International Group of P&I Clubs

Mr Eric Van Hooydonk

11 February 2008

Dear Mr Van Hooydonk

Revision of Belgian Maritime Code – Green Book

I am writing to you from the International Group of P&I Clubs (IG) with regard to the review of the Belgian Maritime Code that is currently being undertaken by a group of experts designated by the Belgian Government, and the Green Book that has been issued for public consultation.

We have received an unofficial translation of the main questions contained in the Green Book from the Royal Belgian Shipowners Association and wish to take the opportunity to provide comments on those questions that are of direct relevance to the IG.

As background information, the 13 P&I Clubs that comprise the IG are mutual not-for-profit insurance organizations that between them cover the legal liabilities to third parties of approximately 90% of the world's ocean-going tonnage and 95% of the world's tanker fleet. The Clubs in the IG provide the broadest and most extensive cover of any P&I insurer, up to US$1 billion for oil pollution, $2 billion for passengers and approximately US$5.5 billion for other types of claim e.g. wreck removal, cargo, collision etc.

The range of liabilities covered by each Club is comprehensive and includes most of the liabilities a shipowner is likely to encounter in the operation of his ship, for example liability to cargo, crew, collision liability, dock damage, pollution liability, liability for wreck removal etc. The cover provided therefore covers most conceivable third party liabilities which a shipowner may encounter, save for those risks which are specifically excluded from Club cover e.g. liabilities arising from an incident caused by an act of war or any act of terrorism, nuclear risks etc.

The IG comments on the questions of direct relevance from the Green Book are as follows:

6) Liability

44 – Should liability be converted into objective liability?

A: We understand the reference to "objective liability" to mean "strict liability". The principle of strict liability is enshrined in all the international Conventions applicable to civil liability in the shipping industry. The aim of these liability regimes is to provide third parties who have suffered loss and damage with sure, speedy and satisfactory compensation. In this very important objective, the current international system has worked and continues to work efficiently. Claims that fall outside of the scope of these Conventions may in certain cases be subject to limitation

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under LLMC. LLMC is different as it is a **not** a liability convention. A claimant must first establish that the shipowner is liable under whatever legal regime is applicable to the incident before LLMC comes into play to potentially limit the liability which has been established outside LLMC.

There is little justification to change this system, particulary given that consumer claimants and private citizens will be furnished with the necessary additional financial protection once the framework of IMO Conventions enter into force.

Once these conventions come into force the scope of LLMC will be restricted in effect to damage resulting from collisions, damage to port facilities and cargo claims, which raise commercial rather than consumer issues, and there is little justification to provide for strict liability of the owner in respect of cases that are likely to involve commercial parties only.

45 – Should we depart from the LLMC Treaty?

A: No. The 1976 LLMC Convention is currently in force in 51 States and the 1996 LLMC Protocol in 28 States. Since shipping is an international industry, it is of utmost importance to ensure that limitation of liability for third party maritime claims are governed by international rules and regulations.

The IG refers to Q. 54 and implementation of the 2001 Bunkers Convention. The IG welcomes implementation of the 2001 Bunkers Convention and with this in mind, also refers to the 2001 Bunkers Convention Diplomatic Conference Resolution (LEG/CONF.12/18) encouraging States to ratify or accede to the 1996 LLMC Protocol. Reference is also made to Article 6 of the 2001 Bunkers Convention which provides for limitation of liability for pollution damage "*under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended*".

54 – Should Belgium join the Bunker Oil Treaty and integrate the provisions thereof in the NBSL?

A: The IG refers to the response to Q. 45 above. The IG supports wide implementation of the 2001 Bunkers Convention.

55- Should Belgium become a party to the HNS Treaty and integrate the provisions thereof in the NBSL?

A: The 1996 HNS Convention is currently subject to a revision process under the auspices of the IOPC Fund, with a view to the holding of an IMO diplomatic conference as soon as possible after the consideration of a draft Protocol by the IMO Legal Committee in October this year. It would, therefore, be entirely appropriate to wait for the outcome of this process before making a decision on ratification or accession to an international HNS liability and compensation regime.

2) Operation: Chartering

57 – Is a revamping of the rules on charter parties necessary or desirable?

The IG believes in total freedom of contract in relation to charterparties. Accordingly it does not believe that any revision of the rules which may be undertaken should lead to any limitation on the freedom of parties to a charterparty to contract on whatever terms they wish.

In this regard we note that the Uncitral draft instrument on the Carriage of Goods Wholly or Partly by Sea (see Q. 59 below) specifically excludes charter parties from its scope.

3) Operation: Transport

3.1 Bill of lading

59 – Should Belgium strive for a UNCITRAL draft treaty to replace the old HVR?

The IG believes that the Hague-Visby Rules (HVR) provide a fair and balanced allocation of risk between carrier and shipper. Since the HVR have been ratified by over 90 states and in the great majority of cases for many years in these states. they have been the subject of judicial interpretation in many different jurisdictions and accordingly much helpful precedent has been established. This has resulted in considerable international uniformity of interpretation which provides very helpful commercial certainty for both carrier and shipper. There is therefore much to be said for retaining the HVR.

Uncitral Working Group III has now finalised the Uncitral draft instrument on the Carriage of Goods Wholly or Partly by Sea. It will be considered by the Uncitral Commission in June 2008 and if approved will be passed to the UN Assembly for adoption in November 2008. The Instrument has a number of distinct disadvantages. It is complex and unwieldy and legislates in areas that have previously been left to domestic law for example delivery, transfer of rights, rights of control, liability of sub-contractors and jurisdiction and arbitration (although there is an opt-in provision in respect of these latter two matters). It has necessarily been drafted by consensus and compromise which has resulted in ambiguity and vagueness in a number of important areas e.g. liability for delay. Because of its complexity and ambiguity it is likely to provoke more than its fair share of litigation as courts seek to interpret its provisions.

Having said this its effect is not wholly negative. Its scope extends to door-to-door carriage as well as tackle-to-tackle / port-to-port carriage and in this regard it applies the network liability concept whereby liability and limitation will depend upon the mode of transport where the loss or damage occurs. A number of aspects of the HVR are retained such as the concept of fault based liability, the right to limit by way of weight and package and the exclusion of charterparties from its scope. It permits some freedom of contract in the liner trade and will generally not apply mandatorily outside liner trade.

The prime purpose of any international convention relating to shipping must be to promote uniformity and thus certainty on an international scale as shipping is an international industry. National and regional legislation creates uncertainty and difficulties. The success or failure of the Uncitral instrument will depend upon how many and which states ratify it. If it is ratified by a

number of large trading nations e.g. the US, China, Japan and some EU states it will suceed. If it is not it will not be successful, as is the case with the Hamburg Rules. It is probably best not to make any

decision whether or not to ratify the instrument at this time but to wait and see the uptake of the instrument by states on the basis it is adopted by the Uncitral Commission and the UN Assembly.

60 – Should the scope of article 91 of the Shipping Code be changed to extend protection to parties other than the third B/L holder?

The IG is not familiar with Art 91 of the Code and can not therefore usefully comment.

However it can say that it very strongly supports the recognition by jurisdictions of 'Himalaya' clauses whether agreed contractually and contained in bills of lading or other contracts of carriage (CoC) or provided for legislatively. Himalaya clauses extend defences contained in a CoC to parties other than the B/L holder such as sub-contractors.

61 – Should the right to claim exclusively belong to the B/L holder or should this be qualified? Should a subsidiary claim entitlement be granted to other interested parties?

The IG believes that only the holder of the B/L should be entitled to claim delivery of the goods to which the B/L relates and be entitled to sue under the B/L (unless a subrogee or assignee).

62 –Should the registered B/L be kept as a "subtype" of the B/L?

The IG does not understand what is meant by this question so can not therefore usefully comment.

64 – Should a number of provisions of Belgian B/L law be abolished?

The IG does not understand what is meant by this question so can not therefore usefully comment.

3.2 Waybills

65 – Should the NBSL detail the rights and duties of contract parties when goods are to be carried under the terms of a (maritime) waybill (in the same way as article 91 of the SC)?

The IG does not see a need to legislate in respect of sea waybills but rather permit parties freedom of contract. Moreover as said above the IG believes in developing international rather than national legislation in relation to the shipping industry which would include legislating in respect of sea waybills.

If legislation is nevertheless developed the IG would suggest it should be kept simple and limited and accordingly along the lines of the CMI Uniform Rules for Sea Waybills which provide a straight forward, easily understood and effective regime.

66 – Should this regime come under imperative law?

See 65 above.

67 – How should the scope of this regime be defined (scheduled transport / tramp services)? Should it be extended to multi-modal and combined transport?

See 65 above.

However if legislation were to be developed the IG does not believe its application should be defined by the mode of sea transport used nor extend to multi-modal and combined transport when the HVR do not.

68 – Should the law take into account the liability of agents executing tasks?

See 65 above.

However if legislation were to be developed the IG does not believe it should extend to complex issues such as agency, if as it believes, it is to be kept simple.

69 – Should the law take into account Electronic Data Interchange (EDI)?

See 65 above.

If it is feasible to do so.

70 – How should one conceive the right to claim of the various parties – sender, consignee and carrier?

See 65 above.

However if legislation were to be developed the CMI Uniform Rules for Sea Waybills provide an effective means of determining who has the right of control and to claim delivery of the goods.

3) Operation: Transport

74 – Should the 2002 Athens Protocol be ratified (with cancellation of the original 1974 Treaty)?

An international industry such as shipping should be regulated on an international basis in order to achieve maximum uniformity and thus certainty, and widespread ratification of the 2002 Athens Protocol would clearly meet this objective on matters of liability and compensation for death of or personal injury to passengers carried by sea. The timing of ratification is, however, likely to be determined for all EU Member States by the adoption of the Regulation of the European Parliament and of the Council on the liability of carriers of passengers by sea and inland

waterways in the event of accidents, which has yet to reach second reading stage in either the EU Council or the EU Parliament.

75- Should the scope of the Athens Treaty (+ 2002 Protocol) be extended to national transport and inland waterway shipping?

This is currently the subject of discussions in both the EU Council and Parliament with regard to the above mentioned Regulation and the outcome of these discussions is likely to provide the answer to this question. Nonetheless, it should be noted that the 2002 Athens Protocol (and the 1974 Athens Convention) was deliberately drafted to apply only to "*international carriage*" and not to domestic or inland carriage.

7) Incidents at sea

7.2 Salvage

91- Salvage: should the 1989 International Convention on Salvage be integrated into the NBSL?

The International Group (IG) has no view on this proposal as it is essentially a matter for Belgian Law. However the IG notes that Belgium has acceded to the Salvage Convention 1989 (the Convention).

92 – Should the law expressly confirm contractual freedom?

Contracts for the provision of salvage services essentially relate to matters of private rather than public law. Consequently the parties to a salvage agreement should be permitted contractual freedom. The IG believes that express reference to contractual freedom should be confirmed in the Code if this enhances party autonomy.

94 – Should salvagers be encouraged to play a part in preventing, fighting and controlling pollution?

Yes. The IG believes that they currently are. See responses to 93 and 104 above.

95 – Should the new provisions be drafted in such a way that Belgium would be attractive to salvage arbitration?

This is a matter for Belgian practioners and legislators.

96 – Should the notion of "object" include sunken ships and other property, on board of a sunken ship or not?

We can not usefully comment as we have insufficient information.

97 – Should an expansion of the definition of 'environmental damage' as mentioned in article 1, d) of the Convention on Salvage be studied?

The IG believes that the definition contained in Article 1 (d) of the Convention is suitably comprehensive.

98 – Should salvage rules be declared applicable to platforms and drilling units?

The International Group does not provide cover for platforms or drilling rigs and is not therefore competent to respond to this question.

99 – Should salvage money and perhaps other rights be granted to some government agencies?

If a government agency acts as a salvor and performs salvage services within the meaning of the Convention which services it is not otherwise under a duty to perform, then the IG believes it is not unreasonable that it should be entitled to a salvage reward provided such reward is determined in accordance with the provisions of the Convention.

The IG believes that any 'rights' should be restricted to a salvage reward in accordance with the preceding paragraph.

100 – Should the law expressly state that all beneficiaries are to contribute to the special compensation referred to in article 14 of the Salvage Convention?

Article 14 of the Convention provides that the vessel owner is liable for special compensation and this is a risk that is covered by IG Clubs. Although it might be just and equitable that all 'beneficiaries' contribute to a special compensation award the IG believes that it would raise considerable practical difficulties in determining who had benefited and to what extent and accordingly how liability should be apportioned. The IG does not therefore advocate changing the current system of dealing with special compensation.

102 - Should the law provide that recourses made after the end of the 2-year prescription term applicable to the salvage party's claim must come within a 3-month term?

The IG believes that the introduction of such a regulation could create problems for instance if a salvage award is not finalised within the two year prescription period.

93 and 104 – Should the law take into account more recent developments like LOF 2000 and the SCOPIC clause? Should an entitlement to compensation for 'environmental salvage' be introduced to the benefit of the salvager?

It is not clear what is meant by whether the law should "take into account" recent developments in salvage such as LOF 2000 or the Scopic Clause. Both agreements resulted from industry initiatives, are well understood and are effective in their current form. The IG does not believe that either agreement should be made subject to specific legislation or regulation.

The IG does not believe that salvors should be entitled to a separate award in relation to preventing or minimising damage to the environment since it does not see a need. The Convention specifically provides that the salvor's reward under Article 13 must take into account

the effort that he has taken to protect the environment. However when formulating the Convention it was recognised that the Article 13 fund might not always be sufficient to achieve this. Accordingly Article 14 was developed under which the salvor is entitled to special compensation which ensures that he is not only never out of pocket where his actions have protected the environment but he can be awarded up to 100% of those expenses.

The Special Compensation P&I Clause (Scopic) which was developed by the IG with inter alia the International Salvage Union's participation and is designed to be used in conjunction with Lloyds Open Form (LOF) of salvage agreement provides an alternative method of remunerating the salvor for protecting the environment to that under Article 14. Scopic contains an agreed tariff rate for personnel, equipment and tugs used by the salvor in providing the services. In addition the salvor is entitled to a 25% uplift on the rates. The tariff rates were last increased on 1/7/07. Scopic is invoked in approximately 20% of LOF salvage cases. The IG is accordingly firmly of the view that salvors are currently well rewarded for preventing or minimising damage to the environment.

Additional Comments

It is the IG's understanding that under Belgian law the shipowner is not only liable for the vessels prpoportion of any salvage award but jointly for the whole award which includes for instance cargo's proportion of the salvage award and that the salvor can arrest the vessel to secure the whole of the award. This is not the position in most jurisdictions where salvors can only arrest the vessel (or a sister ship) to secure the vessel's liability. Normally of course the cargo will be on board the vessel and the salvor by arresting the cargo to secure cargo's liability for salvage will also detain the vessel unless the carg is discharged.

If the IG's understanding is correct, the IG would suggest that this is an area of Belgian law that might benefit from review.

63,148-150 – Should unlimited liability apply to the transport of containers on deck without prior agreement?

The IG believes that the only occasion when a carrier should be deprived of his right to limit in relation to deck cargo is if the loss or damage results from conduct which constitutes that defined in Art 4 (5) (e) of the HVR that is if it is proved that the loss or damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge of the damage would probably result.

The IG does not believe that carriage of containers on deck on a purpose built container vessel or on a vessel that has been fitted with or otherwise has the necessary equipment to carry containers on deck, constitutes conduct within the definition contained in Art 4 (5) (e). The IG accordingly believes that the carrier should be at liberty to carry containers on deck on such vessels and should not therefore lose the right to limit if he does so without the shippers prior agreement.

5) Maritime lien / seizure / procedural law

5.2 Procedural law

146-147 –Should the law governing jurisdiction in cases of B/L transport be modified?

The IG does not know what is the law that currently governs jurisdiction clauses in B/Ls so it cannot comment directly.

However the IG believes that effect should be given to jurisdiction clauses contained in CoCs. This accords with the provisions of Council Regulation No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Additional Comments

The IG does not know if the arrest of vessels in Belgium is subject to the Code. In any event the IG would like to register its concern at the way in which the 1952 Arrest Convention which Belgium has acceded to is interpreted in Belgium, specifically permitting claimants to arrest a ship or a 'sister' ship in respect of claims that do not constitute a maritime lien, which are not claims against the owner or the demise charterer of the ship or sister ship. The IG knows of no other jurisdiction that has ratified the Convention or implemented the Convention provisions into its domestic law that interprets the Convention so as to permit this. One unfortunate aspect of this novel way of interpreting the Convention is that it promotes 'forum shopping' which all responsible jurisdictions seek to discourage.

The IG therefore wonders if it is procedurally possible to address this issue in the proposed revision of the Code and if so would ask that it be addressed.

The IG wishes to express its appreciation for allowing the opportunity to provide comments on those questions in the Green Book that are of direct relevance to the IG. The IG looks forward to the outcome of this process.

I would be most grateful if you can keep the IG informed as this review process progresses.

Yours sincerely,

David Baker
International Group of P&I Clubs