INTERNATIONAL MARITIME ORGANIZATION

IMO

E

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.13/18
17 October 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

Supplementary submission on behalf of the International Group of P&I Clubs

SUMMARY

Executive summary:	This paper explains further some of the issues raised in the submission of the International Group of P&I Clubs contained in document LEG/CONF.13/11.
Action to be taken:	The Conference is requested to note the contents of this paper in conjunction with the contents of LEG/CONF.13/11.
Related documents:	LEG/CONF.13/11; LEG/CONF.13/17

Direct action/two-tier limitation of liability

1 In paragraphs 2 and 4 of our submission (document LEG/CONF.13/11), we propose that the protocol provides an overall limit for the shipowner's limit and a different limit for the direct action against the person providing evidence of financial responsibility. It has been suggested that in order to save time at the Diplomatic Conference it would be helpful to enlarge on this proposal:

- to provide treaty language for consideration at the Conference;
- to explain how claims would be dealt with in practice under our proposal; and
- to explain why it is necessary so far as the Clubs are concerned, to provide for a two-tier limitation structure.

Treaty language

2 We did not provide treaty language in our submission LEG/CONF.13/11 because in our view, our objective could be achieved by putting one figure in the brackets in article 4*bis* and a different figure in article 7. Thus, in our view, the limit in article 4*bis* would require a Certificate of Financial Responsibility whereas cover in respect of the limit in article 7 would be evidenced by the vessel's Certificate of Entry as provided in the IMO Guidelines which were recently agreed by the Assembly (resolution A.898(21)).

Claims practice

3 As has been explained in the submission of the Comité Maritime International (CMI), contained in document LEG/CONF.13/17), P&I Clubs offer indemnity cover – that is, the shipowner member is required first to pay the claim and then be indemnified by his Club. However, in practice, because of their expertise in claims handling, the Clubs usually deal with

claims in the first instance. If the Clubs' proposal were accepted by the Diplomatic Conference, we would expect that practice to continue so that the position of the claimant would not be affected. An example may assist: if the Diplomatic Conference accepts a direct action limit of SDR 100,000 and an overall limit of SDR 200,000, then a claim for, say SDR 150,000 would continue to be dealt with by the Club in co-operation with the shipowner, just as it is today. The only difference would be theoretical – the first tranche of the claim would be levied directly against the insurer, whereas the second would be levied against the shipowner. Since the insurer would be the same in both cases, the result would be the same in practice.

Why do Club Boards insist on a separate limit in respect of direct action?

4 The practices outlined in the previous paragraph inevitably give rise to this question, since the same liability regime applies whether the claim is brought against the shipowner or the insurer. The answer lies in the attitude of Club Boards to anticipatory guarantees, which is how direct action is viewed within the P&I world. If all claims against passenger vessels were to be secured by direct action against the insurer, this would constitute a fundamental change in the business of P&I from being an insurer who is obliged to indemnify a shipowner in respect of third party claims already settled by him. Instead, the P&I insurer would be required to meet third party claims direct and become a species of Personal Accident Insurer. As acknowledged above, as a matter of legal analysis, this difference in status should make no difference to the legal result. However, in relation to the passenger trade, which is notorious for the number of fraudulent claims that are put forward (of all claims presented, only 28% on average are settled), Club Boards consider that it would be imprudent to extend their exposure to liability arising in this way beyond the level that has been indicated. Conscious of the parallels with other liability conventions which provide for direct action and of the need expressed by States for a measure of additional security, Club Boards are prepared to concede a measure of direct action exposure. However, if the protocol as finally agreed provides for direct action in excess of the level indicated, it is doubtful whether Clubs will be able to provide the necessary cover.

Terrorism

5 War risks are excluded from P&I cover and are covered under a separate regime whereby the vessel is insured for liabilities arising from acts of war up to the value of the vessel and then, in excess of the value of the vessel, up to $200 million, the limit of the cover which is available on the market. Although the Clubs were relatively confident that their existing exclusion wording covered terrorism, it was judged necessary to follow market activity in this area in the wake of the atrocities of 11 September 2001 and amend the Clubs' exclusion wording so as to put the matter beyond any doubt. As a consequence, if the draft protocol is not amended in line with the proposal made in paragraph 15 of our submission contained in document LEG/CONF.13/11, then Clubs, and indeed any other liability insurer will be unable to issue the certificates required under the protocol, because their cover will have excluded a risk which is not excluded under the protocol. In brief, unless this amendment is made, the revised Convention will be impossible to implement.
