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
Second session
Agenda item 6

IMO/ILO/WGLCCS 2/6
23 October 2000
ENGLISH ONLY

REPORT BY THE ISF AND ITF ON INFORMAL DISCUSSIONS WITH THE P&I CLUBS

Submitted by the ISF and ITF

SUMMARY

Executive summary: This document contains in its annexes 1 and 2 the minutes of the informal meetings of the Shipowners and the Seafarers with the P&I Clubs held on 28 February and 5 September 2000, respectively. Annex 3 contains copy of a paper submitted by the International Group of P&I Clubs to the meeting of 5 September 2000.

Action to be taken: ---

Related documents: IMO/ILO/WGLCCS 1/11, paragraph 11.4

Summary

Introduction

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

At the meeting of the Ad Hoc Working Group from 11-15 October 1999, the Shipowner and Seafarer representatives agreed to arrange an informal joint meeting with representatives of the P & I Clubs to discuss problems regarding claims for death and personal injury compensation for seafarers. It was also agreed to invite the IMO and ILO Secretariats to attend the meeting and to report back to the Ad Hoc Expert Working Group on the outcome.

The first meeting was held on 28 February 2000 and, following this discussion, a second meeting was held on 5 September 2000.

A copy of the Minutes of both meetings is attached, together with a copy of a paper submitted by the International Group of P & I Clubs to the meeting on 5 September dealing with a number of points raised by the ITF.

***

ANNEX 1

MINUTES OF THE MEETING OF ISF/ITF AND THE INTERNATIONAL GROUP OF P&I CLUBS

HELD ON 28 FEBRUARY 2000 at 12 CARTHUSIAN STREET, LONDON EC1M 6EZ

Present:

For ISF: Mr J Lusted
Captain W Codrington
Mr R Aglieta
Captain K Akatsuka
Mrs E Midelfart
Mr G Koltsidopoulos
Mr D Lindemann
Captain F Preece
Mr D Dearsley
Ms L Howlett

For ITF: Mr M Dickinson
Mr J Whitlow
Mr J-Y Legouas
Mr A Mutawi
Ms D Fitzpatrick

For IG: Mr C Hume
Mr H Hurst

For IMO/ILO: Mr Librando
Mr B Wagner
Mr R Schindler

The Agenda for the meeting, had been agreed by the IMO/ILO Joint Working Group in October 1999. The relevant part of the report of the Joint IMO/ILO Working Group is attached.

In advance of the meeting, the ITF submitted a paper commenting on the various agenda items and making a number of proposals which are referred to below.

It was agreed that the ISF spokesman, John Lusted, should Chair the meeting and that the Minutes of the meeting should be drafted by ISF and circulated to other participants for comments.

Mr Librando advised the meeting that the Report of the Joint IMO/ILO Working Group would be considered at the next meeting of the IMO Legal Committee in March, which would also

consider the request that a further meeting of the Joint Working Group should be held to coincide with the October meeting of the Legal Committee.

Mr Wagner advised that the March meeting of the ILO Governing Body would consider the Report of the Joint Working Group and the request for a further meeting. He also reported that the ILO Joint Maritime Commission meeting in January 2001 would discuss the reports from the Joint Working Group.

It was agreed that Agenda items 1, 2 and 6 should be considered first as they concerned Club rules and matters of principle, followed by items 3, 5 and 7, which dealt with claims handling, and then item 4.

1. THE "PAY TO BE PAID" RULE

ITF explained their objections to the pay to be paid principle, maintaining that it was manifestly unfair to seafarers and that P&I Clubs regularly used threats to invoke the principle in order to reduce the compensation being offered. They proposed that the Clubs should provide a written undertaking to IMO and ILO that the pay to be paid principle would not be invoked when seafarers or their dependants had "established a good and valid claim" against an owner.

ISF replied that they wished to see valid claims dealt with properly and that they understood that the large majority of claims were settled without any undue difficulty. They also sought clarification of the ITF reference to undertakings being provided to IMO/ILO and as to the meaning of "established" claims.

ITF responded that the form of undertaking which the Clubs were being requested to make could be subject to discussion, or might form part of the Code which was also being proposed (see below). They also indicated that an established claim was one which was not contested by the owner or where a judgement had been obtained.

The IG agreed to refer the ITF proposals to the Clubs for comment, although views were expected to be mixed, and a response would be made at the next meeting.

2. DIRECT ACCESS OF CREW MEMBERS/SEAFARERS TO INSURERS

ITF explained that they were not seeking direct access to the insurer in all cases, but were proposing that direct access would arise only after a court award had been made, or liability agreed, and then only if the owner failed to make payment of the award after a period of one month. If such an arrangement could be agreed, the Clubs would be expected to provide a written undertaking to IMO and ILO to incorporate such a provision in Club rules.

The IG responded to the effect that the proposal went to the basis of the Club rules and was unlikely to appeal to members of the IG. In particular, the Clubs wished to raise operating standards among their members, for example by excluding cover from injuries caused by wilful misconduct, and would not wish to be placed in the position of responding to claims which were not covered. Nevertheless, the views of the Clubs on the proposal would be requested and reported to the next meeting.

3. DELAYS IN THE SETTLEMENT OF CLAIMS

ITF produced a number of examples of cases where payment of uncontested claims concerning contractual compensation had been unreasonably delayed, and stated that the average delay was 12-18 months and considerably longer when negligence claims were involved. ITF therefore proposed that a code of conduct should adopted which would provide that contractual claims should be settled within three months and that settlement of such claims should not be conditional on the beneficiaries signing a release on other rights against the owner.

ISF responded that, while compensation should be paid promptly once the facts were established, a three month period for payment would be too short in many cases. It was also considered that a release form was quite acceptable if contractual compensation was paid in full and final settlement, as was the case in several jurisdictions. Whilst agreement on the content of a code of conduct might prove difficult, ISF could see a role for such a document.

ITF explained that their proposal for a time limit related only to uncontested claims and that it might be possible to consider interim payment within a time limit.

The IG emphasised that claims handlers tried to avoid unnecessary delay and that the large majority of claims were dealt with promptly. While not sure whether a code of conduct was necessary, the views of the Clubs would be requested and a report would be made to the next meeting.

4. RESOLUTION OF DISPUTES

ITF pointed to the delays which could occur in dealing with claims as a result of legal challenges and proposed that a form of mediation should be accepted so as to reduce the time before settlement was made.

ISF stated that this was an issue which might be explored, but it would be necessary to consider whether mediation would apply at national level or internationally, and whether such a device might actually create further problems.

The IGF agreed to put the proposal to the Clubs and to report their reaction at the next meeting, but maintained that the overwhelming majority of claims were settled promptly and without the need for legal challenge.

5. CLAIMS HANDLING TECHNIQUES

ITF drew attention to a number of practices by Club correspondents designed to ensure that claims were undervalued or that payments were delayed. These included intimidation or pressure on claimants or witnesses, the use of medical consultants favourable to the owner, legal arguments over the posting of security and conflicts over jurisdiction. ITF proposed that a code of conduct should be developed which would outlaw these abuses.

ISF responded that owners would firmly oppose any attempt to intimidate claimants through blacklisting or other means to accept less than their proper entitlement. If the Clubs were prepared to develop a code of conduct it might be possible to include provisions dealing with several of the points made by ITF. However, seafarers were also known to have submitted

falsely inflated claims and to have tried to use forum shopping in order to maximise their compensation.

The IG agreed that there were examples where seafarers had tried to submit inflated claims and maintained that several of the points raised by ITF were quite legitimate means of verifying genuine claims and often protected seafarers from false accusations. The views of the Clubs on the development of a code would be reported to the next meeting.

6. PRIOR NOTIFICATION OF WITHDRAWAL OF COVER

ITF explained that withdrawal of cover without notification could create serious problems for seafarers and their families, particularly in cases where cover was withdrawn retrospectively and claims were pending. ITF therefore proposed that seafarers should be advised when cover was withdrawn at the same time as the owner was advised and that Club rules should be amended to prevent retrospective withdrawal of cover. ITF also proposed that crew contracts should be amended to allow seafarers the right to repatriation if cover was withdrawn.

ISF replied that owners might have some sympathy with the proposal that retrospective withdrawal of cover might cease to apply, but believed that notification to seafarers of immediate termination of cover would prove difficult for the Clubs to administer.

The IG explained that notifying individual seafarers when cover was withdrawn would be an administrative nightmare and, even if possible would be unlikely materially to help the seafarers on board. It was appreciated, however, that retrospective withdrawal of cover could raise problems and it was agreed that Clubs' views would be requested as to whether it might be possible to waive (rather than to amend) such rules.

7. DATE OF NEXT MEETING

It was agreed that it would be desirable for the three organisations to meet again once the views of the Clubs on the various issues were known and before the next meeting of the Joint Working Group.

It was anticipated that the meeting would be in September and it was agreed that the ISF and ITF secretariats should liaise over the precise date.

Extracted from document IMO/ILO/WGLCCS 1/11

6.79 Concerning the proposal made by the Shipowners and Seafarers for possible continuation of discussions outside the Working Group, informal consultations were held. The Working Group took note of the agreement reached between the Shipowners and the Seafarers to hold an ISF/ITF meeting next year with a view to discussing specific issues. The two groups intended to invite representatives from the P&I Clubs as well other international bodies to attend the meeting.

6.80 The Seafarers expressed satisfaction that agreement had been reached on holding bilateral discussions with appropriate attendance. While welcoming the invitation extended to the P&I Clubs to participate in those discussions, governments were also invited to express their views on the appropriateness of including the following subjects on the agenda of those bilateral discussions: P&I rules and the "pay to be paid" principle; delays in settlement of claims; resolution of disputes; lack of direct access of crew members/seafarers to insurance; prior notification of withdrawal of coverage; settlement at undervalued sums contrary to contractual obligations; advisability of introducing compulsory insurance. Following the bilateral discussions, the Shipowners and Seafarers would report back to the Working Group, in particular regarding those areas where progress had been made.

6.81 The delegation of Cyprus welcomed the agreement between the Shipowners and the Seafarers as a positive sign and expressed the hope that P&I Clubs would accept to contribute to this meeting. The list of the proposed subjects was reasonable although some of the discussion items might need to be prioritized.

6.82 An observer from the International Group of P&I Clubs, stated that during an earlier ISF/ITF meeting held in June 1999, P&I Clubs had given their consent to participate in an informal working group. P&I Clubs were thus ready to take part in the proposed meeting on the following conditions: discussions had to be "off the record" and should not be brought to public scrutiny; no observers were to be admitted; the questions of compulsory insurance and direct access for crew members/seafarers would not be addressed.

6.83 The delegation of the United States expressed support for the initiative of the Shipowners and the Seafarers but cautioned that the informal discussion group should be required to report back to the IMO/ILO Joint Working Group.

6.84 In summing up the debate on this point, the Chairman considered that a most interesting proposal had been made and that the discussion group would greatly facilitate the task of the Working Group itself. This informal group would be expected, of course, to report back to the governing bodies of the two Organizations. The Working Group agreed on the following possibilities regarding personal injury and death: (a) compulsory insurance ; (b) an examination of existing instruments to see whether they could be improved; (c) further discussions among industry, crew members/seafarers and insurers.

10 Any other business

10.1 The Working Group discussed and adopted the Joint Statement which is attached at annex 5.

11 Conclusions

11.1 Taking into account the complementary character of the mandates of the two international organizations, the Working Group considered that a joint IMO/ILO approach was the best way to examine the problems and to make appropriate recommendations to their respective parent bodies. Accordingly, the Working Group considered that it should meet again, *inter alia*, to assess the

material to be communicated to the IMO and ILO by member States and relevant institutions concerning existing mechanisms, and to consider possible longer-term arrangements, such as the establishment of an international fund or national measures of comparable effectiveness.

11.2 The Working Group agreed that further information was needed in the context of the conclusions reached by the Working Group with regard to the following:

ABANDONMENT

.1 the reasons for the low rates of ratification of relevant existing international instruments and problems encountered;

.2 existing national schemes and systems dealing with problems of abandonment of crew members/seafarers;

.3 lessons learned from various civil liability regimes and their impact on certification schemes;

PERSONAL INJURY AND DEATH

.4 existing national schemes and systems for dealing with financial security for personal injury and death.

11.3 On the basis of information collected, the Working Group would examine and evaluate possible new approaches for dealing with the issues of abandonment, financial security for personal injury and death of crew members/seafarers, and in particular would examine the following possible solutions the order of which did not indicate any hierarchy:

ABANDONMENT

.1 national funds
.2 an international fund
.3 compulsory insurance
.4 systems based on bank guarantees or similar mechanisms
.5 other proposals

PERSONAL INJURY AND DEATH

.1 compulsory insurance
.2 personal accident insurance
.3 national funds
.4 an international fund
.5 other proposals.

11.4 The Working Group noted the proposal made by the Shipowners and Seafarers to meet informally with representatives of the P&I Clubs to discuss difficulties encountered and explore possible solutions concerning certain rules of P&I Club coverage and to report back to the governing bodies of the two Organizations. The issues to be discussed include, *inter alia*:

.1 the “pay to be paid” principle;
.2 direct access of crew members/seafarers to insurers;
.3 delays in the settlement of claims;
.4 resolution of disputes;

.5 claims handling techniques;
.6 prior notification of withdrawal coverage, including the addressees of the notice; and
.7 undervalued settlement of contractual obligations

11.5 The other conclusions reached by the Working Group were as follows:

1 The problems of abandonment and claims for personal injury and death were real and serious, involving a human and social dimension and required urgent attention;

.2 A considerable number of international instruments addressed selected aspects of the problems under review, but none of these instruments dealt with the problems in a comprehensive manner;

.3 Focal points should be established to facilitate communication and to inform concerned parties, including the flag State as soon as a problem occurred;

.4 The publication of guidance for States on the repatriation of crew members/seafarers.

Action requested of the IMO Legal Committee and the Governing Body of the ILO

11.6 The Working Group invites the IMO Legal Committee and the Governing Body of the ILO to:

.1 note the report of the Working Group, and in particular the conclusions contained in paragraphs 11.1 to 11.5;

.2 note the Statement of the Joint IMO/ILO *Ad Hoc* Expert Working Group which is given at annex 5;

.3 approve the continuation of the Working Group with the proposed terms of reference contained in annex 7 and instruct the Secretariats accordingly;

.4 request Member States and, through the Secretariat, relevant institutions, to provide in due time information on the issues contained in paragraphs 11.2; and

.5 instruct the Secretariats of the IMO and ILO to compile the information received and to submit it to the next meeting of the Working Group.

***

ANNEX 2

MINUTES OF THE MEETING OF THE ISF, ITF AND THE INTERNATIONAL GROUP OF P & I CLUBS HELD ON 5 SEPTEMBER 2000 AT ITF HOUSE 49-60 BOROUGH ROAD, LONDON SE1 1DS

Present:

For ISF:	Mr J Lusted Captain W Codrington Captain F Preece Captain K Akatsuka Mrs E Midelfart Ms L Howlett Mr C Horrocks
For ITF:	Mr D Cockroft Mr B Orrell Mr J Whitlow Ms D Fitzpatrick Mr J-Y Legouas
For International Group:	Mr C Hume Mr H Hurst
For IMO:	Mr Librando
For ILO:	Ms C Doumbia-Henry Mr K Schindler

The meeting was a follow up to the meeting of the parties on 28 February 2000 with the purpose in particular of hearing the response of the International Group of P & I Clubs (the International Group) to the proposals put forward by the ITF at the earlier meeting.

The International Group had provided a paper in advance of the meeting which set out their response to the paper submitted by the ITF in advance of the meeting on 28 February 2000. A copy of the paper is attached.

The meeting was chaired by David Cockroft, ITF General Secretary

General Comments

ITF

1. The ITF commented that the paper of the International Group appeared to be rather negative and did not contain any alternative suggestions on how the serious issues could be addressed. The response seemed merely to focus and take issue with illustrative case examples provided by ITF in its paper. Many ship owners had expressed sympathy with the position of seafarers and the International Group's response appeared to be in conflict with this. The Working Group had concluded that the problems of claims for personal injury and death were "real and serious" and required "urgent attention": it was regrettable that the International Group had not put forward any proposals for addressing the previously identified problem areas.

ISF

2. The ISF was encouraged by the positive response of the International Group. The purpose of the meeting was to find an industry solution to those problems. They felt that it should be possible to achieve this.

International Group

3. The International Group said that the matters raised at the February meeting and in the ITF's paper had been referred back to the Clubs and the response had resulted from this. The Clubs did not accept that there was a significant problem. The Group indicated that in their opinion and as was apparent from the response, over 99.9% of claims were handled properly. They did not accept that there had been any malpractice or manifest unfairness in the handling of the example cases referred to in Annex 1 of the ITF paper.

   The complaints of the ITF could be divided into issues of principle and issues concerning claims handling techniques. Using the numbering from the ITF paper, the International Group responded:

   (1) and (6) <u>The "pay to be paid" rule and retrospective withdrawal of cover.</u>

   The International Group said that the above rules had been formulated by members over many years and regulated the affairs of members. They were not intended to prejudice claimants. The rules were fundamental to the concept of mutual indemnity insurance. The International Group did not accept that the clubs relied on the "pay to be paid" principle in the case of death and personal injury claims and therefore did not accept that there was any need to change it. Further since the ITF had not put forward any examples of retrospective withdrawal of cover, there was no need to change this rule either.

   (2) <u>Direct access of crew members/seafarers to insurers.</u>

   The International Group said that the clubs did not see any good reason to change club rules. If clubs agreed to a right of direct access, this would undermine the concept of mutuality.

(3) and (5) Delays in the settlement of claims and claims handling techniques

There was a disparity in the facts and matters of the case examples referred to in Annex 1 of the ITF's paper as reported by the ITF and as reported by the Clubs. In a few of the cases which had been handled by the member, the Clubs did not have all the facts. They did not accept that any unacceptable practices had occurred. Concerning payment of contractual claims, the International Group said that the clubs and their members actively encouraged swift settlement of contractual claims. However, if legal proceedings were commenced by seafarers prior to payment of the contractual claims it would inevitably lead to delay in payment of contractual claims because it would be necessary to ensure that such payment did not prejudice the owners' position in relation to the legal proceedings.

The International Group said that the clubs did not accept that they or those acting on their behalf restricted access to seafarers following an incident involving death or personal injury and further they did not accept that tactics such as blackmail, intimidation or threat of blacklisting are used against seafarers. Matters such as clubs use of their own medical experts, security for costs applications and jurisdictional challenges were all legitimate claims handling techniques employed by representatives of seafarers also.

Therefore the clubs did not see the necessity for a Code of Conduct as suggested by the ITF for the handling of personal injury and loss of life claims. Further given the diversity of claims, it would be impractical to formulate such a code.

However the clubs proposed an informal arrangement whereby "manifestly unfair" behaviour by a club could be referred by the seafarer or his representative to the Secretariat of the International Group who would then refer the matter to the club concerned. The International Group emphasised that the Secretariat of the International Group was not proposing to act as a form of mediator but as a channel of communication only.

(6) Prior notification of withdrawal of cover

The International Group said that it would be administratively impossible for clubs to advise individual crew members of withdrawal of cover. Therefore they did not agree to the proposal.

(4) Resolution of disputes

The International Group said that the clubs did not think there was any merit in the proposal and there was no need to curtail the freedom of claimants.

ITF

4. The ITF said that the discussion was not about whether there was a problem since this had already been confirmed by the Working Group. The ITF had sought to put forward a number of pro active proposals in its submission of February 2000 which they hoped could form the basis of an industry based resolution of the problems.

International Group

5. The International Group said that the Working Group's view that there was a problem had been based on the examples of cases given by the ITF. These had been answered by the Group in their response. The International Group said that it was offering to look at cases on a case by case basis in situations of "manifestly unfair" behaviour by a member club. This would achieve more in the short term for the seafarer than constitutional amendments to the P & I Club rules.

ISF

6. The ISF said that it considered the proposal of the International Group to be positive and useful. The ISF was prepared to go further, by communicating all accusations that claims were being handled in an inappropriate manner to the insurer, whether or not the organisation was a member of the International Group.

The ISF also noted that, since the first ad hoc IMO/ILO meeting had been held, in October 1999, there had been two developments that should materially improve the position. First, the IMO had adopted the Guidelines on Shipowners' Responsibilities in respect of Maritime Claims (Resolution A. 898 (21)), which was a clear statement of good practice in this area. Second, the EQUASIS database was now recording a ship's P&I insurer, and seafarers' organisations therefore now had ready access to relevant.

ITF, International Group

7. In response to a query from the ITF, the International Group confirmed that their claim that 99.9% of cases are handled satisfactorily derived from looking at the percentage of cases in the ITF's submission as against the total number of claims handled by clubs during the past five years. The ITF commented that their cases were examples and illustrative only and were not an indication of the size of the problem. There was no basis on which to say that 99.9% of cases were handled satisfactorily. The ITF would not be pursuing the issue unless it was a serious one. The International Group said that they could only investigate such examples as were brought to their attention. This is what they had done in respect of the examples in the ITF paper.

ISF

8. The ISF stated that they supported the principle of third party liability insurance for all shipowners. The Guidelines on Shipowners' Responsibilities produced by the IMO Legal Committee and adopted by the IMO Assembly covered personal injury and loss of life cases. It was clear that this was as far as the international community was prepared to go.

ITF, International Group

9. The ITF said that the guidelines for shipowners were a "catch-all" provision alongside the concepts of compulsory insurance for passengers in the Athens Convention, and compulsory insurance for wreck removal, bunker spills and hazardous substances. They did not in any way preclude an instrument for compulsory insurance for personal injury and loss of life claims and direct access by third parties. The issue was whether P & I insurance in practice provided effective insurance which met the needs of global shipping. The aim was to attempt to solve the problem within the industry however if the P & I clubs could not assist with the

solution, then they should be considered as part of the problem and more modern solutions be implemented.

10. The International Group said that the cover provided by the Clubs was effective. The suggestion that it was ineffective because of certain Club rules was a theoretical not a practical argument. The ITF had not identified any claim that had not been satisfied because of them. Differences could arise as to the value of the claim, but this was perfectly legitimate.

ISF

11. The ISF said that in their view, two issues had to be addressed. The first was how to promote the IMO Guidelines on shipowner's Responsibilities. The second was how to deal with complaints concerning the handling of claims arising from third party liability insurance cover. The possibility of the clubs dispensing with the "pay to be paid" rule appeared to be remote, as this rule was fundamental to their handling of all claims. But in practice, it did not seem to have created a real problem. Concerning claims handling techniques, the International Group and the ISF had made a positive, practical proposal. To the extent that there were problems in some countries, this should be effective in ensuring that the proper standards of claims handling were met. The ISF believed it would be in the interests of all concerned to get such a system implemented at an early rate.

Quit claims

ITF, ISF, International Group

12. The ITF raised the issue of quit claims and said that they considered it was unconscionable and in violation of basic human rights for companies and insurers to require seafarers to sign receipts in full and final settlement for contractual claims regardless of whether there was an additional claim in law. It appeared to be widespread practice to withhold any payments to seafarers who were seeking to enforce their claims at law. This placed injured seafarers and the families of deceased seafarers in a dire financial predicament. Further companies and insurers appeared to take the view that Filipino seafarers serving under POEA contracts were only entitled to contractual payments despite statements to the contrary in the constitution of the Philippines and in court decisions of the Philippines Supreme Court.

ISF

13. The ISF said that they considered contractual payment should be paid as soon as possible after an injury or death occurred

International Group, ISF

14. The International Group said that they considered payments under the POEA contract to be quasi-statutory and that seafarers serving under this contract were restricted to compensation in the contract only. Therefore it was entirely reasonable for owners and clubs to require a full release when making POEA payments. The ISF said that they believed that the latest version of the POEA contract, introduced on 25 June 2000, was intended to clarify a confused situation and therefore was useful. Nevertheless, they were aware that its validity was being challenged in the local courts. Their position was that contractual claims should

be paid as soon as the medical position was clear, which could take time in personal injury cases. However, where the contract of employment provided compensation specifically as a fast track alternative to a prolonged action in tort, the ISF believed that the Clubs were right to seek a release before making a payment.

15. Concerning delays in contractual payments, the International Group said that often it was not possible to assess an injury quickly and therefore it would be impractical to seek to make contractual payments within three months as suggested by the ITF.

16. The International Group confirmed that they provide cover for the standard clause in ITF agreements, namely that contractual compensation for injury and death is without prejudice to any other claims in law.

Future work

ISF, ITF, IG

17. It was agreed that a joint note of the meeting would be prepared and a small working group should meet to explore whether it was possible to produce an agreed position paper for the next meeting of the IMO/ILO ad hoc Working Group (during week commencing 30 October 2000).

ILO

18. The ILO advised that they were producing a report for the next meeting of the Working Group based on the responses to the questionnaire on the abandonment of seafarers and personal accident and death in service claim. They will provide a list of countries who have responded and those who have failed to respond.

IMO

19. The IMO confirmed that it would co-operate with the ILO in the production of the report for the next meeting of the Working Group. Further they considered that at the next meeting of the Working Group, the terms of reference may need to be reviewed.

***

ANNEX 3

International Group of P&I Clubs Response to the Document (the submissions) submitted by the Seafarers Delegation to the meeting held between the Delegation the ISF and the International Group on the 28th February 2000

We refer to the meeting held between the Seafarers Delegation, the ISF and the International Group of P&I Clubs on the 28th February and to the document (the submissions) submitted by you, the Delegation, to that meeting.

As was made clear at the meeting, the matters raised and the specific cases referred to in the submissions, should be considered in their proper perspective. We have made enquiries of Group Clubs and it appears that during the past five years the Clubs collectively have dealt with or are dealing with more than 58,015 crew related claims, that is claims for crew illness, personal injury or death, amounting in value to some US$ 823,640,070.00. We are not able to give you exact figures as not all of the Group Clubs have been able to provide us with the number and value of their crew claims. We have also established that of the twenty-four specific cases that are referred to in Annex 1 of the submissions only sixteen involve Group Clubs. We have as we promised we would, obtained relevant information on the individual cases from the Clubs concerned, which we have summarised below. It seems clear to us in the light of this information that the complaints which have been made in relation to these claims are unfounded. You will therefore understand why we stand by our assertion that crew claims are handled fairly, efficiently and expeditiously by Clubs and those matters raised in the submissions do not give rise to significant difficulties.

We nevertheless make the following responses to each of the matters raised in the submissions and at the meeting. We have adopted the same paragraph numbering as the submissions, but dealt with the topics in the same order in which they were dealt with at the meeting.

(1) and (6) The "Pay to be Paid" Rule and Retrospective Withdrawal of Cover

You allege that the Clubs' "pay to be paid" rule is "manifestly unfair to claimants", particularly seafarers. You accordingly propose that the Clubs give a written undertaking to the Secretariat of the IMO and the ILO not to invoke the pay to be paid principle against seafarers and/or their next of kin in circumstances where the deceased or injured seafarer has established a good and valid claim against the shipowner.

In addition you propose that the Clubs amend their Rules to waive reliance on the right to retrospective withdrawal in relation to death or personal injury claims.

The Clubs are mutual organisations, the members insuring one another for certain third party liabilities relating to the operation of ships, on an indemnity basis. The Club Rules, which have been formulated by the members over many years, are not limited to defining the extent of cover provided by the Club as in the case of a commercial insurance policy. They also regulate the relationship between members, ensuring that all members are treated on an equal footing and satisfy their obligations to one another.

The pay to be paid rule and those rules permitting immediate or retrospective withdrawal of cover for instance for non-payment of premium, are fundamental to this form of mutual indemnity insurance. They ensure that where a member is unwilling or unable to fulfil his

obligations to his fellow members, they are not required to meet his liabilities to third parties. As will be appreciated these Rules when viewed in their proper context and when considered in the light of what they are intended to accomplish, are fair and reasonable.

It is on the other hand unreasonable to expect Club's to either agree to amend or waive the effect of these fundamental Rules or to differentiate between a members potential liabilities and agree to amend or to waive them in relation to some but not other types of claim.

It should also be remembered that members will often elect to handle claims themselves as they are perfectly at liberty to do under the Rules. Indeed many owners or crewing agents prefer to do so since they feel a personal sense of responsibility towards crewmembers and their families. In such case the Club will have little input into the way in which the member handles the claim. The member has a continuing interest in claims, as they will effect his claim record and accordingly the premium that he will pay the following year.

The Clubs do however recognise that in certain limited circumstances, e.g. the insolvency of a member, the rigid application of such rules can bring about personal hardship to crewmembers or their dependants. As has been pointed out a number of times, on the very few occasions when the circumstances arise, the Clubs have not relied on these rules to avoid meeting valid claims for death and personal injury. By valid we mean amongst other things claims brought in accordance with the terms of the crew members contract of employment. The Clubs intend to continue this approach.

You refer in Annex 1 to six cases in respect of which you allege P&I insurers have relied on the pay to be paid rule. Three of these do not relate to International Group Clubs and are not therefore relevant to the submissions or this response. As to the remaining cases we make the following comments from information which has been passed to us.

1. Alsod

The Club is aware of a crew claim involving this vessel but is not certain whether it is the one referred to. The incident of which it is aware took place in 1987 but it has very few details as the owner and his lawyers handled the claim. The Club was first informed of the claim in 1988, at the time the second engineer commenced proceedings in the Greek (not Cypriot) courts. It appears that the officer suffered from a stomach ulcer and subsequently a heart condition which illnesses he alleged were work related. Unfortunately before completion of a medical examination by a court appointed doctor the officer died from a heart attack, but the Club understands that a judgement was given in favour of his estate which was appealed to the Supreme Court by the owner. As the owners have refused to communicate with the Club or its lawyers the Club is not aware of the present position. However the Club has never relied on the pay to be paid rule as alleged nor to their knowledge has the Greek court considered the rule in this case.

2. Edinburgh Castle

We presume that the reference to 1987 is intended to be to 1997. If so we understand that the physical injuries to the crewmembers were slight not severe. The vessel's entry was cancelled for non-payment of premiums and this was made known to the plaintiff's lawyers. However although the Club would be entitled under the Club Rules to cease their involvement in the matter they have not done so and are continuing to discuss the claims with the claimant's lawyers in the hope that a reasonable settlement can be reached.

3. Meonia

We are advised that the circumstances of the accident giving rise to this claim, including the date of the accident were not, in spite of continuous requests for information to facilitate a dialogue, made known to the member or the Club until a Statement of Claim was served in proceedings commenced by the plaintiff some five years after the accident. The 'pay to be paid' rule was not raised as a defence to the claim.

So far as retrospective withdrawal of cover is concerned, no cases have been put forward alleging that Clubs have refused to meet claims in reliance on this rule and the Clubs certainly know of none.

As will be clear from what has been said above, the Clubs do not believe that it would be appropriate to agree to either of the proposals suggested by you, nor do they consider that to do so would confer any practical benefit on crew members.

(2) Direct Access of Crew Members/Seafarers to Insurers

As has been explained under the previous paragraph, the Clubs provide indemnity insurance for their members for a number of potential liabilities that those members may face, in the business of operating ships. The Clubs do not assume direct responsibility for and are not in the business of insuring individuals employed by their members, in order for those members to carry on their business activities.

Club rules have been formulated over many years to reflect the principles of mutuality and those risks which members have agreed to share. Insolvency is not one of these. For Clubs to agree that crewmembers should have a right to proceed directly against a Club in the event of the insolvency of a member and that the Club should in those circumstances not rely on any of the Club rules which it otherwise could, undermines the concept of mutuality. Indeed they would be in a stronger position than a party bringing an action under the Third Party (Rights Against Insurers) Act 1930 to which reference is made in the submissions. Furthermore it would in many cases result in responsible members subsidising irresponsible and poorly managed members at a time when the Clubs are looking to encourage the raising of standards within the industry.
The Clubs can not therefore agree to this proposal.

(3) and (5) Delays in the Settlement of Claims and Claims Techniques

(A) You allege that there are on many occasions substantial delays in the settlement of contractual claims. They therefore propose that a Code of Conduct is agreed by the Clubs, their members and correspondents that would include undertakings that payment for contractual death or injury claims are:

(i) made in full within 3 months of the death or injury

(ii) not made dependent upon the surrender of other rights against the member

As was pointed out at the meeting the extent of many injuries cannot be determined within three months and an undertaking limited to this period would therefore be impractical.

During the discussion that took place on this topic, it was made clear that the Clubs and their members actively encourage swift settlement of bona fide contractual claims in full and that Clubs and their correspondents act correctly and constructively in relation to settling such claims. We would point out that where legal proceedings are commenced by or on behalf of seafarers which advance claims additional to pure contractual claims, settlement of the contractual element is often delayed until judgement or settlement of all aspects of the claim.

Annex 1 refers to nine cases in which it is alleged that there has been delay in settling contractual claims. Of those nine, two do not involve Group Clubs and we can not therefore comment on them.

1 Leros Strength

We understand that contractual payments have in fact been made to a number of the seafarers estates. However other estates were not prepared to accept the contractual payment and have commenced legal proceedings.

2 Athenian Fidelity

We understand that legal proceedings were commenced before any contractual payments could be made and matters have been delayed due to the plaintiff's lawyer's efforts to establish jurisdiction in inappropriate forums.

3 Flare

We are advised that the majority of crew death claims were settled promptly in excess of the POEA limits. The families of five of the deceased crewmembers who were offered identical terms of settlement elected to commence legal proceedings in Canada as did the three Filipino survivors. Those proceedings are presently ongoing. The three survivors apparently were not prepared to accept medical assistance from the owner and are not due to be examined by the court appointed expert until March. Until then it is not possible to properly evaluate their claims.

4 Dystos

The allegation that no compensation has been paid is incorrect. We are advised that to date all crew claims amounting in total to USD 4.22 million have been paid to the dependants, apart from one residual claim where payment has not yet taken place due we understand to complications arising out of the death of a claimant.

5 Rio Frio – Samama

The allegation that payment to the heirs was delayed due to owners disputing the rate of exchange is incorrect. It is also incorrect that the seaman died on the 15th April 1998. This was the date that he was unfortunately taken ill with liver cancer. After contracting the disease full medical assistance was extended by owners. The seaman sadly died on the 20th December 1998.

His widow and dependants were entitled to compensation of the Philippine Pesos equivalent of US$72,000.00 and this sum was offered to her. She did not confirm her acceptance of this sum until 27th April 1999 and a settlement meeting officiated by legal counsel for the OWWA was arranged for 5th May. At the meeting the widow disputed the rate of exchange applied by the Club correspondents to the settlement figure and the meeting was adjourned in order that she

could obtain advice from the Central Bank of the Philippines. Settlement was concluded on 25th May utilising the rate of exchange originally applied by the Club correspondents.

6 City of Lome

As this matter was dealt with by the member direct, the Club concerned was not directly involved but understands that a full explanation of the position was given by their member in liaison with local agents to the ITF.

7 Melanesian Chief

We are advised that the widow of the dead seafarer instructed London lawyers and settlement negotiations are in progress.

(B) It is also alleged that unfair and/or inappropriate claims handling techniques are employed by Clubs, members and correspondents and these should also be the subject of undertakings contained in a Code of Conduct. The particular matters complained of are:

(i) Restricting access to seafarers following an incident involving death or personal injury.

Following an incident Clubs and members frequently appoint representatives, often lawyers, to investigate the cause of an incident, who will obviously need to discuss the matter with the seafarers concerned since they will normally be the main if not the only witnesses to the event, in order to establish what if any liability exists and to protect the members' and frequently the seafarer's rights. Clubs and members will normally in such circumstances pay for a seafarer to be legally represented, meet individual fines and cover accommodation and living expenses.

Clubs can not and do not dictate to seafarers who they can or can not have access to or who they can or cannot appoint as their representatives, nor would they wish to do so. Seafarers are free to make their own decisions and free to take what action they wish. Crewmembers are not repatriated against their wishes or to prejudice their position as appears to be implied. They are normally repatriated as soon as possible after an incident because they wish it and they recognise that it is in their best interests particularly in light of their increasing exposure to criminal sanctions and possible imprisonment. Furthermore local legislation often requires it.

(ii) Pressurising seafarers to accept less than their legal entitlement

Neither the Clubs nor their members accept that the tactics suggested, blackmail, intimidation, the threat of blacklisting etc. are employed by them or correspondents when settling death or injury claims.

Particular reference was made during the meeting to payments under POEA agreements. As you know and as was made clear at the meeting, owners the Clubs and there correspondents, on the basis of legal advice which they have received, take the view that payments made in accordance with the provisions of POEA agreements, being quasi-statutory payments, are intended to provide compensation in full and final settlement of all claims. It is therefore entirely reasonable for owners and Clubs to require a full release when making POEA payments. Indeed the Amended POEA contract which came into force on the 25th June removes any doubt by stating that payments made under the Contract are to cover all claims including but not limited to claims in contract, tort, fault or negligence arising under the law of any country.

We refer to Annex 1 and the cases of the **CCNI Aysen, Ambassador Bridge** and **Takachimo**. Each of these cases involved claims by Filipino seafarers who were signatories to POEA agreements. Payments were therefore made conditional upon the execution of full releases.

The member handled the claim in respect of the **Disney Magic** not the member's Club. The Club does not therefore have detailed information relating to this claim but since it involves a Filipino seafarer it would seem likely that owners and their representatives applied the same principle.

(iii) Clubs use of their own medical experts
(iv) Security for costs applications
(v) Jurisdictional challenges

In the Clubs' view these matters are all legitimate claims handling techniques which are equally employed by seafarer claimants, frequently assisted by you and other seafarer unions.

(a) Medical Experts

The criticism of the Clubs use of specific doctors and hospitals and of the findings being contrary to those of independent medical examiners, can equally be levelled at seafarers and their representatives. It is both reasonable and prudent for each party to appoint it's own medical experts. If the parties can not reach agreement in the light of conflicting medical evidence, that evidence can be tested in court or before a tribunal.

We refer to Annex 1. Only two of these matters involve Group Clubs.

1 Nego Lombok

We understand that there is good reason to believe that this seafarer's condition was pre-existing. Despite this the claim is being handled by owners and their Club. It appears to be a typical case of differing medical opinions. The seafarer following assessment by the treating doctor at the Metropolitan Hospital on 3rd May 1999 was declared partially disabled with a disability assessment of grade 6 that is 50% and this disability assessment was subsequently confirmed by an independent neurologist instructed through Pandiman. A settlement offer based on this assessment was made, $25,000.00, but was rejected on the grounds that the seafarer had obtained a medical opinion assessing his condition as Grade 1 disability. It was proposed that the seafarer be examined by an independent specialist to establish his level of disability. However the seafarer decided to file proceedings with the NLRC and a decision is presently awaited.

2 Knock Clune

This case was again one of differing medical opinions. The owner's doctor took the view that the seafarer at his next evaluation (one month later) would be fit for sea duties. The seafarer's medical examiner assessed him as fully disabled. The matter was referred by the seafarer to the NLRC seeking compensation of $60,000.00 for full disablement. The arbiter determined that the seaman was suffering from some slight residual disability as he did not have full movement, and awarded him only $8,500.00.

(b) The majority of seafarers' employment contracts contain specific law and jurisdiction provisions. In other words, the parties have agreed, prior to any dispute arising, in which jurisdiction disputes are to be resolved and the procedure to be applied to such disputes. This should ensure that there is no need to expend time and costs in resolving the 'correct' jurisdiction from the 'multitude of jurisdictions ' referred to in the submissions. However

all to frequently seafarers indulge in forum shopping despite the terms of their contract and will often arrest or seek to arrest ships for security and to found jurisdiction. They no doubt regard such action as a legitimate tactic. It is equally legitimate for Clubs and their members to contest such attempts to establish alternative jurisdictions.

Whilst the Clubs do not see a necessity for a Code of Conduct, more importantly it would in their view be impractical to formulate such a code, given the number of cases and the diversity of the facts and circumstances of such cases. Even were it feasible to devise an appropriate wording, in order for it to cover all possibilities it would of necessity be complex, unwieldy and difficult to operate and interpret. This in itself would be likely to give rise to disputes.

However the Clubs would propose an informal arrangement, under which a seafarer or his representative, should he believe that a Group Club is employing manifestly unfair techniques, refer the matter to the Secretariat of the International Group, who will then refer the matter to the Club concerned.

(6) Prior Notification of Withdrawal of Cover

You propose that Clubs should notify crewmembers of cancellation of Club cover when notifying members.

It would be administratively impossible for Clubs to take on the responsibility of advising individual crewmembers of withdrawal of cover. Clubs do not have the names of individual crewmembers, (which are constantly changing) and are not in any contractual or other relationship with such crewmembers.

They can not therefore agree to the proposal suggested.

(4) Resolution of Disputes

It is proposed that the Clubs should agree to some form of mediation procedure or alternative dispute resolution to avoid protracted litigation and jurisdictional disputes in relation to death and injury claims.

As has been pointed out the majority of employment contracts between members and crew, contain jurisdiction and law provisions.

The member and crew are of course always free to subsequently determine that a dispute should be resolved by some other means, in some other jurisdiction and, as has been pointed out, many jurisdictions cater for alternative dispute resolution. In these circumstances we can see no reason to curtail the freedom of the claimant and member, to resolve disputes either in accordance with the procedure originally agreed by them in the employment contract or by adopting some other procedure if they so wish.

The Clubs do not therefore think there is merit in the proposal.

Conclusion

We pointed out at the beginning of this response that the Clubs are either in the process of or have handled more than 58,015 crew claims in the past five years amounting in value to over three-quarters of a billion dollars. We believe that we have satisfactorily dealt with the concerns

which you have expressed in relation to those specific cases referred to in Annex 1, which out of interest represent .027% of the known crew claims handled. In the light of what we have said in this response to your submissions, which we hope you will find constructive, you will understand that we do not believe that any of the measures you have proposed will confer any practical benefit or advantage on seafarers.

We look forward to meeting with you on the 5th September.

_____