COMITE MARITIME INTERNATIONAL

THE IMPLEMENTATION IN NATIONAL LAW OF MANDATORY INSURANCE PROVISIONS IN INTERNATIONAL CONVENTIONS

QUESTIONNAIRE TO MEMBER ASSOCIATIONS

The CMI Executive Council has requested the International Working Group (IWG) on Marine Insurance to consider mandatory insurance provisions in international conventions and given recommendations on whether Guidelines for national governments should be drafted to assist in the formulation and proper implementation of national law giving effect and providing a legal framework for them.

The Questionnaire has been developed to collect information on existing national legislation as a basis for proposals for Guidelines.

We would be grateful if you would provide your responses by October 10, 2010 so they may be collated and analysed in time for reporting and discussions at the Assembling in Buenos Aires on Wednesday, October 27, 2010.

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I. This questionnaire addresses mandatory insurance provisions of the following international conventions:

1.1 **CLC Convention of 1992** (International Convention on Civil Liability for Oil Pollution Damage 1992):

Art. VII para. 1: "The owner of a ship… carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund…".

I.2 **HNS** (International Convention of 3 May 1996 on Liability and compensation in connection with Carriage of Hazardous and Noxious Substances by Sea (London),

Art. 12 para. 1: "Insurance or other financial security, such as the guarantee of a bank or similar financial Institution".

I.3 Bunkers Convention (International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage),

Art. 7 para. 1: “The registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party shall be required to maintain

insurance or other financial security, such as the guarantee of a bank or similar financial institution".

I.4 **Nairobi Wreck Removal Convention** of 18 May 2008,

Art. 12 para. 1: "The registered owner of a ship of 300 gross tonnage and above 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"

I.5 **Athens Protocol of 2002** to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974,

Art. 4bis para. 1: "Any carrier who actually performs the whole or a part of the carriage shall maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution".

II. The foregoing referenced Conventions contain the following provisions concerning requirements for coverage

II.1 **CLC Convention of 1992**:

Art. VII para. 8 "Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such a case the defendant may, even if the owner is not entitled to limit his liability according to article V paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings."

II.2 **HNS**:

Art. 12 para. 8 "Any claim for compensation for damage may be brought directly against the insurer or other person providing financial security for the owner's liability for damage. In such case the defendant may, even if the owner is not entitled to limitation of liability, benefit from the limit of liability prescribed in accordance with paragraph 1. The

defendant may further invoke the defences (other than the bankruptcy or winding up of the owner) which the owner would have been entitled to invoke. Furthermore, the defendant may invoke the defence that the damage resulted from the wilful misconduct of the owner, but the defendant shall not invoke any other defence, which the defendant might have been entitled to invoke in proceedings brought by the owner against the defendant. The defendant shall in any event have the right to require the owner to be joined in the proceedings."

II.3 **Bunkers Convention**:

Art. 7 para. 10: "Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage. In such a case, the defendant may invoke the defences (other than bankruptcy or winding up of the ship owner) which the ship owner would have been entitled to invoke, including limitation pursuant to article 6. Furthermore, even if the ship owner is not entitled to limitation of liability according to article 6, 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 pollution damage resulted from the wilful misconduct of the ship owner, but the defendant shall not invoke any other defence, which the defendant might have been entitled to invoke in proceedings brought by the ship owner against the defendant. The defendant shall in any event have the right to require the ship owner to be joined in the proceedings."

II.4 **Wreck Removal Convention**:

Art. 12 para. 10. "Any claim for costs 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 registered owner, 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."

II.5 **Athens Protocol of 2002**:

Art. 4bis para. 10 “Any claim for compensation covered by insurance or other financial security pursuant to this Article may be brought directly against the insurer or other person providing financial security. In such a case, the amount set out in paragraph 1 supplies as the limit of liability of the insurer or other persons providing financial security, even if the carrier is not entitled to limitation of liability. The defendant may further invoke the defences (other than the bankruptcy or winding up) which the carrier referred to in paragraph 1 would have been entitled to invoke in accordance with this Convention. Furthermore, the defendant may invoke the defence that the damage resulted from the wilful misconduct of the assured, but the defendant shall not invoke any other defence, which the defendant might have been entitled to invoke in proceedings brought by the assured against the defendant. The defendant shall in any event have the right to require the carrier and the performing carrier to be joined in the proceedings.”

III. The foregoing referenced conventions deal with certification of the compulsory insurance in the following provisions:

III.1 **CLC Convention of 1992** (International Convention on Civil Liability for Oil Pollution Damage 1992)

Art. 7 para. 2 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 after the appropriate authority of a Contracting State has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a Contracting State 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 Contracting State it may be issued or certified by the appropriate authority of any Contracting State. The certificate shall be in the form of the annexed model and shall contain the following particulars:
(a) name of ship and port of registration;
(b) name and principal place of business of owner;
(c) type of security;
(d) 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;
(e) period of validity of certificate which shall not be longer than the period of validity of the insurance or other security.

Art. 7 para. 3 The certificate shall be in the official language or languages of the issuing State. If the language used is neither English nor French, the text shall include a translation into one of these languages.

III.2 HNS

Art. 12 para 2 A compulsory insurance 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 after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party such compulsory insurance 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 compulsory insurance certificate shall be in the form of the model set out in Annex I 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 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; and
(f) period of validity of certificate, which shall not be longer than the period of validity of the insurance or other security.

Art. 12 para. 3 The compulsory insurance certificate shall be in the official language or languages of the issuing State. If the language used is neither English, nor French nor Spanish, the text shall include a translation into one of these languages.

III.3 **Bunkers Convention**:

Art.7 para 2: 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 after the appropriate authority of a State Party has determined that the requirements of paragraph 1 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 model set out in the annex to this Convention and shall contain the following particulars:
(a) name of 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.

Art. 7 para. 3 (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. 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 recognised 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.

Art. 7 para 4 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.

III.4 Wreck Removal Convention:

Art. 12 para 2 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 300 gross tonnage and above by the appropriate authority of the State of the ship's registry after determining that the requirements of paragraph 1 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 compulsory insurance certificate shall be in the form of the model set out in the annex to this Convention, and shall contain the following particulars:

(a) name of the ship, distinctive number or letters and port of registry;
(b) gross tonnage of the ship;
(c) name and principal place of business of the registered owner;
(d) IMO ship identification number;
(e) type and duration of security;
(f) 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;
(g) period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other security.

Art. 12 para. 3 (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. 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.

Art. 12 para. 4 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(s) of the State may be omitted.

III.5 **Athens Protocol of 2002**:

Art. 4bis para 2 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 after the appropriate authority of a State Party has determined that the requirements of paragraph 1 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 model set out in the annex to this Convention and shall contain the following particulars:
(a) name of ship, distinctive number or letters and port of registry;
(b) name and principal place of business of the carrier who actually performs the whole or a part of the carriage;
(c) IMO ship identification number;
(d) type and duration of security;
(e) name and principal place of business of insurer or other person providing financial security and, where appropriate, place of business where the insurance or other financial security is established; and
(f) period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other financial security.

Art. 4bis para 3 (a) A State Party may authorize an institution or an Organization recognised by it to issue the certificate. 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 recognised 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 from 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 complied with. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

Art. 4bis para 4 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.

QUESTIONNAIRE

1. Licensing

Does an insurer wanting to insure the risks under the Convention referred to above need a license?

Yes.

If so,

1.1 must it be a national license, or do your respective authorities accept licenses issued by foreign bodies?

The Croatian authorities accept insurers with national licences and all P&I Clubs members of the International Group of P&I Clubs. Other providers of the relevant insurance coverage would be subject to an individual assessment at the discretion of the authorities. Minimum compliance for such an insurance provider would be that it is licensed to provide the relevant financial services under the national law of the state of its domicile.

1.2 What are the consequences if an insurer issues a policy without the respective license?

The policy would not be accepted as a basis for issuing the relevant certificate, i.e. the authorities would refuse to issue the convention certificate.

1.3 Is there an obligation of a licensed insurer to conclude insurance contracts?

No.

2. Certification

2.1 Will a certificate issued by a convention state

2.1.1 be recognized in your state without any preconditions?

Yes.

2.1.2 be subject to investigation whether insurance satisfying the convention requirements actually exist?

If there is a reason to doubt the validity of the insurance certificate the authorities may investigate the actual insurance conditions.

2.1.3 be rejected if there is evidence that there no valid insurance at all or that the insurance is not satisfying the convention requirements?

Yes.

2.2 Does the authority in your state in charge of issuing the certificate

2.2.1 require a license of your state or is it sufficient that the insurer is licensed in another state?

It is sufficient that the insurer is licensed in another state; see also answer to question no. 1.1. above.

2.2.2 investigate the insurance conditions before issuing a certificate?

Normally, it does not. It just requires checks and accepts the commonly used "blue card" issued by the insurer as a valid evidence of the adequate existing insurance coverage. However, if the insurance provider is not one of the P&I clubs members of the International group, or alternatively one of the insurers licensed to provide the relevant type of insurance in Croatia, then the authority probably would engage into a thorough investigation of the insurance conditions (see answer no. 1.1. above).

2.2.3 investigate the financial standing of the insurer?
Normally it does not. However, if the insurance provider is not one of the P&I clubs members of the International group, or alternatively one of the insurers licensed to provide the relevant type of insurance in Croatia, then the authority probably would engage into a thorough investigation of the financial standing of the particular insurer (see answer no. 1.1. above).

2.2.4 investigate the license of the insurer?
Normally it does not. However, if the insurance provider is not one of the P&I clubs members of the International group, or alternatively one of the insurers licensed to provide the relevant type of insurance in Croatia, then the authority would thoroughly investigate the license of the insurer (see answer no. 1.1. above).

3. Statutory Law

3.1 Does your national law contain any provisions specifically designed to transform the above mentioned provisions in international conventions into your national law? It does in the case of CLC 1992 and Bunkers Convention to which Croatia is a party, but also in the case of WRC, although that convention is not in force.

If so, could you

3.1.1 summarize the main characteristics of those provisions?
Under Croatian law,

Firstly, it is important to keep in mind the provision of Art. 141 of the Croatian Constitution:

«International treaties which have been concluded and ratified in accordance with the Constitution, publicised and which have entered into force shall make an integral part of the domestic legal order of the Republic of Croatia and shall have primacy over national laws. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law. »

Croatia is a party to the CLC / IOPC Fund 1992 regime, including the Supplementary fund 2003. Croatia is also a party to the Bunkers convention 2001. Therefore, all the provisions of the respective international conventions are directly applicable in Croatia as they make an integral part of the Croatian domestic law. Nevertheless, certain provisions of the respective conventions, in particular the provisions regarding

compulsory insurance and direct action, have been incorporated into the Croatian Maritime Code which is the main source of domestic maritime law.

CLC 1992

The Maritime Code provisions on shipowner's **liability for oil pollution** are contained in Articles 813-823. They generally reflect the respective provisions of the CLC 1992. Limits of shipowner's liability are prescribed in Article 816, and they correspond to the CLC 1992 limits as revised in 2000. The special provisions on compulsory insurance are contained in Art. 820 of the Maritime Code, whilst a special provision on direct action against insurer is contained in Art. 821. The compulsory insurance and direct action provisions apply to foreign and domestic ships carrying more than 2000 tons oil in bulk. Enforcement of compulsory insurance is ensured through the ship certification system prescribed in Article 820 para. 3-5. Furthermore, ships without a prescribed certificate of insurance and state ships without an adequate self-insurance, are not allowed to enter Croatian ports (Art. 62, para. 1 and 2). There are also sanctions (fines) prescribed for trespassing the provisions on certification (Art. 1001 and 1017).

Bunker convention 2001

The Maritime Code contains special provisions on compulsory insurance of **liability for damage caused by bunker oil**, which have been in force since 1st June 2009. According to the said provisions, the registered owner of a ship of more than 1000 GRT that is registered in the Republic of Croatia is obliged to maintain in force insurance or other financial security, such as a guarantee of a bank or a similar financial institution, covering liability for pollution damage caused by bunker oil (Maritime Code, Art. 823). Such insurance must be up to the limits of shipowner's liability for maritime claims as prescribed in Article 391 of the Maritime Code. Limits of shipowner's liability prescribed in Art. 391 of the Maritime Code are equal to those prescribed by Art. 6 of the LLMC 1976/1996. Furthermore, the registered owner of such ship is bound to request the competent port authority maintaining the ship registry to issue a certificate confirming that insurance or other financial security in accordance with the Bunker convention and the Maritime Code is in force (Maritime Code, Art. 823a, para. 2). Art. 823a para. 3 of the Maritime Code prescribe the form and contents of such certificate issued by the port authority on behalf of the Republic of Croatia as Flag State. The said provision is in accordance with the requirements under the Bunkers convention. However, the Maritime Code does not include any provisions on conditions for the validity of the compulsory insurance regarding cancellation of the coverage and possible changes in terms of coverage during the period of insurance. This is seen as a downside in the domestic regulation of the subject matter. Art. 62, para. 3 and 4 of the Maritime Code ensure the enforcement of the compulsory insurance of bunker oil pollution liability. Namely, it is provided that each domestic and foreign ship of more than 1000 GRT entering a Croatian port, must show an evidence that there is insurance or other financial security in force covering shipowner's liability for bunker oil pollution damage in the amount corresponding to the limits of liability prescribed by Art. 391 of the Maritime Code (Maritime Code, Art. 62 para. 3). Furthermore, it is expressly provided that each such ship must have a valid certificate issued by the competent authority of the ship's Flag State confirming that the insurance or other financial security is in force and in accordance with the provisions of Bunkers convention (Maritime Code, Art. 62, para 4). In Croatia, the provisions on compulsory insurance implementing the relevant Articles of Bunker convention are applicable to all the ships of over 1000 GRT, even

when they are domestic ships navigating exclusively within the limits of national jurisdiction. This means that Croatia did not chose to rely on the right to a reservation provided by Art. 7, para. 15 of the Bunkers convention. Therefore, in Croatia the same rules on compulsory insurance apply to all ships of over 1000 GRT, including all such domestic ships, regardless of the limits of their navigation.

The abovementioned provisions of Art. 62 of the Maritime Code are subject to some criticism. Firstly, Art. 62, para. 3 should also include ships calling at the offshore terminals in the Croatian territorial sea and in the Croatian ecological and fisheries protection zone (ZERP). Furthermore it is not correct to require that the ship have both the evidence of insurance or other financial security (Art. 62, para. 3) and the certificate of insurance issued in accordance with the Bunkers convention (Art. 62, para. 4). It is an unnecessary administrative burden. Moreover, it is not in line with the Bunker convention according to which the states parties are obliged to recognize each other's certificates. It is therefore superfluous to require any document (e.g. insurance policy, P&I certificate of entry, blue card, etc.) other than the Bunker convention certificate. There are three other problems with the Maritime Code provisions on compulsory insurance for bunker oil pollution liability:

- it is provided that the certificate must be issued by a competent state body, whilst the Bunker convention allows that the states parties delegate this duty to the authorised organizations;
- it is strictly required that the certificate be issued by the flag state, although it is possible that the flag state is not a party to the Bunkers convention and therefore it cannot issue a certificate according to that convention,
- Art. 62 does not provide any specific rules regarding the financial security covering liability for bunker oil pollution damage of a public ship owned by a state. It should therefore be amended by inclusion of a specific provision similar to that of Art. 62, para. 2 relating to the compulsory insurance of oil pollution liability. In particular, it is a provision forbidding the entry in Croatian ports of a public ship that has no certificate attesting that it is owned by a state and that it has a valid self-insurance. Currently, Art. 62 of the Maritime Code is not in line with Art. 7, para. 14 of the Bunkers convention as it does not exclude the public ships from the application of the compulsory insurance provisions.

Regarding the enforcement provisions, there is an omission in legal drafting of the Art. 1001 of the Maritime Code defining the lack of possession of a prescribed compulsory insurance certificate as a maritime offence. The said Art. 1001 currently relates only to the certification under CLC 1992 and there is no such respective provision relating to the certification under Bunkers convention (i.e. under Art. 823.a of the Maritime Code). By way of analogy there is a lack of legal drafting of Art. 1017 regulating the sanctions for the maritime offence of non-compliance with the compulsory insurance certification requirements. The discussed Maritime Code provisions on compulsory insurance covering bunker oil pollution liability only partly implement the Bunkers convention. In the writers' opinion, such partial implementation of conventional provisions into the domestic law is inadequate. The relevant provisions on the basis and scope of liability for bunker oil pollution damage which is the subject matter of the compulsory insurance have been left out. Oil pollution damage has not been defined and there is no special provision defining the persons liable for such damage. The question is how one defines the subject matter of the compulsory insurance of bunker oil pollution liability now prescribed by

Maritime Code. Finally, the Maritime Code does not contain any specific provisions on direct action against the insurer of bunker oil pollution liability such as that of Art. 7, para. 10. of the Bunkers convention. On the other hand, Art. 821 of the Maritime Code adequately provides special provisions on direct action against the insurer of oil pollution liability in accordance with the CLC 1992. It is recommended that similar provisions be included regulating the direct action in accordance with the Bunkers convention. Although the only correct solution would be to find the answer to these questions in the provisions of the Bunker convention to which Croatia is a party, and which is directly applicable under Croatian law, the described lacuna in the Maritime Code still creates some legal uncertainty and opens more possibility of incorrect application of the relevant law. It is therefore recommended that the Bunkers convention be adequately and entirely implemented in the provisions of the Croatian Maritime Code.

WRC 2007

Although WRC 2007 has not entered into force, and although Croatia is neither a signatory nor a party thereto, certain provisions thereof on compulsory insurance were introduced in the Croatian Maritime Code and have been in force since 1st June 2009. The Maritime Code provides that each domestic ship in international navigation and foreign ship, with gross tonnage of over 300, intending to enter in a Croatian port, or call at an offshore terminal situated in the territorial sea or on the continental shelf of the Republic of Croatia, must provide an evidence of insurance or other financial security, such as a guarantee of a bank or a similar institution, covering the costs of locating, marking and removal of wreck (Art. 62, para. 5). The amount of such compulsory insurance is prescribed by Art. 823.b, para. 2 and it corresponds to the Art. 6, para. 1), point b) of the LLMC 1976/1996. The owner of a ship in international navigation with the gross tonnage of over 300 registered in the register of ships in the Republic of Croatia is obliged to maintain in force such insurance or other financial security such as a guarantee of a bank or a similar financial institution (Art. 823.b, para. 1). It must be in the form that is generally accepted in the maritime practise (Art. 823.b, para. 3). The certificate confirming the existence of a valid insurance that is in compliance with the respective provisions of the Code is issued by the port authority maintaining the ship registry at the request of the owner of the ship (Art. 823.b, para. 4.). The necessary particulars of the certificate are listed in the Art. 823.b, para. 5 which is in accordance with the respective provision of the WRC 2007.

Although the introduction of the described provisions on compulsory insurance into the Maritime Code is generally a positive step towards a better promotion of safety of navigation and protection of marine environment, such partial implementation of WRC 2007 that is not yet in force into the domestic law has not been done adequately. All the relevant provisions on the basis and scope of liability of the shipowner for the costs of locating, marking and removal of wreck have been omitted. There are no provisions in the Maritime Code on limitation of liability for wreck removal, and since the general provisions on the limitation of liability for maritime claims under Croatian law do not apply to wreck removal, shipowners' liability for wreck removal under Croatian maritime law is unlimited. Furthermore there are no adequate provisions implementing Articles 6, 7, 8 and 9 of WRC 2007. Therefore it is not clear what should be the subject matter of compulsory insurance prescribed by Art. 823.b of the Maritime Code, i.e. the basis and scope of shipowner's liability that must be insured are simply not regulated under the Croatian maritime law and should

therefore be interpreted in accordance with the general law provisions on torts. Finally, there is no specific statutory provision providing for the right to direct action against the insurer of the shipowner's liability for the costs of locating, marking and removal of wreck.

Athens protocol 2002

Croatia is a party to the Athens convention 1974, but not to the Protocol 2002. There are no statutory provisions under Croatian law providing for compulsory insurance of liability arising from death, personal injury or loss of or damage to their luggage in marine transport. There are also no provisions allowing direct action against the insurer of such liability. Therefore, insurance of liability for passengers and their luggage in marine transport is voluntary, and direct action against such liability insurer is not allowed. However, in the near future when Croatia joins EU, it will be bound by the Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents. Thereupon, Croatia will have to implement the provisions of the Athens Protocol 2002, including compulsory insurance and direct action in its national law.

HNS 1996/2010

Croatia is not a party to HNS. There are no statutory provisions under Croatian law providing for compulsory insurance of HNS pollution liability. There are also no provisions allowing direct action against the insurer of such liability. Therefore, insurance of liability for HNS pollution liability is voluntary, and direct action against such liability insurer is not allowed.

3.1.2 Provide the IWG with an English translation of those provisions?

The relevant provisions of the Croatian Maritime Code are the following:

Article 820

(1) A ship carrying more than 2.000 tons of oil in bulk as cargo shall have an insurance or other financial security, such as a guarantee of a bank or a certificate delivered by an international compensation fund, up to the limit of liability as prescribed in Article 816 of this Code, covering liability for oil pollution damage.

(2) Insurance or other financial security under paragraph (1) of this Article shall be unconditional and irrevocable.

(3) The owner of a ship described in paragraph (1) of this Article registered in the register of ships in the Republic of Croatia shall request the competent port authority maintaining the ship registry to issue a certificate confirming that an insurance or other financial security is in force and has been provided in accordance with the provisions of this Code and of the applicable international standards.

(4) The certificate described in paragraph (3) of this Article shall be issued in Croatian and English languages and shall contain the following information:

(a) name of ship and port of registration;
(b) name and principal place of business of owner;
(c) type of security;
(d) 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;

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

(5) The certificate described in paragraph (3) of this Article shall be kept on board the ship, and a copy thereof shall be kept in the ship registry.

(6) The validity of insurance or other financial security shall not end prior to the expiry of a three month period, calculating from the day when the Ministry is notified of the loss of validity of the insurance or other financial security, unless the insurance or other financial security is not concurrently substituted by another one.

Article 821

(1) A lawsuit for compensation for pollution damage may be brought directly against the insurer or other person providing financial security according to Article 820 of this Maritime Code.

(2) The insurer or the person providing financial security may avail himself of all the defences which the shipowner would have been entitled to invoke, other than the defence of bankruptcy or winding up.

(3) By way of an exception to the provision of paragraph (2) of this Article, the insurer or the person providing financial security may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the shipowner himself.

(4) The insurer or the person providing financial security shall have the right to require the shipowner to be joined in the proceedings.

Article 823.a

(1) The owner of a ship of over 1000 tons of gross tonnage registered in the register of ships in the Republic of Croatia shall maintain in force an insurance or other financial security such as a guarantee of a bank or a similar financial institution, covering liability for bunker oil pollution damage, up to the amount corresponding to the limits of liability prescribed in Article 391 of this Code for the claims arising from death or personal injury and for other claims.

(2) The owner of a ship described in paragraph (1) of this Article shall request the competent port authority maintaining the ship registry to issue a certificate confirming that an insurance or other financial security is in force and has been provided in accordance with the provisions of the International convention on civil liability for bunker oil pollution damage, 2001 and of this Code.

(3) The certificate described in paragraph (2) of this Article shall be issued in Croatian and English languages and shall contain the following information:

(a) name of 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.

Article 823.b

(1) The owner of a ship in international navigation of over 300 tons of gross tonnage registered in the register of ships in the Republic of Croatia shall maintain in force an insurance or other financial security such as a guarantee of a bank or a similar financial institution, covering the costs of locating, marking and removal of a wreck.

(2) The amount of insurance or other financial security from paragraph 1 of this Article shall be calculated in the following manner:

a) 1 million of special drawing rights for a ship of tonnage that is not over 2.000 tons,

b) for a ship of tonnage that is over 2.000 tons, the following amount shall be added to the amount mentioned under a):

– for each ton from 2.001 to 30. 000 tons, 400 special drawing rights,

– for each ton from 30.001 to 70.000 tons, 300 special drawing rights,

– for each ton in excess of 70.000 tons, 200 special drawing rights.

(3) Insurance or other financial security from paragraph (1) of this Article shall be in a form generally accepted in maritime practice.

(4) After establishing that the requirements prescribed by the preceding paragraphs of this Article are complied with, the port authority maintaining the ship registry shall at the request of the owner of ship issue a certificate confirming that insurance or other financial security is in force.

(5) The certificate described in paragraph (4) of this Article shall be issued in Croatian and English languages and shall contain the following information:

a) name of ship, distinctive number or letters and port of registry,
b) ship's gross tonnage,
c) name and principal place of business of the owner,
d) IMO ship identification number,
e) type and duration of security,
f) 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, and
g) period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

Article 62

(1) Any domestic or foreign ship carrying more than 2.000 tons of oil in bulk as cargo, which does not have a certificate of insurance or other financial security covering legal liability for oil pollution damage prescribed by Article 820 of this Code, shall not be allowed to enter a Croatian port, nor shall it be allowed to leave a Croatian port, nor to load or discharge oil therein.

(2) The provision of paragraph (1) of this Article applies also to a ship carrying more than 2.000 tons of oil in bulk as cargo, owned by a state, and which is not covered by insurance or other financial security, if it does not have a certificate of the state where it is registered as owned by the state, confirming that its liability is covered within the limits prescribed by Article 816 of this Code.

(3) Domestic and foreign ship with gross tonnage of over 1000 intending to enter a Croatian port shall provide an evidence of insurance or other financial security

covering liability for bunker oil pollution damage in the amount corresponding to the limits of liability prescribed in Article 391 of this Code for claims arising from death or personal injury and for other claims.

(4) Ship described in paragraph 3 of this Article shall have a valid certificate confirming that insurance or other financial security is in force in accordance with the provisions of the International convention on civil liability for bunker oil pollution damage, 2001, issued by the competent authority of the state whose flag the ship is entitled to fly.

(5) Domestic ship in international navigation and foreign ship with gross tonnage of over 300 intending to enter a Croatian port, or call at an offshore terminal situated in the territorial sea or on the continental shelf the Republic of Croatia shall provide an evidence of insurance or other financial security such as a guarantee of a bank or other similar institution, covering the costs of locating, marking and removal of wreck in the amount prescribed by Article 823.b of this Code.

Article 1001

(1) Master of a ship, yacht or a boat, or crewmember replacing the master shall be penalized for a maritime offence by a fine from 2.000,00 to 15.000,00 kunas:

1) if the ship carrying more than 2000 tons of oil in bulk does not have a certificate of insurance or other financial security covering legal liability for oil pollution damage upon entering or leaving a port in the Republic of Croatia or upon loading or discharging oil (Article 62),
[…]

Article 1017

Legal person shall be penalized for a maritime offence by a fine from 300.000,00 to 1.000.000,00 kunas, and the liable natural person in the legal person by a fine from 50.000,00 to 200.000,00 kunas, in case that a maritime offence from Article […] 1001 […] of this Code results in an environmental accident, meaning an extraordinary event or a kind of event caused by an action or influence beyond control endangering human life or health and causing larger damage to the environment.

3.2 If your national law does not contain any provisions specifically designed to transform the above mentioned provisions in international conventions into your national law, does your national law then contain general provisions on mandatory insurance, which also apply to the mentioned provisions in the international conventions?

As it has already been stated, Croatia is a party to Bunkers convention and CLC 1992. According to the Croatian Constitution, such international conventions, concluded and ratified in accordance with the Constitution, publicised and which have entered into force make an integral part of the domestic legal order of the Republic of Croatia and have primacy over national laws. It means that *inter alia* the relevant compulsory insurance and direct action provisions of the respective conventions are directly applicable under Croatian law.

Athens Protocol 2002 and HNS are not in force and Croatia is not a party to them, neither are there any general provisions of Croatian domestic law on mandatory

insurance and direct action which would apply to the HNS pollution liability or liability for passengers and their luggage in marine transport.

WRC 2007 compulsory insurance provisions have been partially implemented in the Croatian domestic maritime law, but there is no specific provision allowing direct action against the wreck liability insurer. However, there is a general provision of the Maritime Code (Art. 743) allowing direct action against the liability insurer whenever the insurance is compulsory by law. Therefore, the same provision of Art. 743 would apply in the case of insurance of the shipowner's liability for the costs of locating, marking and removal of wreck, as such insurance is prescribed as compulsory.

If so, could you

3.2.1 summarize the main characteristics of those provisions?

General provision allowing direct action against liability insurer is contained in Art. 743 of the Maritime Code. For the purposes of this questionnaire, that provision is relevant only in the context of compulsory insurance covering the costs of wreck removal, as it has already been explained under point 3.2 above (since direct action for oil pollution and bunker oil pollution claims is governed by the special provisions of the respective international conventions and/or of the Maritime Code, whilst in respect of liability towards passengers there is no compulsory insurance).

Article 743 of the Maritime Code prescribes that in case where liability insurance is compulsory (mandatory by law), the injured party may claim for the indemnity / compensation directly against the insurer of the person liable, but only up to the limit of the insurer's obligation. If under the contract of insurance there is an insured amount agreed as limit of insurer's liability, the insurance proceeds may be paid only up to the insured amount. The right of the insurer to rely on certain defences in response to a direct claim is not specifically regulated. The courts in Croatia, interpreting this statutory provision do not allow the insurers to rely on any defences arising from the insurance contract (pay to be paid, unpaid premium, deductibles, arbitration clauses, etc.) except the defence that the insurer's liability is limited to the insured amount, nor do they allow for the defence of bankruptcy / liquidation of the assured. The liability insurer is therefore regarded as the guarantor of the insured liable party. He therefore can rely on the defences available to the liable party. The defence of the wilful misconduct of the insured has not been tested in Croatian courts, but in the writer's opinion it should be accepted as a valid insurer's defence against direct claim, because wilful misconduct is uninsurable and according to the Maritime Code it is *ius cogens*.

3.2.2 provide the IWG with an English translation of those provisions?

Article 743

(1) In insurance of liability of the assured for damage caused to third parties, insurance compensates for the amounts that the assured is obliged to pay to those parties in relation to his liability covered by insurance and for the expenses that are necessary to establish the level of the assured's liability.

(2) In case where the insurance from paragraph (1) of this Article is compulsory, as well as in the case of liability for death, personal injury and impairment of health of a

member of ship's crew, the injured party may claim directly from the insurer for the compensation of damages suffered as a consequence of an event for which the assured is liable, but maximum up to the limit of the insurer's liability.

(3) Insurance also covers costs of measures taken at the request of insurers or their agents or in agreement with them, for the defence against unreasonable or unjustifiable claims of third parties, as well as costs of reasonable measures taken by the assured for the same purpose without the insurers' or their agents' consent if such consent could not have been timely obtained.

(4) If in the contract of insurance there is an agreed amount up to which liability is insured, the compensation from paragraph (1) of this Article shall be payable only up to the insured amount.

3.3 What does your private international law provide for as the applicable law,

3.3.1 if the claimants are national persons or companies, but if the insurer is a foreign company?
3.3.2 if the claimants are foreign persons and companies, but if the insurer is a national company?
3.3.3 if the claimants and the insurer are foreign companies?

General rules of PIL regarding the law applicable to the contract of marine insurance are contained in Art. 981 of the Maritime Code and they are as follows:

Art. 981

(1) Contract of marine insurance and the legal relationships arising there from shall be governed by the law chosen by the contract parties. If the parties did not contract the applicable law, the law of the principal place of business of the insurer shall apply.

(2) By way of an exception to the provision of paragraph (1) of this article, the legal relationships arising from the contract of marine insurance shall be governed by Croatian law if all the interested parties from that contract are citizens of the Republic of Croatia with the habitual residence in the Republic of Croatia or domestic legal persons with the principal place of business in the Republic of Croatia, and if the subjects of insurance are exposed to the risks exclusively limited to the territory of the Republic of Croatia.

General PIL rule regarding the availability of direct action under Maritime Code is as follows:

Article 982

Availability of direct action shall be determined according to the law applicable to the underlying claim or according to the law applicable to the contract of insurance.

Once the availability of direct action is established either under the law governing the underlying claim, or by the law governing the insurance contract, the direct claim would be subject to the both applicable laws. In particular, matters relating to the contract of insurance would be subject to the law governing the contract of insurance,

whilst the underlying claim matters would be subject to the law governing the underlying claim (typically tortious liability).

General PIL rules regarding the law governing tortious liability (out of which the underlying claim arises) are contained in the following provisions of the Croatian Conflict of Laws Act (in further text - PIL Act):

Article 28

(1) Unless otherwise provided for individual cases, the law governing tortious liability is the law of the place where the act has been performed or the law of the place where the consequences have occurred, depending on which is most favourable for the injured party.
(2) [left out as irrelevant]
(3) [left out as irrelevant]

Article 29

If an event from which liability for damages arises has occurred on a ship on the high seas or on an airplane, the law of the state of the nationality of the ship or the law of the state where the airplane was registered is considered as the law of the place where the acts have occurred which have created the liability for damages.

4. Jurisdiction/Proceedings

4.1 Does your national law contain provisions on jurisdiction of courts for direct claims against Insurers?

The PIL provisions on jurisdiction of courts for direct claims against insurers contained in the relevant international conventions that have been accepted, ratified and publicised in accordance with the Croatian Constitution (i.e. Bunkers Convention and CLC 1992) are directly applicable under Croatian law and shall prevail over any other domestic rules governing jurisdiction of courts for direct claims.

Otherwise, general rule is contained in the provision of Art. 53 of the Croatian PIL Act, and it is as follows:

Article 53

(1) As regards proceedings for tortious liability the court of the Republic of Croatia has jurisdiction if that jurisdiction exists by virtue of the provisions of Article 46 [omitted as irrelevant] of this Act or if the damage has occurred on the territory of the Republic of Croatia.

(2) Paragraph (1) of this Article shall be applied also to proceedings against the insurer of third party liability on the basis of the rule of direct liability of insurer, and to proceedings involving a right of recourse against debtors on the basis of the liability for damages.

Whereby, Art. 46 of the PIL Act contains general rules on jurisdiction of Croatian courts in cases with an international element, and they are as follows:

Article 46

(1) The court of the Republic of Croatia has jurisdiction if the defendant is domiciled or has its principal place of business in the Republic of Croatia.

(2) [Omitted as irrelevant.]

(3) [Omitted as irrelevant.]

(4) If there is more than one "material" defendant, the court of the Republic of Croatia has jurisdiction also when one of the defendants is domiciled or has its principal place of business in the Republic of Croatia.

(5) [Omitted as irrelevant.]

If so, does your national law

4.1.1 allow foreign claimants to directly sue national insurers in your national courts? Yes.

4.1.2 allow foreign and national claimants to directly sue foreign insurers in your national courts? Yes.

4.2 Does your national law allow that the direct claims against an insurer are subject to an arbitration clause? There are no such specific statutory rules under Croatian law. The court practice shows that the interpretation of the relevant matter by the courts in Croatia is that the third party claimant when claiming directly against the insurer is not bound by the arbitration clauses potentially included in the respective contract of insurance.

4.3 Does a judgement against the liable party bind the courts of your country in a direct action against an insurer as regards the merits and quantum? No.

If so,

4.3.1 does this also apply to judgements in default?

4.3.2 can the insurer invoke that the court having decided on the claim against the party liable has not had jurisdiction?

4.3.3 can the insurer invoke that the party liable has not been properly served with proceedings and no opportunity to defend itself?

4.3.4 can the party liable invoke that the party liable has not defended itself properly? No.

4.5 Can the claimant under your national law sue the person liable and the insurer in the same proceedings? Yes.

If so,

4.5.1 are there any requirements as to the domicile of the party liable or the insurer? There are no particular requirements prescribed. General PIL rules on jurisdiction apply. See answers to the questions no. 4.1, 4.1.1 and 4.1.2 above.

4.5.2 Does your national law contain provisions on what has to happen if the insurer requires that the party liable is joined as a further defendant? The insurer may not require that the party liable be joined as a further defendant if that party is not sued. The insurer may only require that the liable party (as his assured) be joined in the proceedings on the insurer's side as an "intervener".

5. Particulars of direct action

5.1 Does your national law contain provisions according to which a direct claimant has to fulfil requirements for commencing a direct action against an insurer? No.

5.2 Does your national law contain provisions on burden and measure of proof which distinguish between a claim against the party liable under the respective convention and a direct claim against the insurer of such party? No.

5.3 What defences does your national law allow an insurer against a direct claim? In respect of claims for oil pollution damage and bunker oil pollution damage the insurer's defences are those provided under CLC 1992 Art. VII, para. 8 and Bunker convention, Art. 7, para. 10. respectively, as the cited conventional provisions apply directly under Croatian law, as has already been explained. Therefore the possible insurer's defences in those cases would be: limitation of liability, all owner's defences against the injured party, and wilful misconduct.
In respect of a direct claim of a crew member and a direct claim for the costs of locating, marking and removal of wreck, the above cited Article 743 of the Maritime Code applies (see answer to question no. 3.2.2 above), in which case the defences available to the insurer are as explained in the answer to the question no. 3.2.1 above. Currently, direct action for HNS damage claims and passenger claims is not allowed in Croatia, as those liabilities are not subject to compulsory insurance.

5.4 Can the insurer take over the defence of the party liable, and has the insurer a statutory power of attorney to act for the party liable? There is no such statutory law.

5.5 Are there any time limits in your national law for a direct action against an insurer? Yes, they are the same as for the underlying claim (e.g. in case of oil pollution and bunker oil pollution damage, the applicable time limits are those of Art. 8. of the Bunkers convention and of Art. VIII. of CLC 1992 respectively.)

If so,

5.5.1 what protects such a time limit (e.g. court proceedings; demand letters)? Only a law suit.

5.5.2 can the time limit be extended by agreement? If so, is the agreement with the insurer sufficient or does the party liable have to agree to the extension as well? No.

5.6 Under your national law, are the party liable and the insurer jointly liable? Yes.

If so,

5.6.1 what legal consequences does your national law provide for such joint liability? The party liable and his liability insurer are effectively jointly and severally liable under Croatian law. This means that a claimant may pursue an obligation against any one party as if they were jointly liable and it becomes the responsibility of the defendants to sort out their respective proportions of liability and payment. This means that if the claimant pursues one defendant and receives payment, that defendant must then pursue the other obligor for a contribution to their share of the liability. However, this is subject to the insurer's particular defences against a direct claim and especially to the amount of insurance as a definite limit of insurer's liability.

5.6.2 can the insurer file a cross action against his insured in the same proceedings? No.

5.6.3 do your courts in such a situation give effect to a jurisdiction or arbitration clause in the insurance policy? There is no such court practice in Croatia.

5.7 Does your national law allow that the claimant assigns his direct claims to a third party? There is no explicit provision forbidding such assignation, therefore, theoretically such assignation would be possible. The insurer in such case would not have to give consent, but would have to be informed of the assignation.

If so,

5.7.1 are there any requirements for the validity of the assignment? No.

5.7 What qualifies under your national law as a *wilful misconduct*?
Dolus eventualis (person acting recklessly and with knowledge that damage may result).

5.9 Does the insurer acquire rights against his own insured (the party liable) if he has to indemnify the direct claimant in circumstances, under which he would have avoided cover if he had been sued by the party liable and not by the direct claimant? There are no specific statutory rules regulating this matter, therefore, it would depend entirely on terms and conditions of the insurance contract.

5.10 How is limitation of liability affected under your national law in cases of direct actions? Insurer has the right to rely on the limitation of liability even in cases where the person liable has lost such right. Insurer may set up his own limitation fund.

5.11 Does your national law contain consequences, if the insurance contract contains provisions which are not consistent with the Conventions referred to above? In such case the certificate of insurance would not be issued (when Croatia acts as flag state). In case where the ship has such valid certificate

issued by another state party to the respective convention (and Croatia acts as port state), the presumption is that the contract of insurance is consistent with the relevant conventional provisions.

If so,

5.11.1 are such provisions invalid? Yes.
5.11.2 is the whole contract invalid? No.
5.11.3 does the contract including such conflicting conditions remain valid, so that the insurance does not fulfil the requirements of the Conventions? What effect does that have under your national law? Contract remains valid, the conflicting conditions are considered non-existent. The contract is construed in accordance with the respective conventions.

6. State Liability

Does your national law provide for liability of the state where to appropriate authority issues a certificate under the Convention, if it turns out

6.1 that there is no insurance contract at all? No.
6.2 that the insurance contract is not consistent with the provisions of the Conventions? No.
6.3 that the insurer is not financially stable and cannot satisfy all direct claims? No.

If you have any questions regarding this Questionnaire, please feel free to contact the Chairman of the IWG on Marine Insurance, Dr. Dieter Schwampe at d.schwampe@da-pa.com. Replies to this Questionnaire should be sent to the CMI Secretariat in Antwerp.

Your cooperation is very much appreciated.

Nigel H. Frawley
- Secretary General -