PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND COUNCIL ON CIVIL LIABILITY AND FINANCIAL GUARANTEES OF SHIPOWNERS

POSITION OF THE INTERNATIONAL GROUP OF P&I CLUBS & ECSA & ICS

Proposed Directive

In the context of the first reading of the European Parliament of the Commission's proposal COM (2005) 593 final for a Directive on the civil liability and financial guarantees of shipowners, the industry organisations would like to present their comments on the draft report from the rapporteur as well as their proposed amendments to the Commission's proposed Directive.

The industry organisations would like to refer to their general positions paper (2600/06) to provide Members of the European Parliament background information to the amendments they are proposing in this document.

The industry supports the wide implementation of the international liability conventions, namely the HNS, Bunker Oil Spills, LLMC and ILO Maritime Labour Conventions, and would urge EU Member States to ratify them as rapidly as possible.

It should also be stressed that IG Clubs provide insurance cover today for the types of claims that are covered by the Conventions.

The intended objectives of the proposed Directive are to improve the quality of shipping and maritime safety and thereby prevent or reduce loss and damage to third parties and the environment. It is suggested that this can best be achieved by requiring Member States to implement LLMC 1996, increasing shipowner liability and introducing a system of state issued certificates evidencing that insurance or financial security is in place together with direct action.

There is no evidence to our knowledge that an increase in liability leads to improvements in safety standards, or the quality of shipping or is linked to shipowner responsibility, if that liability is insured.

European Parliament's Legal Affairs Committee

The industry would encourage members of the TRAN Committee to take account of the Legal Affairs Committee's opinion of 15 September 2006, that amending the basis of shipowners' entitlement to limitation *"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"*. Industry shares the concerns highlighted by the Legal Affairs Committee and would urge that

this document be given careful consideration before making the sweeping and far-reaching changes as have been proposed.

Financial Securities

Industry recognised the concerns of commercial claimants (rather than consumer claimants), who suffer damage that falls outside the scope of these Conventions (e.g. collision damage, damage to port installations and equipment), that they did not have similar financial protection. However, the development and establishment of IMO Resolution A. 898 (21) in November 1999, supported by Industry, should be noted in this respect. This contains Guidelines on Shipowners' Responsibilities in Respect of Maritime Claims and provides that shipowners should ensure that they arrange liability insurance that meets the Guidelines and further ensure that their ships have on board a certificate issued by the insurer. The Guidelines have been followed by the vast majority of the world's fleet and certainly by all ships entered in IG Clubs (92% of the world's ocean-going tonnage).

Industry believes that its proposals will also meet the concerns of port and other authorities that, in the absence of the entry into force of all the framework Conventions mentioned above, they lack appropriate security when granting a vessel refuge. These concerns have also already been met by the provision of the IG's standard form letter of guarantee.

Evidencing insurance by way of State issued certificates is a costly administrative burden on States. There is, at the very least, the need for an economic impact study to assess the benefits of the State certification system envisaged under the Directive in comparison with the costs to, and subsequent administrative burden on, States whether coordinated by a community office or a Member State.

Conclusions

For these reasons, the co-sponsors of this paper support the proposal that Member States:

- implement the 1996 HNS Convention,
- implement the 2001 Bunkers Convention,
- implement the 1996 LLMC regime,
- implement the 2006 ILO Maritime Labour Convention,
- ensure compliance with IMO Resolution A. 898 (21) and the Guidelines on Shipowner Responsibilities

The co-sponsors of this paper do not support:

- amending the shipowners entitlement to limit under LLMC
- Restricting the scope of LLMC to third parties in the transport chain
- The proposal for evidencing financial security for civil liability by way of State issued certificates.

Comments on the Rapporteur's draft report

Amendments put forward by the rapporteur that the industry supports:

Topic	Am#	Art #	IG & ECSA & ICS position
Ratification of HNS Convention by EU Member States	2, 8, 11	Recital 4 a (new), Article 2, point 5 a (new) 3 a (new)	The industry supports a wide and quick implementation of the HNS Convention. This would ensure that damages arising from the carriage of hazardous and noxious cargoes are promptly and efficiently compensated.
Denunciation of the 1976 LLMC Convention by EU Member States in compliance with the provision the 1996 LLMC Protocol	13	4(1)	As proposed by the Commission, the industry encourages the Member States to sign up to the 1996 LLMC Convention as soon as possible and therefore welcomes the rapporteur's proposal which would bring consistency and clarity to the legal framework.

Amendments put forward by the rapporteur that the industry strongly opposes:

Topic	Am#	Art#	IG & ECSA & ICS position
Limitation of the scope of the incorporation of the LLMC Convention in EU law to third parties not involved in the transport chain	6	2, point 3	This proposed provision is clearly in conflict with the intention of the Convention and its application in all existing State parties, which includes the vast majority of coastal Member States. This could also create treaty law conflicts. Claims that are subject to limitation of liability under the Convention include all third party claimants, whether or not they are involved in the transport chain. It is difficult to understand how the proposal would work in practice. For instance, it seems that third party claimants involved in the transport chain could submit claims without reference to limitation under LLMC.
Regime of liability-Shipowners' reckless behavior as a new test to break limitation right	3, 14	4 (2a) (new), Recital 5 a (new)	Changing the test of limitation would give rise to legal uncertainty (and long court processes) and would be counter-productive as regards the aim to offer better legal protection to the victims of maritime casualties. The proposed text is accordingly totally contrary to Article 4 of the LLMC Convention

			and could create treaty law conflicts in those Member States that have already ratified either the 1976 Convention or the 1996 Protocol, since in the Convention the test under which the shipowner loses his right to limitation, is still recklessly and with knowledge that damage would probably result.
Regime of liability- Stricter test of limitation for non LLMC-flagged vessels (no right to limitation for a damage resulted "partly or wholly" from the shipowner's personal act or omission).	15	4 (3)	The industry disagrees strongly with the Commission's and the rapporteur's proposal to introduce a specific liability regime for non LLMC-flagged ships. This is clearly discriminatory towards vessels flagged in non-Member States (many of which are controlled by EU businesses) and it is doubtful that this will encourage non LLMC states to ratify the Convention. For the reasons stated above, the industry also strongly opposes the rationale behind the proposal (i.e. changing the principle of limitation as a means to better compensate or improve ship safety). The new rapporteur's definition of the test of limitation would make the test even easier to break. The industry is strongly concerned that this would challenge the functioning and the sustainability of the LLMC compensation regime, and at the end of the day the effective and quick compensation of the claimants.
Community Office for financial guarantee certificates	16, 18	8(1) 10 a (new)	The industry is of the opinion that a Community Office will not answer the concerns raised by the Commission's proposal. In any case, the burden on states will be very heavy to produce financial guarantees certificates under the Directive.

Article 1 – Subject Matter

Commission's text:	Industry's proposed text:
This Directive lays down rules applicable to certain aspects of the obligations on operators in the maritime transport chain as regards civil liability ***and introduces financial protection adapted for seafarers in case of abandonment.***	This Directive lays down rules applicable to certain aspects of the obligations on operators in the maritime transport chain as regards civil liability.

Justification

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 (6) – Definitions

Commission's text:

(6) "IMO Resolution A 930(22)" means the Resolution of the Assembly of the International Maritime Organisation and the Governing Body of the International Labour Organisation entitled "Guidelines on provision of financial security in case of abandonment of seafarers".

Industry's proposed text:

Deleted.

Justification

See justification for Article 1.

Article 4 (3) – Regime of Liability

Commission's text:	Industry's proposed text:
3. In accordance with Article 15 of the 1996 Convention, Member States shall ensure that Article 4 of that Convention concerning the barring of limitation for liability does not apply to ships flying the flag of a State which is not a contracting party to the 1996 Convention. In such cases, the civil liability regime established by the Member States in accordance with this Directive shall provide that the shipowner loses the right to limit his liability if it is proved that the damage resulted from his personal act or omission, committed with the intent to cause such damage, or through gross negligence.	***Deleted.***

Justification

This provision is clearly discriminatory towards vessels flagged in non-Member States. Yet, the objective of the draft Directive is, as stated in paragraphs 5.1 and 5.3 of the Legislative Financial Statement of the Commission's proposal (COM(2005) 593 final), *"to establish non-discriminatory rules, applicable to all ships irrespective of their flag"*.

This provision is also inconsistent with Article 4 (2) of the draft Directive which requires Member States to ensure "*that the right of shipowners to limit their liability is governed by all provisions of the 1996 Convention*." Yet this would not be the case with regard to Article 4 (3) since it seeks to amend Article 4 of the 1996 Convention.

Moreover the concept of "gross negligence" in the context of civil law is not recognised in many jurisdictions (e.g. the UK), unlike "intent or recklessness with knowledge". This would introduce legal uncertainty and a lack of uniformity that will be counter-productive as regards quick and effective compensation of claimants.

As stated in the general position papers, the industry challenges the rationale of the proposal that links liability with safety standards. There is no evidence that a change to the liability test would assist in improving quality or safety.

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"*

Article 5 - Financial Guarantee for Civil Liability

Commission's text:

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 the 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.***

Industry's proposed text:

Each Member State shall take the necessary measures to ensure that every owner of a ship flying its flag has ***evidence of insurance cover in compliance with IMO Resolution A.898 (21) Guidelines on Shipowners' Responsibilities in Respect of Maritime Claims.***

Each Member State shall take the necessary measures to ensure that every owner of a ship flying the flag of a third country has ***an evidence of insurance cover in accordance with the provisions of the first paragraph as soon as the ship enters a port of a EC Member State. (deleted).***

Justification

The implementation of the IMO Conventions will provide a comprehensive and satisfactory international maritime compensation and liability regime within European waters, providing for compulsory insurance evidenced by State-issued certificates and the right of direct action against the insurer for third party liabilities for almost all types of damage arising from ship sourced pollution.

Consumer claimants and private citizens will, therefore, be furnished with the necessary additional financial protection.

Once these conventions come into force the scope of LLMC 1996 will be restricted in effect to damage resulting from collisions, damage to port facilities and cargo claims, which raise commercial rather than safety or consumer issues, that fall outside the scope of the IMO Conventions.

We would suggest that, where commercial claimants rather than consumer claimants are concerned, evidence of insurance or financial security in the form of a Certificate of Entry (CoE) provided by an insurer or financial guarantor in accordance with the IMO Guidelines should be required and 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 (and also US States in relation to oil pollution e.g. California, Washington, Alaska).

The deletion of the requirement for a guarantee not less than double the ceiling laid down in the 1996 Convention would arise as a consequence of the proposed deletion of Article 4 (3).

Article 6 – Financial Guarantee in case of Abandonment of Seafarers

Commission's text:	Industry's proposed text:
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). ***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 a port or an offshore terminal under its jurisdiction or drops anchor in an area under its jurisdiction.***	***Deleted.***

Justification

See justification for Article 1.

Article 7 – Financial Guarantee Certificates

Commission's text:

1. The existence of the financial guarantees referred to in Articles 5 and 6 and the validity thereof shall be proved by one or more certificates, in accordance with the provisions of this Directive, and following the model set out in Annex II.

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 a ship is registered in a Member State, the certificates shall be issued or certified by the competent authority of the State in which the ship is registered. When a ship is registered in a third country, the certificates may be issued or certified by the competent authority of any Member State.

3. The conditions for the issue and the validity of the certificates, in particular the criteria and conditions for issue, as well as the measures concerning the providers of the financial guarantees, shall be determined in accordance with Article 12(2).

4. The certificates shall comply with the model set out in Annex II and shall include the following information:

(a) name of ship and registry port;

(b) owner's name and principal place of business;

(c) type of guarantee;

(d) name and principal place of business of insurer or other person granting the guarantee and, where appropriate, the place of business where the insurance or guarantee is established;

(e) the period of validity of the certificate, which shall not exceed the period of validity of the insurance or guarantee.

5. The certificates shall be drawn up in the official language(s) of the issuing Member State. If the language used is neither English nor French, the text shall include a translation into one of these languages.

Industry's proposed text:

Deleted.

Justification

The industry proposes deletion of the requirement for State certificates for the reasons outlined in the justification under Article 5.

It should be noted that each Member State will already be issuing separate State certificates under each of the IMO Conventions (Athens, Bunkers, HNS, Wreck Removal when in force, and currently under CLC) for vessels flying their flags. Consumers and private citizens will be furnished with the necessary additional financial protection in this respect both in the form of financial guarantees and State certification.

International Group 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 International Group Club, at no cost or administrative burden to States. This is in conformity with IMO Resolution A. 898 (21).

If States and insurers were to have to issue further certificates as provided for under this Directive it would prove costly and administratively very burdensome.
According to latest statistics there are in the region of 50, 000 commercial vessels trading internationally that are over 300gt, transporting every kind of cargo, with the world fleet registered in over 150 nations, approximately 10,000 of which are flying the flag of an EU Member State. EU Member States would therefore be required to issue State certificates for all such vessels over 300gt in accordance with Article 5 of the existing draft. Furthermore, EU Member States would also need to issue such certificates for the other approximately 40,000 vessels that are registered in non-EU Member States in order to meet the requirements of Article 5, point 2 of the Directive.

In addition, Member States would also be required to issue State certificates on an annual basis, as well as issue new certificates where there is a change of insurer or financial guarantor or any change of ownership or cancellation of cover.

Article 8 – Notification of the Financial Guarantee Certificate

Commission's text:

1. The certificate shall be carried on board the ship and a copy shall be deposited with the authority which keeps the record of the ship's registry or, if the ship is not registered in a Member State, with the authority of the State which issued or certified the certificate.
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.
3. The operator, agent or captain of a ship bound for a port or offshore terminal under the jurisdiction of a Member State or which wishes to drop anchor in an area under the jurisdiction of a Member State in the cases set out in Article 6, 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.
4. The competent authorities of the Member States shall be able to share the information provided for in paragraph 1 through the SafeSeaNet Community platform for maritime data exchange.

Industry's proposed text:

Delete.

Justification

See justification for Article 7.

Article 9 – Mutual recognition by Member States of financial guarantee certificates

Commission's text:

Each Member State shall recognise certificates issued or certified by another Member State under Article 7 for all purposes of this Directive and shall consider them as having the same value as certificates which it issued or certified itself, even when the ship is not registered in a Member State.

A Member State may at any time request an exchange of views with the issuing or certifying State should it believe that the insurer or guarantor named on the certificate is not financially capable of meeting the obligations imposed by this Directive.

Industry's proposed text:

Deleted.

Justification

See justification for Article 7.

Article 10 - Direct action against the provider of the financial guarantee for civil liability

Commission's text:

Any requests for compensation for damage caused by the ship may be addressed directly to the provider of the financial guarantee for civil liability covering the owner's civil liability.

The provider of the financial guarantee may rely on the means of defence which the owner himself would be entitled to invoke, with the exception of those based on the owner declaring bankruptcy or going into liquidation.

The provider of the financial guarantee may also rely on the fact that the damage was the result of intentional fault on the part of the owner. However, it may not rely on any of the means of defence which it could have invoked in an action brought against it by the owner.

The provider of the financial guarantee may, in all cases, require the owner to be joined in the proceedings.

Industry's proposed text:

Deleted.

Justification

See justification for Article 5.

1st December 2006