

ANNEX "B"

Legal Committee
97th Session
Agenda Item 8.

LEG 97/
29th September 2010

Proposal to increase the limits under Article 6 of the LLMC 1976 as amended by the Protocol of 1996.

Submitted by CMI

SUMMARY.

Executive summary: This document considers and sets in its legal context the proposal from Australia to increase the limits of liability under the LLMC 1976/96.

Action to be taken: The CMI invites delegates to note the issues raised by this paper when considering the proposal.

Related documents: LEG 94/11/1, LEG 94/12, LEG 94/12/1 and LEG 96/6/2

1. The Pacific Adventurer.

In LEG 96/12/1 Australia referred to an incident in March 2009 involving the general cargo ship Pacific Adventurer as the result of which approximately 270 tons of heavy fuel oil from her bunkers were lost into the sea. Much of this oil washed ashore in south-east Queensland causing severe environmental, ecological and socio-economic damage. Clean-up costs were substantial.

Australia is a party to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention) though it did not come into force in Australia until 16 June 2009. Art. 6 of the Bunkers Convention provides that in relation to bunker pollution claims the right to limit liability under the LLMC 1976, as amended, is preserved.

In LEG 96/12/1 the Government of Australia states that the claims arising out of the Pacific Adventurer incident substantially exceeded the property damage limits under Art. 6 of the LLMC 1976 even taking into account the increases introduced by the 1996 Protocol. Accordingly the Government of Australia has invited the Committee to consider amending the limits of liability under Art. 6 of the 1996 LLMC (using the Protocol Art.8 tacit amendment procedure) to "ensure that the limits will adequately cover clean-up costs and damages from incidents resulting in the release of substantial amounts of bunker oil". The Committee has agreed to do so.

2. The concept of Limitation.

The concept of limitation can be traced back to 17th Century. Hugo Grotius, writing in 1625, claimed that the right of an owner to limit his liability was

necessary to encourage the development of the maritime industry. In more recent times Lord Denning, in the case of the *Bramley Moore* [1963]2 Lloyd's Rep. 429, stated that limitation "is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience."

It should be noted that the concept of limitation has frequently been attacked but it survives not only in the Limitation of Liability Conventions for general maritime claims but also in the liability and compensation conventions of recent years relating to claims arising from pollution caused by oil, bunkers, HNS and wreck removal.

It is a necessary consequence of this universal acceptance of the concept of limitation that there will be cases in which, when the courts of a State Party apply one of the conventions containing limitation provisions (as they are under a treaty obligation to do), the limit will prove insufficient to pay all claims in full. Indeed, if a review of claims over a period of time did not throw up occasional cases in which the limitation amount had been insufficient it might be concluded that the limits had been set too high.

In LEG 96/6/2 the International Group of P & I Associations (P & I Clubs) reported on an analysis of Group claims data which revealed that between 2000 and 2009 there were 595 incidents involving bunker oil pollution damage claims (excluding other types of property damage claims). Of these incidents only 8 (1.34%) involved pollution claims which exceeded the LLMC 1996 limits. It may be felt that if the concept of limitation is accepted this is, statistically, an outcome which suggests that limitation is operating as intended.

3. The structure of LLMC Art. 6-1976 and 1996 Protocol.

Art 6 is in three interrelated sections. Art. 6 (1) (a) sets a limit of liability for loss of life and personal injury claims and Art. 6 (1) (b) sets a separate limit for claims other than for loss of life or personal injury (often referred to as the "property" fund). Under 6 (2) it is provided that if claims under 6 (1) (a) exceed the limitation amount available thereunder the excess may be claimed rateably against the amount available under 6 (1) (b).

Of possible significance in the context of the Australian request for review of the limitation amount for property damage is the fact that the limits for personal injury claims under 6 (1) (a) of the LLMC 1976 as amended by the 1996 Protocol are approximately twice those for property damage claims under 6 (1) (b). (At the minimum tonnage of 2,000 tons the limit for personal injury claims is 30 million SDR and for property damage claims it is 15 million SDR.)

Historically the ratio between the amount available for personal injury claims and the amount available for property damage claims has always favoured personal injury claims. Thus, in the UK Merchant Shipping Act 1862, £8 per ton was set aside for property damage claims and £15 for personal injuries. However, in the 1924 Limitation Convention £8 was provided for property damage claims and an additional £8 per ton if there were personal injuries involved as well. By the 1957 Limitation Convention the two/one ratio was restored with 1,000 Gold Francs for property damage claims and 3,100 Gold Francs (with Gold Francs 2,100 earmarked for personal injury claims) where there were both property damage and personal injury claims. In the 1976 Limitation Convention we find the current two separate limitation amounts with the "overspill" provision. As indicated above this ratio structure remains unchanged by the 1996 Protocol.

It has proved difficult to trace the reason for these ratios. The Travaux Préparatoires for the 1957 and 1976 Conventions simply reflect the evidently accepted public policy that personal injury claimants are to be given substantial preferential treatment.

It seems to follow from this research that if the limits under Art. 6 (1) (b) are to be increased it would be necessary also to increase the limits under Art. 6(1) (a) - in order to maintain the two/one ratio. This might make it necessary to consider whether third party personal injury claimants would be receiving more generous treatment than passengers under Art. 7 LLMC or under the Athens Convention 2002.

4. Conclusions.

This analysis is intended to enable the Committee to consider the Australian proposal in its proper historic context.