck is located.

3. The Affected State shall promulgate the particulars **of the marking of the wreck** by use of all appropriate means, including the appropriate nautical publications.

## **ARTICLE 10**

### **Measures to facilitate the removal of wrecks**

1. If the Affected State determines that the wreck constitutes a hazard, it shall immediately:

(a) so inform the State of the ship's registry and the registered owner; and (b) proceed to consult the State of the ship's registry and other States affected by the wreck regarding measures to be taken in relation to the wreck.

2. The registered owner shall remove a wreck determined to constitute a hazard.

3. The registered owner, or another interested party, shall provide the competent authority of the Affected State, when the wreck has been determined to be a hazard, with evidence of insurance or other financial security as required by article 13.

4. The registered owner may contract with any salvor or other person to perform the removal of the wreck determined to constitute a hazard on the owner's behalf. *Before such removal commences, the Affected State may lay down conditions for such removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with safety and environmental considerations.*

5. *When such removal has commenced, the Affected State may intervene in the removal only to the extent necessary to ensure that the removal proceeds effectively in a manner that is consistent with safety and environmental considerations.*

6. The Affected State shall:

(a) set a reasonable deadline within which the registered owner must undertake the removal of the wreck taking into account the nature of the hazard determined under article 7;

(b) inform the registered owner in writing of the deadline it has set and specify that, if the registered owner does not undertake the removal of the wreck within that deadline, the State *may* undertake the removal at the registered owner's expense; and

(c) inform the registered owner that it intends to intervene immediately where the hazard becomes particularly severe.

7. If the registered owner does not remove the wreck within the deadline set under paragraph 6 or the registered owner *cannot* be contacted by the Affected State, *that* State may undertake the removal of the wreck by the most practical and expeditious means available, consistent with considerations of safety and protection of the marine environment.

8. If, *however, immediate action is required* and the Affected State has informed the State of the ship's registry and the registered owner accordingly, *it* may undertake the removal of the wreck by the most practical and expeditious means available, consistent with considerations of safety and protection of the marine environment.

9. States Parties shall *take any appropriate measures under their national law to ensure that* their registered owners comply with paragraphs 2 and 3.

10. States Parties give their consent to the Affected State to act under paragraphs 4 to 8 where required.

## **VI. Financial Liability and Insurance Provisions**

### **ARTICLE 11**

#### **Financial liability for locating, marking and removing wrecks**

1. Subject to article 12, the registered owner shall *be liable for* the costs of locating, marking and removing the wreck under articles 8, 9 and 10, *respectively*, unless the registered owner proves that the maritime casualty that caused the wreck:

(a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character; (b) was wholly caused by an act or omission done with intent to cause damage by a third party; or

(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

**2. Nothing in this Convention shall affect the right of the registered owner to limit liability under any applicable national or international Formatted regime,**

**such as the International Convention on Limitation of Liability for Maritime Claims, 1976, as amended.**

3. Nothing in this article shall prejudice any right of recourse against third parties.

## **ARTICLE 12**

1. The registered owner shall not be liable under this Convention for the costs mentioned in article 11, paragraph 1 if, and to the extent that, liability for such costs would be in conflict with:

(a) the International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended;

(b) the International Convention on Liability and Compensation for Damage in Connection with the Carriage by Sea of Hazardous and Noxious Substances, 1996, as amended;

(c) the Convention on Third Party Liability in the Field of Nuclear Energy, 1960, as amended, or in the Vienna Convention on Civil Liability for Nuclear Damage, 1963, as amended; or under national law governing or prohibiting limitation of liability for nuclear damage; or

(d) the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, as amended; provided that the relevant convention is applicable and in force.

2. To the extent that measures under this Convention are considered to be salvage under applicable national law or an international convention, such law or convention shall apply to questions of the remuneration or compensation payable to salvors to the exclusion of the rules of this Convention.

## **ARTICLE 13**

### **Compulsory insurance or evidence of financial security**

1. The registered owner of a ship of over [...] metres in length and flying the flag of a State Party shall be required to maintain insurance, or other financial security such as a guarantee of a bank or similar institution, to cover liability under this Convention in an amount **at least** equal to the limits of liability for the ship calculated in accordance with article 6(1)(b) of the International Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

2. Without prejudice to the application of article 3, paragraph 2, States Parties may apply the relevant provisions of the present article to waters subject to their jurisdiction.

3. A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship of over [...] metres in length by the appropriate authority of the State of the ship's registry after determining that the requirements of paragraph 1 of this article have been complied with. With respect to a ship registered in a State Party such certificate shall be issued **or certified** by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued **or certified** by the appropriate authority of any State Party. This certificate shall be in the form of the annexed model and shall contain the following particulars:

(a) name of the ship, distinctive number or letters and port of registry;

(b) name and principal place of business of the registered owner;

(c) IMO ship identification number;

(d) type and duration of security;

(e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;

(f) period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other security.

4. (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 3. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

(b) A State Party shall notify the Secretary-General of:

(i) the specific responsibilities and conditions of the authority delegated to an institution *or organization* recognized by it;

(ii) the withdrawal of such authority; and

(iii) the date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

(c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.



5. The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages and, where the State so decides, the official language of the State may be omitted.

6. The certificate shall be carried on board the ship and a copy shall be deposited with the authorities who keep the record of the ship's registry or, if the ship is not registered in a State Party, with the authorities issuing or certifying the certificate.

7. An insurance or other financial security shall not satisfy the requirements of this article if it can cease for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate under paragraph 3 of this article, before three months have elapsed from the date on which notice of its termination is given to the authorities referred to in paragraph 6 of this article, unless the certificate has been surrendered to these authorities or a new certificate has been issued within the said period. The foregoing provisions shall similarly apply to any modification, which results in the insurance or security no longer satisfying the requirements of this article.

8. The State of the ship's registry shall, subject to the provisions of this article and having regard to any guidelines adopted by the Organization on the financial responsibility of the registered owners, determine the conditions of issue and validity of the certificate.

9. Nothing in this Convention shall be construed as preventing a State Party from relying on information obtained from other States or the Organization or other international organizations relating to the financial standing of providers of insurance or financial security for the purposes of this Convention. In such cases, the State Party relying on such information is not relieved of its responsibility as a State issuing the certificate required by paragraph 3.

10. Certificates issued and certified under the authority of a State Party shall be accepted by other States Parties for the purposes of this Convention and shall be regarded by other States Parties as having the same force as certificates issued or certified by them, even if issued or certified in respect of a ship not registered in a State Party. A State Party may at any time request consultation with the issuing or certifying State should it believe that the insurer or guarantor named in the certificate is not financially capable of meeting the obligations imposed by this Convention.

11. Any claim for compensation arising under this Convention may be brought directly against the insurer or other person providing financial security for the registered owner's liability. In such a case the defendant may invoke the defences (other than the bankruptcy or winding up of the registered owner) that the registered owner would have been entitled to invoke, including limitation **of liability under any applicable national or international regime**. Furthermore, even if the registered owner is not entitled to limit liability, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the maritime casualty was caused by the wilful misconduct of the owner himself, but the defendant shall not invoke any other defence, which the defendant might have been entitled to invoke in proceedings brought by the registered owner against the defendant. The defendant shall in any event have the right to require the registered owner to be joined in the proceedings.

12. A State Party shall not permit any ship entitled to fly its flag to which this article applies to operate at any time unless a certificate has been issued under paragraphs 3 or 15 of this article.

13. Subject to the provisions of this article, each State Party shall ensure, under its national law, that insurance or other security to the extent required by paragraph 1 is

in force in respect of any ship of over [../..] metres in length, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an offshore facility in its territorial sea.

14. Notwithstanding the provisions of paragraph 6, a State Party may notify the Secretary-General that, for the purposes of paragraph 13, ships are not required to carry on board or to produce the certificate required by paragraph 3, when entering or leaving ports or arriving at or leaving from offshore facilities in its territory, provided that the State Party which issues the certificate required by paragraph 3 has notified the Secretary-General that it maintains records in an electronic format, accessible to all States Parties, attesting the existence of the certificate and enabling States Parties to discharge their obligations under paragraph 13.

15. If insurance or other financial security is not maintained in respect of a ship owned by a State Party, the provisions of this article relating thereto shall not be applicable to such ship, but the ship shall carry a certificate issued by the appropriate authority of the State of registry stating that it is owned by that State and that the ship's liability is covered within the limits prescribed in, paragraph 1. Such a certificate shall follow as closely as possible the model prescribed by paragraph 3.

## **ARTICLE 14**

### **Time-bar**

Rights of compensation under this Convention shall be extinguished unless an action is brought hereunder within three years from the date when the hazard has been determined in accordance with article 7. However, in no case shall action be brought after six years from the date of the maritime casualty that resulted in the wreck. Where this maritime casualty consists of a series of occurrences, the six-year period shall run from the date of the first occurrence.

## **VII. Amendment Provisions**

## **ARTICLE 15**

1. A conference for the purpose of revising or amending this Convention may be convened by the Organization.
2. The *Organization* shall convene a Conference of States Parties for revising or amending this Convention, at the request of *not less than* one-third of States Parties.
3. Any consent to be bound by this Convention expressed after the date of entry into force of an amendment to this Convention shall be deemed to apply to this Convention as amended.

## **VIII. Final Provisions**

### **ARTICLE 16**

#### **Settlement of disputes**

States Parties shall settle any dispute between them concerning the interpretation or application of *this* Convention by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.

### **ARTICLE 17**

**Relationship to other conventions and international agreements** Nothing in this Convention shall prejudice the rights and obligations of any state under customary international law as reflected in the United Nations Convention on the Law of the Sea.

### **ARTICLE 18**

#### **Signature, ratification, acceptance, approval and accession**

1. This Convention shall be open for signature at the Headquarters of the Organization from [.....] until [.....] and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:
- (a) signature without reservation as to ratification, acceptance or approval; or
  - (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or
  - (c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

## **ARTICLE 19**

### **Entry into force**

1. This Convention shall enter into force [.....] months following the date on which [.....] States have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.

2. For any State which ratifies, accepts, approves or accedes to this Convention after the conditions in paragraph 1 for entry into force have been met, this Convention shall enter into force [.....] months after the date of deposit by such State of the appropriate instrument, but not before this Convention has entered into force in *accordance* with paragraph 1.

## **ARTICLE 20**

### **Denunciation**

1. This Convention may be denounced by any State Party at any time after the expiry of one year from the date on which this Convention comes into force for that State.

2. Denunciation shall be effected by the deposit of an instrument to that effect with the Secretary-General.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its receipt by the Secretary- General.

## **ARTICLE 21**

### **Depositary**

1. This Convention shall be deposited with the Secretary General.

2. The Secretary-General shall:

(a) inform all States which have signed or acceded to this Convention of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;

(ii) the date of entry into force of this Convention;

(iii) the deposit of any instrument of denunciation of this Convention together with the date of the deposit and the date on which the denunciation takes effect; and

(iv) other declarations and notifications made under this Convention; and

(b) transmit certified true copies of this Convention to all States that have signed or acceded to this Convention.

3. As soon as this Convention enters into force, the text shall be transmitted by the Secretary-General to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

## **ARTICLE 22**

**Languages**

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic. Done at London this [.....] day of [.....] two thousand and [.....].

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Convention.

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