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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

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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**

Submitted by the International Chamber of Shipping (ICS)

SUMMARY

- Executive summary:** This document states the views of the International Chamber of Shipping on the draft protocol to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974
- Action to be taken:** The Committee is invited to consider the comments and suggestions made in this submission
- Related documents:** LEG/CONF.13/3; LEG/CONF.13/11; LEG/CONF.13/14

Introduction

1 The impetus to revise the 1974 Athens Convention stems mainly from a concern about the liability limits which have fallen behind contemporary consumer protection objectives, the 1990 Protocol not having entered into force internationally. There is also a desire to introduce a requirement for carriers to provide evidence of insurance coverage and to permit direct action against insurers on the grounds that this would ensure guaranteed recovery for passenger claimants in all but the rarest of circumstances.

2 The shipping industry supports the concept of consumer protection and therefore supports the adoption of a protocol to the Athens Convention which will strengthen the legal position of passengers. To this end, we fully support reasonable increases in the 1974 limits.

3 Regarding the proposals for compulsory liability insurance and direct action, the shipping industry has always believed that it is highly unlikely that any international operator is trading without cover and is unaware of any passenger claims that have not been compensated due to lack of insurance. Nevertheless, the industry agreed to support the proposals on the understanding that they would be attached to the well-known and understood liability system of the Athens Convention.

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4 As the discussions progressed, however, additional proposals were advanced which sought to alter the Athens Convention liability regime radically and threatened the use of traditional insurance arrangements as a means of compliance with the proposed insurance requirements.

5 The shipping industry believes that the objectives of the Protocol can best be fulfilled by utilisation of the P&I Club system. P&I Clubs are funded and operated by their (often longstanding) shipowner members, are cost effective and, as mutuals, do not have to provide shareholder returns. The Club system also provides effective claims handling arrangements where expertise has been developed over many years in responding to the specialist demands of settling liability claims to the satisfaction of claimants. We firmly believe that the interests of both passengers and carriers will best be served by the introduction of insurance requirements which can be met through use of the P&I Club system, the long-term sustainability of which has been demonstrated.

6 A number of difficult compromises have been agreed in the Legal Committee with the assistance of the shipping industry, (we refer to some of these below) and we would caution against reopening the discussions on those issues at the Diplomatic Conference.

7 We offer the following comments and suggestions in the belief that they will assist in achieving a balanced revised Convention which will be workable in practice and acceptable to all affected interests. Early and widespread ratification would accordingly be encouraged.

Basis of liability and burden of proof

8 We would urge against reopening the debate on the liability system proposed in the draft protocol. The shipping industry has consistently argued against the introduction of liability provisions modelled on the Montreal Convention (including strict liability) because of the factual differences between the two modes of transport. It is not possible to compare air transport with ferry travel or cruise holidays. The separate passenger liability systems have been developed in recognition of the differences between the modes which prevent standardisation.

9 Nevertheless, the industry has reluctantly agreed to support the compromises reached during the Legal Committee discussions and reflected in the liability provisions of the draft Protocol (Article 4 (to be incorporated in the Convention as Article 3)).

“Act of terrorism” defence

10 We propose that the present war risk defence in Article 4 of the draft Protocol (to be incorporated in the Convention as Article 3(1)(a)) be extended to include terrorist acts. The revised text would read as follows:

“Article 4

Article 3 of the Convention is replaced by the following text:

1 For the loss suffered

(a) resulted from an act of war, hostilities, civil war, **act of terrorism**, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character; or ...”

11 It could be argued that acts of terrorism fall within the existing defences in Article 3(1) (a) and (b) of the Convention. However, for the sake of clarity, the Convention should contain an express reference to terrorism in view of the difficulties in obtaining insurance for this risk following the events of 11 September.

12 Shipowners' P&I Club cover excludes claims arising from acts of terrorism because the Clubs are unable to obtain reinsurance for such risks from the commercial market. Accordingly, unless this amendment is made it will not be possible for carriers to comply with the compulsory insurance provisions of the draft protocol (Article 5 (to be incorporated in the Convention as Article 4bis, paragraph 1)) in relation to claims arising from acts of terrorism. (War risk insurance may be available but only to relatively low limits.)

Definition of “defect in the ship”

13 We support the definition of “defect in the ship” contained in Article 4 of the draft Protocol (to be incorporated in the Convention as Article 3(5)(c)). We can also support the refinement suggested by the International Council of Cruise Lines (ICCL) in document LEG/CONF.13/14.

Limitation and compulsory insurance

14 As is customary, the liability figures have been left to the Diplomatic Conference to decide. However, industry's ability to comply with the new requirements very much depends on the amounts.

15 We firmly believe that the interests of both passengers and carriers will best be served by the introduction of requirements which can be met through use of the P&I Club system.

16 While co-extensive shipowner liability and direct action against insurers would be preferable, there was great disparity in the figures suggested during the Legal Committee's discussions and the Clubs have indicated that the mutual system would be unable to accommodate very high figures by way of direct action.

17 In addition, the proposal that States Parties may set higher limits or provide for unlimited liability in their national laws gives rise to considerable problems. The “opt-out” provision militates against the objective of a harmonised regime for international application. It would lead to claims being determined by location, the possibility of identical claimants receiving different treatment, a growth in forum shopping and delays in settlement. Insurers have a need for certainty of risk exposure and the prospect of varying levels of liability in different jurisdictions would deprive them of that certainty.

18 In the interests of achieving a system which protects the interests of passengers and will be workable in practice and sustainable in the long-term, the International Chamber of Shipping recommends that the following structure be considered:

- The carrier's maximum liability for passenger death and personal injury claims should be set at a reasonable amount and the carrier should be required to provide evidence of financial security (such as a P&I Club certificate of entry) for that amount.
- The carrier's maximum liability should be certain to enable compliance with the requirement to provide evidence of financial security and in the interests of international uniformity.

Accordingly, the proposal that States Parties may set higher limits or provide for unlimited liability in their national laws should be rejected.

- Claimants should have rights of direct action against the insurer for a tranche of the carrier's maximum liability. Direct action will place an additional and heavy burden on the Club system because it will require Clubs to act as guarantors rather than indemnity providers. Accordingly, the direct action component will need to be less than the carrier's maximum liability which would be covered by the well known indemnity arrangements.

19 The P&I Club system has responded to passenger liabilities over many years. The Clubs have vast experience and an excellent reputation for their handling of passenger claims. It is well known that policy defences are sometimes waived and ex gratia payments made in the interests of prompt and appropriate settlement of these highly sensitive claims.

20 The degree of flexibility afforded by the current arrangements has been central to their success and there is a real risk that well-intentioned efforts to formalise certain aspects and introduce new requirements could result in restrictions which would be to the detriment of claimants.

21 Some \$4.25 billion of cover per incident is currently available thanks to the mutuality and reinsurance arrangements of the International Group. In the event of a catastrophic incident requiring access to the full extent of available cover, about \$2 billion would be provided by the Group's reinsurers and the balance would be provided by all shipowner members of International Group Clubs.

22 The Clubs have previously indicated that they wish, if at all possible, to maintain this stretch of cover while at the same time accommodating an increase in the 1974 limits and an element of secured cover (direct action).

23 However, the proposals in the draft Protocol to permit direct action against the Clubs (and other insurers) to the full extent of the carrier's liability under the Convention paradoxically could result in the amount of available cover being significantly restricted if the figures are too high. This follows from the fact that direct action would represent a shift away from the current indemnity arrangements. The Club system is based on the indemnification of members who are paid from mutually shared funds. Direct action, on the other hand, amounts to an anticipatory guarantee.

24 The very high figures proposed by some administrations have served to focus the minds of non-passenger ship operators on the risks of continuing to participate with passenger carriers in the International Group of P&I Clubs' pooling arrangements. Passenger carriers account for less than 5% of the tonnage entered in the Clubs but would present a massive concentration of exposure to the membership as a whole if the limitation and insurance proposals advanced by some administrations were adopted. To address this potential imbalance, non-passenger ship operators have proposed that Club cover for passenger liabilities be restricted.

25 Accordingly, the expectations of some administrations could result in less cover being available for passenger claimants than exists under the current insurance arrangements and the loss of the current claims-handling system. This would be a most unfortunate outcome and it is unlikely that commercial underwriters would be enthusiastic about filling any void.

26 If the P&I Clubs decided to restrict their cover for passenger liabilities, it is unclear to what extent commercial underwriters would be prepared to cover any excess liabilities and
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whether they would do so on a direct action basis. The commercial market is driven by profit and is extremely volatile. Capacity expands and shrinks in response to rates and claims. The interests of passengers would not be protected by reliance on a product which may only exist until the first major claim. In addition, it is not known where the infrastructure for handling claims in excess of the Clubs' liabilities would come from. Even if additional insurance were to be available from the commercial market, the structure would be entirely different from the conditions and cost basis of the underlying P&I cover so that the two would not fit together in a satisfactory or workable format.

27 We firmly believe that the interests of passengers would be best served by reliance on the tried and tested Club system, the long-term sustainability of which has been demonstrated.

Wilful misconduct

28 Following extensive debate, the Legal Committee agreed that the insurer's defence of wilful misconduct of the assured should be retained and we would urge against reopening this issue at the Diplomatic Conference.

29 Passengers are unlikely to suffer as a result of the defence being retained because it is unlikely that it would ever be invoked. In reality, it is difficult to contemplate a wilful misconduct scenario involving a passenger ship.

30 Wilful misconduct is tantamount to a deliberate criminal act. The most obvious example in the marine insurance context is the deliberate scuttling of a ship to claim the proceeds of the hull insurance policy. The insurer's defence gives effect to the general rule of public policy that no-one should be permitted to profit from the consequences of criminal conduct and also to the general rule of insurance law that an assured cannot recover when he has deliberately caused a loss.

31 The defence is only applicable to wilful misconduct of the *assured*. In other words, the conduct must be committed by the assured personally or, in the case of a corporate assured, by an alter ego. Wilful misconduct of the master or crew, without the complicity of the assured, would be covered by the P&I Clubs and they would be subject to direct action under the proposed Protocol.

32 Within the mutual system it is extremely difficult to introduce a system whereby responsible ship operators would pay for the wilful misconduct of their competitors.

33 In jurisdictions where the Marine Insurance Act 1906 or its equivalent apply, commercial underwriters are unable to contract out of the exemption from liability for losses attributable to the wilful misconduct of the assured.

34 Finally we note that the defence is allowed in the Civil Liability, Bunker Oil and HNS Conventions and that the latter Convention includes liability for loss of life and personal injury.

Conclusion

35 The International Chamber of Shipping requests the Diplomatic Conference to take these comments into account during its deliberations.