



## INDUSTRY DEVELOPMENTS

### Cargo Liabilities

The comment was made earlier in this report that it would be unrealistic to expect that the increasing Convention liabilities being placed on shipowners will be reversed. Unhappily, however, the picture is actually worse than anticipated and the introduction of higher liabilities is still under way. Notable is the draft Convention on Contracts for the International Carriage of Goods, wholly or partly by sea. This draft started life within the Comité Maritime International, before being passed to the United Nations

Commission on International Trade Law (UNCITRAL). It has been many years in the making. However, the drafting has now been finalised by a working group and it is due to be considered by the UNCITRAL Commission in June. If approved, it will then be referred to the United Nations Assembly for adoption in November 2008. If the Convention comes into force it will significantly increase shipowners' exposure to cargo claims. In particular, the long-established defence of an error in navigation will be lost. The obligation to exercise due diligence in relation to seaworthiness will apply not only at the outset of a voyage, but also during the voyage. The limits of liability which presently apply under the Hague-Visby and Hamburg Rules on a per package or unit of weight basis will be increased.

As drafted, the Convention will come into force 12 months after ratification by 20 states. This means that, even if it is successful in achieving international support, its application is still years away. Success for the Convention should produce one benefit for shipowners: it may prevent further fragmentation of the laws governing the carriage of goods by sea, which will occur if individual countries introduce their own regimes. Reform of the law in this area is overdue in the US which, if it does not adopt the new Convention, will introduce its own revision of its present cargo liability regime.

### Hazardous and Noxious Substances (HNS)

Although first adopted in 1996, this Convention has failed to gather enough support to come into force. From a shipowner's perspective the Convention would provide the benefits of a clear right to limit liability in the event of an accident involving HNS and a second tier of compensation funded by cargo receivers. The Convention as drafted poses significant administrative difficulties for states, who might otherwise wish to ratify it, in the handling of the second tier of compensation.

In October 2007 the International Oil Pollution Compensation Fund established an HNS Focus Group with the remit to address, within a timeframe of one year, the outstanding concerns of states.

This Focus Group has been making progress and a second meeting is scheduled for June 2008, with a view to submitting a draft Protocol for consideration by the IMO Legal Committee in October 2008 and the holding of a Diplomatic Conference to adopt the revisions in the Protocol as soon as possible thereafter. It is to be hoped that this attempt to rescue the Convention succeeds. Once again, failure to move the HNS Convention forward will bring with it the likelihood of regional implementation of differing laws. The European Union in particular is interested in the HNS

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Convention and, if it fails, may be expected to introduce its own more onerous version of an HNS regime.

#### **European Union (EU)**

The European Union has continued towards the implementation of a raft of legislation known as the Third Maritime Safety Package (ERIKA III). This includes the proposed Civil Liability Directive (CLD). The Directive would require EU states to adopt the 1996 Limitation Convention, but also contains proposals which would seriously weaken a shipowner's right to limit liability. In addition, shipowners would be required to demonstrate financial security for a sum equivalent to double the limitation amount in the 1996 Convention. This is an ill-conceived proposal since there are already a number of pending Conventions (HNS, Bunker Oil Spills and Wreck Removal) which will require shipowners to provide financial security for specific liabilities. Furthermore, the Civil Liability Convention, which governs liability for oil spills from tankers, has had in place a system of financial security for many years. The CLD has had its first reading before the European Parliament and was supported. However, it is notable that many of the EU states have reservations about the CLD and the Directive's progress has therefore been slower and more difficult in the Council of Ministers. It is to be hoped that the EU either abandons or

drastically revises this piece of legislation which would be of doubtful benefit to the EU, but would certainly be damaging to both the shipping industry and its liability insurers.

#### **Bunker Convention – certification and cover for terrorism**

The coming into force of the Bunker Convention in November 2008 has concentrated the minds of the Clubs on the requirement for owners to have in place the certificates required under the Convention by August at the latest. The certificates provide claimants with a right of direct action against the insurer.

During the course of last year, the International Group, through its Secretariat, has been seeking in vain to persuade the IMO that the flag state certificates required under the Bunker Convention should be qualified; in other words they should only extend to those Convention liabilities for which insurance cover is available. In practice, this would exclude cyber, biochem and nuclear risks. Unfortunately, such representations have fallen on deaf ears and nothing short of unqualified certificates, covering all liabilities under the Convention, will suffice.

Following consideration by all Club Boards, it has been agreed that International Group Clubs will issue the requested 'Blue Cards' to enable signatory states to issue certificates from August 2008. Notwithstanding

that Clubs do not currently provide shipowners with primary P&I War Risks cover, it has further been agreed that Clubs will pool all liabilities incurred under certificates issued, including otherwise excluded liabilities, up to the amount of liability so certified. There will be a requirement that Members have in place adequate P&I War Risks cover and that Members indemnify the Club for any liabilities incurred under the certificate which are covered by the War P&I policy. Final details are to be agreed.