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.13/16
23 September 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 by the United States

SUMMARY

Executive summary:	This document indicates the view of the United States regarding documents LEG/CONF.13/4 and LEG/CONF.13/9
Action to be taken:	Paragraph 4
Related documents:	LEG/CONF.13/4; LEG/CONF.13/9; LEG 83/4/8 and LEG 83/4/9

Introduction

1 The United States has reviewed session documents LEG/CONF.13/4 (Definition of "defect in the ship", submitted by the IMO Secretariat), and LEG/CONF.13/9 (Wilful misconduct, submitted by Australia and Norway).

Defect in the ship

2 Document LEG/CONF.13/4 proposes three different variations of the definition of "defect in the ship". The United States recalls its prior submission, contained in document LEG 83/4/8, paragraphs 4 through 7 (for ease of reference attached at annex 1), which explains the importance of a definition that ensures a clear distinction between "hotel type" and the "navigational" elements of a ship. Upon careful consideration of the alternatives contained in document LEG/CONF.13/4, the United States has concluded that the definition proposed in document LEG 83/WP.2 (currently inserted in LEG/CONF.13/3, Art. 4, paragraph (c)) better reflects the intention of the Legal Committee in making clear such a distinction and is sufficient as drafted.

Wilful misconduct

3 Document LEG/CONF.13/9 proposes to remove the insurer's wilful misconduct defence from the compulsory insurance provision. The United States notes that paragraphs 49-53 of the report of the eighty-third session of the Legal Committee, contained on page 11 of document

LEG 84/14, reflected the healthy, informed discussion as to the reasons for removing or retaining the wilful misconduct defence, as well as the Committee's decision to retain the wilful misconduct defence. The United States believes that the wilful misconduct defence should be retained for the reasons set out in its prior submission, contained in document LEG 83/4/9, paragraphs 7 through 19 (for ease of reference attached at annex 2).

Action requested of the Conference

4 The Conference is invited to take note of this document, as well as the documents referenced (LEG 83/4/8 and document LEG 83/4/9 (annexes 1 and 2 respectively)), when considering the issues.

***

ANNEX 1

INTERNATIONAL MARITIME ORGANIZATION

IMO

E

LEGAL COMMITTEE
83rd session
Agenda item 4(a)

LEG 83/4/8
11 September 2001
Original: ENGLISH

PROVISION OF FINANCIAL SECURITY

Liability of the carrier and time-bar for actions

Submitted by the United States

SUMMARY

Executive summary:	This document presents suggested modifications to the Liability of the Carrier and Time-bar for Actions provisions in the prospective Protocol to the Athens Convention.
Action to be taken:	The Committee is requested to consider the text proposed in Paragraphs 8, 12 and 16.
Related documents:	LEG 83/4/2, LEG 83/4/3, LEG 83/4/9 (Compulsory Insurance)

Introduction

1 The United States applauds and appreciates the work of Norway in writing, rewriting and explaining the text of the draft protocol to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 (draft Athens protocol) as the Legal Committee continues its deliberations on this important issue of passenger protection. The United States recognizes that the draft Athens protocol under discussion, LEG 83/4/3, is the result of the hard work and ability of all interested States to listen, understand and compromise. It is in that spirit that we offer this and one other submission document to the eighty-third session of the Legal Committee. Additionally, the United States notes the resolve of the Legal Committee, as indicated in document LEG 82/12, paragraph 62, to ensure that the draft protocol is ready for consideration by a Diplomatic Conference in the 2002-2003 biennium, and will make every effort to ensure that this goal is realized.

2 The United States has actively studied the draft Athens protocol and solicited comments from potentially interested United States sectors. Utilizing a transparent process in formulating equitable positions on the draft Athens protocol, the United States has taken into account a broad range of interests including those of the passengers, the carriers and the insurers. After analysing these interests with great care, the United States has developed positions that increase substantially passenger protection while promoting fairness to the carriers and insurers who have a history of safe operation in the United States. The overriding goal of the United States. in the development of its positions is to promote a draft Athens protocol that increases passenger protection, and that has a reasonable possibility of ratification in the United States, as well as entry into force in the near future.

Liability of the Carrier: "Two-tier" liability scheme

3 The United States generally supports the innovative two-tier liability scheme and its application found in Article 3, of the Consolidated Text of the Athens Convention and prospective Protocol (Consolidated Text), document LEG 83/4/2. This two-tier liability scheme is based on the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (Montreal Convention) but with appropriate adjustments to account for the differences in the modes of travel. Nonetheless, the United States proposes the following amendments in the hopes that the changes will encourage more State Parties to ratify the draft Athens protocol.

Liability of the Carrier: Shipping Incident, Definition of "Defect in the ship"

4 In recognition of the differences between the air and sea context, article 3 of the consolidated text, document LEG 83/4/2, indicates when the two-tier liability scheme applies. Specifically, article 3, paragraph 1 introduces a new term, "shipping incident," and establishes that a loss caused by a "shipping incident" triggers a defined two-tier liability scheme. Article 3, paragraph 2 establishes that a loss not caused by a "shipping incident" does not trigger a two-tier liability scheme.

5 Article 3, paragraph 5 (a), of the consolidated text, defines the new term, "shipping incident." It is the understanding of the United States that the rationale for the definition of "shipping incident" is to distinguish between those occasions/events that are outside the control of the passenger and are related to a ship's movement through the water and those occasions/events that are not. The definition includes the incidents of a shipwreck, collision, or stranding of the ship as well as explosion or fire in the ship, which are events outside the control of the passenger and are related to a ship's movement through the water.

6 The definition of "shipping incident," in article 3, paragraph 5 (a), however, also includes the phrase, "defect in the ship." There currently is no definition for "defect in the ship" despite the potential that the term could be interpreted to include defects unrelated to the ship's movement through the water. Without a definition that relates such a "defect in the ship" to a ship's movement through the water, there is a substantial risk that State Parties will create different interpretations of what the phrase "defect in the ship" means. This in turn would result in State Parties applying the term "shipping incident" differently, leading away from international uniformity of what events comprise a "shipping incident" and its relation to a ship's movement through the water. The lack of a definition of "defect in the ship" enables State Parties to create their own broad interpretations and consequently to blur the line between a non-shipping incident and a "shipping incident." Since the term "shipping incident" is a pivotal term in determining when the two-tier liability scheme is triggered, the ambiguity in the phrase "defect in the ship," which creates the potential for inconsistent application of the phrase, and consequently, of the concept of a "shipping incident" will undermine the goal of international uniformity of triggering the two-tier liability scheme.

7 To ensure that "shipping incidents" are clearly defined to include only those incidents related to a ship's movement through the water, "defect in the ship" should be defined as those defects having to do with navigation, the safe movement of the ship through the water, and the safe egress of passengers from the ship in an emergency.

8 Accordingly, the United States recommends an addition of a new paragraph 5(c) to article 3 of the consolidated text which defines "defect in the ship." The United States. proposes the following definition of "defect in the ship" based on the above and the International Convention for the Safety of Life at Sea, 1974, Chapter II-1, Regulation 3, paragraph 5, "Normal operational and habitable condition:"

> "Defect in the ship" means any malfunction or failure in equipment, hull, structure, machinery or systems used for propulsion, steering, safe navigation, mooring, anchoring, leaving a berth or anchorage, flooding safety, stability, means of passenger escape, and the operation of emergency boat winches."

Liability of the Carrier: Burden of Proof for Non-Shipping Incidents

9 Article 3, paragraph 2, of the consolidated text, document LEG 83/4/2, addresses the burden of proof for non-shipping incidents. The majority position set forth in the proposed article provides that in such cases the carrier shall be subject to a reverse burden of proof; that is, the carrier will be liable unless the carrier can prove that the incident which caused the loss occurred without its fault or neglect.

10 Non-shipping incidents are those unrelated to a ship's movement through the water. A prime example is cruise ships, for which non-shipping incidents relate to the tourist aspect of cruises, i.e. the use by passengers of the "hotel" rooms, stairways, lifts, swimming pools, dining facilities, dancing floors and a host of other sport, leisure and entertainment facilities. This environment involves a large measure of self-responsibility and self-decision making by the passengers. In addition, the standard of care required does not require specialized technical knowledge; rather, such incidents often involve factors that a passenger can readily discern.

11 These non-shipping incidents should be handled on the basis of straight liability for fault, i.e. with the burden of proof on the claimant, rather than on the basis of a reversed burden of proof. Maintaining a straight duty of care in such instances will encourage responsible conduct on the part of both passenger and carrier. Further, many passenger accidents at sea are not witnessed. To reverse the burden of proof in such case would place the vessel owner in the untenable and unfair position of disproving an accident about which it has no knowledge.

12 Accordingly, the United States. submits that the text found in footnote 1 of article 3, paragraph 2, of the consolidated text, and which is substantially the same as the present Convention, be adopted.

Time-bar for actions

13 Article 9 of the proposed draft Athens protocol (document LEG 83/4/3) would amend article 16, paragraph 3, of the 1974 Athens Convention which gives courts with jurisdiction of cases under the Athens Convention the power to suspend the two-year limitation provided by the Athens Convention. Under the current Athens Convention such courts have the power to suspend and interrupt the limitation period for no more than three years after the passenger's disembarkation or when the disembarkation should have taken place, whichever is later. The proposed amendment in the draft Athens protocol would allow courts to suspend or interrupt the limitation period up to a period of three years from the date when the claimant knew or ought reasonably to have known of the injury, but no later than a period of ten years from the date of the passenger's disembarkation or when the disembarkation should have taken place, whichever is later. Not only does this amendment sharply contrast with the 1974 Athens Convention, it also sharply contrasts with the Montreal Convention's two-year limit for bringing an action (Article 35, Montreal Convention).

14 The reason for a time-bar for actions is to provide notice to a defendant of a claim within a reasonable time frame such that the defendant can investigate the allegations and mount a defense. Permitting a court to extend or interrupt the limitation period until three years after a claimant knew or should have known of his injury, with a ten-year overall limitation, is neither reasonable nor fair. The types of claims covered by the Athens Convention are not hidden claims. These are claims based on events which passengers knew existed at the time they occurred. While in some instances the extent of damage suffered may not be readily determined, the fact of the basis for a claim is known. Carriers and their insurers need to know within a reasonable time frame what their exposures are to damages arising from claims. This is particularly important in the maritime industry where seafarers are transient, thus, witnesses pertinent to an accident may be much harder to locate after such a passage of time compared to land-based accidents.

15 The draft Athens protocol introduces the concept of strict liability and expands the application of the reverse burden of proof, both of which shift the risk to the carrier. Adding to these changes by extending the time-bar for action multiplies the burden of these shifts in risk on the carrier. This exponential increase in burden appears unjustified.

16 In the balance between protecting the passenger and providing the carrier and its insurer with certainty, the ability to gather evidence, and the ability to defend against an action, it would be inequitable and contrary to the concept of uniformity within international law to authorize suits against a carrier or its insurer after three years. The current time-bar provisions of the Athens Convention have not been shown to be unfair or unreasonable. Accordingly, the United States submits that article 9 of the draft Athens protocol be deleted, and that there be no change to article 16 of the current Athens Convention.

***

ANNEX 2

INTERNATIONAL MARITIME ORGANIZATION

IMO

E

LEGAL COMMITTEE
83rd session
Agenda item 4(a)

LEG 83/4/9
6 September 2001
Original: ENGLISH

PROVISION OF FINANCIAL SECURITY

Compulsory Insurance

Submitted by the United States

SUMMARY

Executive summary:	This document presents suggested modifications to the Compulsory Insurance provisions, found in article *4bis* of the prospective protocol to the Athens Convention.
Action to be taken:	The Legal Committee is requested to consider the text proposed in paragraphs 4, 5 and 10
Related documents:	LEG 83/4/2, LEG 83/4/3, LEG 83/4/8 (Liability of Carrier and Time-bar)

Compulsory Insurance: Direct Action

1 Article *4bis*, paragraph 10, of the consolidated text of the Athens Convention and prospective protocol (consolidated text), document LEG 83/4/2, provides passenger claimants the ability to pursue a direct action against the insurer or other person providing financial security. The United States observes that direct action provisions are becoming more and more commonplace. For example, such provisions can be found in all of the pollution liability and compensation conventions completed under Legal Committee leadership. The United States notes, however, that under these conventions, the insurer is subject to suit in primarily only one jurisdiction - the State in whose territorial sea the spill occurred. The direct action provisions in the draft protocol to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 (draft Athens protocol) broaden the use of direct action. First, the draft Athens protocol will contain the first application of such provisions in an IMO convention unrelated to pollution. Second, in the event of an incident causing numerous passenger injuries, the guarantor will be subject to suit in many jurisdictions.

2 The United States generally supports the direct action provision. However, noting concern raised both domestically and internationally, the United States has re-evaluated the purpose for direct action in an effort to weigh the burdens with the benefits. It is the understanding of the United States that the provisions for direct action are necessary to combat two potential problems:

(a) a passenger claimant is unable to locate the carrier to obtain redress; and

(b) a passenger claimant is unable to recover damages from a judgement because the carrier is insolvent.

3 In reviewing the concept, the United States notes several drawbacks to a broad application of a direct action provision:

(a) a broad direct action provision blurs the well established distinction between indemnity and liability insurance;

(b) the insurer may be subject to suit as a tort feasor not as an insurer; and

(c) direct action, in effect, abolishes the defenses or contractual rights as between the insured and the insurer.

4 The United States proposes that a more limited right of direct action would both address the need to protect passenger claimants from insolvent or missing carriers while limiting the impact of the drawbacks of direct action. Specifically, the United States proposes amending article 4*bis*, paragraph 10, of the consolidated text, so that it indicates that a direct action claim may be brought against the insurer in only two circumstances:

(a) when the passenger claimant has obtained a judgment against the carrier and/or performing carrier that cannot be executed in whole or in part because of insolvency or an insolvency proceeding in which the carrier and/or the performing-carrier is involved; and

(b) when the passenger claimant, after a diligent search, is unable to locate for suit any carrier and/or performing carrier who actually performed the whole or part of the carriage.

For these two circumstances, the failure to fulfill an indemnity clause would not absolve the insurer under the policy.

5 To minimize the necessity of a passenger claimant having to file a direct action lawsuit against the insurer of an insolvent carrier against which the claimant has obtained a judgment, the United States proposes adding a paragraph to article 4*bis* which indicates the insurer is responsible for paying any unsatisfied final judgment amount to the passenger claimant. Specifically, the United States proposes the following language:

> "The insolvency or bankruptcy of the carrier or performing carrier shall not constitute a defense to the insurer or other person providing financial security for claims filed pursuant to this Convention against such carrier for the death of or personal injury to a passenger. In the event of insolvency or bankruptcy of the carrier who actually performs the whole or a part of the carriage, the insurer or other person providing financial security agrees to pay any unsatisfied final judgments obtained on such claims."

6 The modifications of the draft Athens protocol found in paragraphs 4 and 5 of this document, together with the broad jurisdictional provisions of the draft Athens Protocol and the compulsory insurance provision would ensure prompt payment of all claims without a disruption of the contractual relationship between insurer and insured. These modifications may preclude the increase of insurance premiums (and passenger tickets) and may give an independent incentive for the insurers to ensure the financial responsibility of carriers and performing carriers.

Compulsory Insurance: Willful Misconduct Defense

7 Article 4*bis*, paragraph 10, of the consolidated text, document LEG 83/4/2, offers two completely opposite options for the willful misconduct defense in a direct action. Option A precludes an insurer from raising the willful misconduct of the insured as a defense while Option B allows the insurer to raise the willful misconduct of the insured as a defense. Both options preclude the insurer from raising any other defenses it might have been entitled to invoke in proceedings between insurer and insured.

8 In Norway's submission of the draft Athens protocol, document LEG 83/4/3, it is noted in paragraph 14 that, "under the CLC, and virtually all other maritime law conventions on compulsory insurance, the insurer can put up the defence of wilful misconduct of the insured."

9 As noted above, the draft Athens protocol contains the first application of direct action provisions in an IMO convention unrelated to pollution. In addition, if the passenger claimant pursues a direct action against the insurer, the insurer is exposed to more jurisdictions compared to other conventions permitting direct action, and precludes the insurer from raising any other defenses it might have been entitled to invoke in proceedings between insurer and insured. All these provisions create a significant increase in protection on the passenger claimant's behalf. The purpose of the Athens protocol, in the view of the United States, is to provide adequate passenger protection, but, in a manner that takes into account others interests. The purpose of the Athens protocol is not to shift all risk to the insurer.

10 For the above stated reasons, the United States recommends that article 4bis, paragraph 10, Option B be followed.