CONSIDERATION OF A DRAFT INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA

CONSIDERATION OF A DRAFT PROTOCOL OF 1996 TO AMEND THE CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS, 1976

Submission by the International Group of P & I Clubs

1. The International Group of P&I Clubs represents the 15 P & I Clubs which between them provide insurance cover in respect of the liability risks of more than 90% of the world's shipping.

2. The International Group therefore has a close interest in the development of the HNS Convention and the revision of the LLMC 1976 and has followed the preparatory work in the Legal Committee with great interest. The fixing of the limits in both instruments will be crucial to their success and the attached paper has been prepared with the aim of facilitating informed discussion on this vital aspect of both.
LIMITS OF LIABILITY IN THE DRAFT HNS CONVENTION AND THE DRAFT PROTOCOL TO REVISE THE LLMC CONVENTION

Background

1. As indicated many years ago any prediction as to the capacity of the insurance market to cover any given limit on shipowners' liability for HNS will depend to a large extent on the structure of the HNS Convention and its relationship with other Conventions, particularly those governing the limitation of shipowners' liability. Therefore some judgement has to be made at the outset on the issues of "gaps" and "linkage" as set out so ably in LEG 73/INF.2. From the standpoint of the liability insurer the most attractive of the options there described are the ones which provide for linkage between the HNS regime and limitation regimes in the most straightforward fashion. However linkage can be achieved only at the cost of drafting complexity which may be unacceptable. Moreover linkage may not be politically acceptable for a number of reasons.

2. If this is true of all of the options which involve linkage then liability insurers must also consider how best to cover the liabilities under an HNS Convention which is not linked to any Limitation Convention. For this purpose the problem of "gaps" is not addressed since this is largely theoretical (as the history of the 1957 Limitation Convention demonstrated after the entry into force of the 1969 Civil Liability Convention) and any solution to it including "accepting gaps" (Options D&E in LEG 73/INF.2) will have no practical consequences for insurers. Attention is therefore focused initially on Option E, accepting gaps with no linkage.

3. Under this option the insurance market is less well utilized since in any given incident underwriters are involved in both HNS and non-HNS claims from the outset instead of covering HNS only when the non-HNS fund is exhausted. As a matter of claims experience no HNS claim of any significance has reached the 1976 Convention limit. Underwriters are bound to take a different view of an HNS Convention which imposes a separate liability from the ground up to which they are expected to respond with new resources instead of merely applying additional resources in excess of the level (1976 Convention limits) where they are already committed and beyond which they have not been required to respond, at least in so far as the historical claims experience is a guide. Nevertheless the additional exposure which is a consequence of not linking the HNS and Limitation regimes is clearly insurable, albeit at a lower level.

4. Until a decision is reached on the relationship between the HNS Convention and the general limitation system it is impossible to indicate appropriate levels of limitation from the perspective of the insurance market. Nonetheless in an effort to assist the Diplomatic Conference an attempt should be made to encourage awareness of the likely consequences for the insurance market of the alternatives before the Conference. This paper is intended to initiate such deliberation.

5. The task of predicting the level at which the shipowner's limit on liability should be pitched for both HNS claims and non-HNS claims is inherently difficult not only because estimates have to be made about how the two Conventions will interact but also because estimates have to be made about the state and structure of the insurance market in several years' time when its recent history has been extremely volatile. Plainly any projections will have to be made on a very conservative basis to ensure that the Conventions have long-term credibility. However the rapid amendment procedure will allow upward adjustment to be made quickly if experience in the future demonstrates that this is warranted.
LLMC

6. First, the 1996 Protocol to the 1976 LLMC. The 1976 Convention is very broad in scope excluding only

a) claims for salvage or GA contribution
b) claims for oil pollution damage as defined in CLC
c) nuclear damage
d) claims by servants not limited by domestic law

However its scope will be considerably narrowed if HNS claims are removed from its ambit. It has to be recognised that apart from personal injury the remaining non-HNS claims are largely claims for damage to property which is owned by maritime interests and is generally insured in the marine market. Therefore if linkage is abandoned a strong case can be made for leaving the limitation figures for the 1976 LLMC unchanged in respect of the remaining non-HNS claims.

7. If HNS claims are not removed from the 1996 Protocol to the Limitation Convention and some form of linkage is maintained, additional compensation will still be available for HNS claims through the supplementary HNS Shipowner Fund and the HNS Scheme. Since HNS claims are currently included in the 1976 Limitation Convention, the case for increasing the 1976 figures for non-HNS claims is therefore weaker, but in the expectation that HNS claims may increase and may otherwise swamp the non-HNS claims if the 1976 figures are maintained, it is suggested that with linkage the 1996 Protocol should provide for the LLMC figures to be increased by roughly 50 per cent.

HNS

8. So far as the HNS limits are concerned it is generally accepted that the minimum tonnage should be increased for the reasons suggested by the UK (LEG 71/3/11) though not perhaps to the level envisaged.

It is also accepted that because HNS is carried in smaller ships than oil tankers a case can be made for a steeper increase in the limitation/tonnage line graph than obtains in relation to CLC. For the same reason the maximum limit should be fixed at a lower tonnage than that applicable under the 1992 Protocol to CLC.

On the basis that this structure is adopted with the minimum and maximum limits on liability set at reasonable levels it is suggested that sustainable limits for HNS could be pitched

(i) with linkage, at roughly 200% of the existing overall 1976 limits for both property and personal injury claims

(ii) without linkage, at roughly 150% of the 1976 limits.

A chart is attached which sets out these projections in a diagram.
Limits of shipowners' liability

No Linkage

LLMC

HNS

Linkage

HNS

LLMC & HNS