EXPLANATORY MEMORANDUM TO

THE MERCHANT SHIPPING ACT 1995 (AMENDMENT) ORDER 2016

2016 No. 1061

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The primary purpose of this Order is to amend the Merchant Shipping Act 1995 ("the Act"). It will give effect in the UK to increases in the limits of liability for ship owners and salvors for some maritime claims and introduce an ambulatory reference into the Act to enable future increases to the limits of liability to be applied automatically without the need for further legislative provisions. Furthermore, the Order also amends Section 164 of the Act to provide the Secretary of State with discretionary powers when issuing State Certificates under the International Convention on Civil Liabilities for Bunker Oil Pollution Damage 2001.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Order is the first to use the power in Section 306A of the Act to introduce an ambulatory reference to an international Convention.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The UK is a party to the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the Protocol of 1996 ("the LLMC Convention 1996"), which was implemented domestically through Schedule 7 to the Merchant Shipping Act 1995.

4.2 The LLMC Convention 1996 is administered by the International Maritime Organization (IMO), a specialised agency of the United Nations. On 12th April 2012 the IMO agreed to increase the limits of liability by 51%. The UK supported such an increase, which was adopted in accordance with the procedure under article 8.4 of the Convention. The new limits entered into force internationally on 8th June 2015. This Order amends Schedule 7 to the Merchant Shipping Act 1995 to implement this increase to the limits of liability into UK law.

4.3 This Order also makes use of the power in section 306A of the Act (introduced by the Deregulation Act 2015) to include an "ambulatory reference" in Schedule 7. The

ambulatory reference allows technical changes to international agreements in the maritime sector, in this case changes to the limits of liability, to take effect in UK law without the need for further legislative or regulatory provisions.

4.4 In line with section 185(2E) of the Act the changes to the limits of liability made by this Order do not have retrospective effect.

4.5 Section 164 of the Act is also amended to provide the Secretary of State with discretionary powers when issuing certificates to non-UK flagged vessels attesting that ship-owners have insurance in place to cover their obligations under the Bunkers Convention. This would remove the current obligation on the Secretary of State (exercised by the MCA) to issue certificates even in cases where he is not satisfied that either the vessel or ship-owner meets the minimum criteria.

5. Extent and Territorial Application

5.1 This instrument extends to the United Kingdom.

5.2 The territorial application of this instrument is all United Kingdom ships whether in the United Kingdom or anywhere else in the world.

6. European Convention on Human Rights

6.1 The Minister of State for Transport has made the following statement regarding Human Rights:

"In my view the amendments being made to the Merchant Shipping Act 1995 by the provisions of the Merchant Shipping Act 1995 (Amendment) Order 2016 are compatible with the Convention rights."

7. Policy background

What is being done and why

Implementation of the increases to the Convention limits

7.1 Under the LLMC Convention 1996 a ship-owner (including the charterer, manager and operator of the ship) and salvor has the right to limit the total amount they can be required to pay for damage caused by the ship, the ship-owner or the salvor. Limits are specified for two types of claims: those for loss of life or personal injury; and those for other claims, such as damage to ships, property or harbour works. The limits are based on the gross tonnage of the ship, with larger ships having higher limits.

7.2 The level and availability of insurance is related to the degree to which the ability of claimants to 'break' limitation can be constrained. The Convention provides for a virtually unbreakable system of limiting liability. Shipowners and salvors may limit their liability, except if "it is proved that the loss resulted from their personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result".

7.3 The UK was one of the 20 co-sponsors to initiate a proposal to review the existing limits for claims other than passenger claims available under the LLMC Convention 1996 for the purposes of ensuring that they reflect the increased cost of bunker oil spills.

7.4 The increases to the limits of liability reflect the changes in monetary values (GDP inflation rates) that have taken place between 1996, when the limitations to liability were first introduced, and 2012 when the increases were agreed and adopted.

7.5 This Order makes the UK compliant with its international obligation to implement the Convention in its most-up-to-date version. It seeks to ensure that public sector, businesses and individuals receive prompt and adequate compensation in the event of an incident of loss of life, personal injury or other passenger claims.

Introduction of an ambulatory reference

7.6 When the Government carried out its "Red Tape Challenge" review of secondary legislation, the maritime industry raised issues around the UK's approach to implementing international agreements and the complexity of introducing subsequent amendments into UK law. The Government considered that the use of ambulatory referencing was a means to tackle these issues. In 2015, section 106 of the Deregulation Act gave the power through a new section 306A of the Act to include "ambulatory references" in domestic legislation implementing international maritime conventions. The power can only be used where there is an existing power to make secondary legislation. The implementation in the UK of new conventions would require primary legislation.

7.7 This Order is the first to be made using the power in section 306A of the Act and will enable any future increases to the limits of liability set out in the LLMC Convention 1996 to have effect in UK law without the need for further implementing legislation.

Amending Section 164 of the Act

7.8 The International Convention on Civil Liabilities for Bunker Oil Pollution Damage 2001(Bunkers Convention) requires insurance or other financial security for all ships over 1000 gross tonnage entering the UK. It introduces strict liability for pollution or associated preventative measures for all types of ships' fuel and lubricating oil.

7.9 The Bunkers Convention was given effect in UK Law through the Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006 (S.I. 2006/1244). Article 18 (3) of those regulations amended Section 164 of the Act dealing with the issue of certificates by the Secretary of State (this function is carried out by the MCA), verifying that the ship-owner has in place insurance cover to meet their liability obligations under the Bunkers Convention.

7.10 However, the amendment contained the word "shall" with respect to any request for a certificate by a non-State party to the Secretary of State for Transport, instead of the discretionary "may", which is used in both Article 7 (2) of the Bunkers Convention and the EC Council Decision (2002/762/EC) that authorised Member States to sign, ratify or accede to the Bunkers Convention.

7.11 In the current situation this has had the effect requiring the Secretary of State to issue certificates to a non UK registered ship-owner if they demonstrate that they are able to meet their liability obligations and that the underlying insurance (or other financial security) is sufficient to cover those liabilities. This removes any discretion that the Secretary of State may wish to apply in cases where the ship-owner or the vessel itself fails to respect its other obligations under other conventions or protocols. In particular, this could lead to situations where the Secretary of State is required to issue

certificates to vessels flagged by non-ratifying States that are on the Paris MoU Port State Control Black and Grey lists[1].

7.12 Correcting the legislative language will reflect the original intention of those measures.

Consolidation

7.13 This instrument does not consolidate any domestic legislation.

8. Consultation outcome

8.1 On 22nd December 2015 the Government consulted industry on implementing the increases to the limits of liability as agreed at the IMO in 2012. The Government received six responses before the consultation closed down on 2nd February. All comments received were supportive of the implementation of the increased limits of liability into UK law, the introduction of an ambulatory reference to enable future changes to come into force without the need of further legislative or regulatory provision, and the amendment of Section 164 of the Act.

8.2 A summary of responses, as well as the response of the Government to the points raised following the consultation can be found on the DfT website https://www.gov.uk/government/organisations/department-for-transport

9. Guidance

9.1 The Maritime Coastguard Agency (MCA) will be issuing a Marine Information Notice to notify stakeholders of the entry into force of the increases to the LLMC limits.

10. Impact

10.1 Owing to limitations of the available evidence base and the nature of the maritime insurance industry, it has not been possible to assign a monetary value to the costs of this measure. Ship-owners may experience some increases in their insurance premiums to reflect increased limits of liability. However, the 51% increase to the limits broadly reflects inflation since 1996 and 2012 when the measure was agreed in the IMO, such that real costs would be unaffected. In addition, no evidence has been forthcoming, when seeking such information from insurance industry experts or ship-owners that establishes a clear link between increases to LLMC Convention 1996 limits and insurance premiums.

10.2. The main beneficiaries of increasing the limits of the LLMC Convention 1996 are those who incur a loss or damage to property or environmental damage, as a result of a maritime incident. The benefits to this group are a transfer from the ship-owners, such that the benefits are expected to equal any cost increase resulting from changes to the limits of the LLMC Convention 1996.

10.3. The ambulatory reference will help speed up the implementation process and lead to a reduction in government administration costs. Ambulatory referencing will mean that

[1] The Paris MoU is an organisation that consists of 27 participating maritime Administrations and covers the waters of the European coastal States and the North Atlantic basin from North America to Europe. Its mission is to eliminate the operation of sub-standard ships through a harmonized system of port State control. Its basic principle is that the prime responsibility for compliance with the requirements laid down in the international maritime conventions lies with the ship-owner/operator. Responsibility for ensuring such compliance remains with the flag State.

industry will only have to familiarise itself with changes to the LLMC convention 1996 text instead of referring to national legislation which will in turn help to simplify and consolidate the maritime legislative framework.

10.4 An Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 Increasing the limits of the LLMC Convention 1996 will not have any significant impact on small businesses. The increases are applied to an international Convention already in force and the liability conditions are applied according to the gross tonnage of vessels.

12. Monitoring & review

12.1 The Order amends primary legislation to implement international obligations. As a result it is not appropriate for the Order to contain a review provision. The Department will monitor the operation of the ambulatory reference provision.

13. Contact

13.1 Andrew Kelly at the Department for Transport Tel: 0207 944 5425 or email: andrew.kelly@dft.gsi.gov.uk can answer any queries regarding the instrument.