GOVERNMENT RESPONSE TO THE CONSULTATION ON REGULATIONS REQUIRING COMPULSORY INSURANCE OF SHIPOWNERS FOR MARITIME CLAIMS

(Transposition of Directive 2009/20/EC)

SUMMARY OF RESPONSES AND GOVERNMENT'S REPLY

1. Overview

1.1 The consultation sought views from the maritime sector on the Department's draft Statutory Instrument (“the Regulations”) implementing into UK law Directive 2009/20/EC (the "Insurance Directive") on the insurance of shipowners for maritime claims. The consultation ran from 4 April to 16 May 2012.

1.2 Due to the specialised nature of the subject matter, the consultation was addressed to the insurance and shipping industries, rather than to the general public.

1.3 The consultation asked industry if the Government's proposed approach to implementing the Insurance Directive would achieve the right outcomes, and that in taking this approach it would ensure that both administrative burdens and financial costs were kept to a minimum for the UK maritime sector. The consultation also invited industry to provide any additional information or evidence that could help better inform the evidence base used in the Impact Assessment.

1.4 The comments of those organisations that responded are set out in the following document.

2. Background

2.1 Under the Insurance Directive, owners of seagoing ships flying the flag of an EU/EEA State shipping registry, and other seagoing ships entering a port in an EU/EEA State (including non-EU ships), of 300 gross tonnage and above, are required to maintain insurance or other financial security to cover the vast majority of third party maritime claims of the type described as subject to limits of liability by the International Convention of Limitations of Liability for Maritime Claims 1976, as amended by the 1996 Protocol to the LLMC 76 (the "LLMC 96). The Insurance Directive entered into force across the EU on 1 January 2012. As part of our treaty obligations, the UK must transpose the Insurance Directive into UK law.

3. Summary of Responses and Government Reply

3.1 Out of 29 institutions and organisations that were invited to comment, only 6 took the opportunity to do so, which represents just over a 20% response rate. The following summary of consultation responses is set out by the questions posed in the Consultation Document. A list of those consultees who provided comments is set out (at **Part 3**). Those that responded gave a broad endorsement of the UK's proposed approach to the transposition and application of the Insurance Directive, though a number of individual points were raised, and which are set out below.

There are no references in this summary note to comments made about the Regulations that were of a purely editorial or presentational nature.

PART 1

Question 1

Do you agree that the UK's proposed approach deals with maritime claims in respect of loss resulting from delay in the most appropriate way?

Respondents generally supported the UK approach to this matter, in particular both BIMCO and IGP&I Clubs confirmed that the UK approach was broadly consistent with the rules on cover provided by the IGP&I Clubs in respect of claims resulting from the delay in cargo, but only insofar as the Hague Visby rules are incorporated into the carriage contract. Likewise, in cases of delays caused to passengers or their luggage, these are subject to specific conditions only where delay follows an incident that affects the physical condition of the ship or any other incident involving a threat to life, health or the safety of passengers, and where such provisions have been incorporated into the contract..

A further question was raised by an individual member of the public around the interpretation of regulation 4 (4) of the Regulations, in the case where a delay occurs as a result of a preceding peril. The question raised was that there may be two preceding perils (a collision followed by an explosion) but the outcome is that only one delay occurs. The respondent wished to know whether the incident - as referred to in regulation 4 - referred specifically to the delay or the actual peril preceding it.

The same respondent wished to know whether the insurance would cover claims for losses caused by a detention that was unjustified (regulation 9). Whilst regulation 11 deals with compensation for unjustified detention, the respondent argued that it was not clear if, as a result of successful arbitration, the arbitrator could compensate the shipowner for any losses to his cargo and queried about passengers/luggage delayed as a result of unjust detention.

Government Response

Under the Insurance Directive, it is the shipowner that is required to maintain the insurance. This insurance is intended to cover the vast majority of claims of the type that are described in the LLMC 96 as being subject to limitation under the LLMC 96 up to the LLMC 96 limits of liability and should not be confused with any other type of insurance that might be in place, either in respect of the carriage of cargo or passengers.

Unless it is specifically excluded from the underlying contract of carriage, we do not envisage any circumstances that would give rise to problems for passengers making a claim for loss as a result of delay following an incident, irrespective of the number of perils that may have preceded that delay. The IGP&I Clubs agree, Nevertheless, in light of the comments received, we have made a small drafting change to regulation 4(3)(c) of the Regulations to make the intended effect clearer.

Finally, it is the Government's view that the required insurance would not need to cover delay caused by an unjustified detention and it is not necessary to specify this in the Regulations. Regulation 11 already deals with compensation for unjustified detention, and an arbitrator could compensate the shipowner for any payments he has had to make as a consequence of delay of cargo, passengers or their luggage in these circumstances.

Question 2

Do you agree with the UK's proposed approach on other effective forms of insurance? Consultees are also invited to submit evidence of examples of other forms of proven self insurance.

The Chamber of Shipping expressed concerns regarding the Government's approach to this issue, noting that the consultation letter, covering the provisions of self insurance, indicated that a bank guarantee would be necessary to demonstrate that a shipowner had an appropriate level of financial cover in place to meet his liabilities, and that such evidence was in addition to any written approval that the shipowner had from the Secretary of State.

Since this explicit requirement was not set out in the Regulations, the Chamber did not wish to see such an explicit provision for a bank guarantee added later on. In any case, they considered it to be superfluous, particularly if the shipowner already had written approval from the Secretary of State.

Government Response

Shipowners are required to provide evidence that the insurance that they have in place is sufficient to meet their financial liabilities in the event of a third party claim. Such evidence can be in the form of either the indemnity insurance (for example, as provided by the IGP&I Clubs), or other effective forms of insurance, including proved self-insurance and financial security offering similar conditions of cover. However, it is left to the discretion of individual Member States to determine the precise criteria upon which these other effective forms of insurance are to be accepted.

In order for a shipowner's proved self insurance to be acceptable, the Secretary of State will need to give written approval prior to the ship entering UK waters, and this will be based on the shipowner providing evidence of

financial security that may include, for example, a banker's guarantee, that will demonstrate that a shipowner is able to meet his financial liabilities.

Additional Observations

The Chamber of Shipping felt that regulation 4 (4) went beyond what is required in the Insurance Directive when it stated that the required amount of insurance must be "at least" equal to the relevant maximum amount for the limitation of liability as laid down in the LLMC 96. The Chamber considered that this was a departure from the wording in the Insurance Directive and should be removed to avoid any suggestion of gold-plating.

The Chamber of Shipping also pointed out that regulation 5 was not clear in what circumstances the Secretary of State would confirm that the arrangements for self insurance or financial security were adequate.

Both Nautilus and BIMCO expressed some concerns regarding some of the enforcement elements of the Regulations. Nautilus expressed concerns that regulation 7(3) does not provide an adequate defence for the master of a ship if he is does not carry, or is unable to produce the necessary insurance certification to demonstrate compliance with the requirements. Nautilus noted that Member States should lay down a system of penalties that were effective, proportionate and dissuasive. They also pointed out that the Insurance Directive does not require that an offence is created for the master of a ship and that to do so would be tantamount to gold-plating.

Nautilus suggested that there may be occasions when the master is unaware (and could not have reasonably known) that the insurance has, for one reason or another, been cancelled or invalidated prior to his arrival in a UK port. Nautilus also indicated that they believe that the fine for such an offence is disproportionate for what may have been only a purely technical offence (for example, the unavailability of the appropriate documentation or the insurance not being in place).

BIMCO wished to underline the importance of ensuring that, in the cases where ships were detained in a UK port, the duration was kept to an absolute minimum, that proper consideration was given to the fair treatment of the crew and that masters and shipowners (if fined as a result of non-compliance), had adequate recourse for appeal.

Government Response

Taking each point in turn, we agree with the Chamber of Shipping that regulation 4 (4) does indeed differ from the Insurance Directive. However, the term "at least" was included so as to provide shipowners with the possibility, if they wished to use it, to insure above the relevant maximum. This could, for example, be something that shipowners might wish to have the possibility to do if they sought specific or additional cover beyond the basic provision that the minimum level would provide. We do not accept that this can be

construed as gold-plating, since it maintains the necessary flexibility for shipowners, which already exists within the maritime sector.

The Government is also grateful for the Chamber highlighting the wording in regulation 5 and this has now been corrected to bring clarity to the provision.

Turning to the enforcement framework and in terms of creating an offence for the master of a ship when he does not display or is unable to produce the relevant insurance certification, this is consistent with the approach already used in the UK (for example, under the Bunkers Regulations[1]), as is the level of the penalty.

We believe that the master is entirely responsible for the actual operation of the vessel, and that part of his duties and responsibilities is to ensure that all aspects of the vessel's documentation are extant and, where they are not, to report such matters to the shipowner in order to rectify any shortcomings or discrepancies.

The Insurance Directive requires all Member States to establish a framework of penalties for the breach of national provisions, and for such penalties to be effective, proportionate and dissuasive The Government's approach has been to apply a level of offences and penalties that is consistent with previous legislation on similar issues, thereby ensuring that those who have specific duties and responsibilities for the safe operation of the ship can be penalised when breaches occur.

PART 2

Summary of requests for information set out in the Impact Assessment (IA).

The Consultation Document should be read in conjunction with the Impact Assessment that accompanied it, and which provided detailed consideration of the implementation of the Insurance Directive.

However, due to the limited evidence base, it was not possible to monetise any of the costs and benefits that were identified in the IA. Therefore, in order to better inform the IA, consultees were invited to provide details on any:

(a) additional costs of implementing the Directive in the UK, including any additional costs that would arise from applying for and carrying third party insurance certificates to comply with the Directive;

(b) additional evidence that is available on the number of UK registered ships and / or UK owned ships of 300gt and above that do not currently maintain the third party liability insurance that would be necessary under the proposed Regulations;

[1] The Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulation 2006 No. 1244

(c) additional evidence on the costs and benefits of the proposed Regulations (Option 1);

(d) additional evidence that is available on these potential benefits to victims of maritime incidents, safety and the environment;

(e) additional evidence that is available on the benefits to the shipping industry;

(f) additional evidence that is available on the benefits to financial institutions;

(g) additional evidence that is available on the compliance costs to the shipping industry;

(h) additional evidence that is available on the familiarisation costs to the shipping industry;

(i) additional evidence that is available on the costs to financial institutions;

(j) additional evidence on the potential for the proposed Regulations to impact on competition;

(k) additional evidence on the impacts on small firms, including whether small firms would face costs disproportionate to those incurred by large firms as a result of implementation of the Directive

None of the respondents provided any new evidence or information which could help more fully inform the Government's assessment of the costs and benefits. Nor did any consultees make any comments regarding the assessments that the Government had made around the costs and benefits. In the light of this, the Government has been unable to further expand on its original assumptions and assessments and so the original analysis of cost and benefits have remained in place.

Part 3

List of Respondents who provided comments

Organisations or Institutions:

IGP&I
BIMCO
Chamber of Shipping
Nautilus International
APIL
ITOPF