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October 15, 1962

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

NOTICE TO MEMBERS

There follows a report by the Committee on Bills of Lading, and there is enclosed a copy of the Report of the International Sub-Committee on Bill of Lading Clauses regarding proposed amendments of the Hague Rules. Also, there follows a report of the Committee on Comite Maritime International and enclosed is a copy of the Brussels Convention of 1962 on the Liability of Operators of Nuclear Ships. These are the matters referred to in the Association's Document No. 458 dated September 25, 1962 and, as mentioned therein, the Chairman of the Committee on Bills of Lading is seeking the comments of the members and the Chairman of the Committee on Comite Maritime International is seeking approval of its report.

WILBUR H. HECHT,
President.

JAMES J. HIGGINS,
Secretary.

COMMITTEE ON BILLS OF LADING

There is delivered herewith to each member of the Association a copy of the report and recommendation of the International Sub-Committee on Bill of Lading Clauses of the Comite Maritime International regarding proposed amendments to the Hague Rules.

These amendments will be submitted for decision at the Plenary Session of the Comite Maritime International to be held in Stockholm June 9-15, 1963, at which time they will be open to amendments followed by adoption or rejection. It will therefore be necessary that our Association's delegation, at the Annual Meeting next May, be given broad instructions accurately reflecting the views of the members of the Association.

The Bill of Lading Committee earnestly solicits the comments of the members of the Association for the Committee's guidance in preparing its final report and recommendations on this subject. The matter is so important that the Executive Committee has given it a special place on the agenda of the Fall Meeting. The Committee hopes that there will be a free and lively discussion at that time. The Committee also requests that all the members find the time to make themselves familiar with the enclosed report and that not later than December 31, 1962, they send their views in writing, for the guidance of the Committee, to the Chairman at 80 Broad Street, New York 4, N. Y.

The Bill of Lading Committee will then prepare a report recommending instructions to be given to our delegation to the Stockholm Conference of the Comite Maritime International. The Committee recommends, and hopes that the Executive Committee will approve, that such report be mailed to all the members of the Association well in advance of the Annual Meeting next May.

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COMMITTEE ON COMITE MARITIME INTERNATIONAL

Liability of Operators of Nuclear Ships

The notice of a special meeting of the Association, Document #430, dated August 2, 1959 summarized the important provisions of the draft of a Convention dealing with the liabilities of the nuclear ship which had been prepared by a committee of the Comite Maritime International. This draft convention was sent to you with that notice and it is Document #432.

The draft convention was approved by the Association at a special meeting on August 18, 1959 and your delegates to the plenary session of the Comite Maritime International to be held in Rijeka in September, 1959, were authorized to vote in favor of a convention that embodied the fundamental principles of the draft (Document #432), and to agree to such changes in it as they might deem advisable and which were consistent with its fundamental principles as outlined.

These were:

(1) The operator of a nuclear ship is liable for nuclear damage caused by the nuclear ship without regard to fault.

(2) No other person shall be liable.

(3) Liability shall be limited (the limitation amount was not fixed).

(4) The liability up to the limitation amount shall be insured or covered by an indemnity of the government licensing the nuclear ship.

The Convention approved at the plenary session of the Comite Maritime International at Rijeka in September, 1959, was sent to you under date of October 20, 1959 as Document #434. This proposed draft Convention was in accord with the authorization given by the Association at its special meeting of August 18, 1959. Your delegates voted in favor of it.

In March, 1960 the International Atomic Energy Agency considered this draft at a panel discussion in Vienna. Thereafter a diplomatic conference met in Brussels in April 1961 under the joint auspices of the Belgium Government and the International Atomic Energy Agency. This conference reached an agreement on most of the provisions of the Convention, but adjourned without reaching a final agreement on the subject of jurisdiction of suits for nuclear damage or on the Convention as a whole.

The dispute on jurisdiction was mainly between the advocates of a single jurisdiction for claims for nuclear damage and the advocates of multiple jurisdictions. The American delegation favored multiple jurisdictions but a slight majority seemed to favor a single jurisdiction. The Rijeka draft provided for two jurisdictions, that is,

the courts of the licensing state and the courts of the country in which the nuclear incident took place. Prior to adjournment a working committee was set up to consider the unresolved questions. This committee met in Vienna in October, 1961 and drew up certain recommendations. The conference reconvened on May 14, 1962 in Brussels. An agreement was reached on a complete convention, a copy of which is being mailed with this report.

The fundamental principles of the Convention are those which you approved in August, 1959:

(1) The operator of a nuclear ship is liable for nuclear damage caused by the nuclear ship without regard to fault.

(2) No other person shall be liable.

(3) Liability shall be limited to $100,000,000 for each incident.

(4) The liability up to the limitation amount shall be insured or covered by an indemnity of the government licensing the nuclear ship.

The Convention

ARTICLE I

This Article deals with definitions. The changes that have been made are improvements.

The first definition is that of a nuclear ship. This was the subject of more controversy than any other and the most important part of the controversy was whether it should include warships or be limited to commercial ships. The Rijeka draft included warships. The American delegation at both diplomatic conferences voted against the inclusion of warships. This will be considered in detail later.

ARTICLE II

This Article makes the operator of a nuclear ship liable for nuclear damage without regard to fault and provides that no other person shall be liable for such nuclear damage.

This is the most important provision in the entire convention. It is the most radical provision. The establishment of liability with-

out regard to fault under modern conditions is not very radical but the channeling of liability to one person exclusively is radical.

When this Article was first considered there was a great deal of opposition to it, but that opposition gradually faded when consideration was given to the practical necessities with which we are faced.

Suppose that there is a collision between a nuclear and a non-nuclear ship and the non-nuclear ship is solely at fault. Under existing law the non-nuclear ship would be liable for the nuclear damage. The liabilities which a non-nuclear ship might incur for nuclear damage would be very burdensome. The owner of the non-nuclear ship might not be able to obtain insurance against such potential liabilities, and if he was able to obtain it the cost might be prohibitive. The channeling of liability will relieve the non-nuclear ship of this great potential liability.

There is a further consideration of the suppliers of machinery and equipment for the nuclear ship. Under existing law these suppliers may be liable for astronomical sums for a slight defect in machinery which they supply. This great potential liability will prevent suppliers from taking any part in the building of a nuclear ship unless they are protected from possible liability for nuclear damage.

These practical considerations are ones that led to the adoption of the principle of liability on the part of the operator of the nuclear ship without regard to fault, the relieving of every other person from liability and providing that that liability shall be limited and as limited insured in full.

ARTICLE III

This deals with the limit of liability. This provision has been the subject of a great deal of controversy. No attempt to fix the amount was considered at Rijeka. In Brussels in 1961, $100,000,000 was agreed upon by a narrow margin. The Scandinavian countries made a determined effort to reduce the limitation amount to $50,000,000. In May of 1962 these same countries raised their sights to $70,000,000. The reason for this was that they believed that by the time a nuclear ship becomes commercially feasible, insurance in that amount will be available and there will be no need for a government indemnity. An overwhelming majority of the delegations voted in favor of retaining the figure of $100,000,000, but to satisfy the

Scandinavian countries it was provided in Article XXVI that a conference should be called to consider revision of the Convention after it had been in effect for five years or at an earlier date at the request of one-third of the contracting states.

The liability of the operator up to the limit of that liability ($100,000,000) must be covered by insurance or an indemnity given by the state licensing the operation of the nuclear ship.

ARTICLE IV

This Article provides that where it cannot be determined whether the damage is nuclear or non-nuclear, it should be deemed to be nuclear damage.

ARTICLE V

This Article provides for the ten-year statute of limitations. It also provides that in case nuclear damage is caused by nuclear fuel, radioactive products or waste which were stolen, lost, jettisoned, or abandoned, the period of limitations runs from the date of the nuclear incident caused by such materials, but in no case to exceed twenty years from the date of theft, loss or abandonment.

It also provides that national law may provide a shorter period of not less than three years from the date on which the person claims to have suffered nuclear damage, had knowledge or ought reasonably to have had knowledge of the damage and of the person responsible for the damage.

ARTICLE VI

This Article deals with the effects of national compensation laws.

ARTICLE VII

Where damage is caused by more than one nuclear ship, and the damage is not separable, each shall be jointly liable for the full damage but not exceeding the limit of his own liability. But in cases of joint and several liability each operator shall have a right of contribution against the other in proportion to the fault attaching to each of them. If the degree of fault cannot be determined, the liability shall be borne equally.

ARTICLE VIII

Relieves the operator from liability for nuclear damage caused by war, hostilities, civil war or insurrection.

ARTICLE IX

This article provides that the insurance, or other financial security or indemnification provided for in the Convention shall be exclusively available for payments of the claims under the Convention.

ARTICLE X

This is an article dealing with jurisdiction of suits for nuclear damage. It provides that they can be brought in the courts of the licensing state or in the courts of the contracting state or states in whose territory nuclear damage has been sustained. This differs from the Rijeka draft only slightly. It substitutes the state in which nuclear damage has been sustained for that in which the nuclear incident occurred. The two may not be the same.

This provision has been discussed more than any other. There was a group who strongly advocated a single jurisdiction for all nuclear claims. Our original position was that a suit for nuclear damage could be brought in any jurisdiction for which the suit could be brought for non-nuclear damage. There were a great many proposals dealing with jurisdiction in between these two extremes. The final one adopted was a compromise. It was undoubtedly the best compromise that we could get and we believe it is a satisfactory one. A claimant can go to the licensing state and file his suit there or he can file it in the jurisdiction where the damage occurred. It is likely that suits will be in large measure filed in the jurisdiction where the damage occurred. This will be the more convenient jurisdiction for the claimants in the great majority of cases.

ARTICLE XI

This Article deals with the handling of the limitation fund and the enforcement of judgments. This Article has been the subject of a good deal of consideration. A number of well thought out proposals dealing with this subject were presented and considered. This Article represents a reasonable compromise.

ARTICLE XII

This Article provides that each contracting state shall do what is necessary to implement the Convention and provide that the limitation fund will be fully transferable and that there shall be no discrimination.

ARTICLE XIII

This Article provides that the scope of the Convention shall be world wide.

ARTICLE XIV

This Article provides that this Convention shall supersede other conventions to the extent of any inconsistency between them.

ARTICLE XV

This Article provides: (1) each contracting state undertakes to take all measures necessary to prevent a nuclear ship from flying its flag without proper license; (2) that in the event of nuclear damage caused by an unlicensed nuclear ship, the owner shall be deemed the operator for the purposes of this Convention, except that his liability shall not be limited in amount; (3) that the state whose flag the nuclear ship flies shall be deemed the licensing state for all purposes, and shall be liable for compensation to the victims up to the limit of liability; and (4) each contracting state undertakes not to grant a license to a nuclear ship flying the flag of another state.

ARTICLE XVI

This Article provides that the Convention shall apply to a nuclear ship from the date of her launching and that between her launching and the time she is authorized to fly a flag, she shall be deemed to be operated by her owner and to be flying the flag of the state in which she was built.

ARTICLE XVII

This Article provides that this Convention shall not affect the rights of a contracting state to deny access to its waters to nuclear ships.

ARTICLE XVIII

This Article provides that an action may be brought against an insurer if the right to bring such direct action is provided for under the applicable national law.

ARTICLE XIX

This Article provides that in case of the termination of the Convention by a contracting state, it shall continue in effect, so far as any existing ships are concerned, for a period of 25 years from the date of the licensing of such ship. The object of this provision is to insure that the provisions of the convention, such as the channeling of liability and limitation of liability will cover a nuclear ship for a minimum period of 25 years.

ARTICLE XX

This Article provides for the arbitration of disputes between licensing states.

ARTICLE XXI

This Article provides that a contracting state may elect not to be bound by the provisions of Article XX.

ARTICLE XXII

This Aricle provides that the Convention shall be open for signature by the States represented at the eleventh session of the Diplomatic Conference on Maritime Law.

ARTICLE XXIII

This Article provides for the deposit of the instruments of ratification.

ARTICLE XXIV

This Article provides that the Convention shall come into force three months after the deposit of the instrument of ratification by at least one licensing state and one other state. This means at present that it must be ratified by two states, at least one of which must be either the United States or Russia, which are presently the only licensing states in the world.

ARTICLE XXV

This Article provides that in addition to the countries represented at the eleventh session of the Diplomatic Conference on Maritime Law any states which are members of the United Nations or any of the specialized agencies or of the International Atomic Energy Agency may become parties to the Convention.

ARTICLE XXVI

This Article provides for the reconvening of the Conference after the Convention has been in force for a period of five years.

ARTICLE XXVII

This Article provides that any Contracting State may denounce the Convention at any time after the first revision held in accordance with the provisions of Article XXVI.

ARTICLE XXVIII

This Article provides that the Belgian government shall notify the States represented at the eleventh Diplomatic Conference on Maritime Law, of the signatures, ratifications and accessions received in accordance with Article XXII, XXIII and XXV, the date when the Convention shall come into force and when it is denounced, etc.

SHOULD THE CONVENTION APPLY TO WARSHIPS?

The American delegation took the strong position against including warships in the Convention and for that reason voted against the Convention as a whole. This we think was unfortunate.

In the meetings of the Committee of the Comite and the plenary session of the Comite there was not one voice raised against the inclusion of warships. They were included in the draft adopted by the Comite at Rijeka, Document #434. At the April 1961 session of the Diplomatic Conference the question of warships was debated at length. The vote was a close one in favor of their inclusion. When the conference reconvened in May of 1962, opinion had shifted to a substantial extent. There was a great deal of discussion of the question. The final vote was decisive in favor of including warships. The United States was supported in this position only by the Iron

Curtain countries. The rest of the western world was in favor of including warships.

The point was made that we had one commercial nuclear ship and sixty nuclear warships built, building or authorized, and that it was unfair for us to ask for a convention that applied to one nuclear ship and excluded sixty others.

From our present point of view the greatest potential danger on a nuclear ship is from collision. There is just as much potential danger from a collision involving a nuclear warship as one involving a nuclear merchant ship. The same rules of navigation must apply to both and the same principles of liabilities should apply.

The exclusion of warships would destroy the principle of the channeling of liability which is the very core of the Convention. If a non-nuclear merchant ship were in collision with a nuclear warship and the Convention did not apply to the nuclear warships, a non-nuclear ship would be subjected to a heavy liability for which it might not be insured. The fact is that it might not be able to procure insurance to cover that risk.

The whole trend has been to provide that warships shall be liable for the damage they do in non warlike operations to the same extent that commercial ships are liable. We find that in the Suits in Admiralty Act and in the Public Vessel Act of the United States.

The arguments advanced for the exclusion of warships are untenable. It is first contended that under the Convention there will be no right to deny entry of a warship into a port of the Contracting State. That is specifically answered by Article XVII which provides that this Convention shall not affect the rights of a contracting state to deny access of its waters to a nuclear ship.

Another argument advanced was that it would allow inspection of warships. There is nothing in the Convention that deals with the safety requirements or with the inspection of safety appliances. It deals only with liabilities.

A convention that does not apply to warships is unworkable. It will leave the non-nuclear merchant ship, not only subject to liabilities of nuclear damage, but without limitation of that liability except in those cases where it can take advantage of existing statutes for

limitation of liability. The rest of the free world will not accept a convention that excludes warships. If this convention is to have any value it must have universal acceptance and it must include warships.

Conclusion

It is the conclusion of your Committee that the Convention is a good one and that it deserves our support. We therefore recommend that you approve it and that the proper officers of the Association be authorized and instructed so to advise the interested departments of the government of the United States and the appropriate committees of the Congress of the United States and that they request that approval be given by the other interested bar associations.

Respectfully submitted,

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