



IMO

E

JOINT IMO/ILO *AD HOC* EXPERT
WORKING GROUP ON LIABILITY AND
COMPENSATION REGARDING CLAIMS
FOR DEATH, PERSONAL INJURY AND
ABANDONMENT OF SEAFARERS
6th session
Agenda item 3

IMO/ILO/WGLCCS 6/3/6
5 August 2005
ENGLISH ONLY

**EXAMINATION OF THE ISSUE OF FINANCIAL SECURITY FOR CREW
MEMBERS/SEAFARERS AND THEIR DEPENDANTS WITH REGARD TO
COMPENSATION IN CASES OF PERSONAL INJURY, DEATH AND
ABANDONMENT, TAKING INTO ACCOUNT THE RELEVANT IMO AND ILO
INSTRUMENTS INCLUDING THOSE CURRENTLY UNDER REVIEW OR LIKELY
TO BE ADOPTED IN THE NEAR FUTURE**

Personal injury to or death of crew members

**Submitted by the International Transport Workers' Federation (ITF) and the International
Confederation of Free Trade Unions (ICFTU)**

SUMMARY

Executive summary: This document contains proposals for a longer term sustainable solution to address the problem of financial security with regard to compensation in cases of personal injury to or death of crew members

Action to be taken: Paragraphs 13 to 15

Related documents: LEG 89/16, paragraphs 157-166, IMO/ILO/WGLSCCS 5/3, resolution A.931(22) and associated guidelines

1 This document is submitted following the decision of the IMO Legal Committee, at its eighty-ninth session, authorizing the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers to proceed with the development of longer term sustainable solutions to address the problems of financial security with regard to contractual compensation in case of death and personal injury.

Longer term sustainable solution for the provision of financial security with regard to compensation in cases of death of, or personal injury to, crew members

Background

2 Following agreement that none of the existing international instruments adequately and comprehensively addressed the problems relating to compensation for death of and personal injury to crew members, the Working Group prepared a short term response in the form of a draft

For reasons of economy, this document is printed in a limited number. Delegates are kindly asked to bring their copies to meetings and not to request additional copies.

resolution and related guidelines on shipowners' responsibilities in respect of contractual claims for personal injury to, or death of, seafarers.

3 The draft resolution was approved by the Legal Committee prior to adoption by the IMO Assembly at its twenty-second session in November 2001 by resolution A.931(22). The resolution was then adopted by the Governing Body of ILO at its 282nd session, also in November 2001. The resolution and associated guidelines took effect on 1 January 2002.

4 The Working Group, at its fifth session (12 to 14 January 2004), noted that neither the resolution nor the associated guidelines had had any significant impact. It agreed to recommend to the IMO Legal Committee and the ILO Governing Body to authorize the Group to proceed with the development of longer term sustainable solutions to the problem taking into account two principles:

- (i) that neither resolution A.931(22) nor the associated guidelines should prejudice or serve as a precedent constraining in any way whatsoever the eventual mandatory solution; and
- (ii) the eventual mandatory solution should not in any way interfere, affect, erode or diminish any rights or remedies seafarers may enjoy in a particular State under an existing legal framework.

5 The IMO Legal Committee at its eighty-eighth session and the ILO Governing Body at its 289th session agreed that, in accordance with its revised terms of reference, the Working Group should continue to examine all the related issues and to monitor the implementation of the guidelines and the extent of the problem with a view to achieving better implementation and wider acceptance of the resolution and related guidelines and determining longer term sustainable solutions to address the problem.

General comments

6 It has been acknowledged that there is a compelling need for a longer term sustainable system that will ensure that crew members and/or their families and dependants who have a valid contractual claim in law will receive proper compensation for that claim regardless of the circumstances of the shipowner.

7 The widespread use of shell companies as registered owners of ships means that the corporate vehicle often has no assets other than the single ship which may have little or no value. Therefore, it should not be left to chance whether the shipowner is able to meet his obligations to the crew members under the contracts of employment.

8 Even when the shipowner is insured against liability for bodily injury to or death of a crew member, an insurance provider can, and often does, raise a series of legal defences under the terms of the insurance which can mean that they avoid altogether the payment of compensation claims. At the very least, such defences can seriously protract a claim and the seafarer often will not have sufficient financial resources to counteract those defences.

9 ITF/ICFTU are of the opinion that the only longer term sustainable solution that will guarantee prompt and without prejudice payment of contractual compensation is a mandatory instrument establishing a system of financial security which can be relied upon by the seafarer and/or his/her dependents to provide easy and quick access to contractual compensation in the event of personal injury to or death of the crew member.

Longer term sustainable solution

10 Under IMO, the only two types of mandatory instrument which would be appropriate for establishing a system of financial security are either a mandatory code or a convention.

11 Whatever form the mandatory instrument takes will determine how it is drafted. Therefore, it is suggested that this meeting highlights the principles that should be included in a form of mandatory instrument bearing in mind the decision taken by the Working Group that neither resolution A.931(22) nor its related guidelines should prejudice, serve as a precedent or constrain the eventual mandatory instrument.

12 ITF/ICFTU believe that the following principles should be part of the eventual mandatory instrument providing financial security in cases of death of, or personal injury to, crew members.

(i) **Application**

The mandatory instrument should cover all shipowners in respect of all seagoing ships, including fishing vessels on international voyages. However, it should not diminish any rights or remedies crew members may enjoy under an existing legal framework.

(ii) **Responsibility of the shipowner**

The prevention of accidents on board a ship is the responsibility of the shipowner. Therefore, as part of the company's safety system the shipowner should also ensure that an effective arrangement exists for the payment of compensation to his crew members or their dependants in the event of personal injury or death. It is also the responsibility of the shipowner to inform the crew members of such arrangements and to provide them with the specific details of the scheme.

(iii) **Responsibility of the flag State**

Flag States are responsible under international law for social matters on board vessels flying their flag. As part of this responsibility, they should ensure that crew members on board those vessels are protected financially against the eventuality of illnesses or accidents occurring while on service. The mandatory instrument should incorporate the responsibility of the flag States in ensuring that shipowners whose vessels fly their flag have in place at all times a system of financial security that provides prompt compensation for crew members and their dependants in cases of personal injury or death. The mandatory instrument should allow for the flag State to approve and/or verify the system, including its renewal.

(iv) **Responsibility of the port State**

The mandatory instrument should allow port States to check that ships entering their ports are covered by a system of financial security that provides crew members on board with protection in the eventuality of illnesses or accidents, including the provision of medical treatment at the expense of the shipowner while the ill or injured seafarer remains in the port State, and repatriation expenses once the seafarer is fit to be repatriated.

(v) **Prompt payment, including interim payment**

Large numbers of crew members are injured or die every year, with serious consequences for the livelihoods of their families. The lack of timely contractual compensation adds further hardships and could bring the crew members' families to the brink of poverty. It is therefore imperative that any system of financial security incorporated in a mandatory instrument guarantees the payment of contractual compensation to crew members and/or their dependants promptly and in full. There should also be a provision for an interim payment when the facts of the case are in dispute or the medical condition has yet to stabilize.

(vi) **Without prejudice**

The payment of contractual compensation in exchange for giving away other claims in law is a denial of contractual rights and amounts to economic duress. Therefore, in order to safeguard the rights of crew members and their dependants, the payment of a valid contractual claim for compensation should be made without prejudice to other legal rights of the claimant, for example in tort or negligence. Payment without prejudice should be incorporated in the mandatory instrument by means of a model Receipt and Release and the inclusion of text to prevent the abuse of crew members or their dependants in unequal bargaining positions with shipowners and their insurers.

(vii) **Direct action**

It is imperative that any system of financial security ensures the direct liability of the provider whenever a loss covered by the system occurs. After all, an arrangement against liability to third parties is not for the protection of the party seeking cover but for the protection of the third parties. Although the right of direct action against the provider would not guarantee prompt payment of compensation due, it at least allows claimants another recourse apart from pursuing the shipowner, who may at the time be insolvent or be unreachable through the use of a complex corporate structure, or the vessel which may no longer exist or be of little value.

(viii) **Jurisdiction**

A system of financial security should not determine jurisdiction or applicable law of claims raised under the system thus potentially restricting the entitlement of the seafarer and/or his/her dependants to proper compensation.

(ix) **Notification**

Crew members have the right to know at all times whether they are protected against the eventuality of sickness or accident while on the service of the ship. Therefore, the financial security arrangements under the mandatory instrument should provide for prior notification to the crew members on board of the withdrawal of coverage. Consideration should also be given to the inclusion of a provision to the effect that the withdrawal of coverage should constitute a breach of duty on the part of the shipowner and entitle the seafarer to seek repatriation at the shipowner's expense.

(x) **No retroactive cancellation of cover**

Among the most problematic practices of providers is the retroactive withdrawal of coverage which has the potential to leave crew members who may have suffered an illness or accident while serving on the ship without any recourse. Effective arrangements for the payment of compensation therefore should run from the day of inception of the financial security to the day of expiry without the possibility of the cover being withdrawn retroactively to the detriment of the crew member if the shipowner were to default in some manner.

(xi) **Certification**

The mandatory instrument should provide for the issuance of certificates of financial security demonstrating that the vessel has the means to pay contractual compensation and a register in place to ensure that this should happen. The certification could be issued by the provider but should be endorsed by the administration of the flag State or an organization recognized by that administration. A copy of the certificate should be posted on board for verification by authorities and crew members. The mandatory instrument should allow for flag States to be informed on changes to the financial security system on board which may affect the effective cover of the crew members, for example, cancellation or failure to renew the cover.

(xii) **Enforcement**

In order to guarantee the effectiveness of the system, it is essential that it is readily enforceable. Thus the mandatory instrument should allow for flag States to prevent a vessel from sailing if there is no financial security system in place for the protection of the crew members in cases of illness or accident while on service. The mandatory instrument should also allow for port States to detain a vessel or prevent a ship from entering port if it does not have the appropriate effective arrangements in place.

Action requested of the Working Group

13 The Working Group is invited to take into account the proposal for a mandatory instrument for the provision of financial security with regard to the compensation in cases of death or personal injury suggested by ITF/ICFTU, and to recommend the form the mandatory instrument should take.

14 In order to make progress in this matter, the Working Group is also invited to recommend the formation of a correspondence group to begin the drafting process, and therefore [the Group][it] should agree terms of reference for the correspondence group.

15 The Working Group is also invited to discuss the elements that should be included in the mandatory instrument in order to facilitate the work of the correspondence group.