INTERNATIONAL MARITIME ORGANIZATION

IMO

E

Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers
Agenda item 6

IMO/ILO/WGLCCS 1/6/1
23 September 1999
ENGLISH ONLY

ASSESSMENT OF THE EXTENT OF THE PROBLEM

Submitted by the International Confederation of Free Trade Unions (ICFTU)

SUMMARY

Executive summary: This paper contains the ICFTU position with respect to death and personal injury of seafarers.

Action to be taken: -

Related documents: -

1. Assessment of the extent of the problem

1.1 Crew members are involved in a dangerous occupation which carries a high risk of personal injury and/or death. In those circumstances crew members or their dependants may have to embark on often lengthy and complex litigation to establish liability and seek compensation. There are unique aspects to the working life of crew, such as the perpetuity of movement from one jurisdiction to another, which place them at a great disadvantage in their ability to obtain proper compensation. However the current system of P & I insurance in respect of death and disability claims of crew members does not provide effective security to ensure that compensation is paid to a crew member when legal liability has been established against a ship owner.

1.2 "Uninsured" incidents

There is currently no obligation on a ship owner to insure himself against the risk of personal injury/loss of life being caused to a crew member, whether that liability relates to a breach of contract or in respect of torts committed upon the crew member. It is not uncommon to find P & I policies that specifically exclude cover for these risks. Such exclusion may be requested by the ship owner or may be based on a poor claims record by a member in previous years of coverage which would affect the underwriting information used in the setting of a member's P & I calls. This exclusion will be unknown to the crew member. If a ship owner operates without insurance or other form of financial security, then given the structure of ownership of most vessels (with the true owners operating through shell companies without assets and often incorporated in inaccessible jurisdictions), the prospect of recovering proper compensation is very limited.

1.3 The estimates of the total number of uninsured vessels in the world fleet vary and are considered to be around 5%. It is undesirable that the current system of insurance should enable any vessel to trade uninsured insofar as an incident involving an uninsured vessel can cause massive losses which then must be unfairly borne by third parties. It is also likely that it will be substandard ships that are without any sufficient third party cover. This is because P&I insurance is a form of mutual insurance: the quality of a vessel's management will have a great influence on whether or not a club will accept it. In order to minimise their exposure, mutual insurance associations must ensure that the quality of their membership stays reasonably high. Hence many ships in the substandard sector will be excluded from the possibility of P & I insurance or will only be able to insure at a very high premium.

1.4. Another scenario of an uninsured incident involving crew could arise from the fact that P & I clubs do not allow recovery for losses arising out of irrecoverable debts or out of the insolvency of the ship owner, or indeed any person. Whilst the exact rules in this respect will vary from club to club, it is generally the case that when a company becomes insolvent but its ships continue trading, the insurance lapses and the crew on board, unknown to them, are left totally unprotected against sickness or injuries. Further the insurance company or P & I club has the power to withdraw its coverage retroactively without any formal notification. This is what happened in the well known collapse of Adriatic Tankers.

1.5 In January 1996, the press reported that failure to comply with classification society requirements and to pay due instalments on a premium had led to Adriatic's insurers terminating their cover despite their long relationship with the company over a considerable number of years. Cover was cancelled retrospectively from the inception of membership in accordance with a typical club rule and bye law as follows:

> "Where an owner has failed to pay, either in whole or in part, any amount due from him to the Association, the Managers may give him notice in writing requiring him to pay such amount by any date specified in such notice, not being less than seven days from the date on which such notice is given. If the owner fails to make such a payment in full on or before the date so specified, the insurance of the Owner ....in respect of any and all ships referred to in such notice and entered in the Association by him or on his behalf shall be cancelled forthwith without further notice or other formality....The Association shall with effect from the date of cancellation cease to be liable for any claims of whatsoever kind under these Rules in respect of any and all ships in relation to which the insurance of the Owner has been cancelled...irrespective of whether such claims have occurred or arisen or may arise by reason of any event which has occurred at any time prior to the date of cancellation, including during previous years"

As a result, a number of incidents of loss of life and personal injuries have never been compensated.

1.6 **Pay to be paid**

The rules of all P & I clubs give them considerable ability to avoid paying valid claims against ship owners. Most P & I club rules state that it is a condition precedent to recovery that, since the policy is one of indemnity, it is necessary that a shipowner member should have discharged his liabilities prior to seeking reimbursement. This is an essential part of the concept of indemnity insurance. The insurer only has to reimburse the shipowner if that owner has already paid the claim to the third party. If no payment has been made, the insurer does not have to pay.

1.7 The "pay to be paid" provisions represent the most significant obstacle to a valid claim against a ship owner being paid by the P & I club. However there are other provisions within all P & I club rules to give other grounds to avoid paying valid claims. For example there are general exclusions, which include :

(a) Non-payment of calls/premiums by the member
(b) The use of deductibles
(c) Wilful misconduct on the part of the member
(d) Failure to comply with the duty of disclosure by the member
(e) Unsafe or unduly hazardous trade or voyage

Such defences are issues as between the member (i.e. ship owner) and the P & I club and the innocent crew member who has a valid claim for compensation can be deprived of such compensation through a combination of the ship owner being either unidentifiable, inaccessible or insolvent and the P & I club relying on the exclusions in its rules.

1.8 **Other ways in which valid crew member claims can be prevented by Owners and P & I Clubs**

Whilst a P & I club can ultimately avoid payment relying on one of the club rules as outlined above, that does not prevent the P & I club from actively participating at an earlier stage to prevent (through the use of representatives and lawyers world-wide) claims being pursued or attempting to pay less than the legal entitlement of the crew member. There have been instances where P & I clubs in conjunction with their owners have :

(a) pressured vulnerable and financially desperate claimants or their dependants to accept less than their legal entitlement in return for a full release of claims.

(b) used their considerable resources to prevent legal actions from being brought by bringing jurisdictional challenges, contesting entitlement to financial security and requiring claimants to provide financial security before a claim can be pursued.

1.9 Examples of incidents involving pressure from P & I Clubs and their representatives and actions to prevent legal recoveries are contained in Annex 1. There is an enormous imbalance in the resources available to the P & I club and to the crew member to pursue or defend any claim. Whilst it is unlikely to be possible to produce statistics of settlements at an undervalue, since the full picture here will be known only by the insurers who are unlikely to admit or disclose this, the ITF has encountered many situations where a crew member has settled in full and final settlement with a P & I representative in the immediate aftermath of an accident or where desperate financial circumstances have prevented the individual from lodging a legal claim.

1.10 Further by their nature, claims by crew members often raise complex legal and jurisdictional issues and in the vast majority of cases crew members do not have sufficient financial resources to employ appropriate legal representation to have claims pursued and to counter the efforts of the P & I clubs. The owners and their legal representatives are therefore able to prevent valid claims from being pursued. In any event a crew member who pursues a valid claim against a ship owner has no guarantee, under the current system of insurance, of being able to receive compensation.

2. Evaluation of the relevant IMO (including those elaborated under the joint auspices of the United Nations and IMO), ILO and other applicable instruments

2.1 There is no instrument of the IMO, or any other organisation under the auspices of the United Nations, which deals fully with the issues of claims for personal injury and/or death brought by crew members and/or their dependants. There are however four instruments which may have a bearing on aspects of personal injury claims.

2.2 The first of these is the Convention on Limitation of Liability for Maritime Claims 1976. This Convention introduced uniform rules in relation to limitation of liability of shipowners for maritime claims, including inter alia for personal injury claims. Article 3(e) excludes liabilities in

relation to crew claims if the governing law of the crew member's contract of employment prohibits limitation of liability. However where the Convention does apply to personal injury actions by crew members it has the unfortunate result that whilst the shipowner's liability is limited, the crew member enjoys no increased protection as a *quid pro quo,* for example by virtue of a scheme of strict liability or compulsory insurance.

2.3 The second relevant instrument is the International Convention on Maritime Liens and Mortgages 1993. This Convention provides that claims against the owner, demise charterer, manager or operator of a vessel for loss of life or personal injury shall be secured by a maritime lien on that vessel. This represents an improvement in the protection of crew members since the national law in many States does not provide for maritime liens in relation to personal injury or loss of life actions. However, the Convention is not yet in force.

2.4 The third and forth instruments are the 1952 International Convention relating to the Arrest of Sea-going Ships and the new 1999 International Convention on the Arrest of Ships. Both Conventions recognise loss of life and personal injury claims occurring in connection with the operation of the ship, as maritime claims thus giving rise to the right of arrest.

2.5 However even if the crew member enjoyed the protection of the Maritime Liens Convention or the Arrest Conventions, these would not be a sufficient mechanism for his protection for the following reasons inter alia:

(a) a right *in rem* is only good against a ship of sufficient value, or with sufficient equity. If the ship in question is seriously damaged and of no saleable value, any maritime lien would be of little benefit;

(b) under the 1993 Convention, a lien would only rank *pari passu* with port dues and certain other maritime liens;

(c) the cost and effort involved in arresting a ship could be disproportionately high compared to the sums involved in any claim for personal injury or death therefore it is often unrealistic to expect a crew member to exercise this right in order to recover sums to satisfy his claim.

2.6 As a matter of policy, if crew members were not forced to have to arrest a vessel to guarantee the payment of their claims, there are likely to be benefits for the marine industry as a whole. The costs incurred as a consequence of arrests in the delay of the vessel or otherwise are often extensive. Crew members could avoid the need to arrest if a mechanism was established whereby their claims could be satisfied more efficiently.

ILO

2.7 There are three ILO Conventions (Numbers 55, 56 and 165) potentially relevant although none of them deals directly with the issue of compensation for injury. The Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55) provides that the shipowner is liable for medical care and maintenance of a sick or ill crew member and has to pay the crew member's full wages as long as the latter remains on board the ship. The Sickness Insurance (Sea) Convention, 1936 (No. 56) provides for a compulsory sickness insurance scheme. The Social Security (Crew members) Convention (Revised), 1987 (No. 165) provides that Member States must provide crew with cover in respect of at least three types of social security. While these Conventions may be relevant to someone who has been injured, they do not deal with actual claims for compensation for personal injury *per se*.

3. Evaluation of the adequacy and effectiveness of the existing system

3.1 There is no system which regulates an injured crew member's rights relating to personal injury and death. Crew members remain uniquely unprotected in the shipping industry. In the absence of an international regime for the recovery of damages for personal injury and/or death, the injured crew member must resort to national law in order to pursue any claim he might have against the shipowner. Because of the nature of his occupation, a crew member can be injured in any part of the world. The crew member is thus likely to find himself forced to litigate in a foreign jurisdiction, with the attendant difficulties that entails. The litigation may be complex and costly and there is no guarantee that the shipowner will even enter an appearance. Even if the claimant has a good claim against shipowner at law, justice may not come speedily in the applicable jurisdiction and the crew member may have to wait several years for judgement. He may then have to enforce the judgement in another jurisdiction where the shipowner has assets. In any event, these options remain academic if the crew member does not have access to the considerable resources required for such litigation.

3.2 Justice may also be frustrated by the absence of a system for guaranteeing that the shipowner has the funds to meet any judgement entered against him. In the absence of an enforceable system of financial security, a crew member must trust the financial buoyancy of the shipowner - which is becoming increasingly questionable in era of highly-leveraged one ship companies - or that the shipowner has voluntarily taken out insurance cover.

4. Proposals

Compulsory Insurance and Direct Action

4.1 Compulsory insurance is probably the most widespread system of financial security. Compulsory insurance schemes frequently cover claims for personal injury and death. This reflects the importance ascribed to such claims in most legal systems, and the likelihood of relatively large numbers of claims for relatively small amounts. Models for compulsory insurance can be found at both national and international levels. At a national level, many countries have motor vehicle insurance and employers' liability insurance which have generally been successful. In the maritime context, other examples of compulsory insurance schemes can be found at national level. In the United States, for instance, the Oil Pollution Act of 1990 ("OPA 90) requires that financial responsibility be established by evidence of insurance, surety bond, guarantee, letter credit, qualification as a self-insurer, or other evidence of financial responsibility.

4.2 At the international level, the 1969 International Convention on Civil Liability for Oil Pollution Damage (the "CLC") requires that all owners of vessels with a certain cargo capacity maintain insurance or other financial security. Similarly, the Rome Conventions of 1933 and 1952 on damage caused by aircraft to third parties contain compulsory insurance requirements.

4.3 However compulsory insurance alone does not protect the crew member claim if insurance cover is to be mutual provided by P & I Clubs. Under policies of indemnity insurance, the insurer only becomes liable upon the payment by the insured of his liability to the claimant. When the insured does not or cannot pay compensation to a claimant, the "pay-to-be-paid" rule benefits the insurer (who is excused from paying out under the policy) at the expense of the claimant. The House of Lords has confirmed that where a member of a P&I club has incurred but not discharged a liability to a third party and the rules of the club contained a "pay-to-be-paid" provision, the member had only a contingent right to be reimbursed. Hence on the member's insolvency, no cause of action accrued against the club since there was no existing right to an indemnity to be transferred to or vested in the third party: *The Fanti and The Padre Island [1991] 2 AC 1*

4.4 Therefore compulsory insurance alone does not completely protect the crew member's claim against the shipowner. What is required is compulsory insurance coupled with a right of direct action which enables the crew member to claim directly against the insurer.

4.5 In the United States most of the important maritime jurisdictions have enacted direct action statutes. The two most important and extensive are the Louisiana and the Puerto Rico Statutes. The Louisiana Direct Action Statute provides that an injured party may bring an action against an insurer alone without joining the insured as a party to proceedings. It has been established that the Statute applies to both indemnity and liability marine insurance. Moreover, the Court in Louisiana have adopted a public policy approach whereby an insurance policy against liability to the public is not issued primarily for the protection of the insured, but for the protection of the general public.

4.6 Under the Puerto Rico Statute, the insurer insuring against loss through liability for the bodily injury or death of a third person becomes absolutely liable whenever a loss covered by the policy occurs. As the insurer's obligation does not depend upon the prior payment by the assured of an adverse judgment the indemnity aspect of the P & I policy is abrogated.

4.7 In the same way that compulsory insurance is not viable without direct action, so a system providing for direct action will not be truly effective unless the "pay-to-be-paid" rule is amended. The "pay-to-be-paid" rule is a major obstacle to the ability of the crew member to proceed against the insurer of indemnity cover. Accordingly, a direct action provision along the lines of the Louisiana Direct Action Statute and the Puerto Rico Direct Act could be advocated. This would have the benefits of overcoming the insolvency and pay to be paid obstacles to recovery as well as avoiding the need for more than one set of proceedings in a claim against the insurer.

4.8 Alternatively, insurance could be sought from different sources or in different forms of equivalent nature. For instance, in some Canadian Provinces, motor insurance is provided by state monopoly insurers and/or private insurance companies. In the maritime industry, shipowners, in addition to the P & I third party liability insurance, also have hull insurance which is taken in another part of the insurance market.

Personal Accident Insurance (PAI)

4.9 An alternative to compulsory third party liability insurance would be a compulsory accident insurance personal to the crew member. This would involve accident insurance in which the crew member is named as first party. The shipowner would purchase "open cover" personal accident insurance for the benefit of individual crew members or an entire crew working on a particular ship or group of ships. The certificate would be issued by the insurer naming the crew members as beneficiaries. This would give the injured (or abandoned) crew member the right to make a direct claim against the insurer under the contract of insurance which the shipowner would have entered into for the benefit of the crew member.

4.10 In their paper to the Legal Committee dated 17 March 1998 (LEG 77/4/2), the CMI estimated the costs of personal accident insurance to be minimal (an estimated £00.20 for £120,000 cover per passenger These costs should be borne by the shipowner however it has been argued that the shipowner could have potential savings with regards to the cost of his liability cover (either with a P & I Club or otherwise). It is likely that this type of insurance would have to be purchased in a different section of the market (other than P & I Clubs).

4.11 If a system of personal accident insurance could be adopted for covering crew members claims for damages for death and personal injury, the crew member's right of direct action would be within the terms of the policy.

Conclusion

4.12 The almost total lack of international provision for claims by crew members is unsatisfactory. The lack of a uniform liability, the lack of compulsory insurance or any other form of financial security and the lack of a direct action against the insurer means that rights of the crew member in national law will in practice be undermined. To the extent that they can be pursued the crew member will be involved in extensive and expensive litigation.

4.13 Compulsory insurance without the right of direct action for the claimant is also not a viable solution for the crew member. Neither compulsory insurance nor a right of direct action will achieve their objectives if not accompanied by an amendment to the pay-to-be-paid rule, or at very least a binding commitment by P & I clubs to exercise their discretionary powers for the benefit of claimants. In this respect the public policy principles underlying the Louisiana Direct Action Statute might be cited, namely that the contract of insurance is made not for the benefit of the insured but for the benefit of the third party to whom the insured might become liable.

4.14 Compulsory insurance, whatever form it takes, must avoid lengthy procedures as well as ensuring accessibility to the claimant.

***

ANNEX 1

INSTANCES OF PRESSURE FROM P & I CLUBS AND THEIR REPRESENTATIVES AND ACTIONS TO PREVENT LEGAL RECOVERIES

A. Pressure from P&I clubs and their representatives

1. Vessel A was involved in a collision with another vessel which resulted in its sinking with the loss of all seventeen hands. Fifteen of the crew were Filipinos, whose families notified a crew members' organisation in the Philippines, requesting assistance in obtaining compensation. The P & I Club representative put pressure on all of the families to accept payments due under the deceased's' employment contracts in full and final settlement of all claims, including any claim for negligence. Seven of the families succumbed to this pressure and executed releases. They received payments in the region of $10,000 per crew member. The claims were pursued on behalf of the remaining crew members and compensation was recovered in the regions of $140,000 - $240,000 per crew member. Thus the considerable efforts on the part of the P & I club representative in achieving releases at the outset of the case deprived those dependants of in excess of $1M compensation to which they were entitled and would have recovered if they had pursued a claim in negligence.

2. Vessel B sank with the loss of all 22 crew. The crew were made up of nationals of many different countries and the P & I club systematically arranged, through their representatives, for the dependants to be visited and persuaded to accept minimum payments. The crew have legal representation but despite this, the P & I club representatives have persisted in their approaches to the dependants. Several dependants, financially desperate, accepted the payments offered and signed releases.

B. **Actions to prevent legal recoveries**

3. Vessel C sank with the loss of all hands. Certain of the dependants, with the assistance of welfare organisations, authorised lawyers to act on their behalf in pursuing claims for compensation. The vessel in question was owned by a one ship company whose ultimate ownership was hidden behind various other companies. Whilst P & I cover is in place there was a concern that any judgement against the owners may not be honoured by the P & I club (either relying on pay to be paid provisions or other exclusions under the Club rules) and therefore security for the claim was sought at an early stage. This consisted of injuncting the proceeds of the hull and machinery policy before underwriters paid the claim to the owners and by arresting a vessel which is believed to be in associated ownership with Vessel E. Proceedings in negligence were pursued against the owners in a jurisdiction closest to where the sinking occurred. The owners and P & I club, through their lawyers in different jurisdictions have attempted to stifle the claim being brought by firstly channelling the arrest of the associated vessel and secondly, by challenging the jurisdiction in which the negligence claim has been brought. Therefore contested court proceedings in two jurisdictions are necessary before the issue of whether the shipowners were negligent or not can be dealt with by any court.

4. A crew member was seriously injured on board the Vessel D whilst the Vessel was in port in the UK, necessitating hospital treatment for the individual in the UK for some months. Through the intervention of a welfare organisation a claim was brought in the UK by the injured crew member against the owners, and security was obtained by arresting the vessel. As soon as the crew member was fit to return to his home country the P & I club lawyers brought an application in the proceedings that as the crew members was no longer within the UK, he should provide security to the owners in respect of the costs of the litigation which

had been brought. Without outside assistance, the injured crew member does not have the means to provide such security as his accident will prevent him from working again.

5. A crew member was seriously injured on board the Vessel E whilst the vessel was in Sweden. The vessel was a one ship company and subsequently changed ownership. The P & I club denied the claim and alleged that in any event, the terms of the insurance did not cover the circumstances of the claim. Proceedings were commenced and defended by the P & I club, including an application for security against the crew member. The crew member was successful at first instance but this decision was appealed twice by the P & I club. Eventually 10 years after the accident the crew member received compensation. This claim could not have been taken without outside financial assistance.