Introduction

On the 16 May 2007 the International Maritime Organisation (IMO) at a conference held in Nairobi adopted a final draft of a convention on wreck removal, designated the Nairobi International Convention on the Removal of Wrecks, 2007. The Convention will come into force after ratification by at least ten states and this process is predicted to take not less than three to five years.

The Club reported this significant event in international maritime law in a website article published in June 2007. The purpose of this article is to look a little more closely at the provisions of the Convention. The text of the Convention, as approved at the Nairobi conference, has been kindly supplied by IMO and can be seen below.

Scope and application

The first four articles address the scope, purpose and application of the Convention.

The Convention permits a state party to take measures to remove a wreck that is a hazard to navigation or the marine environment. A hazard is defined as a danger to navigation or a condition giving rise to harmful consequences to coastlines or other wider coastal interests such as ports or fisheries, tourism, offshore and underwater infrastructure. The health of coastal populations and conservation of both marine and non-marine wildlife are further considerations in determining a hazard within the meaning of the Convention. The Convention restricts measures taken by the coastal state to being reasonable and proportional to the hazard faced, such measures to cease on removal of the wreck.

The ‘Convention Area’ is identified as the Exclusive Economic Zone (EEZ) of a signatory state, but excluding the territorial sea itself where national law, if any, applies. However there is provision in article 3(2) for a state party to include their territorial seas within the scope of the Convention if they so wish.

A ‘Ship’ is given a wide definition. Other than fixed structures or floating platforms while actually engaged in exploration, practically all sea going water borne craft fall within the scope of the Convention. There is no minimum gross tonnage in this respect.

A ‘Wreck’ includes a ship, or any part of a ship, or object that has been on board a ship but has become detached, e.g. cargo, that as a consequence of a maritime casualty has sunk or stranded or is adrift. The definition extends to a casualty that may be reasonable expected to become a wreck, provide salvage services are not already being rendered. A Maritime Casualty has an equally wide definition, being an incident of navigation such as a collision or stranding, but extending to any occurrence on board or even external to the ship, for example an explosion alongside a terminal.

Reporting, locating and dealing with a wreck

Articles 5 to 9 state the actions required by the Convention. This includes reporting of a wreck by the Master or its owner/operator in a precise format stating the location of the wreck, its characteristics and condition including the nature of any cargo on board with particular reference to any hazardous or noxious substances. The report is to include the quantity and types of any oils on board including bunker and lubricating oils.

The duty to report falls to the Affected State, that is the state in which the wreck is located, which in turn is to determine whether the wreck poses a hazard in accordance with the specified criteria, mentioned on above. The Affected State is to establish the precise location of the wreck, to promote its position and the threat it poses and, as necessary, mark its position utilizing the international system of buoyage. The costs associated with locating and marking the wreck can be recovered from the owner.

Having determined the wreck poses a hazard, article 9 of the Convention places the onus on the registered owner to remove it. The Affected State may dictate conditions for its removal, including setting deadlines for certain stages of the operation, although the Convention limits these conditions to those of safety and the protection of the marine environment. Moreover, the Affected State has a right to intervene during a wreck removal operation, but again, this intervention is limited by the Convention to considerations of safety and the protection of the marine environment. There is some scope here for dispute between the owner and the Affected State as to what constitutes such considerations.

An owner is permitted under the Convention to contract with a salvor or other suitable party to remove the wreck, but if they fail to do so, or immediate action is required before the owner can mobilise such services, the Affected State may undertake the task.

Liability

Article 10 of the Convention holds the owner liable for the cost of locating, marking and removing the wreck without specific reference to any limitation to these costs other than the general restriction in article 2 of being reasonable and proportional to the hazard faced. However, liability is excluded in the event of an act of war, or the usual IMO description of hostile activity or through force majeure described as a natural phenomenon of an exceptional, inevitable and irresistible character. A further exclusion is where the maritime casualty is intentionally caused by a third party; This may include acts of terrorism, however, in order to qualify, any resulting damage would need to be shown to be "wholly caused" by such act so that it does not provide a complete defence in the event that even a small contributory negligence on the part of the shipowner is involved. This is a very large burden of proof and may not ultimately assist an owner even where the initiating event was a terrorist act. This impacts on the issue of compulsory insurance (see below). A final exclusion is the failure of a Government to properly maintain navigational aids again provided there is no intervening circumstance or break in causation. The onus of proof lies with the party seeking to benefit from these exclusions.

Article 10 also permits an owner to limit liability pursuant to any applicable limitation regime. However, it is often the case that local legislation ratifying the International Convention on Limitation of Liability for Maritime Claims, 1976, as amended (more recently the London Protocol with increased limits) to specifically exclude the right to limit in respect of wrecks.
Liabilities that would otherwise be in conflict with other IMO conventions, such as CLC, HNS, Nuclear Damage and Bunker Oil Pollution are excluded under the Wreck Convention. Finally, article 10 preserves the right of parties incurring cost under the Convention to pursue a recourse action against a third party, such as another vessel involved in a collision.

Compulsory Insurance

The longest article within the Convention, article 12, requires the owner of a ship of 300 gross tonnes or more registered in a signatory state to maintain insurance or other acceptable form of financial security to cover liability under the Convention. The value is to be determined by the applicable legal limitation regime but in any event not to exceed the limits determined by the 1976 LLMC. Each ship is to carry a certificate in an approved format, a draft of which is include in the single annex to the Convention. Ships not registered in a signatory state may obtain certificates from any other state party.

Importantly, the Convention insists that no ship registered in a state party is to be permitted to operate unless it has a certificate and that each state party is to ensure that any ship, whether of a state party or not, on entering its jurisdiction has such certificate as evidence of insurance or other financial security.

Article 12 also provides for claims for costs arising out of the provisions of the Convention to be brought directly against the insurer or guarantor stated in the certificate. That party may invoke the same defences and/or seek to limit liability as entitled by the registered owner, except that party is not entitled to invoke a defence of bankruptcy of the registered owner or that the cover as evidenced by the certificate has in some way been prejudiced. Such insurer may bring a defence to claims where it can be shown the maritime casualty was caused by the willful misconduct of the registered owner.

For reasons explained above, it is possible that an owner may be held liable under the Convention even in the event of a terrorist act. As P&I Clubs do not cover owners for terrorism, the question of provision of the necessary documentation to deal with the compulsory insurance requirements remains an issue to be resolved.

Time Limits

Article 13 imposes a dual time limit within which a claim may be brought: Claims under the Convention will be time barred if not brought within the first three years from the date the Affected State determines the wreck constitutes a hazard with an absolute time bar of six years from the date of the maritime casualty.

Entry into force criteria

The Convention will open for signature from 19 November 2007 until 18 November 2008 and, thereafter, will be open for ratification, accession or acceptance. It will enter into force twelve months following the date on which ten 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.

Conclusion

The Convention seeks to lay down a uniform set of rules for dealing with a wreck and its removal. In this respect the Convention reflects current non-convention practice but with the very significant introduction of compulsory insurance and the right of action directly against that insurer.