PROPOSAL FOR A REGULATION
OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME I)

POSITION OF THE INTERNATIONAL GROUP OF PROTECTION & INDEMNITY (P&I) CLUBS ON INSURANCE IN ROME I

Introduction

The 13 P&I Clubs that comprise the International Group of P&I Clubs (the IG) are mutual not-for-profit insurance organisations 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 approximately 92% 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.

In order to provide the very high levels of insurance cover which they do, the Group Clubs are dependent on their pooling arrangement whereby claims in excess of each club's retained risk (currently fixed at US$ 7 million) are pooled and shared between the clubs in their respective pooling proportions up to US$ 50 million. This pooling arrangement is underpinned by a reinsurance programme which is the largest marine insurance placement in the world. This layered programme, which is renewed annually, protects the Group Clubs for claims exposures from US$ 50 million up to a combined limit of US$ 3.05 billion (for pollution US$1 billion). A further layer of cover, through a collective Group overspill arrangement, provides that the total cover for shipowner members for non-oil pollution is currently in excess of US $5 billion (with oil pollution cover limited to $1.05 billion and passenger cover limited to $2 billion).

11 of the 13 Clubs in the IG are regulated in EU or EEA States.

The IG takes the opportunity to comment specifically on the proposed inclusion of Article 5a on insurance contracts in the Rome I Regulation.

General – P&I insurance contracts between the Club and the entered member

P&I insurance contracts between the Club and the entered member (shipowners and charterers) and the rights and obligations arising under them are essentially a matter of private law as opposed to public law. One of the prime concerns for commercial entities is certainty, particularly in respect of their rights and obligations under contracts into which they enter. Such P&I insurance contracts therefore contain a choice of law clause that is set out in the policy terms. These policy terms that are embodied in the P&I insurance contract (known as Club Rules) are individual to each Club, although it should be noted that they differ little between the Clubs in material respects.

The governing law of these contracts is chosen for a variety of reasons e.g. established system of law, expertise in that jurisdiction in adjudicating particular types of commercial activities, perceived neutrality, etc. Giving effect to choice of law provisions is accordingly of a very real importance to commercial entities. This is particularly so in the context of contracts relating to international trade which may involve rights and obligations arising in a number of different jurisdictions. P&I insurance contracts fall into this category. The IG Clubs do therefore make use of the existing freedom to choose the applicable law.

Presidency Proposal for Insurance Contracts to be Comprehensively Covered by Rome I by the Presidency Text

The IG does not believe that the Regulation should cover marine insurance contracts and agrees with the Commission's original proposal which would preserve the present rules in the EU Directives mentioned below.

Neither the Rome Convention nor the Commission's original draft text govern the law applicable to insurance contracts covering risks situated within the Member States since the current regime of the law applicable to such insurance contracts (in respect of general, non-life insurance) is laid down in the First Council Directive 73/239/EEC of 24 July 1973 and the Second Council Directive 88/357/EEC of 22 June 1988.

The rules contained in these Directives are well understood and have not led to any significant problems that would suggest that there is a pressing need to extend the scope of the Rome I Regulation (i) to govern insurance or reinsurance contracts covering risks within a Member State or a third country, (ii) to provide distinctions between insurance contracts governing large risks and those that do not, or insurance contracts that cover compulsory insurance requirements.

As far as the IG is aware there has been no pressure from consumers (claimants and also shipowners and charterers) or the general insurance market to change the choice of law rules applicable to insurance contracts.

"*Large risks*" within the meaning of Article 5a (1) of the draft Regulation, and as defined in Article 5(d) of the First Council Directive 73/239EEC, include "*all liability arising out of the use of ships, vessels or boats on the sea, lakes, rivers or canals (including carrier's liability)*". As will be appreciated from the introduction, IG Clubs provide cover for large risks for shipowners. This cover is referred to as Protection and Indemnity (P&I) cover.

Article 5a (1) provides that such risks shall be governed by the law of the country in which the insurer or re-insurer has his habitual residence, unless the applicable law has been chosen in accordance with Article 3. This freedom to choose the applicable law is consistent with the choice of law rules in the above mentioned insurance Directives and accordingly permits the parties to choose the applicable law for such insurance contracts.

It is particularly important for the IG Clubs that all entered members of the Clubs have their rights and obligations determined by the same legal regime to ensure consistency. If the choice of law varies according to the location of the "risk" or the domicile of the insured, consistency and certainty would be undermined.

Furthermore, what is meant by the "risk" in the context of P&I insurance? Is the "risk" the vessel itself? Is the "risk" determined by the vessel's country of registration as provided by Article 5a (5) (b)? Or, is the "risk" the liabilities which are covered by the compulsory insurance requirement? These queries highlight the complexity of the Presidency's proposals, as well as the lack of uniformity and very substantial and undesirable degree of uncertainty that they are likely to introduce.

The IG accordingly opposes the Presidency's text and supports the Commission's original proposal with regard to the treatment of insurance contracts which would preserve the present rules in the EU Directives.

Proposed Article 5a (2) – Insurance Contracts Covering Risks Subject to Compulsory Insurance

Having regard to the above, the IG also refers to the Presidency's proposal in respect of policies covering risks subject to compulsory insurance in Article 5a (2), since the Presidency proposes an alternative, mandatory provision that does not allow the parties the freedom to choose the applicable law for insurance contracts covering such risks.

The IG opposes the Presidency's text in Article 5a (2) which would introduce a lack of uniformity and a very substantial and undesirable degree of uncertainty.

The provision governing insurance contracts covering a risk for which a country imposes compulsory insurance may give rise to conflicts with existing insurance practice in the field of Protection & Indemnity and other types of commercial rather

than consumer insurance. There are a number of international maritime liability and compensation Conventions (e.g. 1996 Hazardous and Noxious Substances (HNS) Convention[1], 2002 Protocol to the Athens Convention Relating to the Carriage of Passengers by Sea[2], 2001 Bunkers Convention[3]) which require shipowners to maintain third party liability insurance which is provided by the shipowner's P&I Club or other liability insurer and contained in the P&I insurance contract. Although these particular Conventions are not yet in force internationally, Member States are at varying stages of the implementation process. The compulsory insurance provisions of these Conventions are however almost identical to those contained in the International Convention on Civil Liability for Oil Pollution Damage, 1992, (CLC 92) which is in force across the EU.

Example of the Affect of Article 5a (2) arising from Member States Existing Insurance Obligations

By virtue of the provisions of CLC 92, all EU coastal Member States require their shipowners[4] (i.e. registered on their ship registry) to maintain insurance or other financial security to cover their liability under the Convention for pollution damage arising from the carriage of persistent oil in bulk as cargo. These States issue a State certificate to such vessels, in accordance with the provisions of the Convention, once they are satisfied that adequate insurance cover/financial security is in place. As Contracting States to CLC 92, all such States also require that insurance or other financial security is in place, to the extent required, in respect of any ship wherever registered entering or leaving a port in its territory.

CLC 92 and the other Conventions do not lay down conflict-of-law rules relating to contractual obligations. CLC 92 is an international maritime liability and compensation regime that provides for strict liability of the shipowner for pollution damage arising from the carriage of persistent oil by sea, compulsory insurance and direct action against the insurer or other provider of financial security and State certification.

Under CLC 92 and the HNS & Bunkers Conventions, third party claims are determined in accordance with the law of the country in which the liability arises i.e. the country in which the pollution damage occurs (the pollution damage could of course occur in more than one country arising out of the same incident, which would create a further complexity with regard to the Presidency’s proposals). However, as has already been mentioned earlier in this document, P&I insurance contracts between the Club and the entered member are governed by the law agreed by the parties and set out in the Club Rules and not the law of the country imposing the compulsory insurance requirement.

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[1] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996

[2] Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 2002

[3] International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

[4] if the vessel actually carries more than 2000 tons of persistent oil in bulk as cargo

If the provision contained in Article 5a (2) of the Presidency's text were to be adopted it would result in the law of the country imposing the compulsory insurance also governing the insurance contract despite the parties having made a specific choice of law. This would be contrary to the fundamental principle set out in Article 3 of the draft Regulation upholding the freedom for contracting parties as to choice of law. It would also create considerable uncertainty and will not promote uniformity (one of the main objectives of the Regulation) since the terms and conditions of the insurance contract, the Club Rules, would, as already stated, be potentially subject to a variety of systems of law that may interpret the Club Rules in different ways.

For the reasons given above, the IG believes that Member States should continue to permit insurance contracts covering a risk for which a country imposes compulsory insurance to be governed by the law chosen by the parties, and in light of the existing Directives therefore see no reason to include insurance contracts in Rome I. If they are to be included, for the reasons given above the IG does not believe that Article 5a (2) should be included in the Regulation.

If the IG's position were accepted this would not detract from the rights of the third parties who are the beneficiaries of compulsory liability insurance schemes by virtue of implementation of the international Conventions outlined above. These third party claimants would still be able to bring their claims in the place where the pollution or other damage occurred while the insurer and insured would have their choice of law respected in relation to issues between themselves.

Effect and Impact of the Removal of the Existing Freedoms

It is difficult, if not impossible, to quantify the scale of the impact on the IG, other than to repeat the comments already made, namely that if the provision contained in Article 5a (2) of the Presidency's text were to be adopted it would result in the law of the country imposing the compulsory insurance (which is likely to be widespread across the EU for a number of risks, following entry into force of those Conventions already mentioned) also governing the insurance contract despite the parties having made a specific choice of law.

Given that each of the IG Clubs has a wide international geographical spread of entered members, this would create huge uncertainty as the law governing the contract would vary from entered member to entered member.

This is a significant departure from the current rules that the IG does not accept.

Conclusion

In line with the comments made in this response, the IG believes that the status quo should be maintained and that parties to insurance contracts should be free to choose the applicable law.

This would ensure that P&I insurance contracts are governed by a single legal system, that chosen by the parties, which would result in certainty for both parties to the contract, as is presently the case.

The IG does not therefore believe that there is a necessity to include insurance contracts in the scope of Rome I. If they are to be included the IG believes that draft Article 5a (2) should not be adopted into the Regulation.