Legislative Report

Canadian Board of Marine Underwriters

Annual meeting November 30, 2010

Marine Liability Act – Part 4

Insurance of passenger vessels

Background

When Parliament passed the legislation enacting the Athens convention and its 1990 LLMC protocol, the Minister of Transport pledged to bring in a regime of compulsory insurance for passenger vessels. That proved to be more challenging than imagined as the impact on the adventure tour industry would have been severe. A combination of compulsory insurance and Athens invalidation of waivers would have been toxic. It then was necessary to define those adventure activities and surgically carve then out of Part 4 of the Marine Liability Act.

The recent changes to the MLA paved the way for introduction of the regulations making it mandatory for commercial vessels carrying passengers to carry insurance. The adventure tour vessels were taken out of Part 4 of MLA as were non self-propelled craft – the oars and paddles crowd. The remainder will require proof of insurance to Part 4 limits - 175,000 SDR, usually converted to $350,000, per passenger. It remains to be decided what form that proof will take. For those vessels requiring a safety certificate – over 15 tons or carrying more than 12 passengers, they undergo annual inspection making verification relatively simple. Another idea is for the certificate to be carried on board in a visible location. It is possible that vessels under 15 tons and carrying 12 passengers or less will have a lower requirement than $350,000 x the number of passengers.

As with the Bunker Convention, the form of the security will likely be an issue. Part 3 sets the global limitation as the greater of $4,000,000 and $350,000 times the number of passengers on board. As the limit per passenger is $350,000 the global limit is effectively set by the number of passengers. Passenger vessels are certified for a number of passengers but it is always possible that more might be on board. Transport will likely favour a certificate simply affirming that insurance is in place which meets the requirements of Part 4 without reference to a specific limit of liability. Negotiation may be possible and a limit allowing a sufficient margin for fluctuations in the SDR to Canadian dollar might be acceptable. For example the 2 Canadian dollars to 1 SDR rate mentioned earlier was taken at a very low point of the dollar in our recent history. Currently 175,000 SDR is closer to $300,000 than $350,000 (actually $289,000) reflecting the strength our dollar relative to the US dollar, Euro and Pound sterling in the SDR cocktail.

Certain problems remain. One is the interpretation of “commercial purpose” which delineates a vessel carrying passengers as being subject to Part 4 from a pleasure craft which is not.

Another is the complex definition of “adventure” operators requiring multiple elements to be present – enhanced risk, special equipment and a written acceptance by the passenger of the risks. The swing between 175,000 SDR (approx. $300,000) per passenger under Part 4 and $1,000,000 per accident under Part 3 (or $4,000,000 if over 300 grt.) will result in legal wrangling as to which regime applies to an injured passenger or perhaps several of them. If that were not enough, if a waiver was signed by the passenger the $1,000,000 jackpot may be elusive but if he can persuade the court he was an Athens passenger the jackpot is considerably reduced but the waiver is set aside. Problems aside, we expect the compulsory insurance regulations to be completed within the next 12 months.

Of interest also is the evolution of the Athens Convention. Canada adopted Athens and the 1996 Protocol to LLMC, the Convention dealing with general liability for maritime claims other than for oil incidents. Since then a 2002 Protocol to Athens was drafted, although yet to come into force, which would increase the passenger limits to 250,000 SDR from 175,000, make the carrier strictly liable to the former limits and provide for direct action against the Insurer under a compulsory insurance regime. The advent of cruise vessels carrying 5,000 passengers, which times $500,000 per passenger or $2.5 billion has caused the insurance industry to question whether such vessels remain insurable to such limits. The $2.5 billion is in respect to bodily injuries to which must be added several hundred million more for the hull in a catastrophe, possibly wreck removal, etc. The Protocol has yet to gain the signatures or ratifications necessary to bring it into force.

Wreck Removal –Nairobi Convention

Yet another international convention is on the drawing board. The intent is to arm governments with legislative tools to enable them to order removal and obtain funds from insurers by direct right of action, limiting defences, compulsory insurance, etc. The recommendation to government by CMLA was to push ahead with the adoption of the Convention. As with the Bunkers Convention the LLMC limitation will apply, notwithstanding that the recent changes in Part 3 of MLA exempted salvage from limitation. The Convention specifically provides that ratification by a nation will reinstate limitation of liability despite national law to the contrary. It has long been the quid pro quo for PandI Clubs to exchange their certificate of insurance protection to Convention limits including strict liability and direct right of action against a firm provision to allow limitation of liability. Therefore it would not be acceptable to have a wreck removal convention with unlimited liability.

It is the opinion of this committee that opposition to a proposed convention dealing with protection of the environment would be futile. Although it may not be in the interest of Canadian insurers to have strict liability, compulsory insurance, direct right of action, invalidation of policy defenses, etc. as part of Canadian law it would be difficult if not impossible to argue the interest of Canadian insurers should be put ahead of those of the general population. It is therefore a recommendation that the Canadian Maritime Law Association should take the lead in so far as adoption of international conventions is concerned to which we can add our support to achieve a balanced outcome.

Yet another Convention, that of hazardous and noxious substances or HNS, has been on the table for some time, held up by squabbling over the contributions which will provide the funds to compensate victims of HNS injury or contamination. Canada is currently considering ratifying that Convention and Transport Canada has issued a discussion paper which suggests it would be in our interest to bring the Convention into force.

Rotterdam Rules

To add a final item to our basket of Conventions in various states of limbo we are awaiting the next move of the United States regarding the Rotterdam Rules, the replacement for the Hague-Visby and Hamburg Rules governing transportation of cargo. All interested parties in the United States – USMLA, Bar Association and shipping interests have given their approval. The President has to send the proposal to the Senate for approval to start the process. Finding the opportune moment is important. If the United States ratifies the Convention it is assumed their trading partners will also. The Convention is far from being a gem of clarity or an example of good drafting. Nevertheless it appears to be something that cargo and PandI insurers can live with and the advantages are probably worth the pain during the adaptation period.

Limitation of Liability

An emerging problem is that all these conventions provide for limitation of the vessel to the LLMC limits excepting those with respect to passengers and to oil pollution. Thus in a serious claim the victims will have to share the limitation fund which will be apportioned for third-party injuries, bunkers spills, removal of wreck, etc. With each new serious incident there is increasing pressure to saddle the perpetrators with the full bill for cleanup and damages. In fact environmental laws do not mention limitation of liability in general. The concept has served insurance and shipping industry well for many decades put public pressure may yet see its demise as escalating costs dwarf current limitation amounts.

British Columbia Regulations

An item hot off the press. We have just received confirmation from the Finance branch of the Province of British Columbia that changes to regulations have been made to remove some of the impediments to placing B.C. marine business with non-licensed insurers. These changes were made in response to some written submissions by CBMU, CMLA and industry groups, all of which called for liberalization of the regulations so as to permit free and open access to marine markets, particularly PandI Clubs, by B.C. shipping interests. We are currently evaluating the changes which seem to fall short of complete freedom from provincial regulation but certainly are an improvement.

My thanks to committee members and others, especially the members of the Canadian Maritime Law Association who contribute so much to getting Canadian Maritime Law right and keeping us informed.

Doug McRae
Chairman, Legislative Committee
November 25, 2010