

# COMITÉ MARITIME INTERNATIONAL

## International Working Group (Polar Shipping)

### CONVENTIONS REPORT

Subgroup	International Conventions
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#### A. INTRODUCTION

This report consists of a review of private international maritime conventions with regards to their applicability, and non-applicability, to shipping in the Arctic Ocean and Southern Ocean, together with any recommendations for improvement for the unique conditions in those regions.

#### B. CONVENTIONS REVIEWED

1. *Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, 1910*<sup>1</sup>  
*Protocol to Amend the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, 1967*<sup>2</sup>  
*International Convention on Salvage, 1989*<sup>3</sup>

The *Assistance and Salvage Convention, 1910* and the *Assistance and Salvage Convention Protocol, 1967* deal with the salvage of ships and property related thereto, and the factors involved for remuneration to salvors for a successful outcome. The *International Convention on Salvage,*

<sup>1</sup> *Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, 1910*, 23 September 1910, UKTS 1913 No 4 (entered into force 1 March 1913).

<sup>2</sup> *Protocol to Amend the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, 1967*, 27 May 1967, UKTS 1978 No 22 (entered into force 15 August 1977).

<sup>3</sup> *International Convention on Salvage*, 28 April 1989, 1953 UNTS 165; S. Treaty Doc. No. 102-12, 102d Cong., 1st Sess. (1991) (entered into force 14 July 1996).

1989 adds remuneration in certain instances for the prevention or minimizing of damage to the environment. We have concluded that these conventions apply to the Arctic Ocean beyond national jurisdiction and in Arctic waters within National jurisdiction. We see no need for amendments to make them better suited for the conditions existing in the Arctic Ocean.

## **2. *Convention on the Protection of the Underwater Cultural Heritage, 2001*<sup>4</sup>**

The *Underwater Cultural Heritage Convention, 2001* sets out basic principles for the protection of underwater cultural heritage, provides a detailed State cooperation system and provides rules for the treatment and research of underwater cultural heritage. This Convention applies to a State's internal waters, archipelagic waters, territorial sea, contiguous zones, exclusive economic zones and on the continental shelf. As such, we have concluded that it also applies to Arctic waters and the Arctic Ocean beyond national jurisdiction. We see no need for amendments to make them better suited for the conditions existing in the Arctic Ocean.

As to the applicability of the *Assistance and Salvage Convention, 1910*, the *Assistance and Salvage Convention Protocol, 1967*, *International Convention on Salvage, 1989* and the *Underwater Cultural Heritage Convention, 2001* in the Southern Ocean, they appear on their face to apply to those waters. However, the *Antarctic Treaty*<sup>5</sup> gives rise to particular considerations. As Professor Donald Rothwell pointed out in a paper presented at the CMI 2012 Conference in Beijing:

While the Southern Ocean is not *sui generis* and remains subject to the same laws of the sea and maritime law that apply elsewhere, there are a range of unique issues that arise in the Southern Ocean. The first is the absence of recognized coastal States with capacity to exercise both proscriptive and enforcement jurisdiction off the Antarctic coast. The second, arising from the first, is the predominant reliance upon flag State jurisdiction. The third is the particular issues arising from undertaking maritime regulation and enforcement in one of the world's most remote oceans and associated maritime safety and security issues...<sup>6</sup>

As a result, we are unable to give any recommendation relating to amendments that might improve the applicability of these Conventions in Antarctic waters.

## **3. *United Nations Convention on a Code of Conduct for Liner Conferences, 1974*<sup>7</sup>**

Also known as the *Liner Code, 1974*, this convention addresses issues pertaining to competition

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<sup>4</sup> *Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001*, 2562 UNTS 3 (entered into force 2 January 2009).

<sup>5</sup> *Antarctic Treaty, 1 December 1959* 402 UNTS 71 (entered into force 23 June 1961). See also *Protocol on Environmental Protection to the Antarctic Treaty, 4 October 1991*, 30 ILM 1455 (1991) (entered into force 14 January 1998) [*Antarctic Treaty Protocol*].

<sup>6</sup> Donald Rothwell, "Legal challenges for maritime operations in the Southern Ocean," (Paper delivered at the 2012 Comité Maritime International Beijing Conference, 18 October 2012), (2013) *CMI Yearbook* 428-445 at 444.

<sup>7</sup> *United Nations Convention on a Code of Conduct for Liner Conferences, 6 April 1974*, 1334 UNTS 15 (entered into force 6 October 1983).

among and between different international liner services which have organized into liner conferences. There are no geographic limits on the applicability of the Convention. The topics covered by the Convention (pricing, competition, adequacy of service, dispute resolution) do not appear to pertain to the issues and concerns raised by increased commercial vessel traffic. In polar regions, it is our understanding that vessels engaged in liner services (i.e., container ships) are not currently transiting through polar waters because of concerns that ice or unreliable icebreaking services would unduly delay vessels engaged in liner services.

#### **4. *International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels, 1926 and 1934 Additional Protocol*<sup>8</sup>**

The *Immunity of State-Owned Ships Convention*, 1926 provides that sea-going ships owned or operated by States are generally liable to third parties under the same rules of liability and the same obligations as those applicable in the case of privately-owned ships. However, these liability rules do not apply to ships of State owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships, and “other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on government and non-commercial service. ...”<sup>9</sup> An exception to such immunity applies to claims in respect of collision and other accidents of navigation, salvage, general average, and claims relating to repairs, supplies or other contracts relating to the ship. The 1934 *Protocol* clarified that vessels chartered by a State, while exclusively engaged on governmental and non-commercial service, are entitled to the Convention’s immunity conferred upon State-owned vessels.

As a general matter, the Convention has no direct bearing on the increase in commercial traffic in Polar regions. The Convention contains no geographic limits on its applicability. There is no obvious need to amend the Convention in light of the increased vessel traffic in these regions.

It is our understanding that icebreakers owned and operated by the Russian government are used to escort commercial vessels transiting in the Northern Sea Route over the northern coast of Russia. In the event that a marine casualty involving a Russian icebreaker causes a significant pollution event in the Arctic, it is unclear whether Russia would face civil liability should the oil impact the waters of other countries.

Russia provides such services on a commercial basis through Atomflot which operates as a corporation. However, it is unclear whether the ships have been privatized. If they are, they will no longer receive protection as government ships. While we understand that Russia receives payments from merchant vessels for providing the icebreaking service, Russia might contend that it is providing icebreaking services as a government service, rather than for commercial gain, and that the payments are simply reimbursement of the costs of providing the government service. If courts agree with Russia’s argument, then it would only be liable for

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<sup>8</sup> *International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels and 1934 Additional Protocol*, 10 April 1926, 24 May 1934, 179 LNTS 199 / UKTS No. 15 (1980), Cmnd. 7800 (entered into force 8 January 1937).

<sup>9</sup> *Ibid* at Art 3.

claims in respect of collision, accidents of navigation, salvage, and general average arising out of a marine casualty. It is unclear whether such claims would include liability for responding to environmental accidents such as a major oil spill, or third party damages claims resulting from such an accident.

## **5. *United Nations Convention on Conditions for Registration of Ships, 1986*<sup>10</sup>**

The *United Nations Convention on Conditions for Registration of Ships, 1986* provides for the identification and accountability of persons responsible for management and operation of ships. The Convention applies to certain vessels used in international seaborne trade, without other geographic limitation. The topics covered by this Convention include requiring that vessels sail only under the flag of one State, requiring flag States to establish a national maritime administration to perform certain surveying and regulatory functions and enforce registration requirements, registration and documentary requirements for the identification of shipowners, manning of ships, ensuring financial responsibility of shipowners, and the application of the Convention's provisions to bareboat charters and joint ventures. It does not seem that the application or provisions of the Convention will be impacted by travel through Arctic waters, since the Convention essentially deals with registration and administrative requirements of shipowners and flag States.

## **6. *Convention relating to Registration of Rights in respect of Vessels under Construction, 1967*<sup>11</sup>**

The *Convention relating to Registration of Rights in respect of Vessels under Construction, 1967* does not provide geographic limitations on its application. The Convention requires States to provide for the registration of vessels constructed in their territories, as well as titles and any mortgages on such constructed vessels. The Convention also covers the priority of ship mortgages, the registration of vessels in more than one State, deregistration, and dispute resolution. The topics covered by this Convention are not implicated by increased marine traffic in polar waters.

## **7. *UNIDROIT Convention on International Financial Leasing, 1988*<sup>12</sup>**

The *UNIDROIT Convention on International Financial Leasing, 1988* applies to certain financial leasing transactions for plant, capital goods, or other equipment involving lessors and lessees whose places of business are in different States, without geographic limitation. The Convention deals with contractual financial leasing agreements and the rights and duties of the parties to such agreements. It addresses topics such as the liability of the lessor for death, personal injury, or damage caused by the leased equipment, the lessors warranties of quiet possession, the lessee's duty to maintain the equipment, the lessee's right to supply agreements, the lessor's

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<sup>10</sup> *United Nations Convention on Conditions for Registration of Ships*, 7 February 1986, 26 ILM 1229 (not in force).

<sup>11</sup> *Convention Relating to Registration of Rights in Respect of Vessels under Construction*, 27 May 1967 (not in force).

<sup>12</sup> *UNIDROIT Convention on International Financial Leasing*, 28 May 1988, 2321 UNTS 195 (entered into force 1 January 1995).

rights in the event of the lessee's default, the lessee's right in the event of the lessor's breach, and the ability of the parties to transfer rights under the leasing agreement. We do not see any reason why the Convention needs to be amended to address any of the issues presented by increased maritime traffic in polar regions.

## **8. *International Convention for the Unification of Certain Rules of Law Related to Bills of Lading and Protocol of Signature, 1924*<sup>13</sup>**

Known as the *Hague Rules*, 1924, this convention addresses duties, liabilities, immunities and rights of the carrier of a contract of international carriage of goods by sea where a bill of lading is issued. There are no geographical limitations on its applicability, and it can be applied to commercial shipping in the polar regions.

Among the topics covered within the *Hague Rules*, 1924, severe conditions of polar waters (sea ice, low temperature, longer daytime, etc.) would have effects on the carrier's duty and liability regarding seaworthiness,<sup>14</sup> (in that ships navigating in the polar waters would be required to have a higher level of seaworthiness ("polarworthiness"). It is recommended that the IWG continue its study on this and consider drafting a definition of "polarworthiness" for possible amendment to the *Hague Rules* and other carriage of goods Conventions). Also, while severe conditions are generally expected in polar waters, it might still be difficult to predict how conditions will change due to insufficient data. This would affect application of immunity for damage caused by perils of the sea.<sup>15</sup>

Other topics dealt with by the *Hague Rules*, 1924, such as the evidential effect of bills of lading, notice requirement for loss or damage to the goods, validity of contractual modifications, other immunities of the carrier and limitation of liability, and dangerous goods, are not affected by increased shipping in the Arctic and Southern Oceans.

## **9. *Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Law related to Bills of Lading, 1968*<sup>16</sup>**

The *Visby Rules*, 1968 amend the *Hague Rules*, 1924. As such, the analysis above for the *Hague Rules*, 1924 basically applies to the *Visby Rules*, 1968 as well. To reiterate, there are no geographical limitations on its applicability, and it can be applied to commercial shipping in the polar regions. Also, no amendment would be necessary, as increase of shipping in polar waters does not seem to have an impact on amendments made by the *Visby Rules*, 1968, such as time for suit for indemnity claims, damage computation rule, container clause for limitation,

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<sup>13</sup> *International Convention for the Unification of Certain Rules of Law related to Bills of Lading and Protocol of Signature*, 25 August 1924, 120 LNTS 155 / [1956] ATS 2 / UKTS 1931 No. 17 (Cmd. 3806) (entered into force 2 June 1931).

<sup>14</sup> *Ibid* Arts 3(1) and 4(1).

<sup>15</sup> *Ibid* Art 4(2)(c).

<sup>16</sup> *1968 Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Law related to Bills of Lading*, 23 February 1968, 412 UNTS 127 / [1993] ATS 23 (entered into force 23 June 1977).

defences against tort claims and protection of servants and agents of the carrier.

**10. *1979 Protocol Amending the International Convention for the Unification of Certain Rules relating to Bills of Lading as modified by the Amending Protocol of 23rd February 1968*<sup>17</sup>**

Known as the *SDR Protocol*, this instrument amends the *Visby Rules*, 1968 to change the monetary unit used for limitation of carrier's liability. There are no geographical limitations on its applicability, and no revision is necessary, in light of increased shipping in the polar regions.

**11. *United Nations Convention on the Carriage of Goods by Sea, 1978*<sup>18</sup>**

The *Hamburg Rules* address issues of liability of the carrier, liability of the shipper and transport documents. There are no geographical limitations on its applicability, and can be applied to commercial shipping in the Arctic and Southern Oceans.

The *Hamburg Rules* do not contain special provisions on seaworthiness or perils of the sea, as these factors are to be dealt with under the provision stipulating the carrier's negligence based liability with the burden of proof for non-negligence on the carrier. Severe conditions of the polar waters will also be considered in this general framework. Thus, no revision is necessary.

**12. *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008*<sup>19</sup>**

The *Rotterdam Rules* re-harmonize the rules applicable to international carriage of goods by sea, and make adjustments to modern practices such as door-to-door contracts. There are no geographical limitations on its applicability, and it can be applied to commercial shipping in the Arctic and Southern Oceans.

Regarding the duty of the carrier to make and keep a ship seaworthy<sup>20</sup> and the immunity of the carrier for damage caused by perils of the sea<sup>21</sup>, the above analysis under the *Hague Rules*, 1924 will similarly apply to the *Rotterdam Rules*.

Also, as dangerous goods under the *Rotterdam Rules* include goods that are a danger to

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<sup>17</sup> *1979 Protocol Amending the International Convention for the Unification of Certain Rules Relating to Bills of Lading as Modified by the Amending Protocol of 23rd February 1968*, 21 December 1979, 1412 UNTS 146 / [1993] ATS 23, (entered into force 14 February 1984).

<sup>18</sup> *United Nations Convention on the Carriage of Goods by Sea*, 31 March 1978, 1695 UNTS 3 (entered into force 1 November 1992).

<sup>19</sup> *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 11 December 2008, GA Res 63/122, UNGAOR, 63d Sess, UN Doc A/RES/63/122 (2 February 2009) (not in force).

<sup>20</sup> *Ibid* Art 14.

<sup>21</sup> *Ibid* Art 17(3)(b).

the environment (Articles 15 and 32), and as the polar environment could be more vulnerable than that of other waters, it is possible that some goods, which are not considered as dangerous goods usually, become dangerous goods when they are carried in polar waters. Here again, however, the wording of the *Rotterdam Rules* is wide enough to leave this matter to interpretation, and thus, no revision is necessary.

### **13. *United Nations Convention on International Multimodal Transport of Goods, 1980*<sup>22</sup>**

The *United Nations Convention on International Multimodal Transport of Goods, 1980* stipulates a liability of the carrier multimodal based on the uniform system. Although most of today's commercial shipping in the Arctic Ocean is for bulk cargo such as oil and gas from that region, and thus usually not a part of multimodal transportation, container ships might navigate in the Arctic Ocean in the future. The Convention has no geographical limitations on its applicability, and it can be applied to commercial shipping in the Arctic Ocean and the Southern Ocean. However, this Convention has not entered into force, and the chance of entry into force in the future is low.

As the scope of the Convention is not limited to carriage by sea, the Convention does not contain special provisions on seaworthiness or perils of the sea. These factors will be dealt with under the provision stipulating the carrier's negligence-based liability with the burden of proof for non-negligence on the carrier. Severe conditions of the polar waters will also be considered in this general framework. Thus, no revision is necessary.

### **14. *International Convention on Civil Liability for Oil Pollution Damage, 1969*<sup>23</sup>**

The *CLC, 1969* deals with liability and compensation for pollution damage caused by spills of persistent oil from tankers. It is a strict, but limited liability regime, coupled with compulsory insurance. Liability is tightly channeled to the registered owner of the tanker. Other parties, including the charterer, any person taking preventive measures or performing salvage operations are explicitly protected from compensation claims, “unless the damage resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result.”<sup>24</sup>

“Pollution damage” is specified in a two-fold definition, On the one hand, it includes loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship,<sup>25</sup> but with a limitation as regards ‘pure environmental damage’ (not involving any loss of profit) to “reasonable measures of reinstatement.” On the other hand, it covers the costs of ‘preventive measures’, which is defined as “any reasonable measures taken by any

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<sup>22</sup> *United Nations Convention on International Multimodal Transport of Goods*, 24 May 1980, GA Res 33/160, UN Doc TD/MT/CONF/17 (not in force).

<sup>23</sup> *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 UNTS 3 (entered into force 19 June 1975) [*CLC 1969*], as amended.

<sup>24</sup> *Ibid* at Art III(3).

<sup>25</sup> *Ibid* Art I(6).

person after an incident has occurred to prevent or minimize pollution damage<sup>26</sup> and further loss or damage caused by such measures.

In geographical terms, the *CLC, 1969* covers pollution damage in the coastal waters (territory, including territorial sea, and waters up to 200 nautical miles from the coastline) of the party States<sup>27</sup> and preventive measures, wherever taken, to prevent or minimize such damage.<sup>28</sup> It is hence not necessary for the coastal State to set up a formal EEZ to be covered by the *CLC, 1969*, but the zone must be determined “in accordance with international law”.

While it is possible in theory that parts of the Arctic Ocean that are not covered by ‘proper’ EEZs could fall outside the scope of the Convention on the ground that the area fails to be determined in accordance with international law, the more realistic starting point is that all areas of the Arctic where shipping takes place will normally be covered by the *CLC, 1969*. Should the damage take place beyond the 200nm area, preventive measures in these areas would still be compensated.

By contrast, the Convention does not apply in the Antarctic, in the absence of coastal States with territorial sea and EEZ or equivalent zones. (Even preventive measures are limited to measures that prevent pollution damage as defined in Article 1(7). Liability for ships in the Antarctic is regulated by other instruments.<sup>29</sup>

Even if the full *CLC, 1969* compensation regime (including the strict liability, compensation limit, insurance requirements, direct action, etc.) applies to oil pollution incidents in the Arctic, there may still be substantive issues which deserve some consideration with regards to how well the ‘regular’ rules of the *CLC, 1969* cater for the special circumstances in the Arctic Ocean.

The assessment of the reasonableness of reinstatement costs and preventive measures may need specific criteria in the Arctic Ocean (in view of the costs involved in removing a wreck, or emptying tanks in remote Arctic areas, or the costs of the scientific studies of the conditions, baselines, recovery etc.). With respect to exemptions from liability, navigation in the Arctic is more likely than regular tanker trade to give rise to exemption under Article 3(2)(d) on navigational aids (including charts). This in turn increases Arctic coastal States' exposure to liability under the *CLC, 1969* (though such incidents will still be covered by the Fund), other questions could relate to specific insurance requirements. These matters may not need amendments of the Conventions, but could at least to a significant degree be addressed by less formal interpretation guidelines, or changes to the claims manual.

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<sup>26</sup> *Ibid* at Art I(7).

<sup>27</sup> *Ibid* Art II(a). All Arctic coastal States are parties to the *CLC 1969*, except the US, where civil liability for pollution by ships is regulated by national laws.

<sup>28</sup> *Ibid* Art II(9)(b).

<sup>29</sup> Such as Annex VI to the *Antarctic Treaty Protocol*, *supra* note 5.

- 15. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971<sup>30</sup>**  
**Protocol of 1976 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971<sup>31</sup>**  
**International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, 1992<sup>32</sup>**  
**Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992<sup>33</sup>**

The International Oil Pollution Compensation Fund (the IOPC Fund), compensates victims when the shipowners liability under *CLC, 1969* is inadequate to cover the damage. The IOPC Fund is financed collectively by contributions from companies or other entities receiving oil carried by sea in State Parties to the Fund Convention. Recourse to the IOPC Fund may take place where the damage exceeds the shipowner's maximum liability, where the shipowner can invoke any of the defences allowed in the *CLC, 1969*,<sup>34</sup> or where the shipowner (and the insurer) is financially incapable of meeting the obligations. It is therefore closely linked to the *CLC, 1969* and has the same scope, definitions and geographical coverage as the *CLC, 1969*.

To further increase the amount of compensation available, a Supplementary Fund was established through the *2003 Protocol*. It supplements compensation available under the IOPC Fund with an additional third tier of compensation. The Protocol is optional and participation is open to States parties to the IOPC Fund. The Supplementary Fund does not affect what damage is compensated or the criteria for compensation, but only raises the maximum compensation available from SDR 200 million to SDR 750 million and thus reduces the risk of incomplete compensation, or delays in compensation due to 'pro-rating' of claims. The level of compensation available for oil tanker incidents in the Arctic would therefore be improved if the coastal States in the region participated in the Supplementary Fund. Of the Arctic coastal States, only Canada, Denmark, and Norway participate in the Supplementary Fund. It is recommended that the CMI study this particular aspect and make such recommendations as may be advisable.

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<sup>30</sup> *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 18 December 1971, 1110 UNTS 57 (entered into force 16 October 1978).

<sup>31</sup> *Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971*, 19 November 1976, 1862 UNTS 509 (entered into force 22 November 1994).

<sup>32</sup> *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, Damage*, 27 November 1992, 1953 UNTS 330 (entered into force 30 May 1996).

<sup>33</sup> *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 16 May 2003, Can TS 2010 No 4 (entered into force 3 March 2005).

<sup>34</sup> Under *CLC 1969*, *supra* note 23 Art III(2) the shipowner is exempted from liability if he proves that the damage:

- (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- (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.

**16. *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996*<sup>35</sup>**

***Protocol of 2010 to Amend the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996*<sup>36</sup>**

The *HNS*, 1996 is essentially a combination of the *CLC*, 1969 and *IOPC Fund Conventions* in a single instrument, regulating damage from other hazardous and noxious substances than those covered by the *CLC* 1969. It is similar to the *CLC* 1969 and *IOPC Fund Conventions*, for example in respect of strict liability, insurance, key definitions, grounds for exonerations and channeling of liability. The maximum compensation by the *HNS* Fund is SDR 250 million.

The main differences between the *CLC*, 1969 and *IOPC Fund Convention* and the *HNS*, 1996 are that the range of substances are different and that more types of damage are covered (the *HNS* Convention covers not only pollution damage but also damage caused by e.g., fire and explosion and includes the loss of life or personal injury caused by those substances). In view of this, there is also a slight difference with the *CLC*, 1969 in terms of geographical coverage. While the extent of damage caused by contamination of the environment is the same as for the *CLC*, 1969 (territory of a Party State and EEZ or equivalent),<sup>37</sup> other damage is limited to the territory, including the territorial sea of a State Party. However, damage caused by substances carried on board ships registered in a State Party is covered, irrespective of the geographical location of the ship.<sup>38</sup> Measures taken to prevent damage are covered, wherever taken.

Our remarks with respect to the *CLC*, 1969 relating to the Arctic Ocean and the Southern Ocean apply equally to the *HNS Convention*.

**17. *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*<sup>39</sup>**

The *Bunkers Convention* does not comprise a supplementary layer of compensation, but sets out a regime of strict liability of the shipowner for pollution damage. The shipowner is more broadly defined in this instrument, by including the owner, bareboat charterer, operator and manager of the ship. The provisions on grounds of exoneration of the shipowner are similar to those in the *CLC* and *HNS* Conventions, but the channeling of liability is different, in that it does not provide for the ‘immunity’ for compensation claims against a number of parties, such as salvors or persons taking preventive measures.<sup>40</sup> The *Bunkers Convention* also

<sup>35</sup> *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*, 2 May 1996, 35 ILM 1406 (not in force) [*HNS* 1996].

<sup>36</sup> *Protocol of 2010 to Amend the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996*, 30 April 2010, IMO Doc LEG/CONF.17/10 (4 May 2010) (not in force).

<sup>37</sup> *HNS* 1996, *supra* note 35 Art 3(b).

<sup>38</sup> *Ibid* Art 3(c).

<sup>39</sup> *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001*, 23 March 2001, Can TS 2010 No 3 (entered into force 21 November 2008) [*Bunkers Convention*].

<sup>40</sup> But see IMO Doc. LEG/CONF.12/18 (Resolution on Protection for Persons Taking Measures to Prevent or

includes a requirement of compulsory insurance for all ships over 1,000 gross tonnage, but this obligation is imposed on the registered owner of the ship only. The financial limit of the liable party is established by reference to the applicable national or international limitation regime, but the liability shall not exceed an amount calculated in accordance with the *LLMC*, 1976, as amended.<sup>41</sup> Maximum compensation amounts available under the Bunkers Convention are considerably lower than for *CLC*, 1969, *IOPC Fund Convention*, and *HNS Convention*.

The definition of pollution damage and the scope of application are identical to those of the *CLC*, 1969.<sup>42</sup> This means that pollution caused by ships' bunkers in the Arctic will be covered to the extent that the damage occurs in territory or the coastal waters (up to 200 nm) in a Party State.<sup>43</sup> Measures to prevent such damage are covered wherever they are taken.

## **18. *Nairobi International Convention on the Removal of Wrecks, 2007*<sup>44</sup>**

The *Nairobi Convention* is the most recent IMO Convention on civil liability for shipping, but has not yet been ratified by the main flag States. It lays down the main obligations of States and ship operators when it comes to locating, marking and removing wrecks. The registered owner has a strict liability for the costs for locating, marking and removing the wreck up to the limits of the *LLMC*, 1976 as amended. It includes a compulsory insurance regime based upon the system which is familiar from other IMO Liability Conventions. Defences include cases where the casualty that caused the wreck was wholly caused by governments' negligence in maintaining navigational aids.

The *Nairobi Convention* does not apply to measures undertaken under the *Intervention Convention* and its measures that are considered to be salvage will be governed by the law of salvage and not by the *Nairobi Convention*.

The geographical applicability of the Convention is unusual, as it separates between the territorial seas and the exclusive economic zones of Party States. The 'Convention area' includes only the EEZ or equivalent zone. States remain free to maintain different rules for wrecks located in their territorial sea, based, although an opt-in clause to apply the Convention in that sea area too is included in Article 4(2).

The removal of wrecks in polar regions is likely to be very costly and it is quite possible that liability under the *Nairobi Convention*, which is limited to the *LLMC*, 1976 as amended, will not be sufficient to cover the costs. It is recommended that the CMI study this particular aspect

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Minimize the Effects of Oil Pollution).

<sup>41</sup> *Bunkers Convention*, *supra* note 39 at Art 6, states: "Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended."

<sup>42</sup> *Ibid* Art 2.

<sup>43</sup> Currently all Arctic coastal States (except the US) are parties to the Convention. Iceland is not a party.

<sup>44</sup> *Nairobi International Convention on the Removal of Wrecks*, 18 May 2007, 46 ILM 694 (entered into force 14 April 2015).

and make such recommendations as may be advisable.

Currently all Arctic coastal States, except for the US and Iceland, are parties to the Convention. The relevance of the Convention in the Arctic is currently reduced by the fact that only one of the Arctic coastal States (Denmark) has ratified it. But even if the other States had, the Convention would not apply to the removal of wrecks located in the territorial seas of those States, unless they have specifically notified that this is the case.

**19. *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969*<sup>45</sup>**  
***Protocol Relating to Intervention on the High Seas in cases of Marine Pollution by Substances other than Oil, 1973*<sup>46</sup>**

The *International Convention* authorizes States to “take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil” following a “maritime casualty.”<sup>47</sup> The measures have to be proportional to the actual or threatened damage. While the Convention only refers to the high seas, it is generally accepted that these instruments also encompass enforcement measures in the EEZ.<sup>48</sup> Article 221 of the *United Nations Convention on the Law of the Sea, 1982* includes a similar rule.<sup>49</sup> The *Intervention Protocol* extends the right to include casualties involving other substances than oil. There is nothing in these provisions suggesting that it would not apply in full to the Arctic.<sup>50</sup> In contrast, in Antarctica, it is doubtful if the regime can be directly applied in view of the reference to coastal States and “their” coastline. However, the right to take (proportional) measures to prevent a maritime casualty is arguably part of customary law and may be considered to be a part of the doctrine of necessity under general international law.

**20. *International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990*<sup>51</sup>**  
***2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances*<sup>52</sup>**

The *OPRC Convention* deals with coastal States’ preparedness and response to oil pollution

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<sup>45</sup> *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, 29 November 1969, 970 UNTS 211 (entered into force 6 May 1975) [Intervention Convention].

<sup>46</sup> *Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, 1973*, 2 November 1973, 1313 UNTS 3 (entered into force 30 March 1983).

<sup>47</sup> *Intervention Convention*, *supra* note 45 at Art 1(1).

<sup>48</sup> See, e.g., IMO Doc. LEG/MISC/8, at 70.

<sup>49</sup> *United Nations Convention on the Law of the Sea, 1982*, 1833 UNTS 3 (entered into force 16 November 1994) [UNCLOS].

<sup>50</sup> Norway, Russia and the US are parties to both the *Intervention Convention* and the *Intervention Protocol*. Denmark is only a party to the former while Canada is not party to either instrument.

<sup>51</sup> *International Convention on Oil Pollution Preparedness, Response and Cooperation*, 30 November 1990, 1891 UNTS 51 (entered into force 13 May 1995) [OPRC Convention].

<sup>52</sup> *2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances*, 15 March 2000, [2007] ATS 41 (entered into force 14 June 2007).

incidents. Its parties “undertake, individually or jointly, to take all appropriate measures ... to prepare for and respond to an oil pollution incident”.<sup>53</sup> It includes both obligations on ships flying the flag of the party (such as emergency plans and reporting procedures), and obligations in their capacity as coastal States (contingency plans, notification, cooperation with other States). The 2000 *OPRC-HNS* extended the regime to other hazardous and noxious substances. All Arctic coastal States are parties to the *OPRC Convention*, but none of them have ratified the 2000 *OPRC-HNS*.

Neither instrument contains any provision with respect to geographical scope or applicability. It thus applies in the Arctic, but probably not - in the absence of coastal States - in Antarctica. However, the parties to the *Antarctic Treaty Protocol*, 1991 in to Annex IV have agreed on certain basic obligations in this area.<sup>54</sup>

It is to be recalled that Article 1(1) of the *Intervention Convention* provides that “Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution which may reasonably be expected to result in major harmful consequences.”

There is a specific Arctic instrument implementing the *OPRC Convention*. The *Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response*<sup>55</sup> in the Arctic was agreed in 2013. It includes some more detailed obligations for the Arctic States taking into account the remoteness of the areas and the difficulties involved with recovering oil in cold circumstances. The Agreement is not yet in force.

## **21. International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004<sup>56</sup>**

The *BWM Convention* is a very different type of Convention, a technical IMO Convention, like *MARPOL*, *AFS* and others. It has detailed rules for the prevention, reduction or elimination of the transfer of harmful aquatic organisms through the control and management of ships' ballast water and sediments. It has not yet entered into force.

The Convention applies to any ship flying the flag of (or operating under authority of) Party States, irrespective of trading areas, thus including polar waters. It does not, like some IMO technical Conventions, have separate rules for special areas.

Port States have duties to verify and check the compliance with the Convention's rules

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<sup>53</sup> *OPRC Convention*, *supra* note 51 at Art 1(1).

<sup>54</sup> *Antarctic Treaty Protocol*, *supra* note 5 Art 12.

<sup>55</sup> *Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic*, 15 May 2013, <<http://arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic/>> (not in force).

<sup>56</sup> *International Convention for the Control and Management of Ships' Ballast Water and Sediments*, 13 February 2004, IMO Doc BWM/CONF/36 (expected to enter into force 8 September 2017).

and to have facilities in ports to receive sediments. This includes ports in the Arctic region. With respect to the Antarctic, the situation is different. There is no port State control regime for Antarctica and port waste facilities are provided for in departure and arrival ports, not in the Antarctic ports.<sup>57</sup> Port State control is normally not carried out in Antarctica.

### ***Conclusions on Conventions 14 to 21 above***

All of the reviewed Conventions apply irrespective of trading area and, hence applicable in principle to the polar regions. For the Arctic this is clearly the case, but for the Antarctic the absence of coastal and port States in the traditional sense raises questions as to their applicability. The parties to the *Antarctic Treaty* have provided separate rules in that framework, notably through Annex IV of the *Antarctic Treaty Protocol*, 1991.

The most important substantive gap would appear to be the absence of any instrument in force for covering damage caused by other hazardous substances than oil. The ratification of the FINS Convention would be the single most important measure to address this issue. Another concern is that clean-up operations in polar regions are likely to be much more costly than elsewhere. It is therefore possible that the limits of liability are insufficient, in particular in the case of the *Bunkers Convention* and *Nairobi Convention*, where the level is set by reference to the *LLMC*, 1976.

The specific challenges that polar navigation entails may also have the consequence that the material rules of the Conventions are insufficient to provide adequate protection in these areas. In the case of one of the Conventions, such concerns have been addressed at the regional level among the Arctic States, through the recent agreement on oil pollution preparedness and response in the Arctic.

Perhaps it should finally be added that none of the reviewed Conventions apply to warships or government ships on non-commercial services. It is added in the more recent instruments, except the *Nairobi Convention*, that parties shall ensure that such ships act in a manner consistent, so far as is reasonable and practicable, with the rules of the Convention.

## **22. Collision Convention, 1910<sup>58</sup>**

Approximately 80 State Parties, including the Arctic coastal States Canada Denmark, Norway and Russia are a party to the convention(the US is not a party to the Convention). The 1910 *Collision Convention*'s objective as stated in the preamble is to establish "...uniform rules of law with respect to collisions...". The Convention is applicable to collisions in all waters, both within and beyond national jurisdiction.<sup>59</sup> Consequently, it is applicable to collisions within the territorial sea as

<sup>57</sup> See, e.g., Art 9 of Annex IV to the *Antarctic Treaty Protocol*, *supra* note 5.

<sup>58</sup> *International Convention for the Unification of Certain Rules of Law Related to Collision between Vessels and Protocol of Signature*, 23 September 1910, [130] ATS 14 (entered into force 1 March 2013 [*Collision Convention 1910*]).

<sup>59</sup> *Ibid* Art 1.

well as in adjacent areas of the EEZ and high seas. This includes both Arctic and Antarctic waters. Further, it is applicable to collisions involving vessels in international voyages (seagoing vessels) and between such vessels and vessels navigating between ports in the same State (inland navigation).<sup>60</sup> The Convention is not applicable to warships or governmental ships in public service.<sup>61</sup> A collision between a naval vessel and a civil vessel in international voyage or inland navigation is not regulated by the rules of the *Collision Convention*. It is primarily applicable to collisions where all the involved vessels are flying the flag of State Parties.<sup>62</sup> There is a requirement of reciprocity for the Convention to be applicable to incidents involving vessels flying the flag of non-State Parties.

The Convention is based on fault: A vessel is liable for the damages of the collision caused by its fault.<sup>63</sup> Neither ‘vessel’ nor ‘collision’ is defined. However, collision does not include impacts on cables and pipelines.<sup>64</sup> It does not further define ‘fault’ or what standard of care is required. But it is indicated that noncompliance with regulations causing the damages may qualify.<sup>65</sup> The liability includes the damages caused by the fault, including the damages to vessel, cargo as well as property, death and personal injuries.<sup>66</sup> However, when the collision is caused by *force majeure*, is accidental or the cause is in doubt, the damages are to be covered by the sufferers.<sup>67</sup> The Convention provides for apportionment of responsibility where two or more vessels are in fault.<sup>68</sup> The fact that the collision is caused by a fault to the pilot, does not release the vessel from liability.<sup>69</sup> Under the additional article, such identification of the vessel with the fault of the pilot is pending an agreement on limitation of liability. Since there is no such agreement between the State Parties to the *Collision Convention*, Article 5 has probably yet to enter into force.<sup>70</sup> Consequently, vessels are not necessarily identified with faults by an ice breaker causing the collision between them.

Actions to recover the damages must be taken within two years from the date of the casualty.<sup>71</sup> Further, the *Collision Convention* includes a requirement of providing assistance following a collision.

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<sup>60</sup> *Ibid* Art 1.

<sup>61</sup> *Ibid* Art 11.

<sup>62</sup> *Ibid* Art 12.

<sup>63</sup> *Ibid* Art 3.

<sup>64</sup> *Ibid* Art 2.

<sup>65</sup> *Ibid* Art 13.

<sup>66</sup> *Ibid* Art 4.

<sup>67</sup> *Ibid* Art 2.

<sup>68</sup> *Ibid* Art 4.

<sup>69</sup> *Ibid* Art 5.

<sup>70</sup> F. Berlingieri, *International Maritime Conventions (volume 2); Navigation Securities, Limitation of Liability and Jurisdiction* (Abingdon; Informa Law from Routledge, 2014), 22.

<sup>71</sup> *Collision Convention* 1910, *supra* note 58 Art 7.

## **23. International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, 1952<sup>72</sup>**

The *Civil Jurisdiction Convention*, 1952 has 63 parties and none of which are Arctic States. According to its preamble the objective is to ensure some uniform rules on civil jurisdiction in matters of collision. Articles 1 and 2 set out alternative bases for providing a Court jurisdiction in a civil case following a collision:

- where the defendant is living or has its business address;
- where the arrest of the vessel (or other vessel of the defendant) took place, where the arrest could have been taken;
- where the collision took place (port, internal waters); or
- where a court is agreed upon by the parties

Article 3 regulates situations where there are counter-claims, several claimants or the collision has involved more vessels. The provision provides for joining these cases before the same Court as decided under Article I. The Convention is also applicable to cases where a vessel has caused damages to others without an actual collision.<sup>73</sup> The Convention does not affect national legislation on collisions between naval vessels or other ships in governmental service.<sup>74</sup> Similar to the *Collision Convention*, this Convention is applicable to vessels flying the flag of the State parties (Article 8). If it is to be applicable to persons belonging to non-State parties, there is a requirement of reciprocity. If all parties are of same nationality, its national law is applicable.

## **24. International Convention for the Unification of certain Rules relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation, 1952<sup>75</sup>**

The *Penal Jurisdiction Convention*, 1952 has 31 parties and none of which are Arctic States. According to its preamble the objective is to establish certain uniform rules on penal jurisdiction in matters of collision. The penal and disciplinary jurisdiction in cases of collisions or other navigational incidents lie with the flag State of the vessel at the time of the collision.<sup>76</sup>

It is only the flag State that is competent to order arrest or detention of the vessel.<sup>77</sup> However, a State may take action in respect to its nationals for offences committed onboard the vessel flying the flag of other States.<sup>78</sup> This includes taking action in respect of licences issued by it. The Convention is not applicable within the ports and inland waters.<sup>79</sup> It is

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<sup>72</sup> *International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision*, 10 May 1952, 439 UNTS 217 (entered into force 14 September 1955) [1952 Civil Jurisdiction Convention].

<sup>73</sup> *Ibid* Art 4; cf. *Collision Convention 1910*, *supra* note 58 at Art 13.

<sup>74</sup> *Ibid* Art 5.

<sup>75</sup> *International Convention for the Unification of certain Rules relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation*, 10 May 1952, 439 UNTS 233 (entered into force 20 November 1955).

<sup>76</sup> *Ibid* Art 1.

<sup>77</sup> *Ibid* Art 2.

<sup>78</sup> *Ibid* Art 3.

<sup>79</sup> *Ibid* Art 4.

applicable to collisions taking place in its internal waters (outside the ports) and in the territorial sea unless the coastal State reserves its right to exercise penal jurisdiction over vessels flying the flag of foreign States at the time of the signing or ratification of the Convention.

The basis for an arrest is a “maritime claim” and it includes claims originating from incidents or obligations such as loss of life, salvage operations and towage. Questions may arise on whether pollution of Antarctic waters, fees from ice breaker assistance, etc., qualify as maritime claims and thus potentially form the basis for an arrest.

The Convention further regulates who is competent to decide on arrest, and under which conditions.<sup>80</sup> The purpose of the arrest is to ensure security for a maritime claim. Other ships which are owned by the person liable for the maritime claim may be subject to arrest under certain conditions.<sup>81</sup> The conditions for the release from arrest include the provision of sufficient security.<sup>82</sup> The Court of the State in which the arrest has been effected may decide whether the security provided is sufficient and is provided in a satisfactory form. A request for release from arrest upon security is not an acknowledgment of liability for the maritime claim. A vessel may not be rearrested for the same maritime claim except in specific cases.<sup>83</sup> The Convention provides for protections of the owners of arrested ships where the Court of the arresting States *inter alia* is competent to require the claimant to provide security for losses incurred by the arrest.<sup>84</sup> It is the Court of the State where the arrest has been performed or security provided that is competent to decide the merits of the case.<sup>85</sup>

The 1910 *Collision Convention*, the 1952 *Civil Jurisdiction Convention*, the 1952 *Penal Jurisdiction Convention*, and the *Arrest of Ships Convention*<sup>86</sup> all apply to the Arctic Ocean. There appear to be no compelling need to amend any of their provisions to better suit the Arctic Ocean. However, some of these Conventions may have limited application to Antarctic waters. The reason is that States are prohibited from exercising territorial sovereignty or jurisdiction in Antarctica and within the waters South of 60°S, which constitute Antarctic waters.

There are two examples of the exercise of jurisdiction based on territoriality in the Conventions:

- under the 1952 *Civil Jurisdiction Convention*, an action for a collision may be taken before the Court of the place where the collision has occurred;<sup>87</sup> and
- the *Arrest of Ships Convention*, 1952 is applicable to any ships within the jurisdiction of its State Parties<sup>88</sup>

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<sup>80</sup> *Ibid* Arts 2 and 3.

<sup>81</sup> *Ibid* Art 3, para 2.

<sup>82</sup> *Ibid* Art 4.

<sup>83</sup> *Ibid* Art 5.

<sup>84</sup> *Ibid* Art 6.

<sup>85</sup> *Ibid* Art 7.

<sup>86</sup> *International Convention on Arrest of Ships*, 12 March 1999, UN Doc A/CONF.188.6 (entered into force 14 September 2011) [*Arrest of Ships Convention*].

<sup>87</sup> 1952 *Civil Jurisdiction Convention*, *supra* note 72 Art 1(1)(c).

<sup>88</sup> *Arrest of Ships Convention*, *supra* note 86 Art 8(1).

Consequently, a Court of a State may not assume civil jurisdiction over a collision case originating from an area within Antarctic waters which is part of its territorial claims. It may neither arrest vessels flying the flag of other States in these waters. Another question is whether Courts of other States than the flag State are competent to arrest vessels while in their ports or territorial sea or internal waters for maritime claims arising from Antarctic waters. The competence to arrest vessels while exercising the right of innocent passage through the territorial sea is limited to claims arising from the passage through these waters.<sup>89</sup>

These are questions of interpretation which may arise when considering application in polar regions, without the need to revise the Conventions. Examples include:

- *Arrest of Ships Convention, 1952*: Do charges from the use of ice breaker assistance qualify as a maritime claim under the Arrest Convention, Article 1(1) (k) or (n)? Or does pollution of the Antarctic marine environment qualify as environmental damage and constitute basis for a maritime claim under the same Convention (Article 1 (1) (d)? Must assistance in interpreting these provisions be sought in other maritime Conventions, e.g. the International Convention on Civil Liability for Oil Pollution Damages?
- *Collision Convention, 1910*: To what degree will the regulations of the Polar Code apply to the requirement of due care when navigating polar waters? How does the use of mandatory routeing measures, use of sea ice pilots and convoying affect the decision on fault and liability?

**25. *Convention on Limitation of Liability for Maritime Claims, 1976*<sup>90</sup>  
*Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, 1976*<sup>91</sup>**

There is nothing in the *LLMC*, 1976 to suggest that its applicability would be limited in Arctic or Antarctic waters, or otherwise make geographical limitations. It applies in the same manner irrespective of the sea area concerned, as long as it is the applicable law in the State where the matter is settled. This, in turn, is decided by whether the States concerned have ratified the *LLMC*, 1976 and what version. With the sole exception of the US, all Arctic States (including Denmark and Iceland) are parties to the 1996 *Protocol*. In addition, *LLMC*, 1976 makes exemptions to certain kinds of claims which are covered within other Conventions or Rules. However, none of this is based on geographic criteria. National Rules for State Parties are accepted only for inland waters ways ships and ships of less than 300 tons.

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<sup>89</sup> UNCLOS, *supra* note 49, Art 28(2).

<sup>90</sup> *Convention on Limitation of Liability for Maritime Claims*, 19 November 1976, 1456 UNTS 221 (entered into force 1 December 1986).

<sup>91</sup> *Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims, 1976*, 2 May 1996, Can TS 2008 No 18 (entered into force 13 May 2004).

**26. *International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, 1926*<sup>92</sup>**

***International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1967*<sup>93</sup>**

***International Convention on Maritime Liens and Mortgages, 1993*<sup>94</sup>**

The *Maritime Liens and Mortgages Conventions* set forth rules regarding the types of liens, the priority of liens, the recognition of liens, and the procedures for enforcing such liens in States that ratified the Conventions. We do not believe that these Conventions need to be amended due to the increased marine traffic in the polar regions. The types of increased risks posed by traffic in these areas has no apparent connection to the subjects covered by these Conventions.

**27. *Convention on the Liability of Operators of Nuclear Ships, 1962*<sup>95</sup>**

The *Nuclear Ships Convention* established responsibility for nuclear damage: absolute responsibility of the liable parties (the victims are not required to prove guilt or negligence on the part of the accused); the concentration of liability on the operator of the nuclear ship, the person empowered by the corresponding State to operate the nuclear ship; and limitation of responsibility in dimension and in time. The operator bears responsibility for any nuclear damage if it is proven that the damage was caused by a nuclear incident connected with nuclear fuel and radioactive products or radioactive waste of the ship. The operator is relieved of responsibility if the damage is connected with an incident caused directly by war, military activities or civil war.

We have concluded that the provisions of the *Nuclear Ships Convention* could apply to the Arctic Ocean beyond national jurisdiction. In the same time we consider that the Convention needs some amendments to make them better suited for the conditions of liability regime. The *Nuclear Ships Convention*, as well as some others, form an international regime for nuclear protection,<sup>96</sup> which was developed to provide the basis for a global nuclear liability framework that could attract broad adherence from countries with and without nuclear power plants. Generally speaking the provisions of the Convention could be applicable to the Arctic waters once coastal States will agree to apply the liability regime without limitations.

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<sup>92</sup> *International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages*, 10 April 1926, 120 LNTS 187 (entered into force 2 June 1931).

<sup>93</sup> *International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages*, 27 May 1967, SD No 12 (1967) 3 (not in force).

<sup>94</sup> *International Convention on Maritime Liens and Mortgages*, 6 May 1993, 2276 UNTS 39 (entered into force 5 September 2004).

<sup>95</sup> *Convention on the Liability of Operators of Nuclear Ships*, 25 May 1962, IAEA Leg. Ser. No. 4 at 34, 57 A.J.I.L. 268 (not in force) [*Nuclear Ships Convention*].

<sup>96</sup> Which include: *Convention on Third Party Liability in the Field of Nuclear Energy*, 29 July 1960, 956 UNTS 251 (entered into force 1 April 1968); *Additional Protocol to the Convention on Third Party Liability in the Field of Nuclear Energy*, 28 January 1964, 956 UNTS 335 (entered into force 1 April 1968); *Vienna Convention on Civil Liability for Nuclear Damage*, 21 May 1963, 1063 UNTS 265 (entered into force 12 November 1977); and *Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage*, 12 September 1997, 2241 UNTS 27 (entered into force 4 October 2003).

For nuclear liability regime in general and for the Convention in particular, two most important issues arise: State immunity and jurisdiction.

“Nuclear ship” means any ship equipped with a nuclear power plant which includes warships and State-operated vessels.<sup>97</sup> The specialized convention on State immunity, the *European Convention on State Immunity*<sup>98</sup>, according to Article 29(b) does not apply to damage caused by nuclear energy. Therefore, the international customary law on State immunity has to be applied as far as possible. Under its rules, it is decisive whether the State acted as a State or like a private person (for example State-owned icebreakers used for the assistance of commercial shipping). It is doubtful that a State as operator of a nuclear installation would not enjoy immunity in the courts of other countries when this installation causes nuclear damage.

In the case of a nuclear incident at sea based installations, victims could sue the State before the competent courts, regardless of whether the installation served public purposes. For victims of a nuclear incident, the question arises whether the involved State can be made liable or whether the State can rely on the defense of State immunity is one of the most critical and the Convention does not answer it. By the Convention it remains doubtful whether and when the defence may be invoked.

## **28. *Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971*<sup>99</sup>**

The *Nuclear Convention, 1971* was adopted with the purpose to resolve difficulties and conflicts which arise from the simultaneous application to nuclear damage of certain maritime conventions dealing with ship owners liability, as well as other conventions which place liability arising from nuclear incidents on the operators of the nuclear installations from which or to which the material in question was being transported.<sup>100</sup> The *Nuclear Convention* objectives are:

- to prevent conflicts of simultaneous applicable liability rules
- as laid down in other treaties on ship-owners' liability
- ensure only the operator is liable.

Under the Convention a person otherwise liable will be exonerated from liability if an installation operator is liable under the *Paris Convention*<sup>101</sup> the *Vienna Convention*<sup>102</sup>, or national

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<sup>97</sup> *Nuclear Ships Convention*, *supra* note 95, Art 1(1).

<sup>98</sup> *European Convention on State Immunity*, 16 May 1972, ETS no.074 (entered into force 11 June 1976).

<sup>99</sup> *Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material*, 17 December 1971, 974 UNTS 255 (entered into force 15 July 1975).

<sup>100</sup> IMO, *Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (NUCLEAR)*, online: IMO < <http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Convention-relating-to-Civil-Liability-in-the-Field-of-Maritime-Carriage-of-Nuclear-Material-%28NUCLEAR%29.aspx>>.

<sup>101</sup> Convention on Third Party Liability in the Field of Nuclear Energy, 29 July 1960, 956 UNTS 251 (entered into force 1 April 1968).

<sup>102</sup> *Vienna Convention on Civil Liability for Nuclear Damage*, 21 May 1963, 1063 UNTS 265 (entered into force 12

law which is similar in the scope of protection given to the persons who suffer damage. Taking into consideration the above mentioned, the *Nuclear Convention* could be applicable in Arctic waters with regard to:

- determination of the convention area - transport accident may occur outside territory of Installation State; outside territory of any State (e.g. EEZ or high seas) or within the bounds of territorial waters of non-Contracting States;
- Convention leaves some discretion to law of the competent court (important for victims and operators).

## **29. *Convention on the Liability of Operators of Transport Terminals in International Trade, 1991*<sup>103</sup>**

The Convention has been signed only by the United States in 1992. It sets forth uniform legal rules governing the liability of a terminal operator for loss of and damage to goods involved in international transport while they are in a transport terminal, and for delay by the terminal operator in delivering the goods<sup>104</sup>. The Convention establishes a uniform legal regime governing the liability of an operator of a transport terminal (referred to herein also as “terminal operator” or “operator”) for loss of or damage to goods and for delay in handing goods over. Terminal operators are commercial enterprises that handle goods before, during or after the carriage of goods. Their services may be contracted for by the consignor, the carrier or the consignee. As in other Conventions, analyzing in this note, the Convention does not contain a definition of the “Convention area.” By Article 2(1), the Convention applies to transport-related services performed in relation to goods which are involved in international carriage:

- when the transport-related services are performed by an operator whose place of business is located in a State Party, or
- when the transport-related services are performed in a State Party, or
- when, according to the rules of private international law, the transport-related services are governed by the law of a State Party.

Under Article 1(d), “transport-related services” includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing. The terms used in practice to refer to such enterprises are varied and include, for example: warehouse, depot, storage, terminal, port, dock, stevedore, longshoremen’s or dockers’ companies, railway station, or air-cargo terminal. The applicability of the Convention is determined on the basis of the transport-related services such enterprises perform, irrespective of the name or designation of the enterprise.

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November 1977).

<sup>103</sup> *Convention on the Liability of Operators of Transport Terminals in International Trade*, 19 April 1991, 30 ILM 1506 (not in force).

<sup>104</sup> The Convention is based upon a draft prepared by the United Nations Commission on International Trade Law (UNCITRAL) and an earlier preliminary draft Convention elaborated by the International Institute for the Unification of Private Law (UNIDROIT).

Under most nations laws, including Arctic States, the parties are in principle free to regulate by contract the liability of terminal operators. Many operators take advantage of this freedom and include in their general contract conditions clauses that considerably limit their liability for the goods.<sup>105</sup> Such broad limitations and exclusions of liability give rise to serious concerns and could hardly be accepted by Arctic States or other countries which determine the largest world tonnage.

It could be also assumed that risk of loss or damage will shift the risk of loss or damage from the terminal operator, who is best placed to ensure the safety of goods, to the cargo owner, who has limited influence on the causes for loss or damage. Broad exclusions and limits of liability are likely, over a longer period of time, to reduce the incentive for terminal operators to pay continuous attention to working procedures designed to avoid loss or damage to goods. Those concerns may become even more serious when transport-related services for a particular transport route such as the Northern Sea Route are provided by only one or a limited number of operators.

The Convention applies only if the transport-related services constitute a commercial activity,<sup>106</sup> related with the international trade which is the case for the Arctic, but if transport-related services are performed with respect to goods involved in domestic carriage, the Convention does not apply. In order to provide certainty as to the applicable regime, Article 1(c) provides that the places of departure and destination must be “identified” as being located in different States already at the time when the goods are taken in charge by the operator. An Arctic oil field with cargo terminal, as the place of departure could be in the same State as destination and still be recognized as international shipping and trade.

Furthermore, when the consignor hands over goods for carriage to a terminal operator, the carrier’s liability may not yet begin; at the place of destination, the carrier’s liability may end when the carrier hands the goods over to a terminal operator, which is usually before the goods are handed over to the consignee or to the next carrier. While the carrier’s liability is through various transport conventions to a large degree subject to harmonized and mandatory rules, there may exist periods during which the goods in transit are not subject to a mandatory regime. Those and some other negative consequences which could occur from Arctic shipping of mentioned gaps in the liability regime are serious because, according to statistics, most cases of lost or damaged goods occur not during the actual carriage but during transport-related operations before or after the carriage.

It is also hard to imagine the possibility of easy harmonization of the provisions of the Convention with national law, especially in the Arctic States - the rules in national legal systems governing the liability of terminal operators differ widely, as to both their source and content.

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<sup>105</sup> The limitations of liability found in general contract conditions restrict, for example, the standard of care owed by the operator, exclude or limit responsibility. In some national laws the freedom of terminal operators to limit their liability is subject to mandatory restrictions.

<sup>106</sup> This does not mean that a particular transport-related service must be subject to the payment of a fee. For example, in some terminals short-term storage at the place of destination may be “free of charge” and the charges would start to accrue after the second or third day.

The rules may be contained in civil or commercial codes or in other bodies of law governing the deposit or bailment of goods; in some legal systems the terminal operator is strictly liable for the goods, in other systems the operator is liable for negligence, i.e. if he did not take reasonable care of the goods; in some legal systems operators are subject to different liability rules depending upon the nature of services rendered. Further differences concern the burden of proving the circumstances establishing the operator's liability; in respect of financial limits of liability<sup>107</sup> and limitation periods.<sup>108</sup>

Furthermore, many national laws are not suited for modern practices in transport terminals. For example, national laws may not accommodate the use of containers or computerized communication techniques or may not deal adequately with the question of dangerous goods.

So, in our view in the current edition, the Convention may not be applicable to Arctic shipping.

## C. CONCLUSIONS

- 1) The IWG notes the different limitation regimes in place for wreck removal costs in States Parties to the WRC (referred to in paragraph 18 herein) and recommends monitoring the situation as the number of States Parties to the *Wreck Removal Convention* increase.
- 2) It is recommended that the CMI's Ratification and Implementation Committee bring as much pressure to bear on the IMO as is possible to convince States to ratify the HNS Convention as soon as possible.
- 3) Discharge of ballast water into the Arctic and Southern Oceans would have a disastrous impact on the eco-systems in those waters. Although the *BWM Convention* is expected to enter into force in 2017, it is recommended that the CMI bring pressure to bear on Governments to ensure that this Convention is widely ratified.

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<sup>107</sup> In some legal systems the operator's liability is unlimited, while in others limits are established.

<sup>108</sup> For example, storing goods in the operator's warehouse and loading of goods into the vessel's hold may be subject to different sets of rules.