



**PROPOSAL FOR A REGULATION
OF THE EUROPEAN PARLIAMENT AND THE COUNCIL
ON THE LIABILITY OF CARRIERS OF PASSENGERS BY SEA AND INLAND
WATERWAYS IN THE EVENT OF ACCIDENTS
PROPOSED AMENDMENTS
OF THE INTERNATIONAL GROUP OF P&I CLUBS ON THE ADVANCE PAYMENTS
PROVISION**

Introduction

The 13 P&I Clubs that comprise the International Group of P&I Clubs (the Group) are mutual not-for-profit insurance organizations that between them cover the third party liabilities (which include pollution, loss of life and personal injury, cargo loss and damage and collision risks) of over 90% of the world's ocean-going tonnage. The Clubs are mutual organisations, that is the shipowner members are both insured and insurers as the members own and control their individual clubs. The day to day activities and operations of the Clubs are delegated to managers. Clubs are individually liable for claims up to US \$6 million. Above this amount claims are pooled, that is shared, between the 13 Group Clubs.

Proposed Regulation on the Liability of Carriers of Passengers by Sea and Inland Waterways in the Event of Accidents

The Group believes that an international industry such as shipping should be regulated on an international basis in order to achieve maximum uniformity and thus certainty. The Group therefore welcomes the Commission's proposal to incorporate the IMO Athens Convention 2002 into EC law.

The Group's general position on the Proposal, along with the proposed extension of the Convention to domestic carriage is set out in a separate position paper issued jointly with the European Community Shipowners' Association (ECSA).

One feature of the Proposal which gives rise to considerable concern to the Group is the provision on advance payments in Article 5 of the Proposal.

(A) Alignment of Legislation

The Group understands the wish to align shipping and the implementation of an efficient liability system for passengers by sea with the schemes for other forms of transport notably the air and rail sectors. However the Group firmly believes that the Proposal should reflect the fundamental differences that exist between the various passenger forms of transport, which are in many instances reflected in the different liability regimes which have been negotiated in respect of those modes of passenger carriage. The provisions relating to insurance and evidence that insurance is in place are for instance much more complex and demanding in the Athens convention than in say the Montreal convention which is comparatively straight forward and simple. Under the Athens convention it is necessary for the insurers to confirm to flag states that insurance is in place that meets the requirements of the Convention in order for flag states to issue the certificates called for under the Convention to carriers. Without such certificates carriers cannot trade. No such certification is required under the Montreal convention. It is the complex nature of the insurance and certification scheme and the differences in the physical carriage of passengers, which in the Group's view create very real difficulties when seeking to incorporate provisions commonly contained in legislation/regulations governing non-sea carriage into legislation governing sea carriage. Advance payment which was rejected during the international negotiations which resulted in the Athens Convention is an example.

(B) Advance Payment

There is for instance a far greater volume of personal injury claims arising on passenger vessels generally than on aircraft and in any one serious incident the number of casualties on a vessel are likely to be greater than on an aircraft because of the greater number of passengers carried. The majority of incidents on passenger vessels involve minor injuries whereas there is a much greater likelihood of incidents involving serious personal injury or fatalities on aircraft. Passengers travelling by sea have a much greater freedom of movement and a wider range of activities open to them than aircraft passengers, who have in comparison a limited capacity to harm themselves during a flight. The Athens Convention takes this into account, whereas the air and rail schemes do not, by providing a distinction between fault based liability for "non-shipping incidents" (e.g. slips, falls etc.) and strict liability for "shipping incidents" (e.g. shipwreck, grounding, fire etc.).

Indeed, the Athens Convention (Article 6) recognises that a passenger travelling by sea may actually have contributed to, or entirely caused, the personal injury or death that arises (e.g. by failing to follow the safety instructions of the crew) whether or not the incident was "shipping" or "non-shipping". Because of the freedom of movement of sea passengers there are

likely to be many more instances where this occurs. It is far less likely during air carriage, given the restricted freedom of movement that exists during a flight.

The Group is also concerned that the advance payments proposal would adversely affect the current practice of Group Clubs to provide prompt payments to claimants in cases of serious injury and hardship, which are dictated by the circumstances of each particular case.

Introducing an entitlement to advance payments may actually render a claimant worse off than he/she is under current practice since it would bring into play issues of liability and identity, which will vary in different jurisdictions (possibly significantly), as well as issues of quantification of claims, credit for interim payments and re-imburement for payment when no liability has been established.

In practice, Group Clubs will almost invariably make advance payments in cases of hardship and serious casualties, as was the case in relation to claims arising from the *Estonia*, *Herald of Free Enterprise*, *Scandinavian Star* and *Express Samina*. However the introduction of a formal provision on advance payments could affect this practice and lead to jurisdictional and procedural difficulties, particularly in cases involving major loss of life. For example, how would the provision work in practice in cases where the carrier is not liable? How would it deal with credit to be given for such payments? How would the identity of the person entitled to damages be established? It is likely that there is no common answer to these questions which would depend upon and differ from jurisdiction to jurisdiction. It should be noted that under the convention the claimant has a large choice of jurisdictions in which to proceed.

Moreover certain of the current wording is ambiguous. For instance it is not clear what is meant by "immediate economic needs" and it is not stated that these should be the consequence of the injury. In addition there is no requirement for a claimant to demonstrate hardship.

(C) Conclusion

Accordingly, the Group believes that the operation of the proposed advance payment provision is likely to give rise to many difficulties in practice, and would urge that further consideration be given to its inclusion in the Proposal.

D. 2734/06
SF 6.565/10.330

Proposal for a Regulation on the Liability of Carriers of Passengers by Sea and Inland Waterways in the Event of Accidents

Draft Report made by Rapporteur Costa

The industry; represented by ECSA and the International Group of P&I Clubs takes the opportunity of the forthcoming discussions in the TRAN Committee to comment on the draft report as made by Rapporteur Costa on the abovementioned proposal.

In general, the Industry supports the aim of the Proposal to incorporate the 2002 Protocol to the Athens Convention relating to the carriage of passengers and their luggage by sea into EC law.

The industry welcomes the willingness of the Rapporteur to include in the proposed Regulation the solution adopted in the IMO on the issue of insurance cover for terrorism related incidents arising under the Athens Convention. This issue was discussed at the recent session of the IMO Legal Committee and a compromise solution was agreed by the Committee, after almost 4 years of complex negotiations, based on a proposal that received the support of a number of Members States and industry.

The solution takes account of the existing exclusions in standard P&I cover provided by the Group Clubs, whilst utilizing the capacity in the war risk insurance market. The application of an alternative, separate provision on terrorist risks in the proposed Regulation may adversely affect the operation of the proposal and compromise the objective of applying a comprehensive harmonized liability scheme across the EU. The Industry strongly urges that the proposed Regulation adopts the agreement reached in the IMO discussions on this issue and subsequently ensures that such agreement applies to the proposed Regulation.

With regard to the Rapporteur draft report, the Industry welcomes the fact that he has proposed a transitional period of two years to domestic carriage by regular ferry lines so as to ensure efficient and financially sustainable civil liability coverage for passengers.

Whilst the principle of granting a transitional period to domestic carriage by regular ferry lines is very much welcomed, the Industry believes a longer transitional period, preferably of five years, will be necessary since such a period would enable domestic carriers to ensure that their insurance arrangements are properly adapted to the proposed European liability scheme.

In this respect, it should be noted that granting a longer transitional period would not result in domestic operators having no insurance coverage. The vast majority of carriers operating in domestic traffic already have insurance cover, either with P&I

providers such as International Group Clubs or with local or national insurance markets, but generally to lower liability limits than those provided for under the 2002 Athens regime. Obtaining appropriate insurance cover up to the limits of the 2002 Athens Protocol, with the appropriate procedures in place to comply with the certification requirements, would take some time. This is made more difficult because of the recently adopted compromise in the IMO, which requires passenger carriers to have insurance cover for death and personal injury resulting from terrorist acts. Not all carriers, particularly those operating domestically, currently have such cover. Obtaining insurance cover for liability for terrorist acts through the war risk insurance market may prove difficult for such carriers as it is a relatively limited market when compared to the non war risk market.



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PROPOSED AMENDMENTS OF THE INTERNATIONAL GROUP OF P&I CLUBS
ON MATTERS OTHER THAN ADVANCE PAYMENTS**

Introduction

This paper sets out the comments of the International Group of P&I Associations on the text of the Proposed Regulation, other than on the proposals in respect of Advance Payments which are dealt with in a separate paper.

We set out only the Articles of the Regulation and Convention on which we have comments.

Article 1

Subject-matter

This Regulation lays down a Community regime of uniform liability for the carriage of passengers by sea and inland waterways.

To that end, this Regulation incorporates the relevant provisions of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by its protocol of 2002, hereinafter referred to as “the Athens Convention 2002” and extends the application of those provisions to carriage by sea within a single Member State and to international and domestic carriage by inland waterways.

On 19 October 2006, the Legal Committee of the IMO adopted a Reservation and Guidelines for Implementation of the Athens Convention. These set out procedures in relation to the issue of certificates and address the difficulties arising out of terrorism and are essential to the successful operation of the Convention. We suggest that these be incorporated in this Regulation in the same way as the Convention.

Article 2

Scope

The Regulation shall apply to any international or domestic carriage, by sea or inland waterway, if:

- (a) the ship is flying the flag of a Member State;
- (b) the contract of carriage has been made in a Member State; or
- (c) the place of departure or destination, according to the contract of carriage, is in a Member State.

We suggest the scope is expressly limited in the case of domestic traffic and inland waterways to carriage within Member States. There is otherwise the possibility that, for example, the Regulation might apply to ship flying the flag of a Member State engaged in domestic traffic in a Non-member State.

Article 4

Limits of liability

In the event of loss of or damage to mobility equipment or medical equipment belonging to a passenger with reduced mobility, the compensation may be equal to, but shall not exceed, the replacement value of the equipment.

While understanding the need to protect the interests of persons with restricted mobility, we consider that the equipment referred to is already covered by the Convention (see the definition of “luggage” in Article 1.5).

Article 5

Advance payment

In the event of the death of, or personal injury to, a passenger the carrier shall make an advance payment sufficient to cover immediate economic needs, within 15 days from the identification of the person entitled to damages. In the event of death this payment shall not be less than EUR 21 000.

See separate paper on this subject

APPENDIX

ATHENS CONVENTION RELATING TO THE CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA, 2002

(Consolidated text of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 and the Protocol of 2002 to the Convention)

ARTICLE 1

Definitions

In this Convention the following expressions have the meaning hereby assigned to them:

3 “ship” means only a seagoing vessel, excluding an air-cushion vehicle;

The draft Regulation does not amend the definition of ship, although the extension in scope indicates that it is intended to also apply to non seagoing ships.

ARTICLE 4bis

Compulsory insurance

- 1 When passengers are carried on board a ship registered in a State Party that is licensed to carry more than twelve passengers, and this Convention applies, any carrier who actually performs the whole or a part of the carriage shall maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability under this Convention in respect of the death of and personal injury to passengers. The limit of the compulsory insurance or other financial security shall not be less than 250 000 units of account per passenger on each distinct occasion.

We have not set out Article 4bis in full as it is lengthy and contains the very detailed insurance and certification requirement.

The Convention requires a Certificate to be issued by flag states “to cover liability under this Convention”. The form of Certificate is prescribed and is contained in the Annex to the Convention and also refers to insurance “satisfying the requirements of Article 4bis.” Corresponding wording is contained in the “blue cards” issued by insurers to flag states.

We submit that Certificates issued under Convention would not apply to liabilities arising under the increased scope introduced by the Regulation. If the intention is that the provisions in Article 4bis are to apply to domestic traffic and inland transport, it appears that a separate certification mechanism is necessary.

ARTICLE 17

Competent jurisdiction

- 1 An action arising under Articles 3 and 4 of this Convention shall, at the option of the claimant, be brought before one of the courts listed below, provided that the court is located in a State Party to this Convention, and subject to the domestic law of each State Party governing proper venue within those States with multiple possible forums:
 - (a) the Court of the State of permanent residence or principal place of business of the defendant; or
 - (b) the Court of the State of departure or that of the destination according to the contract of carriage; or
 - (c) the Court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State; or
 - (d) the Court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.

We suggest that the Regulation makes it clear that an action brought under the extended scope implemented in the Regulation is subject to the jurisdiction of the Courts within Members States but not other States Party to the Convention.
