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STATUS REPORT ON LIMITATION OF LIABILITY PROJECT

We had hoped to enclose in this mailing a joint report of the Committees on Limitation of Liability and CMI on their proposed new Limitation of Liability statute, but the problem of dealing with drilling rigs and other offshore mobile craft has held up completion of the report. The time schedule has therefore been revised as follows:

May 3, 1978, 2:00 p.m.: The Committees will meet in New York to review the recommendation of their Working Group and to commence developing a consensus and report.

May 5, 1978, 9:30 a.m.: Approximately one-half of the Annual Meeting will be devoted to a "seminar" at which the key features of the proposed legislation will be described, members of the Committees will answer questions, and comments from the floor will be encouraged.

Summer, 1978: The Committees will labor and produce a final report and recommendations which will be mailed to all members.

November 4, 1978, 9:30 a.m.: The report will be the main order of business at the Fall Meeting, and it is to be hoped that the Association will then take a position on the proposal.

Meanwhile, in order to make the "seminar" productive, we request that the members do some homework on this very important subject. Basically this requires a familiarity with the CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976, which appears at 1977 AMC 1607-1620 and at 8 J. Mar. L. & Com. 533-544. (The relevant Articles are 1-13.) The U.S. Delegation to the IMCO Conference declined to sign the Convention because it thought that the limits of liability were too low. However, the Delegation's report concludes with this statement:

"The Delegation believes that the limitation regime established by the new Convention is technically sound, and provides a good model if new U.S. legislation on limitation is undertaken. Of course, the legislation would have to provide high enough

limitation amounts to effect a fair balancing of the interests of shipowners and claimants."

Our Committees have followed this suggestion and are seeking to adapt the Convention to domestic needs. It should be noted that the draft Convention had originated with the CMI, of which the Association is, of course, a member, and also that at the Annual Meeting of the Association on May 7, 1976, the draft Convention (which did not then contain any limitation amounts) was unanimously approved. Doc. No. 597, pp. 6514-6515.

In order to facilitate the homework we will now mention the key features of the Convention:

1. Limitation amounts with respect to cargo vessels are based upon gross tonnage (Art. 6.5), a formula similar in principle to that of the 1957 Convention which had been adopted by many maritime countries. Obviously the tonnage formula is completely different from the U.S. system basing limitation on post-casualty value, which permits a limiting owner to escape scot-free if his vessel is lost. There seems little doubt that any new statute must use a tonnage formula. The U.S. has a precedent for this in the 1936 Amendment which provides for a special fund of $60 per gross ton of a sea-going vessel causing death or personal injury.

2. The limitation formula is contained in Articles 6-8, but the limitation amounts are expressed in terms of Special Drawing Rights. These are rather meaningless so we have converted them to current dollars (1 SDR = $1.2285) as evidenced by the attached schedule of illustrative tonnages/limitation amounts. This schedule should give you enough to work with for the present. It will be seen that the Convention contemplates rather large figures which, nevertheless, did not satisfy the U.S. Delegation. The current thinking in the Working Group is that these may have to be increased, especially in respect to crew and other death and personal injury claims. The Convention does not apply to claims for oil pollution damage which, internationally and nationally, are covered by separate legislations (Art. 3.(b)). A new U.S. statute will probably track the Convention on this point.

3. Separate funds are provided for death/personal injury (Art. 6.1.(a)) and for property damage (Art. 6.1.(b)). The former is approximately 200% of the latter, but nevertheless death/personal injury claimants not satisfied out of their own fund share ratably with property damage claimants in the second fund.

4. A different formula is used for passenger claims (Art. 7), namely, a specified monetary amount (now about $57,000) multiplied by the number of passengers for which the ship is certificated. (Note that this is *not* merely $57,000 for each passenger/claimant.) The reason for the different approach is that a passenger ship of relatively low gross tonnage carries a disproportionately large number of potential claimants. This approach is also reflected in the Financial Responsibility Act of 1966, which protects passengers by supplementing, though not amending, the Limitation Act. Crew and property damage claims are paid out of their own funds as on cargo vessels.

5. In drafting the proposed Convention the CMI followed, and carefully articulated, the "guiding principle" that limitation amounts should reflect *commercial insurability* and that, if owners carried such insurance as is reasonably available in the market, limitation should be more difficult to break than under present law. The U.S. Delegation accepted this principle as sound but thought that the limits prescribed by the Convention did not correspond to reasonably insurable levels. On the other hand the Delegation took no exception to the Convention's definition of conduct barring limitation (Art. 4). This Article is extremely important. The present "privity or knowledge" formula, which equates in practice to simple negligence on the part of the owner, would be replaced by language which equates to *willful misconduct.* The Convention language of Article 4 appears in four previous maritime conventions and one aviation convention, although the instant phraseology is somewhat tighter in that it requires the "personal" act or omission of the owner. The current thinking of the Working Group is that the Convention language sufficiently protects the owner and that in any event it should be adopted as a means of promoting international uniformity.

6. The Convention (Art. 4) places upon the claimant the burden of proof as to the owner's willful or reckless act. This is contrary to current U.S. law which makes the owner prove the negative. There are good arguments pro and con on this issue and not even the Working Group, let alone the Committees, has decided which to recommend.

7. Although we have for simplicity referred to the "owner" as the limiting party, the Convention extends the right of limitation to the "owner, charterer, manager and operator" (Art. 1.2), to a salvor (Art. 1.3), and to an insurer (Art. 1.6). This, of course, is much

broader than U.S. law, which allows only the owner or owner *pro hac vice* to limit; and in jurisdictions with Direct Action statutes insurers may be sued outside the limitation case. The Working Group is favorably disposed to this expansion of the right to limit but is not favorably disposed to another expansion reflected in Article 1.4.

8. Article 2 permits limitation of certain claims which under current U.S. case law are not subject to limitation, namely, claims for damage to aids to navigation and claims for wreck removal (Art. 2.1.(a)(d)), and claims for breach of "personal contracts" (Art. 2.2). The current thinking of the Work Group is that abolition of the much-litigated "personal contract doctrine" may not be a bad thing.

9. Two controversial types of vessels are excluded from the Convention. First, small pleasure craft are excluded as a practical matter by the minimum funds in Article 6.1. Secondly, drilling rigs and drilling vessels are specifically excluded by Article 15.5(b). It is deemed essential that any U.S. legislation exclude the first and include the second. Because of the odd configuration of drilling craft the problem of devising a proper formula is difficult, and the Working Group has not yet solved it, but is trying to determine an equitable method of applying the tonnage formula to such craft. However, a great deal of data on these craft have been collected, and a solution to the problem may be imminent.

10. The Convention has not yet been ratified by any country.

Any questions which the members may have in advance of the Annual Meeting may be directed to the Chairman of the Committee on Limitation of Liability, Richard W. Palmer, Esquire, Messrs. Rawle & Henderson, 2100 Packard Building, Philadelphia, Pennsylvania 19102, Telephone (215) 569-2500.

DAVID R. OWEN
President

COMPARATIVE LIMITATION FUNDS UNDER THE IMCO CONVENTION AS OF MARCH 22, 1978

Size of Vessel (Gross Tons)	Death/Personal Injury Fund	Property Damage Fund	Total
500 & Under	$ 409,092	$ 205,161	$ 614,253
1,000	716,218	307,740	1,023,958
3,000	1,944,721	718,060	2,662,781
5,000	2,762,905	1,128,380	3,891,285
10,000	4,808,364	2,154,181	6,962,545
20,000	8,899,278	4,205,575	13,104,853
30,000	12,990,195	6,257,382	19,247,577
50,000	19,132,713	9,328,640	28,461,353
70,000	25,275,230	12,399,899	37,675,129
100,000	31,430,032	15,458,872	46,888,904

Passenger Claims

($30,712,586 Maximum)

Authorized No. of Passengers	Limitation Fund
20	$ 1,146,587
100	5,732,935
500	28,664,670
1,500	30,712,586