INTERNATIONAL MARITIME ORGANIZATION

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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

Limits on direct action

Submitted by the International Council of Cruise Lines (ICCL)

SUMMARY

Executive summary:	This submission outlines two proposed restrictions on the availability of direct actions under the draft protocol. Specifically, these proposed restrictions are intended to avoid serious litigation abuses caused by the naming of insurers in cases arising from every trivial mishap aboard passenger vessels and also in cases when the carrier is solvent and has properly responded to the claim.
Action to be taken:	Delegates are urged to adopt reasonable limits on the ability of claimants to name insurers in every single case, regardless of circumstances, so that passengers aboard vessels enjoy an adequate level of protection without unfairly penalising vessel operators or their insurers. These limits are particularly important given the unprecedented nature of direct actions in the international carriage of passengers, the high volume of trivial claims and the resulting adverse effect on insurance capacity.
Related documents:	LEG/CONF.13/3; LEG/CONF.13/11; LEG/CONF.13/13

Introduction

1 The proposal for direct action in the draft protocol is of a magnitude significantly beyond any insurance scheme previously devised. Insurance guarantees required in the context of pollution or hazardous substances involve a very limited number of casualties and claims asserted annually in the few jurisdictions where they arise. By stark contrast, the draft protocol would spawn a potentially unlimited volume of claims in virtually all jurisdictions, tied to the estimated 1 billion passengers carried on international itineraries each year. Without some rational limit on the availability of direct action, insurers and the courts would be literally inundated with such claims. Mishaps in shipboard restaurants, casinos, lounges, showrooms, and

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recreation areas would all give rise to direct action, even though shore side claims arising in these contexts do not.

Limits on availability of direct action should be adopted to prevent litigation abuse and ensure sufficient insurance capacity

2 Many expert in the insurance industry predict that if the draft protocol, is adopted in its present form, traditional insurance coverage may be capped or restricted by the P&I Clubs. This would leave operators to develop some additional type of insurance not in existence today. The very strength of the mutual system is its diversity and the ability of a wide array of ship owners to pool their collective risks. Bulkers, container and chemical ships, oil tankers, and even LNG carriers spread their substantial risks amongst large passenger vessels and vice-versa, creating high capacity and stability. Forcing passenger operators to conjure an unprecedented form of new insurance (with waiver of defences and dollar-for-dollar direct action for every claim) assumes that which is neither feasible, practical, nor in the long-term interest of the travelling public.

3 An important criterion for any insurance is sustainability of cover. Mutual insurance available through the Clubs is uniquely reliable because member ship owners have a stake in the future of shipping. The Clubs are not operated for profit. Commercial market underwriters, whose investors have no such interest and are motivated solely by profit, are not likely to be as responsive to claims in the long term. Industry experts uniformly doubt market insurers can or will provide enduring coverage with unrestricted right of direct action in an uncertain risk environment. *Many national laws prohibit individual insurance companies from exposing more than 10% of their net assets to any one risk. No insurer has indicated a willingness to provide the form of coverage contemplated by the draft protocol at any cost*. Even if the necessary insurance could be pieced together through many different insurers, each would have to provide a guarantee and be named in direct actions by passengers, creating a logistical quagmire.

4 All parties studying the insurance issues recognize the problem of finding any viable alternative to the P&I Clubs, particularly for the form of proposed coverage. In a paper entitled "An Opinion on the Feasibility of the Prospective Protocol to the Athens Convention Being Met", circulated to the Correspondence Group by BankServe Insurance Services Limited, the author concedes:

> "Establishing a new insurance to take just one of the liability risks, otherwise covered by the P&I Clubs, will be very expensive. The reason centers on the handling and processing the many attrition claims from the ground up involving serious administrative and claims handling costs, as well as legal costs. ***This and the exceedingly high levels of specific reinsurance required to meet a catastrophic loss may require the setting up of a new dedicated insurance company that could run foul of US antitrust laws and EU commissioners at DG COMP, formerly DGIV***."

5 The Norwegian delegation circulated a "Report of the Intersessional Liaison with Insurers, Brokers, Etc., on the Athens Convention" on April 12, 2002, acknowledging under the heading "Insurance Capacity":

> "***Brokers indicate... insurance is not offered today at the levels that are likely to be required under the prospective Convention...Some brokers have been concerned with the durability of [non-Club] insurance: Underwriters may withdraw after the first really major incident.***"

6 Marsh and Willis, two of the world's largest and most respected marine brokers, have issued detailed papers outlining many problems with the protocol's requirements. Willis' paper states:

> "There are three principal ...difficulties which would present potential problems, whether or not the current market was a mutual or commercial one. (1) Right of direct action against the insurer. (2) Waiving of cover defenses under the insurance policy. (3) Very high compulsory limits. ***Each of these significantly increases the difficulties of an effective insurance solution and each limits the availability of insurers able to participate***...
>
> ***The amount of capacity ...would require the participation of the vast majority, if not all of the world insurance market able to write such risks. Notwithstanding this, it is very questionable whether it would be possible at all, regardless of cost, to offer such limits...The guaranteed levels of limit proposed would exceed any known insurance market capacity to fulfill the insurance requirements over a sustained period.***"

Marsh adds:

> "…[T]he separate insurance of passenger ship liabilities arising from the new protocol would in our view be subject to all the problems BankServe has identified and at least one more. ***This is the availability of insurance capacity in absolute terms and specifically to respond to the relatively very onerous terms (compared to the Montreal Convention, for example)***...."

7 Naming insurers as parties in *every single lawsuit*, large or small, will create a superfluous administrative burden, subjecting underwriters to all the typical litigation pitfalls (answering pleadings, depositions and subpoenas; attending court hearings in countless jurisdictions, etc.). Legal proceedings would become unnecessarily complex and costly, and would drain judicial resources without a rational basis. A claimant's ability to sue multiple parties for every alleged mishap will undoubtedly encourage abuse.

8 To ICCL's knowledge, no insurance requirements similar in cumulative effect to those of the draft protocol have ever previously been implemented in any industry, especially coupled with strict liability and potentially unlimited recovery. Hypothesizing the mere existence of insurance *capacity* at some future time does not mean the *form* of required insurance can ever be found.

9 For these reasons, ICCL suggests two important limits on the availability of direct action, so the existing and tested system of insurance provided by the Clubs, with US $4.25 to 4.5 billion in available coverage, can endure in the passenger vessel industry:

(i) permit direct actions *only in shipping incidents or claims arising from vessel defects (as defined)*, to prevent the anomaly of passengers joining insurers in lawsuits for every trivial mishap; and

(ii) permit direct actions *only when actually needed*--if the carrier is insolvent or otherwise unable or unwilling to answer a claim.

10 To effect these limitations, ICCL proposes the following amendment to paragraph 10 of Article 4bis of the draft protocol (new language shown in bold italic):

> "Any claim for compensation ***arising from a shipping incident or defect in the ship as defined in this protocol, which is*** covered by insurance or other financial security pursuant to this article, may be brought directly against the insurer or other person providing financial security. ***However, such direct action shall be brought only in the event the carrier is insolvent or otherwise unable or unwilling to answer the claim.*** In such case, the amount set forth in paragraph 1 applies…"

11 Even with these compromises, passenger claims would continue to be secured by compulsory insurance to the full limit of the Club system, an amount far greater than in all other international carriage. The protocol would still impose requirements well beyond any comparable regime.

Action requested of the Conference

12 The ICCL respectfully asks administrations to consider adopting these modest limits on the availability of direct actions to prevent claimants from using the remedy when it is neither necessary nor warranted, thereby avoiding litigation abuses and wasted resources of the parties and courts.