

## Containers Lost at Sea - liability and insurance

### Summary

Even with proper stowage and securing, factors such as heavy weather and rough seas have sometimes resulted in the loss of containers from ships. Efforts to recover the lost containers and mitigate damage arising from the containers and their contents can be time consuming and difficult depending on where the containers are, for example, afloat or on the seabed, etc. It has been apparent from the media reports of recent significant incidents that there may be some confusion and misconception about the shipping industry's liability for the response costs, and the extent of a shipowner's third party liability insurance cover for such costs.

An international comprehensive framework of strict liability (i.e. regardless of fault) and compensation conventions has been agreed by the International Maritime Organization (IMO) to ensure that valid claims for pollution and other damage from ships are met promptly without the need for time consuming and costly legal action.

In order to ensure that claimants have access to compensation for the costs associated with the recovery of containers lost overboard from ships at sea, and damage arising from the containers or their contents, governments that have not already done so are encouraged to ratify and implement the following international conventions:<sup>1</sup>

- the 2007 Nairobi Wreck Removal Convention (WRC) and, importantly, to elect to extend the geographic scope of application to wrecks located in their territorial waters;
- the 2010 Hazardous and Noxious Substances Convention (HNSC); and
- the 1996 Convention on Limitation of Liability for Maritime Claims (LLMC).

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<sup>1</sup> Nairobi International Convention on the Removal of Wrecks, 2007  
Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996  
Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976

## 1 Introduction

The shipping industry's goal is to eliminate accidents, and ship losses have declined significantly over the years due to improved ship design and safety on board as a result of effective regulation by IMO. However, the sea remains an unpredictable and at times dangerous place to operate. Proper packing, stowage and securing of containers and reporting of correct weight are very important to the safety of a container ship, its crew, and its cargo, to shore-based workers and equipment, and to the environment.

However, even with proper packing of the cargo into the container, correct container weight declaration, and proper stowage and securing aboard ship, a number of factors ranging from severe weather and rough seas to more catastrophic and rare events like ship groundings and collisions can result in containers being lost at sea. According to the latest survey prepared by the World Shipping Council, approximately 226 million containers were transported internationally by sea in 2019 and the percentage of containers lost overboard was less than one thousandth of 1%. Nevertheless, further preventive measures that would be effective and practicable are being explored with governments and other stakeholders to enhance container ship safety and try and bring container losses as close to zero as possible.<sup>2</sup>

Although the amount of containers lost overboard at sea as a percentage of those carried each year is infinitesimal, recent incidents involving the loss of large numbers of containers have sometimes resulted in difficult and time consuming efforts to recover the lost containers and mitigate damage arising from the containers and their contents, protect the marine environment and minimise losses for related interests, including fishing and tourism. It has been apparent from the media reports of such incidents that there may be some confusion and misconception about the shipping industry's liability for the response costs, and the extent of a shipowner's third party liability insurance cover for such costs.

## 2 The IMO International Liability and Compensation Regime

A comprehensive framework of strict liability and compensation conventions has been adopted under the auspices of IMO to ensure that the valid claims of third parties for pollution and other damage from ships are met by shipowners and without the need for claimants to bring time consuming and costly legal action against the shipowner. The conventions have been developed and agreed by the IMO Legal Committee and are tailored to particular risks. The conventions include:

- the 1969/92 Civil Liability Convention (CLC), 1971/92 Fund Convention, 2003 Supplementary Fund Protocol (oil pollution damage arising from the carriage of persistent oil cargoes by tankers);
- the 2001 Bunkers Convention (oil pollution damage arising from fuel carried on board clean tank and non-tank vessels e.g. passenger ships, bulk carriers, and container ships);

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<sup>2</sup> World Shipping Council Containers Lost at Sea 2020 Update, [https:// www.worldshipping.org/industry-issues](https://www.worldshipping.org/industry-issues)

- the HNSC (pollution and other damage arising from cargoes of prescribed hazardous and noxious substances such as chemicals); and - the WRC (locating, marking, and removing hazardous wrecks).<sup>3</sup>

All of the liability conventions provide for strict liability of the shipowner (i.e. regardless of fault) and compulsory insurance, with rights for claimants to bring their claims directly against the shipowner's insurer to an amount which is guaranteed by the insurer and certificated by States Parties.

The maximum amounts of compensation available for all claims following an incident are prescribed in the conventions, or for claims under the Bunkers Convention and the WRC, by reference to the LLMC. The amounts are reviewed by IMO when necessary to ensure they remain at levels that are sufficient to meet the vast majority of valid claims.

It is important that governments ratify the latest up to date conventions (e.g. LLMC 1996, CLC 1992, Fund Convention 1992, Supplementary Fund Protocol 2003, HNSC Protocol 2010) to ensure that claimants will have access to the highest levels of compensation that have been agreed by IMO.

### **3 Conventions of Particular Interest in regard to Containers Lost at Sea**

Specifically in relation to containers lost at sea and damage arising from the containers and their contents, governments are encouraged to ratify the following conventions:

#### **2007 WRC**

The Wreck Removal Convention entered into force in 2015 and established a regime of strict liability for shipowners for the costs of locating, marking, and removing hazardous wrecks. Shipowners are required to maintain insurance to cover liability under the Convention, and claims for costs can be brought directly against insurers. Liability for costs covered by other conventions, including the CLC, Bunkers Convention and HNSC, that are applicable and in force, is excluded.

“Wreck” is broadly defined as, following a maritime casualty, a sunken or stranded ship or any part or any object from a sunken or stranded ship. The definition includes any object that is lost at sea from a ship and that is stranded, sunken, or adrift, such as lost containers. It also includes ships that may be reasonably expected to sink or strand.

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<sup>3</sup> Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969  
 Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971  
 Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992  
 International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

“Hazard” means any condition or threat that poses a danger or impediment to navigation, or is likely to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.

“Related interests” means the interests of a coastal State directly affected or threatened by a wreck, such as:

- maritime coastal, port and estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned;
- tourist attractions and other economic interests of the area concerned;
- the health of the coastal population and the wellbeing of the area concerned, including conservation of marine living resources and of wildlife; and
- offshore and underwater infrastructure.

The WRC applies only within the exclusive economic zone of a State Party. However, States can elect to extend the application of certain provisions to wrecks located within their territory, including the territorial sea. This is easily achieved by notifying the Secretary General of IMO at the time of ratification, or at any time thereafter, that the State wishes to make use of the opt-in provision in Article 3, paragraph 2 of the Convention and extend the application of the Convention to wrecks located within its territory, including the territorial sea. Many incidents that could trigger the WRC occur in territorial waters and coastal areas and include groundings in shallow or inshore waters resulting in restrictions to the approaches to anchorages, ports and harbours.

Therefore, the application of the WRC in the territorial sea is strongly recommended to ensure the following benefits:

- wider geographic scope of application of the internationally agreed provisions on wreck removal as contained in the Convention and therefore greater uniformity and certainty of law; and
- compulsory insurance cover for shipowners to ensure they have financial security to pay claims, and the right of direct action against insurers, in respect of measures taken under Articles 7, 8 and 9 of the Convention (locating, marking and removal of wrecks) in a State’s EEZ, territory and territorial sea.

## **1996 LLMC**

The shipowner’s liability under the WRC may be limited under the 1996 LLMC or any other international or domestic limitation regime that is applicable to claims arising from the incident. The limitation amounts of the 1996 LLMC were increased by 51% in 2012, with effect from 2015. By way of example, for a 50,000gt container ship (capable of carrying approx. 4500 TEU (containers), the limit of liability for claims (other than claims for loss of life or personal injury) was increased from 18,200,000 SDR (approx. US\$26,000,000) to 27,482,000 SDR (approx. US\$39,200,000). For a 175,000gt container ship (capable of

carrying approx. 18,000 TEU (containers), the limit of liability was increased from 45,200,000 SDR (approx. US\$65,000,000) to 68,252,000 SDR (approx. US\$97,400,000).<sup>4</sup>

In addition, the WRC requires owners of ships >300gt to maintain insurance or other financial security to cover removal costs up to the limits of liability under the applicable national or international regime, but not exceeding the limits of liability in the 1996 LLMC. However, some coastal States and flag States have not ratified the 1996 LLMC and they may be parties to older limitation regimes, which means that a lower amount of guaranteed compensation may be available from the shipowner / their insurer instead of the 1996 LLMC amount.

A number of States Parties to the 1976 and/or 1996 LLMC have made a reservation under the Convention in order to preserve a policy of unlimited liability for wreck removal claims in those States, and have notified IMO accordingly. When the LLMC was negotiated, this reservation was permitted to enable such States to ratify the LLMC. However, it has the effect of negating an important principle that was established in the CLC (on which the WRC and the other IMO liability conventions are modelled) that limitation of liability is the *quid pro quo* for the shipowner's acceptance of strict liability with very few defences. While the shipowner's liability for wreck removal claims in States that have made the reservation may be greater than the 1996 LLMC amount, the insurer's certificated liability does not exceed that amount. The shipowner's liability in excess of the amount guaranteed by the insurer would be an uncertificated and potentially uninsured liability for the shipowner, depending on the terms stipulated by the shipowner's insurer. The reservation permitted under the LLMC for wreck removal claims does not affect pollution damage claims to which the CLC, HNSC (when it enters into force) or Bunkers Convention apply.

## **2010 HNSC**

Damage from hazardous and noxious substances in containers, such as the hundreds of substances listed in the IMDG Code, would be covered under the 2010 HNSC. However, the Convention is not yet in force. The following types of damage would be covered:

- loss of life or personal injury on board or outside the ship if it is caused by the HNS cargo;
- loss of or damage to property outside the ship; economic losses resulting from contamination, e.g. in the fishing, mariculture and tourism sectors;
- costs of preventive measures, e.g. clean-up operations at sea and onshore; and
- costs of reasonable measures of reinstatement of the environment.

Claimants in States Parties to the HNSC would benefit from the higher levels of compensation available from the shipowner/insurer, and from the HNS Fund for claims that exceed the shipowner's limit of liability. The HNS Fund will be financed by cargo interests to supplement the compensation that would be available from the shipowner in major incidents, up to the Convention limit of 250 million SDR (approx. US\$357 million).

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<sup>4</sup> SDR (Special Drawing Rights) is the unit of account of the International Monetary Fund. SDR figures have been converted to US\$ at the rate of SDR 1 = US\$1.43

#### **4 Additional Mechanisms for Access to Compensation**

It is important to note that access to compensation is available for claimants even in States that have not ratified the above conventions. Marine liability insurance (protection and indemnity) for over 90% of the world's ocean-going tonnage is provided by the International Group of P&I Clubs. The Group comprises 13 mutual shipowner insurance associations. The third party liabilities covered by the Group Clubs are those associated with owning and operating vessels and include pollution, wreck removal (and associated liabilities such as removal of bunkers on board wrecks to avoid pollution), collision, damage to fixed and floating objects including docks, wharves, jetties terminal and other port and terminal facilities, personal injury and loss of life, loss of or damage to cargo, and infringement of rights, which would include elements of consequential economic loss. Essentially the Clubs cover legal liabilities arising from the operation of a vessel which a shipowner may face. Therefore, all the potential legal liabilities which might arise in the context of lost containers are likely to be covered by the shipowner's P&I insurance.

In addition, the IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims (IMO Resolution A.898(21)) recommends that shipowners should ensure that effective liability insurance is in place for the type of claims described in the LLMC up to the limits of the Convention. This has been made mandatory in some countries in their domestic laws. In the EU, this is a mandatory requirement for all ships >300gt due to the Insurance Directive (Directive 2009/20/EC on the Insurance of Shipowners for Maritime Claims).

However, claimants in States that have not ratified the WRC, HNSC and LLMC may have to rely on any applicable domestic laws to establish liability for claims (which may not be as broad as those under the WRC and HNSC) and may have to prove that there was fault on the part of the shipowner (or other parties). In addition, they would not be able to bring claims directly against the insurer for a guaranteed amount.

In the EU, the Environmental Liability Directive (ELD) is of relevance for the few ship-source pollution damage liabilities that are not covered by the IMO liability and compensation conventions, such as spills of non-persistent oils, or where the conventions are not in force in an EU Member State. The ELD does not however have the same benefits for claimants (i.e. public authorities) as the IMO conventions, in terms of compulsory insurance and direct action. The ELD may be applicable in some circumstances where lost containers or their contents have caused or threatened to cause "environmental damage", i.e. damage to protected species and natural habitats, water damage, or land damage. Until the HNSC enters into force, the ELD would apply to environmental damage or to any imminent threat of such damage arising from an incident that would be covered by the HNSC, e.g. damage from hazardous and noxious substances in containers lost overboard in EU waters. The shipowner's liability to prevent and / or remediate such damage may be limited under the LLMC or other applicable law. The EU Council decided in 2017, in the interest of the EU, that Member States shall endeavour to ratify or accede to the HNSC, within a reasonable time and, if possible, by 6 May 2021.

## 5 Conclusion

In order to benefit from a comprehensive liability and compensation regime for the reasonable and proportionate costs of operations to recover containers lost at sea and damage arising from the containers and their contents, governments are encouraged to ratify and implement the 2007 Nairobi Wreck Removal Convention (WRC), the 2010 HNS Convention, and the 1996 LLMC, and to elect to extend the scope of application of the WRC to wrecks located within their territory, including their territorial sea.

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*The International Chamber of Shipping is the principal international trade association representing shipowners and operators in all sectors and trades and is concerned with all technical, legal, employment affairs and policy issues that may affect international shipping. Its membership comprises national shipowners' associations in the United States and the Americas, Asia and Europe and whose member shipping companies operate over 80% of the world's merchant tonnage.*



*The International Group of P&I Clubs (IG) comprises 13 mutual (Protection & Indemnity) liability insurance associations that provide third party liability insurance cover to approximately 90% of the world's ocean-going tonnage. The 13 IG Clubs cover a wide range of liabilities relating to the use and operation of ships, including loss of life and personal injury to crew, passengers and others on board, cargo loss and damage, pollution damage by oil and other hazardous substances, wreck removal, collision and damage to property.*



*The World Shipping Council is the united voice of liner shipping, working with policymakers and industry groups to shape the future growth of a socially responsible, environmentally sustainable, safe, and secure shipping industry. WSC members are container and ro-ro carriers, representing ca 90 percent of global liner ship capacity.*



*The European Community Shipowners' Associations (ECSA) was founded in 1965 and represents the national shipowners' associations of the EU, Norway and the UK. The European shipowners control 39.5% of the global commercial fleet, contribute €149 billion to the EU GDP and provide 2 million Europeans with careers both on board and ashore. ECSA promotes the interests of European shipping so that the industry can best serve European and international trade in a competitive free business environment to the benefit of shippers and consumers.*



*The Asian Shipowners' Association (ASA) is a voluntary organization of the shipowner associations of Australia, China, Chinese Taipei, Hong Kong, Japan, Korea and the Federation of ASEAN Shipowners' Associations comprising shipping associations of ASEAN countries. The aims of the ASA are to promote the interests of Asian shipowners. It has been estimated that ASA shipowners and managers control and operate around 50% of the world's cargo carrying fleet.*

## Theoretical Incident Scenario

50,000gt containership carrying 2,500 containers loses 100 containers overboard in severe weather and rough seas 30 nm off the coast (i.e. in the EEZ), including 50 with dangerous goods.

Potential consequences	Potential claims
Some of the lost containers sink to the seabed <ul style="list-style-type: none"> <li>• May pose a hazard to fishing boats' nets</li> </ul>	<ul style="list-style-type: none"> <li>• Response measures to recover the lost containers</li> </ul>
Some of the lost containers drift <ul style="list-style-type: none"> <li>• May pose a hazard to navigation; other vessels; approaches to ports and harbours</li> <li>• Potential hazard to the environment</li> </ul>	<ul style="list-style-type: none"> <li>• Economic losses resulting from hazard to navigation e.g. port closed for 4 days.</li> <li>• Clean-up and preventive measures at sea and onshore to recover the lost containers and their contents</li> </ul>
Containers with dangerous goods <ul style="list-style-type: none"> <li>• Toxic substances may have an impact on fishing, mariculture, mangroves</li> <li>• May pose a hazard to human health</li> </ul>	<ul style="list-style-type: none"> <li>• Costs of reasonable measures of reinstatement of the environment, e.g. mangroves</li> <li>• Economic losses in the fishing and mariculture sectors</li> <li>• Personal injury/illness, e.g. responders injured while dealing with dangerous goods</li> </ul>
Consumer goods and plastics wash up on beach <ul style="list-style-type: none"> <li>• May have an impact on tourism.</li> </ul>	<ul style="list-style-type: none"> <li>• Economic losses of affected businesses</li> </ul>

**Potential claims would be covered by the international conventions that are in force internationally and have been ratified and implemented by an affected State, as shown in the diagram on the next page.**



## Affected Coastal State is a State Party to:

### No International Conventions:

Basis and extent of the shipowner's liability for claims will depend on the domestic law applicable to the incident.

Where the shipowner is not at fault or liability is contested, it will be a matter for courts to determine a causal link.

Coastal State may not have authority to require the owner of a foreign ship to locate, mark or remove containers in the EEZ that pose a hazard to navigation.

### 1976 LLMC OR 1996 LLMC

Basis of the shipowner's liability for claims will depend on the domestic law applicable to the incident (e.g. tort). If the shipowner is at fault or the matter goes to court and a causal link is established and the claim is upheld, the shipowner's liability may be limited

#### 1976 LLMC Limits

Personal injury Claims: 15,574,000 SDR (US\$22,217,000)  
Other Claims: 7,593,500 SDR (US\$10,800,000)

#### 1996 LLMC Limits

Personal Injury Claims: 54,964,000 SDR (US\$78,400,000)  
Other Claims; 27,482,000 SDR (approx. US\$39,200,000)

### Wreck Removal Convention

Strict liability of the shipowner for claims under the Convention: i.e. claims for locating, marking and / or removing containers and their contents, declared a "hazard" by the affected State.

- The shipowner's liability may be limited to an amount determined by any applicable limitation convention (e.g. 1976 or 1996 LLMC).
- Claimants may bring claims directly against the shipowner's insurer. The insurer's liability will be limited to an amount determined by the applicable limitation regime (e.g. 1976/1996 LLMC)
- If no applicable limitation regime, the insurer's liability will not exceed the LLMC 1996 amount

*WRC with opt in:*

*Strict liability of the shipowner and rights of direct action against the insurer for above claims in the territory of the State, including the territorial sea*

**HNS 2010 (when it has entered into force)** strict liability of the shipowner and rights of direct action against the insurer for claims under the Convention up to a total amount of 94,300,000 SDR (approx. US\$134,500,000). Access to an HNS Fund for any claims exceeding the shipowner's limitation amount, up to a maximum aggregate amount of 250 million SDR (approx. US\$357 million)

- Loss of life or personal injury on board or outside the ship if it is caused by the HNS cargo;
- Loss of or damage to property outside the ship; economic losses resulting from contamination, e.g. in the fishing, mariculture and tourism sectors;
- Costs of preventive measures, e.g. clean-up operations at sea and onshore; and
- Costs of reasonable measures of reinstatement of the environment.

Increasing Coverage