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

LEG/CONF.13/11
30 August 2002
Original: ENGLISH

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

Submitted on behalf of the International Group of P&I Clubs

SUMMARY

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| <i>Executive summary:</i> | In this paper, proposals are made which are intended to facilitate the operation of the draft protocol. |
| <i>Action to be taken:</i> | Delegates are invited to consider and, if thought fit, to adopt the proposals made in paragraphs 5, 7, 11, 15, 17, 19 and 20. |
| <i>Related documents:</i> | LEG/CONF.13/3; LEG/CONF.13/9 and LEG/CONF.13/10 |

1 The International Group of P&I Clubs acknowledges the principal objectives of the proposed reform of the Athens Convention. However, the Clubs believe that the Diplomatic Conference should address seven points in the draft protocol, in the manner set out below:

Direct Action Limit

2 The International Group has conducted a review of representative claims incurred over the last ten years by one of the Clubs most heavily committed to cruise and ferry vessels, a review which encompasses all passenger claims incurred on a worldwide basis, including the United States of America, and covering all passenger carrying vessels from large cruise ships to small ferries. These statistics indicate that during the last ten year period (1992-2002) the average annual payment world-wide in respect of claims for death or injury of a passenger was US\$21,737. The vast majority of such claims relate to minor incidents hence the relatively low average cost per claim which is substantially below the per capita limit applicable under the existing Convention.

3 The Club covering the largest ferry operator in the UK has provided the following statistics in relation to UK claims: of the total number of claims paid during the same 10 year period, 83% resulted in payments of less than US\$10,000 (with an average claim payment of US\$2,608); 14% in payments of between US\$10,001 and US\$100,000 (average US\$23,117).

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4 Since 97% of claims within this sample are settled for less than US\$100,000, it is clear that the desire to provide a central core of guaranteed cover, which the International Group supports, will be satisfied by setting the limit for direct action at a more realistic level than some have suggested. A figure of SDR100,000 will accommodate the vast majority of passenger claims.

5 The International Group submits that the direct action limit in protocol article 5 (Art. 4 bis. 1.) should be set no higher than SDR 100,000 per passenger.

Strict liability

6 The same analysis applies to the setting of an appropriate limit of strict liability for 'shipping incidents'. Again, a figure of SDR100,000 will clearly satisfy nearly all claimants. Furthermore, there seems to be no convincing reason for distinguishing between air and sea passengers when finalising levels of strict liability.

7 The International Group therefore submits that the strict liability limit for casualties arising from "shipping incidents" at protocol article 4 (Art.3.1.) should be set at SDR 100,000 per passenger, the same level as the Montreal Convention's strict liability limit.

Overall limit

8 There are further compelling reasons for setting the levels of direct action liability, strict liability and compulsory insurance at levels which are actually attainable. In relation to the overall limit of shipowner's liability at Protocol Article 6 (Article 7(1), the International Group has consistently made clear throughout the Athens debate at IMO that, if liability levels are incorporated into the Protocol which result in an unrealistically high concentration of risk, the International Group Clubs will be obliged either to cap their exposure or to exclude passenger risk altogether.

9 In this context the International Group endorses the conclusions reached by two leading international broking houses, Willis and Marsh, in papers circulated by IUMI. The International Group believes that it is in the best interests of passengers to ensure that the Protocol's liability limits are set at levels that enable the Clubs to continue to provide the cover for these risks within the overall framework of Group cover, while at the same time meeting the key objectives of this reform. While the capacity problem to which both Willis and Marsh refer would be to some extent alleviated by setting a direct action figure at a lower level than the overall limit of shipowner's liability at Article 7(1), the level of overall limit chosen by the Diplomatic Conference is critical to the International Group's ability to continue to provide sustainable levels of insurance for these risks. The International Group recognises that the reinsurance markets on the one hand and the circumstances in which cruise and ferry operators trade on the other may be significantly different in future years. The International Group is able to say that, viewed from their current perspective, it is most unlikely that Clubs will be willing to pool cover in respect of the overall liability regime espoused by this Protocol if it includes a direct action limit of more than SDR 100,000 per passenger and an overall limit of more than SDR 350,000 per passenger. Moreover, some Clubs have already expressed their unwillingness to go that far and others have serious reservations about the prospect. It is impossible therefore to predict what market capacity and conditions may exist in the future or whether Clubs in the International Group will be willing to cover passenger vessels at all.

Opt-out

10 It is common ground for all Clubs that an opt-out for individual States, as envisaged in protocol article 6 (Article 7(2)), is not sustainable since it deprives the insurer of certainty of exposure and raises the aggregation of risk to potentially infinite levels. Different liability limits in different jurisdictions do not promote consistency of approach, invite forum shopping, and will inevitably complicate and delay the claims-handling procedure to the detriment of passenger claimants. Retention of the opt-out in Article 7(2) would merely encourage insurers to introduce their own limits.

11 **The International Group recommends that article 7(2) be deleted.**

Act of Terrorism

12 The International Group submits that the prospective protocol is defective in that it includes no defence for the carrier (or insurance provider) in the event of the casualty being caused by an act of terrorism. Protocol Article 4 Art. 3.1) provides a defence where the carrier can prove that the incident:

- (a) results from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (b) was wholly caused by an act or omission done with the intent to cause the incident by a third party.

13 Moreover, where the loss exceeds the limit of liability incorporated in article 3(1) “the carrier shall be further liable unless the carrier proves that the incident which caused the loss occurred without fault or neglect of the carrier.”

14 The Chairman of the Correspondence Group is on record as stating that he believes that article 3 as drafted is wide enough to provide the carrier with a defence in the event of an incident caused by an act of terrorism because an act of terrorism is always “done with the intent to cause the incident by a third party”. Although we welcome this construction and the policy behind it, we do not agree that the protocol as drafted has the desired effect in all cases because it is a pre-condition for the defence to operate that the incident is **wholly caused** by an act or omission done with intent to cause the incident by a third party. We are conscious because of cases like the **Achille Lauro** that lawyers will seek to argue that an incident was not wholly caused by the act of a third party and that the carrier must bear some responsibility for not preventing the terrorist act.

15 **The International Group therefore suggests the following amendment to article 3(1)(a) which clarifies the issue: Insert the words “act of terrorism” before the word “insurrection” in article 3(1)(a).**

Wilful Misconduct

16 The submission made by Australia and Norway in document LEG/CONF.13/9 suggests that the insurer or other provider of financial security should be liable even where the carrier has been guilty of wilful misconduct. The defence of “wilful misconduct” was retained in the prospective protocol (article 4 bis 10) after exhaustive debate in the Legal Committee and we believe that was the correct conclusion for the following reasons:

- (a) English maritime law provides that “the insurer is not liable for any loss attributable to the wilful misconduct of the assured”(Marine Insurance Act 1906, section 55.2(a)). This defence is incorporated into English law as a matter of public policy, it being regarded as unacceptable for the assured to obtain insurance for liabilities arising out of his own deliberate wrongdoing. Similar provisions have been adopted, as a matter of public policy, in the insurance laws of many other countries.
- (b) P&I Clubs are mutual insurance organisations which cover the third party liabilities of their shipowner members. They are governed by Boards drawn from their shipowning membership, a structure which ensures that the mutual principle is observed in the settlement of claims. In this context, it would be a rare shipowner indeed who volunteered to cover the claims of another shipowner caused by the latter’s wilful misconduct. The International Group of P&I Clubs has made it clear during the debate on this issue that the Clubs are not prepared to cover the liabilities of any of their members caused by their wilful misconduct.
- (c) The International Group further submits that over the last ten years the focus in the maritime community, at national, European and international level, not least within IMO itself, has been on ship safety and shipping standards. It would be a curious departure from those goals if the international community were now to insist that shipowners obtain insurance against liabilities caused by their own wilful misconduct.
- (d) The submission made by Australia and Norway in document asserts that “insurance for wilful misconduct could, for example, be fitted into the Clubs’ reinsurance programme.” For the reasons given in this submission, it could not.
- (e) In practice, given the availability, as a matter of public policy, of the wilful misconduct defence in the maritime context, passengers are able to take out personal accident cover (PAI) precisely to cater for this rarest of all contingencies.
- (f) The defence of wilful misconduct has been preserved in recent international conventions, for example the CLC, HNS and Bunker Conventions.

17 The International Group submits that the wilful misconduct defence should be retained in the Athens Convention.

Time-Bar

18 Although Clubs believe that justifiable claims should be properly compensated, it has to be acknowledged that a substantial proportion of the claims made are not settled – for good reason. The longer the period of time allowed under the Convention for the bringing of claims, the more difficult it will become to gather the necessary evidence to reject fraudulent claims. The two years provided under the existing Athens Convention has not given rise to any problems in practice and this should be retained.

19 The International Group therefore suggests inserting the word “two” within the brackets of paragraph (i) of article 16.3 (protocol article 9).

20 In relation to protocol article 7, (Art.8), the International Group recommends retention of existing Convention limits for what are in any event insured risks.

21 The International Group submits that the interests of passengers will be best served by a compensation regime which is insurable on a sustainable basis. The essential objectives of the protocol can be achieved within the current insurance framework which has a proven track record. If liability levels are agreed in the protocol so as to produce a greater concentration of risk overall than is contemplated in this submission, there is no guarantee that any insurance provider will be able to respond.
