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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**

Wilful misconduct

Submitted by Australia and Norway

SUMMARY

Executive summary: This paper argues that the insurer's wilful misconduct defence be removed from the compulsory insurance provisions.

Action to be taken: Paragraph 16

Related documents: LEG/CONF.13/3

Purpose of paper

1 The basic text of the draft protocol to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (“the Convention”) includes provisions for compulsory insurance. However, Convention article 4bis, paragraph 10 contains an exception that the insurance shall be null and void if the incident has been caused by wilful misconduct of the carrier. The sponsors of this paper are of the opinion that the passenger should also have the benefit of insurance when the damage is caused by wilful misconduct of the carrier. Indeed, it is in these situations that the passenger is most likely to suffer loss. If the compulsory insurance regime established for the protection of passengers does not address loss resulting from the wilful misconduct of the carrier it would be incomplete.

2 In several great maritime disasters, such as the **Herald of Free Enterprise** and the **Scandinavian Star**, there was at one stage uncertainty whether the wilful misconduct defence would be invoked, and the passengers consequently be left without compensation. The sponsors of this paper find such uncertainty unfortunate. We do not think the involved Parliaments could have accepted that victims be left without compensation because of the wilful misconduct of the owner.

3 The need for an insurance cover – a “financial lifeboat” – that extends also to the wilful misconduct situations, is emphasized by the fact that there is no licensing system (except safety

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controls) for international passenger trade. When anyone can run a ferry operation, the general public should at least be properly insured, even as regards dubious operators.

Legal Committee

4 The issue has been raised in the Legal Committee.¹ Since then, material facts have changed. In the following, these and other points raised in the Legal Committee will be addressed.

5 At the eighty-third session of the Legal Committee, the P&I Clubs indicated that the Club Boards would not be prepared to provide direct action certificates covering the wilful misconduct of the shipowner because:

- (a) many Clubs were based in jurisdictions which provided by statute that this risk should not be covered;
- (b) such legislation was incorporated into the Club Rules which formed the basis of the contract with the member; and
- (c) as a matter of policy Club Boards would not wish to cover this risk since it would be seen as providing protection to the sub-standard operator.

6 The willingness of most delegations to accept the inclusion of the defence of wilful misconduct was based on a number of considerations including;

- (a) statements made by the representatives of the insurance industry to the effect that the industry would not cover wilful misconduct;
- (b) the exclusion of the wilful misconduct defence might conflict with public policy and the law in some jurisdictions which prohibited insurance from covering wilful misconduct;
- (c) such a situation was unlikely to occur in the passenger ship industry and that having the defence in the Convention would not undermine the overall objectives of the Convention; and
- (d) the wilful misconduct exclusion would act as an incentive for carriers to maintain a high level of safety in their operations to avoid risking the loss of insurance cover.

Availability of insurance

7 Since the discussions at the eighty-third session of the Legal Committee, the material facts have changed. A number of brokers have now confirmed that market insurance is in principle available also for wilful misconduct. In aviation insurance, this exception is unheard of, even for insurance amounts of USD 2 billion.² This was not clear when the matter was considered last time at the eighty-third session of the Legal Committee, shortly after the incidents of 11 September 2001. That calls for a revision of the basic text.

¹ LEG 83/4/3, paragraphs 14-16; LEG 83/4/5, paragraphs 14 *et seq.*; LEG 83/4/6, paragraph 17; LEG 84/4/7; LEG 83/4/9, paragraphs 7-10; LEG 83/14, paragraphs 49-53.

² See to this e.g. London Aircraft Insurance Policy
<<http://folk.uio.no/erikro/WWW/corrgr/insurance/airpolicy.pdf>> (large file).

8 The P&I Clubs are not likely to offer insurance cover for wilful misconduct. In our view, this should not be decisive as long as insurance for this particular risk can be purchased elsewhere, and the alternative is that the passenger is left without cover in cases of wilful misconduct. Insurance for wilful misconduct could, for example, be fitted into the Clubs' reinsurance programme.

Precedents

9 In the CLC, HNSC and the Bunkers Convention the wilful misconduct defence is available to insurers. However, even if that would be reasonable in case of pollution damage, where Governments are often the major claimant, that would not be reasonable in respect of passenger claims, where all claimants are individuals who have suffered bodily injury.

10 The wilful misconduct exception stems from the English Marine Insurance Act, 1906, s. 55.³ Although some States have adopted similar rules, it is far from universal.⁴ It is submitted that the Diplomatic Conference should not feel bound to follow English law in this matter.

11 The Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 1999, article 50, does not address details of the insurance cover, and does not take a stand on the wilful misconduct defence. However, national implementations of this insurance requirement expressly prohibit the wilful misconduct defence.⁵ In motorcar insurance, it is believed to be considered unacceptable in most of the world to leave passengers without protection in cases of wilful misconduct by the driver.⁶

Certainty

12 It is very unclear indeed which conduct amounts to wilful misconduct. Already for reasons of certainty of law and foreseeability, the wilful misconduct defence should not be included in the Protocol.

Public Policy

13 Admittedly, it would be undesirable from a public policy point of view if a shipowner could insure against the consequences of his own wilful misconduct.⁷ The rationale for the defence of wilful misconduct is to ensure that the assured does not benefit by wilfully causing its own loss. However, the issue here is whether the *passenger* should have the benefit of insurance even when the carrier has committed an act of wilful misconduct. The public policy consideration that the assured does not benefit by wilfully causing its own loss can not apply to passengers, who clearly have no influence or control over the conduct of the carrier.

³ See <<http://www.jus.uio.no/lm/england.marine.insurance.act.1906/doc.html>>.

⁴ See LEG 84/4/7, paragraphs 19-22.

⁵ See e.g. in respect of United States law Part 205 of Title 14 of the Code of Federal Regulations, see <http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_14/14cfr205_00.html>.

⁶ See e.g. in respect of the law of the European Community, Council directives 72/166/EEC art 3 and 84/5/EEC art 2

(<http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31972L0166&model=guichett> and

<http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31984L0005&model=guichett>, respectively).

⁷ Notably, the above-mentioned English Marine Insurance Act, 1906, s. 55, is not mandatory on this point, and can therefore hardly be based on such policy considerations; see

<<http://www.jus.uio.no/lm/england.marine.insurance.act.1906/doc.html>>.

14 Even if the wilful misconduct defence were not included in the Convention, this would not prevent a provider of compulsory insurance instigating recourse action against the carrier in cases of wilful misconduct. In that case, the carrier would not benefit from his wilful misconduct even if the passenger had his claim covered. Thus it is possible to protect the passenger and meet public policy considerations that the carrier should not benefit from his own wilful misconduct.

15 The objective of the Convention is to provide enhanced compensation and to make insurance for the benefit of passengers compulsory. The inclusion of the wilful misconduct defence undermines the objective of the Convention by restricting compensation to passengers in the event of wilful misconduct of the carrier. Passengers can only recover by suing the carrier, which may be bankrupt or disappear. Indeed, it is often for these reasons that a carrier may be motivated to engage in wilful misconduct in the first place. In these circumstances, public policy considerations clearly favours that the passenger should be protected despite the wilful misconduct of the carrier.

Insurance practices

16 The clubs have been reluctant to invoke the wilful misconduct defence, and have not invoked it even in major incidents in which there could have been reasons to do so. This calls from the following observations from a government point of view:

- These insurance practices do not take care of the public policy argument that the carrier should not benefit from his own wilful misconduct. A point of public policy that regularly fails is not a good reason to maintain the wilful misconduct defence.
- The fact that clubs have been reluctant to invoke the wilful misconduct defence is no guarantee that they will continue to be reluctant in the future. On the contrary, the fact that they insist on maintaining the defence and the reluctance of some clubs to cover passenger claims are clear indications that practices may be more restrictive.
- The fact that clubs do not invoke the wilful misconduct defence is not an indication that other insurers will not do it. As the clubs seem more reluctant to cover passenger risks, it is likely that such other insurers will be more active in the market.

Conclusion

17 The sponsors of this paper propose that the wilful misconduct defence be removed from draft Convention Article 4bis, paragraph 10. A draft amended text is provided in the Annex.

ANNEX

**CONVENTION ARTICLE 4BIS, PARAGRAPH 10 (IN PROTOCOL ARTICLE 5)
SHALL READ:**

“10 Any claim for compensation covered by insurance or other financial security pursuant to this article may be brought directly against the insurer or other person providing financial security. In such case, the amount set out in paragraph 1 applies as the limit of liability of the insurer or other person providing financial security, even if the carrier or the performing carrier is not entitled to limitation of liability. The defendant may further invoke the defences (other than the bankruptcy or winding up) which the carrier referred to in paragraph 1 would have been entitled to invoke in accordance with this Convention, **but** ~~Furthermore, the defendant may invoke the defence that the damage resulted from the wilful misconduct of the assured, but the defendant~~ shall not invoke any ~~other~~ defence which the defendant might have been entitled to invoke in proceedings brought by the assured against the defendant. The defendant shall in any event have the right to require the carrier and the performing carrier to be joined in the proceedings.”
