PROPOSAL FOR A DIRECTIVE
OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON CIVIL LIABILITY AND FINANCIAL GUARANTEE OF SHIPOWNERS (CLD)

IG COMMENTS FOLLOWING THE EUROPEAN PARLIAMENT'S FIRST READING

September 2007

Introduction

The 13 P&I Clubs that comprise the International Group of P&I Clubs (the IG) 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 approximately 92% of the world's ocean-going tonnage.

The IG has been closely following the progress of the 3rd Maritime Safety Package proposal on civil liability and financial guarantees of shipowners (CLD) through first reading in the European Parliament (EP). The IG supports the underlying objectives of the draft Directive of (i) preventing damage, (ii) improving the quality of shipping and maritime safety, (iii) ensuring an effective compensation regime and (iv) implementation of the international maritime liability regimes. However, the IG does not believe that the Directive fulfills these objectives. This document identifies a number of objections on underlying issues of principle. A separate paper is annexed to this document highlighting in more detail several technical problems which arise from the text of the draft Directive.

Prevention and compensation are different

The opening paragraph of the Explanatory Statement to the final EP TRAN Committee report[1] states that the aim of the proposal is to put in place *"a core of rules common to all Member States governing civil liability, but also for any person responsible for the operation of a ship …….. to draw up rules designed* ***both to prevent accidents and compensate for damage".***

Ensuring safe ships on the one hand and adequate compensation to accident victims on the other are excellent objectives which the IG fully supports. The problem is, however, that these are **separate** objectives which require different regulatory solutions.

Most fundamentally the presumption that the CLD will contribute in preventing accidents occurring in the first place is wrong. Because of this point some of the proposals could have the reverse of their intended effect.

[1] FINAL A6-0055/2007

LLMC is not a liability Convention

The first main proposal in CLD is that all member states implement the Convention on Limitation of Liability for Maritime Claims 1996 (LLMC).

It appears that LLMC is perceived as a liability convention giving rights to claimants. This is not the case. Unlike other conventions such as the CLC[2], the **LLMC is a limitation convention** giving rights to shipowners and operators. The LLMC therefore makes no reference to claimants or their rights other than to indicate which types of claim are subject to limitation, the limits of liability of the shipowner and the procedure for establishing and distributing the limitation fund. In fact, LLMC states that *"the act of invoking limitation of liability shall not constitute an admission of liability"*.

LLMC is not a maritime safety tool

The IG welcomes many of the recent measures introduced by the European Community as positive contributions to maritime safety. These measures are properly targeted at areas which specifically deal with ship safety such as port state control, flag state compliance, and vessel traffic monitoring. The LLMC, however, is not designed to deal with safety issues.

The IG is not aware of any evidence to support the idea that the existence of the right to limit liability under LLMC has any influence at all on a ship operator who might be tempted to "cut corners". In fact it is inherently unlikely that LLMC has any effect on the conduct of such shipowners and the convention is therefore not an effective tool in the context of maritime safety.

Financial guarantees will not contribute to ship safety

The second main element in CLD is the requirement that all ships over 300 gross tonnes carry state issued certificates as evidence that civil liabilities are guaranteed.

However, guaranteeing payment for claims arising after an accident will not reduce the chances of accidents happening in the first place. Further, the requirement for insurers to provide financial guarantees will significantly increase the insurers' exposure. At the same time, it will also enable owners, charterers and cargo owners to operate or employ substandard ships in the knowledge that insurers will have to meet any liabilities which arise. Accordingly, the requirement of a guarantee may reduce the financial exposure of shipowners and therefore serve to undermine rather than strengthen ship operators' safety consciousness.

In addition, as noted above, the LLMC only contains a general description of the types of claim which it applies to. It does not define the legal liabilities which are determined by separate legal regimes. The IG is concerned by the fact that it seems unlikely that insurers will be able or willing to provide financial guarantees for undefined and open-ended liabilities as contemplated in CLD.

Lack of proportionality

There are about 50,000 commercial vessels over 300gt trading internationally. The world fleet is registered in over 150 nations, with approximately 10,000 vessels flying the flag of an EU Member State. Member States would therefore be required to issue on an annual basis CLD certificates for

[2] 1992 International Convention on Civil Liability for Oil Pollution Damage

all these European flagged vessels. Member States would also need to issue certificates for most of the other 40,000 or so vessels registered in non-Member States which need to be able to operate in European waters.

It is the IG's firm opinion that the costs in operating such a system would be entirely disproportionate to the apparent benefits conferred. Even more so because to our knowledge it has not been demonstrated that claimants are uncompensated for lack of a financial guarantee.

There is an alternative to financial guarantees

Guidelines adopted by the International Maritime Organization (IMO) in 1999 recommend that shipowners should maintain insurance of the type currently provided by members of the International Group of P&I Clubs and ensure that their ships have on board a certificate issued by the insurer as evidence of such cover.[3] IG Clubs already issue such "certificates of entry" to all entered vessels. These Certificates are carried on board as evidence that the vessel is entered with an IG Club and are available for inspection as part of the port state control regime.

Treaty law concerns

The essence of any treaty obligation is uniform application and reciprocity which each State agrees to by becoming a contracting party with other States. In return that State acquires similar rights vis-à-vis those States and complies with the duties and obligations imposed by the relevant regime. These principles remain fundamental to sectors as global as international maritime transport and trade.

It is worrying therefore that while CLD requires Member States to become contracting parties to the LLMC regime as soon as possible, it also contains measures which are in conflict with that international regime. One example is the introduction of a new test of "gross negligence" as a means of removing the right to limitation for vessels flying the flag of states not party to 1996 LLMC. Another example is the new definition of "civil liability" which seeks to restrict CLD to third parties not involved in the maritime transport chain. These changes go to the heart of LLMC which would then exist in two fundamentally different forms in States which have adopted what should be the same international legal regime.

Following from this the IG see fundamental questions arising, such as how will EU LLMC Member State parties meet their treaty obligations to non-EU LLMC State parties if their duties and obligations are amended by CLD? And furthermore, if States are unable to meet their treaty obligations under LLMC, would EU Member States be required to denounce LLMC in order to implement the Directive?

One stated objective of the CLD is to encourage adoption of LLMC throughout the world. This is an objective supported by the IG. However, fundamentally changing LLMC and creating a lack of uniformity is likely rather to discourage non-member states from ratifying.

[3] (IMO Assembly Resolution A.898 (21))

Legal uncertainty and increased litigation

The IG had real concerns with the draft text of the CLD produced by the Commission. Those concerns are now even greater in the light of the amendments adopted by the EP. There is a serious risk that these proposals will create legal confusion and increased litigation.

This is particularly so if the definition for breaking limitation will in some cases (vessels flying the flag of a non-LLMC State party) be set as one of "gross negligence". The fundamental problem is that this term is not universally recognised and would inevitably lead to extended litigation to establish whether or not in a particular instance an owner had been "negligent" or "grossly negligent". Such litigation would be detrimental to the quick and effective compensation of victims and therefore also contrary to the objectives of the draft Directive.

There are in addition many other points of serious concern to the IG in this draft proposal – not the least as amended by EP. These have been set out in further detail in the annex to this note.

The IG would urge that these concerns are given careful and due consideration before making the radical and far reaching changes that have been suggested in this draft Directive.

06.09.07

Annex

PROPOSAL FOR A DIRECTIVE
OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON CIVIL LIABILITY AND FINANCIAL GUARANTEE OF SHIPOWNERS (CLD)

IG COMMENTS ON THE CLD TEXT FOLLOWING THE EUROPEAN PARLIAMENT'S FIRST READING

September 2007

EP Amendment 3 - Recital 3

The international ***regimes*** in respect of civil liability and compensation ***of third parties for damage related to maritime transport*** should be ***implemented and*** improved in order to guarantee that operators in the maritime transport chain ensure that ***goods are*** only transported on board ***ships*** of the highest standard ***to ensure fair compensation of victims who are not party to the maritime transport chain and encourage operators and their representatives to exercise greater vigilance and professionalism***.

International Group Position

The industry has already indicated that there is no evidence that an increase in liability, which is already very substantial under LLMC 96, would result in improved standards particularly if that liability is insured. This is particularly so in the context of mutual insurance where the ship owners individual losses up to US $ 7 million are shared between the entire membership of his club and in excess of this figure between all IG Clubs up to $5.05 billion.

Whilst the industry supports the implementation of the international maritime liability regimes, it is essential to realise that these regimes have been established through international cooperation over decades and are not aimed at preventing damage or encouraging "*operators and their representatives to exercise greater vigilance and professionalism*". It is a mistake to expect the Conventions to fulfill a purpose for which they were not designed. There are mechanisms already in place to achieve these objectives (Port State Control, Flag State compliance etc.).

The aim of the liability regimes is to provide third parties who have suffered loss and damage with sure, speedy and satisfactory compensation. In this very important objective, the current international system has worked and continues to work efficiently.

Supposed "improvements" in the form of amendments will also lead to treaty law problems with other states which are party to these conventions but not members of the European Community.

In fact, it should be noted that a rigorous review of the international oil pollution compensation regime, lasting approximately 5 years, was completed by Member States of the IOPC Fund (which includes all coastal EU Member States) in 2005. As part of this review the IMO adopted the 2003 Supplementary Fund Protocol, which is in force in the majority of coastal EU Member States and provides compensation for a single oil pollution incident up to approx. EUR 850 million (US$1.136 million), as well as establishing a Working Group on quality shipping.

Finally, the liability Conventions impose defined liabilities on shipowners and their insurers. The nature of those liabilities are set out in the Conventions and clearly understood. LLMC is different as it is a **not** a liability convention. A claimant must first establish that the shipowner is liable under whatever legal regime is applicable to the incident before LLMC comes into play to potentially limit the liability which has been established outside LLMC.

EP Amendment 5 – Recital 5a

(5a) It should not be possible to apply limitation of liability under the 1996 Convention to victims not party to the maritime transport operation, if the owner of the ship responsible for the damage has failed to act in a professional manner and should have been aware of the harmful effects of his act or omission

EP Amendment 9 – Article 2, point 3

(3) "civil liability" ***for the purposes of the 1996 Convention*** means the liability ***by virtue of which a third party to the maritime transport operation responsible for the damage caused is entitled to make*** a claim subject to limitation under Article 2 of ***that*** Convention, with the exception of claims covered by Regulation (EC) 2005/0241 (COD) of the European Parliament and of the Council on the liability of passenger carriers by sea or by inland waterway in the event of accident;

EP Amendment 10 – Article 2, point 3a (new)

(3a) "gross negligence" means conduct showing an unusual lack of due diligence and care, and a consequent disregard of what should in principle have been clear to everyone in a given situation.

International Group position

It is clear that the intention is to apply the CLD to victims not party to the maritime transport chain. Given that the Directive requires implementation of LLMC but provides a new definition of "civil liability", does this mean that those claimants who are party to the maritime transport chain will be outside LLMC and therefore able to pursue claims without them being subject to limitation?

Furthermore, there is no definition of "professional manner". Is it simple negligence? Or is it gross negligence as in EP Amendment 10? In any event, the terms "negligence" and "gross" primarily involve matters of evidence rather than legal definition and require courts to exercise judgement based on all the circumstances of an individual case.

The policy behind the concept of "*a third party to the maritime transport operation*" is understandable but there could be problems of definition. For example tug owners, terminal operators and stevedores are involved in the transport operation but are they a third party for the purposes of this definition?

The introduction of "gross negligence" as a test for barring the right to limit undermines the fundamental principles of certainty and prompt payment of compensation to victims provided by the test contained in LLMC, which is common to a number of international Conventions and accordingly widely understood, that is an act done with intent to cause loss or recklessly and with knowledge that loss would probably result. Even those who might support abolition of limitation

would recognise that merely changing the test would result in far more cases going to Court with the increased legal costs, uncertainty of outcome and delays inherent in litigation.

These views are consistent with the opinion of the European Parliament's Committee on Legal Affairs, which proposed deletion of this article since it *"might give rise to legal confusion and does not seem to an effective way to offer better legal protection to the victims of maritime casualties"* and *"would probably do more harm than good and should consequently not be supported"*.

Furthermore, these amendments raise a potential treaty law conflict since they could remove the right of shipowners registered in non-EU Member States to limit their liability in EU LLMC State Parties, whereas shipowners registered in EU Member States would always be in a position to limit their liability in a non-EU LLMC State Party for claims subject to limitation under LLMC, subject to Article 4 of that particular instrument. This lack of balance and reciprocity will also discourage non-member states from implementing LLMC.

EP Amendment 6 – Recital 7

Each Member State shall take the necessary measures to ensure that every owner of a ship flying its flag has a financial guarantee to protect the seafarers employed or engaged on board the ship in case of abandonment, in accordance with IMO Resolution A 930(22), ***and to cover costs of accommodation, medical care, and repatriation***.

International Group position

The industry recognises the importance of the issue of abandonment of seafarers. However, it is already dealt with internationally through the recently finalised 2006 ILO Maritime Labour Convention which includes a provision that requires States to ensure that owners of vessels that fly their flag provide financial security for repatriation of seafarers in cases that include insolvency.

Article 2 – Definitions

(1) "ship" means a seagoing vessel, irrespective of its flag, of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles and floating craft;

Article 3 – Scope

1. This Directive shall apply, ***with the exception of Article 3a and 3b***, to:

(b) ships having a gross register tonnage of 300 or more, except for the regime of liability laid down in Article 4 which shall apply to all ships

International Group position

Air cushioned vehicles and floating platforms are expressly excluded from the scope of LLMC. The IG notes that CLD is apparently intended to apply, for example, to floating installations in the offshore industry.

It is also noted that there is a reference to gross **registered** tonnage. However, LLMC applies gross tonnage as defined in the International Convention on Tonnage measurement of Ships 1969 which replaced the unit of gross registered tonnage which was formerly used.

Again, how will a Member State be in a position to implement the CLD, which requires ratification of LLMC, if it has already ratified LLMC and excluded such vessels from the scope of that regime? Will they be required to repeal existing legislation or denounce LLMC?

Is it the intention to apply Article 4 to even the smallest of vessels i.e. less than 300gt? A seagoing ship (such as a privately owned leisure yacht of 1 gt) is not subject to LLMC but the effect of CLD would appear to make that ship subject to the limitation regime. The minimum limitation amount under LLMC is SDR 30 million (approximately EUR.34 million). It is difficult to see the policy objective behind this extension.

EP Amendment 15 – Article 3

2. This Directive shall apply, ***with the exception of Article 3a and 3b***, to:

(a) maritime areas under the jurisdiction of Member States***, in accordance with international law;***

(b) ships having a gross register tonnage of 300 or more, except for the regime of liability laid down in Article 4 which shall apply to all ships;

3. This Directive shall not apply to warships, auxiliary warships or other State-owned or operated ships used for a non-commercial public service;

4. This Directive shall be without prejudice to the implementation in each Member State of the Conventions listed in ***Article 3a, 3b and*** Annex I.

International Group Position

The proposed reference to maritime areas under the jurisdiction of Member States, "*in accordance with international law*" is contradictory to the requirement contained in Article 8 (2) of the CLD that the operator, agent or captain of a ship entering the Exclusive Economic Zone of a Member State is required to notify the authorities of that State that a financial guarantee certificate is being carried on board, since this requirement is clearly not in accordance with international law and the concept of "freedom of navigation" as contained in the United Nations Convention on the Law of the Sea (UNCLOS).

The proposed amendment would seem to indicate that the Directive shall apply to all vessels in excess of 300 gt, with the exception of those governed by the Bunkers and HNS Conventions (i.e. *"with the exception of Article 3a and 3b"*). However the certification requirements contained in the Bunkers Convention only apply to vessels of 1,000 gt or more. Is it intended that the Directive will apply such certification requirements to vessels between 300gt and 1,000 gt?

EP Amendment 16 – Article 3a

Civil liability for bunker oil pollution damage

Member States shall become contracting parties to the Bunker Oil Convention as soon as possible and in any case before the date indicated in Article 13.

International Group Position

It should be noted that as of 05.09.07 the Bunkers Convention has already been ratified by 16 of the 18 states required to bring it into force. 11 of the 16 are EU Member States (Bulgaria, Cyprus, Estonia, Germany, Greece, Latvia, Luxembourg, Poland, Slovenia, Spain and the UK). The Convention comes into force twelve months after the necessary number of ratifications. There are therefore good prospects that the Convention will come into force before too long, perhaps towards the end of 2008.

EP Amendment 20 – Article 4, paragraph 2 a (new)

2a. For the purposes of applying Article 4 of the 1996 Convention, knowledge of probable damage by the person responsible may in all cases be deduced from the nature and circumstances of his personal act or omission committed recklessly.

International Group position

It is unclear if the intention of this amendment is to provide a clarification to, or a guide to interpretation of, Article 4 of LLMC. In any event, this amendment is incompatible with Article 4 paragraph 2 of LLMC. The reference to deducing the knowledge of probable damage by the person responsible "from the nature and circumstances of his personal act or omission committed recklessly" does not appear at all in LLMC. Courts will in any event need to look at all material facts in order to establish whether the shipowners' conduct is such as to justify the loss of the right to limit and it is difficult to see how this text will assist.

This has the potential therefore to create a further treaty law conflict since EU Member States would not be in compliance with the duties and obligations imposed by LLMC. The industry is strongly concerned that this would challenge the functioning and the sustainability of the LLMC regime.

Article 5 – Financial Guarantee for civil liability

Each Member State shall take the necessary measures to ensure that every owner of a ship flying its flag has a financial guarantee for civil liability. The limit of this guarantee shall not be less than double the ceiling laid down in the 1996 Convention.

Each Member State shall take the necessary measures to ensure that every owner of a ship flying the flag of a third country has a financial guarantee in accordance with the provisions of the first paragraph as soon as that ship enters its exclusive economic area or equivalent area. The financial guarantee shall be valid for at least three months from the date it is required.

International Group position

IG P&I Clubs require members to meet certain standards which directly relate to safety and quality. Members know that failure to meet these requirements may prejudice their cover. The requirement on insurers to give a guarantee which cannot be brought to an end on less than three months notice could restrict the ability of the P&I Clubs to ensure that shipowner members maintain standards. A financial guarantee will increase the financial exposure of the insurer but, more importantly, reduce the financial exposure of the owners, operators and charterers to the consequences of operating an unseaworthy ship.

Both States and insurers will already have to issue certificates under the various international regimes, and IG Clubs already issue Certificates of Entry (CoE) to all entered vessels, which are carried on board, as evidence of the fact that the vessel is entered with an IG Club.

As previous industry position papers have commented, where commercial claimants rather than consumer claimants are concerned, evidence of insurance or financial security in the form of a CoE provided by an insurer or financial guarantor in accordance with the IMO Guidelines should be acceptable. It is worth noting that many States accept CoEs as evidence of insurance in relation to liabilities not currently covered by IMO Conventions e.g. Japan, India, Iceland (and also US States in relation to oil pollution e.g. California, Washington, Alaska).

In addition, there should be a clear definition of what liabilities are being guaranteed. As noted above (in the comment to EP Amendment 3) , LLMC only refers to general types of claim (such as "claims for loss of life or personal injury or loss of or damage to property…occurring onboard or in direct connection with the operation of the ship…and consequential loss resulting there from"). The exact liability would first be determined under domestic law which could vary considerably throughout member states. There could, for example, be local regulations applicable to ships using a particular port. It is therefore impossible to know in advance what is being guaranteed and what the level of exposure is. This is in clear contrast to the IMO liability Conventions where both the scope and level of the liability which is being guaranteed are clearly defined. This is one reason why the IG cannot confirm that its members will be able to give the guarantees required.

<u>EP Amendment 22 – Article 7, paragraph 2, subparagraph 1</u>

2. Certificates shall be issued by the competent authorities of the Member States once they are sure that the shipowner complies with the requirements laid down in this Directive. ***When issuing certificates, competent authorities shall also consider whether a guarantor has a business establishment in the EU.***

International Group position

What is the meaning of "a business establishment"?

Although the majority of Clubs in the International Group are incorporated outside the EU, 11 of the 13 Clubs have voluntarily agreed to be regulated by authorities in EU or EEA Member States. The two that have not are regulated by Japanese and US regulatory authorities. All Clubs in the International Group already issue financial guarantee certificates (COFRs) under the CLC regime to vessels registered in EU Member States. EU Member States do therefore already validate the insurance cover provided by International Group Clubs for this purpose.

The issuance of COFRs and consequent issuance of certificates by States under CLC operates smoothly due largely to the relatively small number of ships involved and the fact that almost all tankers are entered with Clubs in the International Group (approximately 95% of the world's ocean going tanker fleet). The issuance of certificates under CLD is a very different proposition.

It should also be borne in mind that when issuing certificates States will need to make an assessment of whether *"the shipowner complies with the requirements laid down in the Directive"*. Member States would be required to issue State certificates on an annual basis for up to 50,000 ships, as well as issue new certificates and validate the insurer where there is a change of insurer or financial guarantor or any change of ownership or cancellation of cover.

Article 8, paragraph 2

2. The operator, agent or captain of a ship entering the exclusive economic area or equivalent area of a Member State in the cases set out in Article 5 shall notify the authorities of that Member State that a financial guarantee certificate is being carried on board in accordance with the provisions of Annex III.

International Group position

This provision will be particularly onerous. For example, if a vessel is travelling from Murmansk through the North Sea, English Channel, Mediterranean Sea and Suez Canal to South or East Asia it will be required to notify the authorities of all Member States whose exclusive economic area or equivalent area that it enters on such a route that a financial guarantee is being carried on board. This has therefore the potential to create significant and unnecessary bureaucracy both for the ship and for the authorities. This kind of paperwork obligation can also distract the Master from what should be his primary obligation, namely to navigate his ship safely, particularly in heavily trafficked areas such as the English Channel. It would also seem to be in breach of the provisions of UNCLOS, which all EU Member States have ratified. Once again it is likely therefore to lead to Member States being in breach of their treaty obligations.

Equally importantly, Amendment 24 Article 8a requires Members states to impose "effective, proportionate and dissuasive penalties" for non-compliance. Such penalties are likely to vary from Member State to Member State and this provision would therefore again lead to a lack of certainty and uniformity.

The imposition of potentially substantial penalties on the master for what would in most cases be an administrative oversight is another example of the worrying trend towards increased criminalisation of seafarers.

EP Amendment 26 - Article 10a (new)

Solidarity fund to cover damage caused by ships without a financial guarantee. A solidarity fund shall be set up to compensate third parties, whether natural or legal persons, that have suffered damage caused by ships which, notwithstanding the obligations laid down in this Directive, have sailed in EU territorial waters without being covered by a financial guarantee certificate. The amount to be allotted to this fund, and the fund's operating rules, shall be determined in accordance with the procedure referred to in Article 12.

International Group position

The proposal for a solidarity fund raises many concerns and uncertainty.

Who will finance the fund? Will it be financed by shipowners? If so, it is unreasonable that responsible shipowners should finance a fund to cover damage caused by an irresponsible shipowner that has failed to maintain insurance cover or adequate insurance? Would the fund have a limit? How would the financers be levied and on what basis? Who would administer the fund? How would payments from the fund be determined?

It is worth re-iterating that approximately 92% of the world's ocean going tonnage is entered in Group Clubs (vessels not entered with Group Clubs are by and large entered with non-Group P&I insurers) and that IG Clubs provide insurance cover today for the types of claims that are covered by the various international maritime liability Conventions, irrespective of whether Conventions are in force or not.

It is also important to emphasise that the lack of a guarantee does not mean that the victim will not be paid. The normal practice, even in the absence of guarantees, is that shipowners meet their liabilities and that their insurance provides funds to meet claims.

It is highly unlikely that there are many, if any at all, vessels operating in EU waters and engaged in international trade without adequate third party liability insurance cover. The IG considers it is important to keep a sense of proportion and avoid the assumption that there are many uninsured ships, or that there many examples of ships which have insurance but where the shipowners or insurers fail to meet their legal liabilities.