THE XXXIInd CONFERENCE OF THE COMITE MARITIME INTERNATIONAL

/Montreal, May 24-29, 1981/

Hazardous and Noxious Substances

1. For the purposes of discussing this subject with a view to providing some result which would be of use to the Legal Committee of IMCO the XXXIInd Conference of the C.M.I. had to make certain fundamental assumptions. The Conference did not discuss the desirability or usefulness of a Convention on Hazardous and Noxious Substances but assumed that there will be a Convention as a result of the work of IMCO. The Comments and recommendations made by the Conference in this paper should not therefore be taken as unanimous agreement that a Convention is either desirable or practicable.

2. The Conference has also conducted its work on the assumption that the Convention will broadly follow the text found in IMCO document LEG XLIV/2, 10 September 1980 /Alternative 2/. The Conference did not consider that it should devote time to matters of drafting except insofar as the definition of "Shipper" involved an important matter of principle. Instead, the Conference concentrated on discussing what it saw as the crucial issues on which there is still no agreement at IMCO and on which the comments of the Conference could make a useful contribution.

The Conference did not consider that it should discuss the choice of substances to be subject to the Convention or whether it should be limited to bulk cargoes or deal with packaged cargoes as well, as technical experts at IMCO had already devoted much time and thought to producing the

XXXII KONFERENCIJA MEDJUNARODNOG POMORSKOG ODBORA

/Montreal, 24-29. svibanj 1981/

Opasni i štetni materijali

1. U svrhu raspravljanja o ovom predmetu, a u cilju postizanja nekog ishoda koji bi bio od koristi za Pravni odbor IMCO-a, XXXII konferencija CMI-a je morala poći od nekih osnovnih pretpostavki. Konferencija nije diskutirala o poželjnosti ili korisnosti Konvencije o opasnim i štetnim materijalima, već je pretpostavila da će takva Konvencija biti rezultat rada IMCO-a. Primjedbe i preporuke Konferencije u ovom tekstu ne bi stoga trebale biti shvaćene kao jednodušno slaganje o poželjnosti ili korisnosti Konvencije.

2. Konferencija se u svojem radu rukovodila pretpostavkom da će Konvencija u glavnim crtama slijediti tekst kojeg nalazimo u IMCO-vom dokumentu LEG XLIV/2, 10 September 1980 /Alternativa 2/. Konferencija nije smatrala da treba posvetiti vremena pitanjima kao što je izrada teksta, osim u slučaju definicije pojma "krcatelj", koje je važno načelno pitanje. Umjesto toga Konferencija se usredotočila ne one stvari koje je držala ključnim, a o kojima još nije postignut sporazum pri IMCO-u i u pogledu kojih bi primjedbe Konferencije mogle predstavljati koristan doprinos.

Konferencija nije smatrala da bi trebala raspravljati o izboru materijala koji bi bili predmet Konvencije i da li bi ona trebala biti ograničena na rasute terete ili bi se povrh toga uključili i pakirani tereti, budući da su tehnički eksperti pri IMCO-u već posvetili mnogo vremena i

present limited list on the premise that only bulk and not packaged cargoes were to be included. As to the choice of risks to be covered, it was assumed that the Convention will apply both to pollution and to fire and explosion risks from those substances.

3. The first matter of principle considered by the Conference was the identity of the person or persons to be liable under the Convention. Although it appeared to have been generally accepted that the shipowner should bear at least part of the liability under the Convention, it was thought that it was important to review this premise and to examine its rationale. It was felt that although there might be some justification for the shipowner bearing liability, such as the fact that he has custody of the cargo and that he holds himself out as a carrier for reward of the cargoes in question, this was not the only reason for the shipowner being liable particularly in the case of a strict liability regime. The purpose of the Convention is to provide compensation for victims of accidents involving hazardous or noxious cargoes and the shipowner is in practice the party who can most easily and effectively be found to provide compensation, even if only for the primary tranche of liability. There are existing and efficient mechanisms for obtaining and enforcing payment of compensation by shipowners, which can be used to cover HNS liabilities.

The Conference is therefore of the opinion that the shipowner should bear the primary liability under the Convention.

4. The Conference did not discuss whether the liability should be based on fault or should be strict; the assumption was made that the Convention would apply strict liability in the

razmišljanja u izradi sadašnje ograničene liste pod pretpostavkom da treba uključiti samo rasute terete, a ne i pakirane. Što se pak tiče izbora rizika koji trebaju biti pokriveni, držalo se da će se Konvencija primijeniti na rizike kako zagadjenja, tako i za slučaj vatre i eksplozije takvih materijala.

3. Prvo načelno pitanje kojim se bavila Konferencija bio je identitet osobe ili osoba koje su odgovorne prema Konvenciji. Iako je izgledalo da je općenito prihvaćeno kako bi brodovlasnik trebao snositi u najmanju ruku dio odgovornosti prema Konvenciji, mislilo se da je ipak važno razmotriti ovu pretpostavku i ispitati njezinu opravdanost. Smatralo se da možda postoji neko opravdanje za odgovornost brodovlasnika, kao npr. činjenica da on čuva teret i da nastupa kao vozar takvih tereta uz naplatu, no to nije bio jedini razlog da brodovlasnik bude odgovoran, osobito u slučaju režima objektivne odgovornosti. Svrha ove Konvencije je da predvidi naknadu za žrtve nesreća u vezi s opasnim i štetnim teretima, a u praksi je brodovlasnik ona strana koju je najlakše i najdjelotvornije naći za pružanje naknade, makar samo i za primarni dio odgovornosti. Postoje djelotvorni mehanizmi za dobivanje i prinudnu naplatu naknade od strane brodovlasnika, koja se može koristiti za pokriće OsM odgovornosti.

Konferencija je zbog toga mišljenja da bi prvenstvenu odgovornost prema Konvenciji trebao snositi brodovlasnik.

4. Konferencija nije raspravljala o tome da li se odgovornost treba temeljiti na krivnji ili treba biti objektivna; pretpostavilo se da bi Konvencija primjenjivala objektivnu

form contained in Alternative II or in some other modified form.

5. The Conference did however discuss the question of limitation of the shipowner's liability. It was agreed that limitation should be allowed. There were strong indications that cover would be available through shipowners' P & I Clubs provided that limitation at a reasonable level was allowed. Liability without the benefit of limitation would prevent insurance cover from being available. It will assist in ensuring the continued availability of reasonable coverage if all liabilities - liability under the HNS Convention as well as other contractual, tortious and strict liabilities - were to be covered within the same fund. A proliferation of separate funds would be detrimental to the availability of adequate insurance cover in the long term. Furthermore, it had been agreed at the diplomatic conference leading to the Convention of Limitation of Liability for Maritime Claims in 1976 that liabilities arising from the carriage of hazardous cargoes should come within that Convention. Exclusion of HNS Convention liabilities from the 1976 Limitation Convention would be in direct conflict with the terms of the latter Convention. For these reasons and also because any result providing for higher limitation of liability than that found in the 1976 Convention would hinder the entry into force of the 1976 Convention,

The Conference is of the opinion that the shipowner should be entitled to limit his liability under the HNS Convention in accordance with the 1976 limitation Convention and that there should not be a separate fund for HNS liabilities.

6. As a result of this conclusion, and on the assumption that further compensation needs to be found for victims of

odgovornost u obliku sadržanom u Alternativi II, ili u nekom drugom modificiranom obliku.

5. Na Konferenciji se ipak raspravljalo pitanje ograničenja odgovornosti brodovlasnika. Postignut je sporazum da ograničenje treba dopustiti. Postoje značajni nagovještaji da bi se moglo dobiti pokriće P & I klubova brodovlasnika pod uvjetom da se dozvoli takvo ograničenje do razumne granice. Odgovornost bez prednosti koje pruža ograničenje dovela bi do toga da se ne bi moglo dobiti pokriće osiguranja. To bi pripomoglo da se osigura kontinuirana dostupnost razumnih pokrića, čak i onda kada bi se sve ostale odgovornosti -- odgovornost prema OŠM Konvenciji, kao i druge ugovorne, izvanugovorne i objektivne odgovornosti -- pokrivale iz istog fonda. Pojava mnoštva odvojenih fondova loše bi djelovala na dostupnost odgovarajućeg pokrića osiguranja ako se gleda dugoročno. Nadalje, na Diplomatskoj konferenciji koja je dovela do zaključenja Konvencije o ograničenju odgovornosti za pomorske tražbine 1976, došlo se do sporazuma da se odgovornost koja proizlazi iz prijevoza opasnih tereta treba uključiti u tu Konvenciju. Isključenje odgovornosti prema OŠM Konvenciji iz Konvencije o ograničenju iz 1976. bilo bi u neposrednoj suprotnosti s odredbama ove potonje Konvencije. Zbog ovih razloga, a i zbog toga što bi svaki ishod koji bi tražio veće ograničenje odgovornosti nego ono što ga nalazimo u Konvenciji iz 1976. priječio stupanje na snagu Konvencije iz 1976,

Konferencija je mišljenja da bi brodovlasnik trebao biti ovlašten na ograničenje svoje odgovornosti prema OŠM Konvenciji u skladu s Konvencijom o ograničenju iz 1976. i da ne bi smio postojati poseban fond za OŠM odgovornost.

6. Kao rezultat ovog zaključka i pod pretpostavkom da treba naći daljnju naknadu za žrtve nesreća u vezi OŠM,

accidents involving HNS, the Conference considered from where such extra compensation should come. Whilst it was suggested that providing compensation on the scale which might be necessary in the event of a really catastrophic event involving HNS occurring might be ultimately a governmental task, it was assumed that there was to be a tranche of private liability above that borne by the shipowner, which should be placed on those interested in the cargo, presently designated in the IMCO draft as the "shipper".

The definition of the shipper was considered to be one of the most complicated and difficult aspects of the Convention and it was acknowledged that despite its apparent circularity the definition contained in Article 1 /4/ of the IMCO text is as effective a definition as is possible. Although it is essential to be able to identify accurately the person upon whom enormous new liabilities are placed, the choice of shipper rather than consignee, person entitled to the bill of lading, or other person interested in the cargo is less important than the necessity of imposing an insurance obligation upon a party involved in the maritime carriage in addition to the shipowner. Nonetheless it was suggested that there might be problems of identifying the insured and of proving an insurable interest, although these could be overcome provided that the insurance would cover any person who would be deemed to be the shipper of the consignment in question. Therefore it is clear that the availability of insurance for the shipper's liability is at least as important as the fact of liability of the shipper. It was indicated that although there might be a problem of spread of risk if the scope of the Convention is limited, insurance capacity is

Konferencija je razmatrala izvore takvih dodatnih naknada. Dok se predlagalo da bi pružanje naknade u opsegu koji bi mogao postati potreban u slučaju prave katastrofe izazvane s OSM morao biti zadatak države, isto se tako pretpostavilo da bi trebao postojati jedan dio privatne odgovornosti, pored one koju snosi brodovlasnik, a trebao bi pasti na one koji su zainteresirani za teret - u ovom času označeni su u nacrtu IMCO-a kao "krcatelji".

Definicija krcatelja smatrala se jednim od najsloženijih i najtežih vidova Konvencije i svi su prihvatili da je unatoč njezinoj očitoj općenitosti definicija sadržana u članu 1 /4/ IMCO teksta najbolja moguća. Iako je od bitne važnosti da se bude u mogućnosti odrediti osobu na koju se stavlja teret, ogromne odgovornosti, pitanje izbora krcatelja umjesto primatelja - odnosno osobe na koju je ispostavljena teretnica, ili drugu osobu zainteresiranu za teret - manje je važno od potrebe da se stvori obveza osiguranja za jednu od stranaka uključenih u pomorski prijevoz, uz brodovlasnika. Usprkos tome bilo je rečeno da bi moglo biti teškoća oko odredjivanja osiguranika i dokazivanja osigurljivog interesa, iako bi se te teškoće moglo prebroditi pod uvjetom da bi osiguranje pokrilo bilo koju osobu koju bi se smatralo krcateljem pošiljke u pitanju. Zbog toga je jasno da je mogućnost osiguranja krcateljeve odgovornosti barem isto tako važna kao i činjenica odgovornosti samoga krcatelja. Ukazano je da iako bi se mogla pojaviti teškoća zbog proširenja rizika ako bi opseg Konvencije bio ograničen, postoji mogućnost osiguranja krcatelja pod uvjetom da je osiguranje ograničeno na razumnu sumu i pod uvjetom da prvi dio odgovornosti snosi brodovlasnik. Ako bi osiguranje krcateljeve odgovornosti padalo,

available for the shipper provided that it is limited to a reasonable sum and provided that the first tranche of liability is borne by the shipowner. Since shipper liability insurance would be placed at least initially in a different sector of the market from shipowners' liability insurance, greater overall capacity might be available than if the complete liability were to be placed on the shipowner. It was suggested that although many substantial shippers of HNS cargoes would have access to the liability insurance market and would be able to overcome any problem of certification, it might also be possible for a shipowner to provide a facility for shippers by taking out an annual insurance cover for shippers' liability with the ship's master acting as agent for issuing a certificate to the shipper.

The Conference is therefore of the opinion that shipper liability insurance is available and that certification of such insurance can be administered in practice.

7. The Conference considered briefly the control of shippers' insurance and in particular Article 12 of the Convention. Whilst it was not possible to discuss this question at lenght, it was thought that objections could be raised to Article 12 and the draconian effect this Article could have on the shipowner's liability.

It was considered that control of both shipowner's and shipper's insurance should be a governmental task.

8. The Conference questioned whether the Convention should apply only to maritime carriage of HNS cargoes since accidents are as likely to occur on land as during maritime carriage but it was accepted that different considerations apply to inland carriage. As IMCO is purely a maritime organisation, it can not concern itself with other non-maritime sectors of the carriage of these cargoes.

makar samo u početku, na drugo područje tržišta od osiguranja brodovlasnikove odgovornosti, bila bi dostupna veća ukupna sredstva negoli kada bi čitava odgovornost pala na teret brodovlasnika. Predloženo je da iako bi mnogi stvarni krcatelji OSM tereta imali pristupa na tržište osiguranja odgovornosti i bili u stanju riješiti bilo koju teškoću posvjedočenja, isto bi tako moglo biti moguće da brodovlasnik pruži olakšicu krcateljima na taj način, što bi uzeo godišnje pokriće osiguranja za odgovornost krcatelja, pri čemu bi zapovjednik broda kao agent izdao svjedodžbu krcatelju.

Konferencija je zbog svega ovoga mišljenja da je osiguranje krcateljeve odgovornosti moguće i da se posvjedočenje o takvom osiguranju može praktično postići.

7. Konferencija se na kratko osvrnula na nadzor osiguranja krcatelja, a osobito na član 12. Konvencije. Nije bilo moguće naširoko raspravljati o ovom pitanju, ali se držalo da se može prigovoriti članu 12. i drakonskom učinku koji bi ovaj član mogao imati na brodovlasnikovu odgovornost.

Smatralo se da bi nadzor kako brodovlasnikovog tako i krcateljevog osiguranja trebao biti zadatak države.

8. Konferencija je ispitivala da li bi se Konvencija trebala odnositi samo na pomorski prijevoz OSM tereta, jer postoji isto takva vjerojatnost da dodje do nesreća na kopnu kao i za vrijeme prijevoza morem, ali je prihvaćeno da se pri kopnenom prijevozu moraju uzeti u obzir drugačije okolnosti. Pošto je IMCO isključivo pomorska organizacija, ne može se baviti drugim, nepomorskim područjima prijevoza ovakvih tereta.

Prevela: K.V.