THE IMPLEMENTATION OF THE NAIROBI INTERNATIONAL CONVENTION ON REMOVAL OF WRECKS, 2007 IN THE CROATIAN LAW

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ABSTRACT

The Nairobi International Convention on the Removal of Wrecks, 2007 (Nairobi WRC 2007) establishes uniform international rules aimed at ensuring the prompt and effective removal of wrecks located beyond the territorial sea and, under certain circumstances, within the territorial sea. Authors analyse the objectives and general principle of the Nairobi WRC 2007 and illustrate the need to adopt rules and procedures to ensure prompt and effective removal of wrecks. The paper is focused on the compensation of costs therein involved, as well as the impact of its entry into force. Mindful of the fact that wrecks may pose hazard to navigation and marine environment, an evaluation is made of the provision on salvage and wreck removal in the Croatian Maritime Code, 2004 and legal analyses is provided which proves the benefits of incorporating the Nairobi WRC 2007 into Croatian law. In authors’ opinion the implementation of legal instruments included in the Nairobi WRC 2007 will contribute to laying foundations of firm jurisdictional basis for dealing with hazardous wrecks and provide coastal states with legal certainty for action.

Key words: Wreck Removal Convention, Croatian Maritime Code, compensation for the costs, implementation

1 INTRODUCTION

By 2009 over 1300 abandoned wrecks have accumulated along the coastlines of the world, making this problem a daily actuality. The increasing number of shipwrecks globally causes hazards to navigation, which potentially may endanger other vessels and their crews. Many of the wrecks also have a potential to cause substantial damage to the marine and coastal environments, and the removal costs on the coastal nation involved are often substantial.

The absence of legal basis for costal states to remove wrecks located beyond the territorial sea causes a serious obstacle in dealing with this matter, since the coastal states have no jurisdiction beyond outer limit of territorial sea.

The Nairobi International Convention on the Removal of Wrecks, 2007 (Nairobi WRC 2007), was adopted by a diplomatic conference held in Kenya in 2007, as an instrument to fill a gap in the existing international legal framework by providing the first set of uniform international rules aimed at ensuring prompt and effective removal of wrecks located beyond the territorial sea.

1http://textbook.ncmm.no/5-international-conventions-and-regulations-of-importance-to-maritime-medicine/513-removal-of-wrecks-
2 PREPARATORY WORK ON NAIROBI WRC 2007

The need to set uniform rules on removal of wrecks outside of the territorial sea was raised at first at the IMO Legal Committee in 1974. Yet, although the need of such an international instrument of harmonisation was clearly acknowledged, this topic has not gone further until 1993, when delegations of Germany, the Netherlands and United Kingdom submitted this matter to the 65th meeting of the IMO Legal Committee by proposing a draft convention on wrecks removal.

At the 70th Session, Germany, the Netherlands and United Kingdom submitted further paper on this subject arguing that the international convention is necessary in order to establish uniform rules on wreck removal beyond the territorial sea. A draft convention was attached to their joint submission.

The draft convention emphasised three key components to be regulated by it:

1. the rights of coastal states to remove the wrecks out form its exclusive economic zone (EEZ) if they are considered to present danger to the safety of navigation or marine environment;
2. strict liability of the shipowners for the costs of reporting, locating, marking and removing a wreck if required to do so by the coastal state;
3. compulsory insurance or other financial security that has to be maintained by the shipowners up to the limits of the International Convention on Limitation of Liability for Marine Claims, 1976.

In 1996, the Comite Maritime International (“CMI”) became actively involved in the Legal Committee program. It made a report regarding the survey of national legislation regarding the wreck removal, which concluded that national regimes on wreck removal have many similarities dealing whit wrecks in territorial sea of its member states. The result of the CMI opened possibility to extend the scope of application of the convention even in internal and territorial waters, although the draft was confined only to international waters (i.e. EEZ).

A number of delegations lead by the delegation of the Netherlands, strongly opposed the extended application. The reason for such reluctance can be found in the absence of necessity for such a solution. Although a new legal basis is necessary for the coastal states to take measures outside their territorial seas, the coastal states are to be limited in the freedom of action in accordance with the limitations imposed by Intervention Convention 1969. Such limitations are considered to be inappropriate for actions taken by the coastal states within the sea areas under their jurisdiction. Therefore, imposing the application, of the new convention even in the inland waters would result with restriction of coastal states right to take whatever action they consider to be appropriate in their state territory. Yet, one cannot ignore the fact that most of the wrecks lie in shallow waters that are within the inland waters over which the coastal states exercise their jurisdiction.

3 OBJECTIVES AND GENERAL PRINCIPLES OF NAIROBI WRC 2007

As stated before, the main objectives of the Nairobi WRC 2007 were to impose new international regime under which the coastal states could take actions for wreck removal beyond their territorial seas, where they cannot exercise their jurisdiction in accordance with provisions the law of the sea.

Three objectives are considered to be achieved by the convention’s provisions: the rights of coastal states to remove the wrecks out form their exclusive economic zone, strict liability of the shipowners for the costs of reporting, marking and removing a wreck, and imposing the compulsory insurance or other financial security for the shipowners.
Considering the fact that Nairobi WRC 2007 deals with the liability of the shipowners and impose on them the obligations in accordance with its provisions, the Nairobi WRC 2007 can be placed within the group of conventions covering liability and compensation, together with the CLC, FUND, NUCLER, PAL, LLMC, HNS and BUNKER Conventions, forming the pillar of uniform international legal regime of compensation for damages in maritime affairs. Yet, there are a several significant differences that make the Nairobi WRC 2007 more effective in achieving its main objectives. These differences are showed below.

4 SCOPE OF APPLICATION OF THE NAIROBI WRC 2007

Although it follows the basic structure of other conventions covering liability and compensation, it has to be emphasized that Nairobi WRC 2007 pursues new definitions made for the purpose of the Convention. It uses terms not yet used in the provisions of other conventions covering liability and compensation, which is of significance for defining the limits of convention’s application.

Article 3 of the Nairobi WREC 2007 defines its scope of application, stating that the Convention shall apply to wrecks in the Convention area, except as otherwise provided in this Convention.

The Convention area is a newly adopted term, not yet encountered in international law. For the purpose of the Convention, it means the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. The territorial sea of the coastal state is not subject to the scope of the Convention. Nevertheless, a State Party may extend the application of this Convention to wrecks located within its territory, including the territorial sea, subject to article 4, paragraph 4. In that case, it shall notify the Secretary-General accordingly, at the time of expressing its consent to be bound by this Convention or at any time thereafter.

Therefore, if a State Party does extend the application of this Convention within its territory, including the territorial sea, by notifying the Secretary-General in accordance with the Convention, the Convention area shall constitute both the EEZ (or an area beyond and adjacent to the territorial sea not more than 200 nautical miles) and territorial waters.

But in this case, the Conventions’ provisions shall not prejudice the rights and obligations of that State to take measures in relation to wrecks located in its territory, including the territorial sea, other than locating, marking and removing them in accordance with this Convention, nor shall provisions regarding the liability of the shipowners, exceptions of liability and compulsory insurance or other financial security apply to any measures so taken other than those of locating, marking and removing wrecks in accordance with the Convention.

This, somewhat cumbersome wording of Article 3, is result of the compromise in achieving the acceptance of the opt-in rights of the coastal state, in particular regarding the application of provisions regarding the liability of shipowners, exceptions of liability and compulsory insurance or other financial security. This is a result of instigation of the International Group of P&I Clubs to safeguard their letters of guarantee, and to ensure that claims for expenses beyond those incurred in Articles 7 – 9 (i.e. locating, marking and removal of the wrecks) would not be covered by such a guarantee.3

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2 http://www.imo.org/About/Conventions/ListOfConventions/Pages/Default.aspx
The Nairobi WRC 2007 applies to the wrecks within the Convention area. Therefore, the definition of the wreck is required to fulfill the scope of application.

The Convention gives a wide definition of the wreck. The wreck, for the purpose of the Convention, means

(a) a sunken or stranded ship; or
(b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or
(c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or
(d) a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.

Analyzing the mentioned definition, what needs to be emphasized is its broad range that includes not only a sunken or ship stranded, or its part, but also a floating ship that is expected to sink or to strand. The Conventions’ provisions apply not only to ships but also to their cargo.

Yet, the Convention shall not apply if effective measures to assist the ship or any property in danger are already being taken. This exclusion was added at the instance of the CMI and the International Salvage Union to ensure that the coastal states do not have a right to intervene when the causality is in the hands of a competent salvor. In such circumstances, the legal rules applicable to a salvor in possession will apply and the state that intervenes may expose itself to legal liability to the salvor.4

The Nairobi WRC 2007 specifically states in which occasion Article 4 of the Convention shall not be applicable.

The Convention shall not apply to measures taken under the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, as amended, or the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973, as amended.

Furthermore, the Convention shall not apply to any warship or other ship owned or operated by a State and used, for the time being, only on Government non-commercial service, unless that State decides otherwise.

Finally, the exclusion of some part the Convention is also provided if the State Party has made a notification under Article 3, paragraph 2, when Article 2, paragraph 4, Article 9, paragraphs 1, 5, 7, 8, 9 and 10 and Article 15 shall not apply in its territory, including the territorial sea.

Furthermore, Article 9, paragraph 4, insofar as it applies to the territory, including the territorial sea of a State Party, shall read: Subject to national law of the Affected State, the registered owner may contract with any salvor or other person to remove the wreck determined to constitute a hazard on behalf of the owner. Before such removal commences, the Affected State may lay down conditions for such removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment.

5 THE RIGHTS AND DUTIES OF THE SHIPOWNERS AND AFFECTED STATES

The Nairobi WRC 2007 address the reporting of shipwrecks, determination of the hazard, locating and marking of wrecks and measures to facilitate their removal.

4 ibid.
The Convention requires that the master and the operator of a ship that is registered in a State Party reports, in some detail, any maritime incident that results in a wreck to the State Party within whose convention area the wreck is located.

The Affected State shall, upon the receipt of the report, then determine if such a wreck poses a hazard to navigation or to the environment and, if so, take appropriate measures to warn mariners of the wreck and to locate and mark the wreck in accordance with the internationally accepted system of buoyage or take steps to ensure the removal of the wreck. Article 6 of the Convention lists criteria for Affected States to consider in the determination of whether or not a wreck poses a hazard.

Although the Affected State is defined by Article 1 of the Convention as the State Party in whose convention area the wreck is located, there is no question that wreck can pose a hazard to navigation or to the environment even to states other than affected one.

Should Article 6 of the Convention be applicable even for those states, is yet to be determined by the jurisprudence and legal doctrine. But there is no question that this issue will be raised in practice, especially if wreck is considered to pose a hazard by the state which is not determined as affected in accordance with the Convention, in contrary with the consideration of the Affected State.

The Convention provides several measures to facilitate the removal of wrecks that are determined to pose a hazard by the Affected State. Upon such a determination, the Affected State must inform the State Party where the ship is registered and the registered owner and consult with them and any other Affected State about measures to be taken in relation to the wreck.

Ultimately, the registered owner of the ship is responsible for the removal of such hazardous wrecks. The registered owner may contract any salvor or other person to remove the wreck in accordance with conditions set by the Affected State to ensure that the removal proceeds expeditiously in a manner consistent with considerations of safety and protection of the marine environment.

The Affected State may intervene to remove a wreck at the owner's expense should the owner fail to remove the wreck within a reasonable deadline set by the Affected State or in circumstances where the hazard becomes particularly severe. The Affected State must notify the owner in writing that it intends to intervene.

6 THE SHIPOWNER LIABILITY

The Nairobi WRC 2007 holds the strict liability of the registered shipowner for the costs of locating, marking and removing the wreck.

Within the meaning of the Convention, the registered owner means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship at the time of the maritime casualty. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the operator of the ship, “registered owner” shall mean such company.

Like in other conventions covering liability and compensation (such as CLS, HNS, BUNKER), the shipowner is entitled to exclusion of the strict liability if he can provide that wreck:

- resulted from an act of war or similar hostilities; or
- resulted from a natural phenomenon of an exceptional, inevitable and irresistible character; or

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- was wholly caused by acts or omissions by third parties done with intent to cause damage; or
- was wholly caused by the negligence or other wrongful act of any Government or authority responsible for the maintenance of navigational aids.

Although the provisions of the Convention permit a shipowner to limit liability under applicable national or international regimes, such as the LLMC, it should be reminded that many states have exercised the reservation contained in the LLMC to exclude wreck removal claims, with the result that the costs of removing such wrecks by public authorities will not be subject to any limits of liability on the part of the owner of the wreck.

It has to be emphasized that these provisions are without prejudice to the rights and obligations of a State Party that has made a notification under Article 3, paragraph 2 in relation to wrecks located in its territory, including the territorial sea, other than locating, marking and removing in accordance with this Convention.

Moreover, these provisions are without prejudice to the right of shipowners incurring any costs under the Convention to pursue a recourse action against a third party, e.g. costs arising from a collision with another vessel.\(^6\)

The Nairobi WRC 2007 provides exceptions to liability of the shipowner. He shall not be liable under the Conventions' provisions, for the costs mentioned in article 10, paragraph 1 if, and to the extent that, liability for such costs would be in conflict with:

(a) The International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended;
(b) the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as amended;
(c) the Convention on Third Party Liability in the Field of Nuclear Energy, 1960, as amended, or the Vienna Convention on Civil Liability for Nuclear Damage, 1963, as amended; or national law governing or prohibiting limitation of liability for nuclear damage; or
(d) the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, as amended; provided that the relevant convention is applicable and in force.

It is evident that intention was to made liability of the shipowners under the Convention subsidiary to those liability established under the other conventions covering liability and compensation, of course, if they are applicable and in force.

Such a solution shall not pose any problem in case of liability under the CLC, HNS or NUCLEAR liability regime, since these regimes have their own “stand-alone” funds.

However, in the case of BUNKER liability regime, the liability is restricted to the ship’s LLMC limitation fund which applies as well to the limitation regime under the Nairobi WRC 2007. In the case of causality involving both claims (i.e. for bunker oil pollution and wreck removal) when shipowner limits its liability in accordance with the LLMC Convention, these claims will have to compete each other for the limited funds available.\(^7\)

To the extent that measures under the Convention are considered to be salvage under applicable national law or an international convention, such law or convention shall apply to questions of the remuneration or compensation payable to salvors to the exclusion of the rules of this Convention.

\(^6\) loc.cit.
7 COMPULSORY INSURANCE OR OTHER FINANCIAL SECURITY

The Nairobi WRC 2007 has compulsory insurance provisions that correspond to the compulsory insurance provisions of other international maritime conventions on liability and compensation (i.e., CLC, BUNKER and HNS Convention). Compulsory insurance is imposed to shipowners of 300 tonnes gross or more up to the limits provided by the LLMC Convention for the shipowners liability. Compulsory insurance or other financial security has to be maintained for the purpose of covering costs of locating, marking and removal of wreck within the convention area.

Responsibility for implementation of such obligation lies with the States Parties, whose appropriate authority or ship’s registry after determining that the requirements have been complied with, are entitled and obliged to issue a certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention.

A State Party may authorize other institution or an organization to issue such certificate but it shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

The Convention empowers the States Parties to effectively impose these provisions. There are two important obligations of the States Parties:

- not to permit any ship entitled to fly its flag to which this Article applies (i.e. ships of 300 tonnes gross or more) to operate at any time unless a certificate has been issued in accordance with the convention’s provisions;
- to ensure, under its national law, that insurance or other security to the extent required is in force in respect of any ship of 300 gross tonnage and above, wherever registered, entering or leaving a port in its territory, or arriving at or leaving from an offshore facility in its territorial sea.

The purpose of these provisions is to ensure that any ship, whether registered in a State Party or not, upon entering its jurisdiction has on board a certificate of insurance issued by a State Party. It would thus ensure that all ships of 300 gross tonnes or more operating within the State Party's EEZ are covered by insurance in the event of a shipwreck.

Following the legal regime established in other liability conventions, the Convention provides a right of direct action against insurers or persons providing financial security for the shipowner's liability for any claim arising under the Convention, i.e. reporting, locating, marking and removal of wrecks.

8 THE PROVISIONS ON SALVAGE AND WRECK REMOVAL IN THE CROATIAN MARITIME CODE, 2004

As stated in the introduction, the International Convention on the Removal of Wrecks provides a legal framework for the States Parties for the removal of existing or future wrecks located outside their sovereign territory, meaning primarily the exclusive economic zone where a Coastal State has specific sovereign rights or, if a State Party has not establish such a zone, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

In accordance with the United Nations Convention on the Law of the Sea, on 3 October 2003, the Republic of Croatia has established the Protected Ecological and Fishery Zone ensuring certain sovereign rights.

In view of the geographical features which make the Adriatic Sea a semi-enclosed sea and the fact that it is a relatively small area, the consequences of the marine environment
pollution would have a significantly higher impact than in other marine areas. Therefore, the adoption of international rules on the removal of wrecks is of great importance.

Removal of wreck is one of the many activities that take place at sea. Various types of legal relations arising in connection with the wrecks and the legal nature of the matter itself have prompted the development of specific rules.

In Croatian national law, the concept and legal effects of the removal of wrecks are equated with the concept of salvage. Consequently, the provisions of the Maritime Code regulating the concept of salvage will also apply to legal relations arising from the removal of wrecks.

The provisions on the removal of wrecks form an integral part of the Part III of the Maritime Code which contains provisions on maritime safety (provisions on the waterways, navigation and pilotage).

Further, the provisions on compulsory insurance covering the costs of locating, marking and removal the wrecks are contained in the part of the Maritime Code which deals with the liability of the ship owner. Relevant provisions on wreck removal are also contained in other acts and regulations. As for legal relations that are not regulated by the Maritime Code, the appropriate provisions of the Civil Obligations Act shall apply.

It should be noted that the Maritime Code, which was modeled after the Convention, accepts very broad definition of wreck. Wreck means not only a sunken or stranded ship or any part of a sunken or stranded ship, including any object that is or has been on board such a ship or any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea, but also a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.

A very important novelty regarding the removal of wrecks was established by amendments to the Maritime Code of 2008. This novelty brings new requirements relating to compulsory insurance.

According to Article 62 paragraph 5 of the Maritime Code any ship of 300 gross tonnage and above intended to sail into a Croatian port or arrive at an offshore facility in its territorial sea and continental shelf area must have insurance or other financial security, such as a guarantee of a bank or similar institution.

According to the Maritime Code, a ship that does not have a valid certificate of insurance can not be referred to sail into a Croatian port, or to arrive at an offshore facility in the territorial sea and continental shelf. The purpose of this provision is to provide the financial resources required for wreck removal. The amount of compulsory insurance or other financial security is prescribed by Article 823 b of the Maritime Code. The calculation of the amount of compulsory insurance is carried out on the basis of the ship’s tonnage.

These provisions represent a major novelty in our maritime law because the Maritime Code of 2004 and laws that preceded it did not prescribe to what extent is the owner of the wreck liable.

The provisions on compulsory insurance or other financial security for ships of 300 gross tonnage and above entered into force on 1 June 2009.

Authors believe that the application of this regulation will not create additional difficulties in practice since the ships are already covered by such insurance, and the requirement to obtain such insurance has already been imposed by national regulations of most countries.

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Authors consider it very useful that some of the modern solutions contained in the Convention have been incorporated into Croatian law. It is our opinion that the Republic of Croatia should become a party to this International Convention and extend the application of its provisions to the wrecks located within its territory, including the territorial sea.

In this way, the provisions on the liability of the owner, exceptions to liability and compulsory insurance or other financial security would be applied. The State would also have the right to direct action against the insurer of the registered owner.

The argument for the ratification of the Convention is based on the fact that the most dangerous wrecks lie precisely in the territorial waters, which is also the place where the biggest number of wreck removals is carried out.

9 CONCLUSIONS

The Nairobi WRC 2007 provides international rules on the rights and obligations of States and shipowners in dealing with wrecks and drifting or sunken cargo which may pose a hazard to navigation and/or pose a threat to the marine environment. The Convention clarifies rights and obligations regarding the identification, reporting, locating and removal of hazardous wrecks.

The broad definitions of wreck, hazard and related interests together with the wide ranging criteria which should be taken into account when determining whether a wreck poses a hazard and must therefore be removed, will significantly enhance coastal States’ powers to intervene following the maritime casualties.

The Nairobi WRC 2007 requires shipowners to be insured up to the limits set out in the Convention on Limitation of Liability for Maritime Claims to cover the cost of the removal of a wreck. However, the WRC does not limit the liability of the shipowner except where there is an applicable national or international regime.

In authors’ opinion the impact on shipowners of the insurance provisions of the Nairobi WRC 2007 should be minimal as wreck removal expenses are among the risks covered in the standard policies of the Protection and Indemnity Clubs that insure most merchant ships, while shipowners would remain responsible for any costs exceeding those insurable limits and required insurance would likely be sufficient for most situations.

The contracting States have been given the option to extend the convention to wrecks within their territorial waters. This is likely to be an attractive option and cause more States to adopt the convention, because of the provisions for compulsory insurance and the right of direct action against the insurer. In short, applying the Nairobi WRC in territorial waters offers the Coastal State additional financial comfort.

Therefore, authors are proposing Republic of Croatia to accede to the Nairobi WRC 2007 and extend the application of the provisions of this Convention to the wrecks located within its territory, including the territorial sea. In this way, the provisions on liability of the owner, exceptions on liability and compulsory insurance or other financial security would apply and the Republic of Croatia would also have the right to direct action against the insurer of the registered owner.

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