



INTERNATIONAL CONFERENCE ON THE
REVISION OF THE ATHENS
CONVENTION RELATING TO THE
CARRIAGE OF PASSENGERS AND THEIR
LUGGAGE BY SEA, 1974
Agenda item 6

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**CONSIDERATION OF A DRAFT PROTOCOL OF 2002 TO AMEND THE ATHENS
CONVENTION RELATING TO THE CARRIAGE OF PASSENGERS AND THEIR
LUGGAGE BY SEA, 1974**

Insurance limits, definition of "defect in the ship" and wilful misconduct

Submitted by the International Council of Cruise Lines (ICCL)

SUMMARY

Executive summary: This submission outlines the concerns of the ICCL, whose members represent approximately 95% of the worldwide deep-water overnight passenger cruise industry, regarding the insurance aspects of the draft protocol and the definition of "defect in the ship" for the purposes of strict liability.

Action to be taken: Delegates are encouraged to adopt achievable insurance requirements, thereby protecting consumers without penalizing vessel operators or bringing about the unintended restriction of current insurance capacity. Delegates are also encouraged to ensure that strict liability is limited to marine casualties and not applied to mishaps arising in hotel-related operations of passenger ships.

Related documents: LEG/CONF.13/3; LEG/CONF.13/4; LEG/CONF.13/9;
LEG/CONF.13/11; LEG/CONF.13/13

Introduction

1 The International Council of Cruise Lines (ICCL) fully supports the original goals in adopting a new protocol: higher levels of compensation and the introduction of compulsory insurance. The Legal Committee has forged many additional and well-intentioned passenger protections in the process. These include strict liability for shipping incidents and vessel "defects", a longer statute of limitations, expanded venues for suits, direct actions against insurers, and mandatory waiver of coverage defences.

2 The draft protocol now sets a standard for passenger vessels far beyond any comparable industry, including railways and airlines. The cumulative effect has caused considerable concern in the marine insurance industry, especially among the International Group of P&I Clubs. The

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majority of the Clubs' members are non-passenger operators who will be expected to insure mutually the protocol's regime. They believe the direct action component, in particular, creates a disproportionate concentration of risk in the passenger ship sector. Club Boards and the International Group as a whole have therefore been forced to consider restricting the level of insurance their members will make available to passenger vessels. The backlash raises a serious question of adequate capacity in the insurance market to fulfil the protocol's requirements.

3 For these reasons, administrations are asked to consider limiting direct action (a new precedent in the international carriage of passengers) in amount and application. A compromise is deemed essential to create an acceptable balance that allays the concerns of the world's non-passenger ship owners. Their agreement to underwrite the liabilities of the protocol will guarantee the highest and most reliable insurance protection available.

4 When evaluating this submission, delegates are asked to be cognizant of the substantial number of trivial claims against passenger vessels that arise in the same manner as in any shore side hotel, restaurant, theme park or resort (sprained ankles, injured fingers, trips and falls etc). Delegates should also be mindful of the significantly less onerous insurance requirements applied to all other common carriers.

Comparison to claims and insurance in other industries

5 Coverage provided by the P&I Clubs for passenger ships is already significantly higher than that required for airlines or trains. As stated by Willis, one of the leading insurance brokers, in its paper analysing the draft protocol:

“The International Group of P&I Clubs offers the highest limits currently readily available to any transport industry...which equates to between US \$4.25 and 4.5 billion... The additional capacity is provided essentially by the world shipping industry, by a mechanism of retroactive additional premiums...The International Group reinsurance program is the largest single marine contract currently in the market.”

On the largest ships carrying approximately 3,500 passengers and 1,000 crew, *existing club cover therefore already equates to at least US \$1 million per person on board in the worst possible case* (\$4.5 billion) ÷ 4,500). Statistics demonstrate that the average cost of shipboard claims is magnitudes lower than this amount, and much less than the average cost of airline claims where most accidents are fatal.

Airline Comparison

6 Despite the higher average cost of airline claims, the Montreal Convention does not contain any requirement for direct action nor waiver of any policy coverage defences. Article 50 merely allows States to require proof of adequate coverage.

7 The standards for aviation insurance enacted in the EU and US are minimal by comparison to what has been proposed in the Athens protocol, both in amount and form. EC Resolution ECAC/25-1, adopted on 13 December 2000, sets a minimum of SDR 250,000 insurance per passenger. There is no restriction on coverage defences. United States law requires airlines to maintain \$300,000 total coverage per passenger, for only 75% of the number of seats on each aircraft. (14 C.F.R. §205(b)(2)). This requirement can be satisfied by an airline's own self-insurance plan *without any outside coverage whatsoever*. (14 C.F.R. §205.3(a)). A limited prohibition on coverage defences applies merely to the minimum insurance tier, so aviation

insurers are free to invoke all policy defences for amounts in excess of \$300,000. (14 C.F.R. §205.6 (a)).

8 By contrast, the draft protocol would require insurance as high as SDR 500,000 per capita *with right of direct action in every case and waiver of all coverage defences* except wilful misconduct of the assured. A shipowner also faces unlimited liability under the proposed opt-out clause, which would be indemnified via existing P&I coverage to an enormously higher limit. These discrepancies place vessel operators at a substantial competitive disadvantage without any apparent justification.

Rail Comparison

9 The current limit for injury or death in international carriage of rail passengers under the Convention relative aux transports internationaux ferroviaires (“COTIF”) is only SDR 70,000. The Vilnius Protocol of 1999 adopted a revised limit of SDR 175,000. No insurance requirements are specified, let alone any comparable to the draft Athens protocol. A passenger on a cross-Channel ferry would thus be entitled to seek almost three times the damages of a passenger on the Eurostar (assuming a per capita limit of SDR 500,000 without applying the opt-out clause). The ferry passenger would *also* be able to sue the insurer directly, even for a mere trip and fall, *and* be immunized from any coverage defense.

Other Maritime Comparisons

10 None of the conventions governing the operations of tankers or chemical carriers combine the stringent liability standards and high limits with the insurance requirements found in the draft protocol, even though a disaster involving such ships in any major port likely creates far greater catastrophic exposure.

11 According to the Global P&I Mid-Year Review published this past month by Aon, another of the world’s largest brokers,

“[T]he International Group has expressed concern that, unless the revised limits are manageable, the P&I coverage for passenger vessels may have to be capped or even excluded. This concern has prompted Marsh and Willis publicly to enter the debate and, inter alia, highlight potential capacity shortfalls in the event of a passenger catastrophe claim... ***[I]t is increasingly likely that a cap on passenger claims (possibly at US \$1 billion) could happen sooner rather than later, and even by the 2003 renewal.***”

This backlash effect is underscored in paragraph 4 of the submission of the International Group of P&I Clubs, LEG/CONF.13/11.

12 The unprecedented insurance proposals are having the unintended consequence of restricting the coverage now available for passenger vessel claims. Other than making insurance compulsory, no explanation has been advanced for enlarged insurance requirements for passenger ships, such as direct action with commercially impractical limits. ICCL urges delegates to solve this serious problem by adopting a reasonable compromise with regard to the direct action component.

Insufficient Insurance Capacity Outside the Clubs Warrants A Limit on Direct Actions

13 Throughout history the P&I Clubs have provided the necessary insurance protection for marine passengers within a workable and practical mutual system. The Club approach efficiently

spreads the loss exposure over a worldwide fleet of commercial blue water vessels in a highly cost-effective manner. This system has never exhibited signs of failure nor uncertainty.

14 For these reasons, among many others, ICCL supports the proposal advanced by the International Group of P&I Clubs to limit direct actions to an amount not to exceed SDR 100,000. Adopting a reasonable limit on the amount of direct action will help ensure passenger vessels can continue to be insured through the time-tested mutual system offered by the P&I Clubs, whose broad-based membership can provide the highest and most reliable coverage available in the world.

Wilful misconduct of the Assured should be retained as a defence to direct actions

15 ICCL respectfully joins in the comments offered by the International Chamber of Shipping and the International Group in their submissions on this issue. No other international convention deprives an insurer of this defence (and those governing international carriage of passengers do not prohibit *any* coverage defences). ICCL's members' own experiences verify that the P&I Clubs already cover wilful misconduct committed by the master or crew without the assured complicity. Wilful misconduct of the ship owner himself is the only instance in which the Clubs' rules prohibit coverage.

The existing definition of "defect in the ship" should be retained

16 ICCL submits that the present definition in the draft protocol is clear and creates an appropriate distinction between those cases that warrant application of strict liability and those that do not. Respectfully, any change at this juncture should be undertaken with great caution. Distinctions based on the ship's "structure" or "normal operation" are open to inconsistent interpretation aboard vessels offering countless amenities. Without careful wording, even including fire protection equipment within the reach of strict liability could result in a passenger claiming that tripping over a fire door threshold while intoxicated resulted from "defective" design. Accordingly, ICCL proposes the following amendment, if any (new language shown in bold):

"Defect in the ship" means any malfunction or failure in any part of the ship or its equipment when used for passenger escape, embarkation, disembarkation **or fighting fire**, or used for propulsion, steering, safe navigation, mooring, anchoring, leaving a berth or anchorage, flooding safety, stability, and the operation of emergency boat winches."

The phrase "or fighting fire" clearly encompasses alleged defects in sprinklers or any other anti-fire equipment *when being relied upon for that purpose*.

Action Requested of the Conference

17 ICCL submits these views for consideration at the Diplomatic Conference so that a workable protocol with increased compensation and compulsory insurance can be agreed and ratified.