

The 2002 Protocol of the Athens Convention was intended to bring the 1974 version up to date. The then limit of liability for passenger claims of SDR46,666 (\$68,800 current values) per passenger does not now reflect a fair value for the loss of a human life anywhere.

An attempt to increase the figure to SDR 175,000 in 1990 failed to gain support internationally, and the UK, following the Herald of Free Enterprise disaster, felt obliged to increase the figure unilaterally to SDR300,000 for carriers of passengers whose principal place of business is in the UK.

The 2002 Protocol tried to bring the figures up to date and revise the basis of liability, creating strict liability for shipping incidents of SDR250,000 per passenger, with compulsory insurance and direct action against insurers, and an overall limit of SDR400,000.

The insurance industry warned the Diplomatic Conference that there was insufficient capacity in the market to cover risks at this level, particularly regarding the very large cruise vessels being built, some of which can carry over 3,000 passengers.

A single casualty could be covered, but unlimited and immediate reinstatement of the cover after a total loss of such a ship was uninsurable.

Moreover, the P&I Clubs warned that losses caused by terrorism were not covered by the Clubs, and that the existing War Risks Cover would not meet the protocol's insurance requirements.

Despite these warnings the protocol was adopted, but governments have found themselves unable to ratify it, since they cannot satisfy its insurance requirements. This should be borne in mind by the delegates of states working on the Wreck Removal Convention.

Since 2002, interested parties have been discussing whether a formula can be found to bridge the gap.

On September 15, the International Maritime Organization published two documents setting out a formula to enable ratification of the protocol with the support of the governments of UK and Norway, the International Council of Cruise Lines and the International Chamber of Shipping.

These documents aim to align the requirements of the protocol with the insurance available.

Put simply, the complex formula enables the states parties to certify that the insurance arrangements are in accordance with the Athens Convention as amended by the 2002 Protocol, despite the fact such insurance cover is provided in two tranches by war and non-war risks insurers, and that the war risks cover will contain the usual seven-day cancellation clause and certain standard market exclusions, such as bio- chem and cyber attack.

In addition the war risks (including terrorism) will be acceptable despite being capped at SDR250,000 per passenger or SDR340m per incident.

The achievement of this arrangement on an internationally agreed basis has required innovative drafting at an international law level.

Guidelines have been agreed setting out the terms of the arrangement enabling states to ratify the 2002 Protocol and thus to enter into force.

An agreed standard form of reservation has also been drafted. This will be made by all states ratifying the 2002 Protocol, effectively amending the protocol retrospectively for those states which ratify it subject to these terms.

If the insurance market develops other cover to meet the terms of the Athens Convention and 2002 Protocol, the guidelines contain a provision enabling them to be amended by a resolution of the IMO Legal Committee, thus enabling the requirements of the convention and protocol to be kept in line with the cover available.

Purists may reasonably ask whether these arrangements align with generally accepted principles of international law. But in the face of a real need to enable passengers to benefit from an improved regime, and a general agreement among states that the proposed arrangement represents the best available, the use of a standard form of reservation, even if it is not enshrined within the protocol, appears to be an effective way of ensuring uniformity between the states parties which adopt this form of reservation.

It seems likely that European Union members, who have for some time been under pressure from the European Commission to find a way of solving this knotty problem, will adopt the proposed formula and ratify the 2002 Protocol in the reasonably near future.

However the real test of the wording adopted in Paris will be when we see other states adopt it too.

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