



BIMCO

Explanatory Notes to WRECKHIRE 2010 **International Wreck Removal and Marine Services Agreement (Daily Hire)**

The primary focus of the revision has been to update the most commonly used of the three wreck removal/marine services agreements – WRECKHIRE 99. To ensure consistency across the suite of wreck removal/marine services agreements, parallel amendments have been made, where appropriate, to WRECKFIXED 99 (Lump Sum – “No Cure, No Pay”) and WRECKSTAGE 99 (Stage Payments).

The background to the revision of WRECKHIRE is that in early 2009 the International Group of P&I Clubs Salvage Sub-committee approached BIMCO with a request to help initiate a revision of this well-used agreement. The Clubs felt that although the agreement had served the industry well over the past 10 years, certain amendments were necessary to introduce better cost control, to restore to the contract a more equal balance between the parties, and to incorporate current commercial practice

One of the key issues that triggered the decision to revise the agreement was that the nature of wreck removal/marine services in respect of legislative and technical requirements has changed significantly in the 10 years since the form was last revised. For instance, enhanced environmental concerns often now require the removal of bunkers from a stricken vessel in advance of or concurrent with a wreck removal/marine services operation. Because of the technical difficulties associated with bunker removal it has become increasingly difficult for insurers to place a cap on costs when faced with an indeterminate period of hire for marine services.

The revision of the BIMCO/ISU Wreck Removal/Marine Services Agreements began in 2009 and was concluded a year later. BIMCO is grateful to the following Sub-committee members for their valuable contributions to the revision process:

Mr Mike Lacey, ISU, London (ISU)

Mr Mark Hoddinott, Titan Salvage, UK (Salvor)

Mr Michael Kelleher, West of England, UK (Club)

Mr Jonathan Hare, Skuld, Norway (Club)

Mr Reinder Peek, Smit Salvage B.V., Netherlands, (Salvor)

Mr Donald Chard, The Chamber of Shipping of the UK, London (Owner)

Mr Hugh Hurst, International Group of P&I Clubs, UK (Club)

Mr Dominic Johnson, Holman Fenwick Willan, UK (Lawyer)

In revising WRECKHIRE 99, the Sub-committee has introduced some novel provisions:

- A bonus incentive scheme designed for operations over an extended duration whereby the contractors will be paid an agreed bonus if the task is completed within the specified period.
- A time cap placed on completion of the salvage operation for operations over an extended period after which the daily rate of hire will be reduced.
- An expert evaluation process to expedite disputes over the application of standby rates.

The following explanatory notes are intended to provide users with guidance as to the nature and extent of changes made to the revised WRECKHIRE form:

PART I Box Layout

Part I of WRECKHIRE 2010 is largely unchanged from the '99 edition of the form. A new Box 9 has been added to deal with extra costs relating to the disposal of the whole or part of the vessel in terms of which party is to be responsible for the costs (or an agreement to share the costs) plus a provision of a handling charge (see Clause 14 below).

Box 14 dealing with extra costs for the Company has been split between handling charges in general and handling charges for fuels and lubricants (see Clause 13 below).

Part II

Clause 1 (Definitions)

A number of new definitions have been added to the agreement to improve the overall clarity of the form. The new definitions include "Company", "Contractor", "Services" and "Worksite" all of which were terms already used in WRECKHIRE. There is now a consistent use of these defined terms through the Agreement.

Clause 2 (The Services)

This Clause deals with the Contractors' obligations in providing the agreed services, as well as the provision of personnel, craft and equipment, the method of work, and any change in the method of work, or provision of personnel, craft and equipment. Consistent with the approach taken in the 1989 Salvage Convention, the Contractor is obliged to exercise "due care" when providing the services. Provided that it is not inconsistent with the nature of the services to be rendered, the Contractor must also exercise "due care" to prevent and minimise damage to the environment.

The first paragraph of Clause 2 has been amended to make the delivery and/or disposal of the vessel a "due diligence" type obligation on the part of the Contractor. The previous reference to the Contractor's "endeavour to deliver" has been removed as the obligation to exercise "due care" applies to all of the agreed services under the Agreement, which may also include delivery and/or disposal.

In the last sentence of the first paragraph the Contractor now has to exercise due care to "prevent" as well as minimise damage to the marine environment. This has been done to be consistent with the phrasing used in the newly introduced Clause 24 (Pollution).

Two new provisions have been added at the end of Clause 2. The first requires the Contractor to give the Company Representative daily reports (the reports to be based on a standard format set out in Annex III (Contractor's Daily Reports)). The second new provision requires assistance to be given to the party named in Box 7 by the other party to assist in obtaining confirmation from the authorities of compliance with their orders.

Clause 3 (Company Representative)

This Clause provides for a representative of the Company to be available during the performance of the services with the authority to act on behalf of the Company. This provision now requires the Contractors to provide the Company Representative with full and unfettered access to the site and to the Contractors' craft and equipment, unless such access is reasonably refused by the Contractor.

The Clause also deals with the attendance on site, at the Company's risk and expense, of ship's personnel who are fully conversant with the layout of the Vessel and its cargo system in order to provide advice to the Contractors.

Clause 4 (Change of Method of Work and/or Personnel, Craft and Equipment)

Problems may arise during the operation that require a substantial change of method, equipment, etc. This Clause deals with the circumstances under which the Contractor may seek a variation to the Rates of Hire.

Clause 4 has been substantially restructured and split into three distinct sections. The first section (sub-clause (a)) deals with substantial changes before or during the services resulting in additional costs. The second section (sub-clause (b)) deals the task becoming easier due to a change in circumstances and where the Company can ask for a reduction in payments to the Company. In both cases the parties must agree to a work variation order and to any increase or decrease in costs. In sub-clause (c) provision is made for the parties to resolve any disagreement in respect of sub-clauses (a) and (b) by referring the matter to a new expert evaluation procedure or to mediation or arbitration.

The previous method of referring the matter solely to arbitration was felt to be too slow and inefficient for this type of dispute where it is essential that work is not interrupted or delayed awaiting the outcome of an arbitrator's decision. In any event the Contractor is obliged to continue operations pending the outcome of any evaluation, mediation or arbitration.

Clause 5 (Miscellaneous)

This Clause, which is largely unchanged from the WRECKHIRE 99 edition, deals with matters such as the marking of the Vessel; use of the Vessel's machinery and equipment; removal or jettison of parts of the Vessel and/or its cargo, and provision of plans and manifests.

In sub-clause (d) the strict obligation on the Company to provide the Contractors with plans, drawings and other data/information has been amended to "best endeavours" as the Company may simply not be in possession of some of the requested information. The Contractors are at liberty to request the Company to provide plans, drawings and information but such requests must be "reasonable".

Clause 6 (Permits)

This Clause deals with the need to obtain licences, approvals, authorisations and permits. The Permits Clause previously allowed for either party to be designated as responsible for obtaining permits. This has now been amended to make the Contractor solely responsible for this task although the Company is required to assist where necessary (for example in situations where a particular permit can only be issued to the shipowner or where the submission of certificates held by the shipowner is required). This amendment reflects the reality of salvage operations where the on-site contractor is best placed to obtain the necessary permits.

Clause 7 (Delays)

This Clause has undergone significant amendment and now offers a much more sophisticated method of dealing with delays encountered during the salvage operation. The previous Clause did not take into account a partial reduction in salvage work, meaning that anything other than full salvage work resulted in the standby rate applying. The new Delays Clause deals with partial standby as well as a full stand-down of services and which rates should apply under each set of circumstances. The provision as amended clearly sets out the position of the parties and which rate should apply in the event of delays whether caused by weather (sub-clause (a)) or breakdown or failure of the contractors' equipment or personnel (sub-clause (b)) or third party equipment or personnel hired in by the contractor (sub-clause (c)). As such, the provision more clearly sets out the position of the parties in the event of delays whether caused by weather or breakdown or failure of

the Contractors' equipment or personnel or third party equipment or personnel hired in by the Contractor.

Sub-clause (d) places the onus on the company representative to act swiftly to advise the contractor of any delays to which the representative feels the standby rate should apply. The representative must also at that time inform the contractor and the company in writing (which would normally be done as part of the daily report and is consistent with obligations under the Lloyd's Form SCOPIC Clause).

Sub-clause (e) excludes from the standby rate individual delays of 6 running hours or less duration. This "free time" represents half a working day and is felt by the salvors to be a reasonable compromise. However, if the delay exceeds 6 hours then the entire delay period is to count at the standby rate.

Sub-clause (f) provides a means of resolving any disagreement as to what rates applies in the different circumstances listed in sub-clauses (a), (b) and (c) or for how long such a rate should apply. If the parties cannot agree on the rate that is to apply then the matter is referred to a new expert evaluation procedure (Clause 20).

It should be noted that in terms of Clause 11 (Bonus) and Clause 12 (Reduced Daily Rate of Hire), it is not intended that a delay under Clause 7 should affect these provisions.

Clause 8 (Suspension or Termination)

This Clause remains unchanged from WRECKHIRE 99. It sets out the circumstances under which the Agreement may be terminated by the Company (sub-clause 8(a)); the manner in which the suspension or termination of the Agreement will be carried out by the Contractor (sub-clause 8(b)); and the situation if permission to suspend or terminate the services is not given by the competent authorities (sub-clause 8(c)).

Clause 9 (Delivery and/or disposal)

The Clause has been amended to take account of situations where the Contractors also agree to dispose of the vessel or part of the vessel. "Part" of the vessel includes cargo and bunkers and it is recognised that disposal of such items may take place at different locations and at different times from the disposal of other parts of the vessel.

Clause 10 (Payment)

The Payment Clause is the result of the merging of the old Clause 10 (Price and Conditions of Payment) and Clause 11 (Time of Payment and Interest).

Clause 10 is fundamental to the proper working of the Agreement and deals with the rates of hire for personnel, craft and equipment (sub-clause 10(a)); provides that such hire is fully and irrevocably earned on a daily basis and is non-returnable (sub-clause 10(b)); provides for overpayments to be paid back to the Company (sub-clause 10(c)); provides for payment to be made to the Contractor without deduction (sub-clause 10(d)); deals with the nominated bank account for payment (sub-clause 10(e)); gives a right of termination in the event that payment is not made in accordance with the terms of the Agreement, or if security is not provided in accordance with the provisions of Clause 13 (sub-clause 10(f)); and enables the Contractors to charge the Company interest at the agreed rate in the event any sums due and payable are not received by the Contractors within the agreed period (sub-clause 10 (g)).

The only notable change to the wording is in sub-clause (a) which now includes a reference to the application of a reduced rate of hire when an agreed date is passed or a period of time has lapsed as per new Clause 11 (Reduced Rate of Hire).

Clause 11 (Bonus)

This new Clause provides for the payment of a bonus if the Contractors are able to complete the task within the agreed schedule. Along with Clause 12 (Reduced Daily Rate of Hire) this provision is intended to be applied to operations that extend over a significant period of time, (e.g., in excess of 6 months). The bonus is payable on a sliding scale with 100% payable if work is completed before or on the agreed date, but pro rata from the agreed date until the final date for completion. Thereafter no bonus is payable by the company and the reduced daily rate of hire in accordance with Clause 12 (Reduced Rate of Hire) will apply.

Clause 12 (Reduced Daily Rate of Hire)

This is the complementary provision to Clause 11 (Bonus) providing a “carrot and stick” incentive scheme to the contractors to complete the salvage operation within agreed time limits. Its inclusion is pivotal to the P&I Club’s concern that salvage operations have been taking too long to complete and that salvors need to be put under some pressure to expedite operations. Along with Clause 11 (Bonus) this provision is intended to be applied to operations that extend over a significant period of time, (e.g., in excess of 6 months).

Clause 13 (Extra Costs)

This Clause provides for any various extra costs incurred to be for the account of the Company. A new sub-clause (e) obliges the Company to meet the cost of obtaining and maintaining licenses and permits needed to undertake the salvage operation.

New sub-clause (i) adds the cost of bunkers and lubricants used in the operation unless such items have been included in the agreed daily rate.

The final paragraph of Clause 13 has been amended to require the Company to reimburse the Contractor for any costs paid on the Company’s behalf plus any agreed handling charge.

Clause 14 (Extra costs of disposal of vessel)

This is a new Clause introduced to cover any additional costs relating to the disposal of the vessel or parts of the vessel (for example, the disposal of bunkers from a vessel may incur an importation tax charged by the state where the disposal takes place). This provision allows for the parties to agree beforehand which party should be responsible for such costs. Similar to Clause 13 (Extra Costs), the Contractor is to be reimbursed if it pays any costs which should be for the Company’s account and may also charge a handling fee.

Clause 15 (Security)

The Security Clause requires the Company to provide an irrevocable and unconditional security in any form as agreed between the parties. The Company is required to provide satisfactory security to cover monies due to the Contractor. The Contractor may also commence operations without the provision of initial security, but can request it to be provided at a later stage when “reasonably” required. This Clause remains unchanged from WRECKHIRE 99.

Clause 16 (Liabilities)

Clause 16 provides the usual knock for knock provisions common in offshore contracts. Sub-clauses (a), (b), (c) and (d) have been slightly modified to include “sub-contractors” (which reflects the common use by salvors of third party sub-contractors). Sub-clause 16(e) is new and replaces the old

consequential losses provision which was felt to be ineffective. The new wording is taken from TOWHIRE 2008 the consequential losses provision of which has been positively received by lawyers previously critical of BIMCO consequential liability provisions.

Clause 17 (Himalaya Clause)

This Clause remains unchanged from WRECKHIRE 99.

Clause 18 (Lien)

This Clause remains unchanged from WRECKHIRE 99.

Clause 19 (Time for Suit)

This Clause remains largely unchanged from WRECKHIRE 99. The previous reference to notification by “telex, facsimile, cable or otherwise in writing” has been deleted because methods and forms of notification are now dealt with by a new Notices Clause (see Clause 22).

Clause 20 (Expert Evaluation)

WRECKHIRE 2010 introduces a new method of dealing with certain types of dispute under the Agreement – notably disputes relating to the application of standby rates (Clause 7) and additional costs following a change to the nature of the services (Clause 4). It was felt that the standard BIMCO Dispute Resolution Clause used in most BIMCO forms is simply not well suited to resolving issues that require a more or less on-the-spot decision so that work is not interrupted. Conventional arbitration lacks the infrastructure and expertise to determine such types of disputes. Therefore a two-tier approach to dispute resolution has been introduced.

In the first instance, if the parties cannot agree to additional costs for a change in the nature of the services, or are in dispute as the application of the standby rate, they may refer the disagreement to an “expert evaluator”. It is intended that the role of the “expert evaluator” will be assumed by a SCR (Special Casualty Representative) chosen from the Panel of SCRs maintained by the Salvage Arbitration Branch of Lloyd’s. Once appointed, the SCR acting as “expert evaluator” will take into account short written submissions provided by each party and then within 72 hours give written advice to the parties as to how costs/rates should be adjusted or how time should be accounted for. The cost of such an evaluation is to be met by both parties.

It is important to note that the evaluation is not binding on either party. The intention is to take impartial advice so as to not delay or further delay the salvage operation. The parties only agree that whatever the SCR proposes is given immediate effect but without prejudicing their right to resolve the dispute by conventional arbitration methods set out in Clause 21 at a later date.

Clause 21 (Arbitration and Mediation)

The Arbitration and Mediation Clause of WRECKHIRE 2010 builds on the “Governing Law and Arbitration” Clause in WRECKHIRE 99 which makes special provision for using Lloyd’s Salvage Arbitrators who are experts in resolving salvage related disputes. Consistent with the current BIMCO standard Dispute Resolution Clause, the parties may choose an applicable law and arbitration venue from a choice of English law/London arbitration; US law/New York arbitration; or a choice of law and arbitration as chosen and agreed by the parties.

The Clause incorporates the LMAA’s recently introduced intermediate claims procedure to supplement the existing small claims procedure. The Clause also introduces new mediation provision which permits the parties to refer all or part of a dispute, for which arbitration has been commenced, to mediation.

Clause 22 (Notices Clause)

The notices provision is new but is a provision commonly found in other recently produced BIMCO standard forms. The Clause provides that all notices must be in writing and sent using one of the prescribed formats. The Clause also sets out when notices given under the Agreement take effect depending on the method of communication used.

Clause 23 (Insurance)

This is another new Clause for WRECKHIRE and provides for each party to warrant that they have in place appropriate insurance cover.

Clause 24 (Pollution)

This Clause is also new and requires the Contractor to exercise “due care” to prevent and minimise damage to the environment and have in place an oil spill response plan which meets the requirements of the Authorities and the Company. Sub-clauses (b) and (c) provide knock-for-knock provisions in relation to pollution from the vessel and the Contractor’s vessels.

Clause 25 (Rotation and Replacement of craft, equipment and personnel)

This is another new provision that basically gives the Contractor the right to swap resources/equipment in and out of the salvage operation for maintenance and/or fatigue-relief purposes.

Clause 26 (General Provisions)

This set of clauses covering the enforceability of provisions; third party beneficiaries; no-waiver; and warranty of authority, reflect additional clauses commonly added to wreck removal and other marine service agreements used in the salvage/offshore industry.

Availability

WRECKHIRE 2010 is available to users of BIMCO’s online charter party editing system, *idea*. Samples copies of the Agreement may be downloaded free of charge from the BIMCO website at www.bimco.org.

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