



ECSA



ICS

D. 2600/06
SF 6.565/10.330

PROPOSAL FOR A DIRECTIVE ON CIVIL LIABILITY AND FINANCIAL SECURITIES OF SHIPOWNERS

ECSA/ICS Comments

MAIN POINTS

1. The Industry¹ fully supports prompt ratification of the 1996 International Convention on the Limitation of Liability for Maritime Claims (1996 LLMC) by all EU Member States. The Industry furthermore advocates prompt ratification of the 1996 Convention on Hazardous and Noxious Substances (HNS) and the 2001 Convention on Bunker Oil Spills by all EU Member States as well, as decided by Council Decisions in 2002. Such prompt ratification would provide for adequate civil liability, compulsory insurance and direct action in the EU for specifically defined claims.
2. The industry, however, proposes the following alternatives to the proposals made in the draft Directive:
 - Rather than adopting the proposed Directive, the European Community (EC) should incorporate the IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims into EC law to provide for a system of compulsory insurance thereby ensuring EU adherence to international standards.
 - If the proposed Directive would nevertheless be adopted, it should be restricted to the ratification of the 1996 LLMC by all Member States and to the introduction of compulsory insurance/financial security for civil liability for ships calling EU ports in accordance with the provisions of the IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims.
 - Insurance/financial security should be evidenced by a certificate of entry in a P&I Club but not by a certificate issued by an EU Member State. The proposed requirement for a certificate issued by an EU Member State would create a cumbersome bureaucracy and could amount to a technical barrier to trade in insurance services, contravening the spirit and EU obligations under the WTO/ General Agreement on Trade in Services (GATS).
 - The current test for breaking the shipowners' limitation, notably "recklessly and with the knowledge that damage would probably result" should be maintained, rather than introducing "gross negligence" as conduct barring limitation. This test is the commonly used term in all modern maritime liability conventions and it is internationally accepted and understood.
 - Insurance/financial security should continue to be linked to specifically defined claims and not to maritime claims in general to allow a proper insurance assessment and coverage. Cargo claims should be excluded from any compulsory insurance in line with the IMO

¹ The Industry is represented by the European Community Shipowners' Associations (ECSA) and the International Chamber of Shipping (ICS), representing more than 50% of the world's merchant tonnage.

Guidelines on Shipowners' Responsibilities in respect of Maritime Claims. The same is valid for damage resulting from a collision.

- The proposal to have financial security/insurance to cover costs linked to the repatriation of abandoned seafarers is supported but must be further pursued in the IMO/ILO working group as agreed by the General Conference of the International Labour Organisation in February 2006.
3. The Industry has concerns about the following proposals:
- The proposal to have financial security/insurance which is not less than double the amounts of the 1996 LLMC for all ships, including 1996 LLMC ships, has not been justified and it is legally not advisable with insurers providing insurance cover only up to the limits of liability but not beyond.
 - The proposal to impose "gross negligence" as conduct barring limitation on non-1996 LLMC flagged ships will not act as an incentive to ratify the 1996 LLMC, but will only punish the shipowner of such ships. It will also result in treaty law problems for States being contracting parties to both the 1976 and 1996 LLMC Conventions and it may result in equal discrimination against European flagged ships operating in other parts of the world.
4. The Industry fails to understand why the European Commission is pressing for a revision of the 1996 LLMC within the IMO immediately after it has urged Member States as well as third countries to ratify this Convention soonest and why the Commission has then the aim to end the system of limitation of liability. In this respect, the Industry draws attention to the fact that limitation of liability is an internationally accepted system, which was also politically supported by the European Council and the European Parliament when adopting the Directive on environmental liability with regard to the prevention and remedying of environmental damage.
5. Finally, the Industry urges the Community to respect the decision of the IOPCF Assembly² of October 2005 and March 2006 not to revise the CLC/Fund Conventions but to accept the voluntary contractually binding agreements³ which aim at establishing an equal sharing of the burdens of payments between the shipowner and the cargo owner. The decision of the IOPCF Assembly was taken after more than five years of negotiations and it reconfirmed the success of the international regime on liability and compensation for oil pollution damage, i.e. rapid, sufficient and guaranteed compensation for oil spill victims irrespective of who is liable for a spill.

² The International Oil Pollution Compensation Fund Assembly, which is the supreme organ governing the 1992 International Oil Pollution Compensation Fund.

³ With the voluntary contractually binding agreements, the International Group of P&I Clubs, on behalf of the shipping industry, has agreed to pay more compensation for oil pollution damage resulting from incidents caused by smaller tankers (STOPIA) and to share in the costs of compensation under the Supplementary Fund to the 1992 IOPCF Convention (TOPIA). These agreements took effect as from 20 February 2006 and they were supported by representatives from oil receivers, shipowners and governments.



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BACKGROUND NOTE

1. Civil liability for damages to third parties

States, acting under the auspices of the International Maritime Organisation (IMO), have identified a number of third parties who may be affected by shipping incidents and who deserve special protection. These parties are in particular victims of oil and chemical spills and passenger claimants. To that end, specific international civil liability and compensation regimes have been developed, notably the 1992 Civil Liability and Fund Conventions, the 1996 Hazardous & Noxious Substances Convention, the 2001 Convention on Civil Liability for Bunker Oil Damage and the 2002 Athens Convention. Each of these conventions includes a requirement for shipowners to have insurance and a right for claimants to proceed directly against the insurer in respect of clearly defined liabilities.

As far as limitation of liability is concerned, other maritime claims are subject to the 1976 or 1996 LLMC whereby the latter convention introduces higher liability limits and modernises the international liability and limitation system. This convention also reflects the capacity developments on international insurance markets and it introduces a tacit amendment procedure which allows a quick adaptation of the liability limits to further developments on these markets. This meets the interests of both the industry and the victims of a shipping casualty.

The industry strongly urges the Community to ensure that all EU Member States ratify the 1996 LLMC, as well as the other liability conventions mentioned above, promptly.

2. Compulsory insurance

The Industry recognises that the 1996 LLMC is not connected to a legally binding system of compulsory insurance. To that end, the Assembly of the IMO adopted a Resolution (A 898/21) in February 2000 with Guidelines on Shipowners' Responsibilities in respect of Maritime Claims urging shipowners to arrange for ships' insurance cover for relevant claims up to the limits of the applicable LLMC Convention and to ensure that ships have onboard a certificate issued by the insurer. The overwhelming majority of shipowners have followed these Guidelines.

The Industry therefore strongly recommends the Community not to adopt the proposed Directive, but to incorporate the provisions of the IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims into Community law thereby achieving the same objectives as envisaged by the draft Directive (i.e. compulsory insurance and financial security certificate onboard ships) but ensuring EU adherence to international standards.

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However, if the Community would decide to adopt the proposed Directive, the Industry would strongly recommend restricting the scope of the Directive to obliging EU Member States to ratify the 1996 LLMC linked to an obligation of compulsory insurance and financial security certificates for civil liability for ships calling at EU ports, in accordance with the provisions of the IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims.

It should be noted that the IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims have expressly excluded cargo claims from any compulsory insurance. The reason is that States see no need to establish a special protection for cargo claims. States consider that cargo owners are fully capable of protecting themselves. The proposed Directive should follow this. This is also valid for damage resulting from a collision.

3. Financial security/certificates

The Industry fully supports the proposal that all ships must have insurance/financial security for civil liability. However, the Industry suggests that financial security should be evidenced by a certificate of entry in a P&I Club but not by a Member State certificate. It is believed that obliging EU Member States to issue State certificates as evidence of financial security for civil liability would create a cumbersome bureaucracy and could amount to a technical barrier to trade in insurance services, contravening the spirit and EU obligations under the WTO/General Agreement on Trade in Services (GATS).

Whilst supporting the proposal that all ships must have insurance/financial security, the Industry draws attention to the fact that today mandatory insurance is linked to specific and well-defined liabilities. However, the proposed Directive deviates from this current practice by imposing mandatory insurance for any claims resulting from damage caused by ships (Article 10§1), for which liability is provided by national law. This will create important practical difficulties both for shipowners and their insurers, with insurers unwilling to allow such claimants to sue them directly. The Industry, instead, suggests that mandatory insurance should continue to be imposed in relation to specific and well-defined claims so as to allow shipowners and their insurers to know exactly for what type of damage or claims mandatory insurance coverage and certificates are required.

The industry has strong reservations regarding the proposal that all ships – irrespective of flag – entering EU waters should have insurance/financial security for double the amounts of the 1996 LLMC. Firstly, the Commission has never given any justification for such proposal. Secondly, the proposal is legally not advisable since ships flying the flag of a 1996 LLMC State are subject to the ceilings laid down in this Convention. As a consequence, insurance cover for ships flying the flag of a 1996 LLMC State is linked to the limits of liability of that Convention and insurers do not provide insurance cover over and above the limits of liability. Thirdly, as the Commission explained in their Explanatory Memorandum very rightly, “the right of the shipowner to limit his liability is practically unbreakable”. Indeed, the shipowner will lose the right to limit his liability only in case he has acted with intent to cause damage or recklessly and with the knowledge that damage would probably result. Experience shows that this is reflected in the insurance markets. It would be incorrect and excessive if the Directive is demanding from all European shipowners to establish a financial guarantee over and above that for which they are liable in practice.

It is believed that the proposal would be contrary to the principle of freedom of navigation so far as non-EU ships not calling at EU ports are concerned.

Finally, it should be noted that all of the IMO liability and compensation conventions provide for compulsory insurance and direct action already. The ratification and subsequent application of these Conventions should therefore be a priority.

4. Financial security in case of abandonment of seafarers

The Industry supports the proposal to have financial security/insurance to cover costs linked to the repatriation of abandoned seafarers but recommends to further pursue this topic – as well as the discussion on financial security for crew claims in the event of personal injury – in the IMO/ILO working group, as agreed by the General Conference of the International Labour Organisation in February 2006.

5. A different standard as conduct barring limitation for ships flying the flag of a non-1996 LLMC State: the concept “gross negligence”

The Industry cannot support a proposal that would result in a legal discrimination of ships, i.e. the proposal to impose upon ships flying a flag of a third country which has not yet ratified the 1996 LLMC a different test for breaking the limitation of liability, notably “gross negligence” as conduct barring limitation.

Firstly, in cases of a collision between a European and a non-European ship in European waters, such a proposal would lead for the same incident to different standards of limitation. This opens a practice for forum shopping. Secondly, it seems to be politically unwise to confront private shipping companies based in third countries and trading with Europe with a threat of unlimited liability in case their Governments would not have ratified the 1996 LLMC. First of all, if a State does not ratify the 1996 LLMC, it will be the shipowner flying its flag that will be affected rather than the State itself. Furthermore, it is questionable whether imposing a different standard as conduct barring limitation on ships flying the flag of non-LLMC States would result in States ratifying the 1996 LLMC promptly, bearing in mind the Commission’s intention to revise this Convention within the IMO anyway. Thirdly, there is a potential risk that this proposal could lead to equal discrimination against European ships in other parts of the world. Fourthly, the proposal might also lead to legal problems for States which are party to the 1976 LLMC as well as to the 1996 LLMC with such States having treaty law obligations vis-à-vis other 1976 LLMC States. For all these reasons, the Industry recommends revising such proposal.

Moreover, the current test for breaking the shipowners’ limitation, in each of the international liability and compensation conventions as well as in the LLMC, is “intent to cause damage or recklessly and with the knowledge that damage would probably result”. Introducing “gross negligence” as conduct barring limitation will neither reduce substandard shipping nor result in better shipowners’ conduct. Replacing the concept of “recklessly and with the knowledge that damage would probably result” with the concept of “gross negligence” basically aims at the same result but serves no purpose. The concept of “recklessly and with the knowledge that damage would probably result” is the commonly used term in all modern maritime liability conventions and is internationally accepted and understood and the Industry strongly recommends the Community to respect the current test for breaking the shipowners’ limitation. Moreover, the test “intent to cause damage or recklessly and with the knowledge that damage would probably result” was deliberately introduced in 1976 by States, acting under the auspices of the IMO, so as to provide a clear limit for shipowners as well as for their insurers.

The Industry believes that there are more effective measures to eliminate substandard shipping than introducing “gross negligence”, such as better targeted inspections (e.g. in ports) and a stricter application of existing rules on issuing insurance certificates/financial guarantees. In this respect, the Industry draws attention to ongoing efforts being undertaken by the International Group of P&I Clubs to tackle substandard shipping on a worldwide basis. The IOPCF Assembly has established a special working group on this subject beginning in 2006.