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

**Ninth Session
Original: English**

**IMO/ILO/WGLCCS 9/ 2
ILO/IMO/WGPS/9/2009/2**

**Geneva, 31st January 2009
ENGLISH ONLY**

DRAFT FOR DISCUSSION

**Document submitted by the Joint Secretariat
Financial security for seafarers and their dependents with regard to compensation in the
case of personal injury or death of a seafarer**

COMMENTARY

General

1. The attached preliminary *Proposal for a text on financial security for seafarers and their dependants with regard to compensation in the case of personal injury or death of a seafarer* (“draft text”) has been prepared by the Joint Secretariat to assist the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers (Joint Working Group), in accordance with its Terms of Reference to “continue with its 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” in order to “complete the discussions and agree on principles to facilitate the drafting of mandatory provisions for inclusion in an appropriate instrument or instruments”. This is in accordance with the relevant Resolution of the 94th session of the International Labour Conference which recommended that the Joint Working Group “...develop a standard accompanied by guidelines, which could be included in the Maritime Labour Convention or another existing instrument, at a later date”¹. At its 8th Session the Joint Working Group requested the Joint Secretariat “...to produce a draft instrument or instruments for the Ninth Session with appropriate commentaries”².

¹ Resolution III of the 94th (Maritime) Session of the International Labour Conference.

² Report of the Eighth Session (21-24 July 2008), paragraph 124. IMO Document No. IMO/ILO/WGLCCS 8/5, dated 8 August 2008

2. The draft text takes account of the Report of the 8th Session in July 2008, which contained the work performed so far by the Joint Working Group, and is based, as much as possible, on the principles agreed between the Shipowner and Seafarer representatives and, where they could not agree, on the direction that appeared to be indicated by the majority of Government representatives (as reflected in the Report and the “Government recommendations resulting from group consultations” set out in Appendix II to the Report). As proposed in the Report of the 8th Session of the Joint Working Group there has also been intersessional cooperation and discussion between the Shipowners and Seafarers with a view to bridging “existing differences” as a way to help advance the discussion at the 9th Session.³ The attached proposal for a draft text is based on a proposal for text and comments developed during the intersessional discussions.
3. It will be recalled that there has not yet been any recommendation by the Joint Working Group regarding the form or placement of any text that is agreed. As noted by the Representative of the International Labour Office at the 8th Session the first concern is to achieve clarity on content.⁴ The question of a recommendation from the Joint Working Group as to the most appropriate form is a decision that would flow from the recommendations on principles to be reflected in a mandatory text building on the IMO/ILO *Guidelines on Shipowners' Responsibilities in respect of Contractual Claims for Personal Injury to or Death of Seafarers*⁵. As suggested in the draft revised Terms of Reference agreed at the 8th Session, options regarding the precise location or form of future mandatory provision are a secondary consideration. However, as also indicated in the revised Terms of Reference, the Joint Working Group in its examination of the issues should also take account of the relevant IMO and ILO instruments “including those currently under review or likely to be adopted in the near future”⁶.
4. The Joint Working Group has, however, considered the fact that the Maritime Labour Convention, 2006 (MLC, 2006) already contains a Regulation (Regulation 4.2) and related Standard and Guideline concerning shipowners’ liability. As noted in connection with this Regulation, its purpose is “To ensure that seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment”. Regulation 4.2 paragraph 1 specifically requires that:

Each Member shall ensure that measures, in accordance with the Code, are in place on ships that fly its flag to provide seafarers employed on the ships with a right to material assistance and support from the shipowner with respect to the financial consequences of sickness, injury or death occurring while they are serving under a seafarers’ employment agreement or arising from their employment under such agreement.
5. Standard A4.2, paragraph 1, whose text is reproduced below as paragraph 1 of a new Standard A4.2.1, establishes minimum standards including, in subparagraph (b), a requirement for financial security.

³ *Supra*, note 2. para 115.

⁴ *Supra* note 2, paras 120 and 122.

⁵ IMO Resolution A.931(22)

⁶ *Supra*, note 2, para 125 point 2.

6. In light of these provisions, and without prejudice to a future recommendation as to the form and placement of a proposal for text, it is important that the relationship between the financial security requirement in Standard A4.2, paragraph 1(b) and any specific Standard on financial security be clarified. In fact representatives of the Shipowners and Seafarers and the Governments at the 8th Session made proposals for text within the framework of the MLC, 2006 Regulation 4.2. Although they differed in terms of whether a new Standard and Guideline should be adopted under Regulation 4.2 or whether an amendment to the existing Code provisions was more appropriate, it appeared that it was generally considered that this provided a useful framework for discussion of the content of any proposed text.
7. The proposal developed during the intersessional cooperation discussions also adopted the framework of a possible new Standard under Regulation 4.2. The draft text below, which is based on that framework, also adopts this approach and consists of Standard A4.2.1 (corresponding to the present Standard A4.2), followed by a new Standard A4.2.2, and an additional provision for Guideline B4.2. However this arrangement has been adopted for the purpose of convenience only: it should not be understood as indicating a preference for the introduction of the new provisions by way of an amendment to the MLC, 2006 or even as indicating how such an amendment should be worded if the option of amending the MLC, 2006 were adopted. These are matters that would need to be considered once agreement is reached on the principles to be included in any proposal for text.

The Draft Text: Comments on specific provisions

Standard A4.2.1

8. This Standard, corresponding to the present Standard A4.2, is reproduced for convenience only. **It is not submitted to the Joint Working Group as a proposal for discussion.**

Standard A4.2.2

9. *Paragraph 1* of this Standard seeks to provide a definition of what could be considered a “contractual claim” within the meaning of Resolution A.931 (22), but in the context of Standard A4.2 of the MLC, 2006. It therefore uses the terminology “illness and injury”, rather than “personal injury”, which is used in Resolution A.931. It also ties the concept of “contractual claim” to the terms of Standard A4.2.1 or of the seafarers’ employment agreement or applicable collective agreement. This could help to provide an answer to the question of exclusion clauses; in other words, such clauses would be permitted to the extent that they were compatible with Standard A4.2.1 or permitted by the applicable seafarers’ employment agreement or collective bargaining agreement.
10. There are a number of sources of inspiration for *paragraph 2*. One was a proposal to begin the Standard with a provision of a more general nature (i.e., not limited to the question of financial security referred to in Standard A4.2.1, para. 1(b)). Another source was the concern of the Shipowners’ representatives that claims should be “legally valid and agreed” before payment was made on such claims. In addition, there was an earlier suggestion by the Shipowners relating to the need to have fair and effective procedures for the settlement of disputes. The result of putting these various ideas together is therefore a general provision promoting the rapid and fair settlement of disputes, in order

to give the Shipowners a significant measure of certainty, in the case of claims for compensation under Standard A4.2.1, para. 1(b), that the contractual claims could be regarded as legally valid prior to payment.

11. *Paragraph 3* sets out some of the main principles that would underlie the operation of the financial security system to assure compensation under paragraph 1(b) of Standard A4.2.1. There is a measure of agreement on their general content. *Subparagraph (b)*, relating to pressure to accept a payment less than the contractual amount, could be refined further so that Members would have an idea of the kind of measures they should take to indicate what might or might not constitute pressure and to deal with cases where pressure was exercised. Guidance on this subject could be included in Guideline B4.2. *Subparagraph (c)* refers to cases where the “nature” of the long-term disability of a seafarer makes it difficult to assess full compensation; the appropriateness of the term “nature” has been questioned. It is used in the guidelines attached to Resolution A.931(22). It is presumably intended to cover cases (which may be fairly frequent) where the extent of a permanent loss of function or loss of enjoyment of life cannot be fully assessed until the health impairment has stabilized. There may be a more appropriate term used in a medical context.
12. The question as to who precisely could make a claim for compensation still needs to be considered further. This is why square brackets have been included in *paragraph 4*.
13. *Paragraph 5* seeks to clarify the question as to who would be responsible for notifying seafarers where the financial security has been cancelled or is not to be renewed.
14. *Paragraphs 6 to 8* concern the certificate to be issued by each financial security provider.
15. *Paragraph 7* is the subject of disagreement and has been placed inside square brackets.
16. *Paragraph 8*, establishing the details to be included in the certificate, could be set out in an Appendix to the Standard rather than in the Standard itself along the lines of other certification requirements in the MLC, 2006 . The detail in *item (i)* has been questioned. The original suggestion related to “An attestation that the financial security meets the requirements of this Standard”. Since this might be difficult for the financial security provider to certify, an alternative wording is suggested in square brackets.

Guideline B4.2

17. A proposed additional paragraph would recommend (“should”) or allow (“may”) use of the Model Receipt and Release Form attached as an appendix to Resolution A.931(22). The words “should” and “may” have been placed inside square brackets. The related suggestion originally referred to such use being “Without prejudice to each Member’s national laws and regulations”. These words have been replaced by “To the extent compatible with the Member's national law and practice”, which is used, for example, in Regulation 2.1, paragraph 3 of the MLC, 2006. It would indicate an intention not to interfere with any national law or practice relating to the agreed settlement of obligations.

Preliminary proposal for a text on financial security for seafarers and their dependants with regard to contractual claims arising from sickness, injury or death of a seafarer

[Regulation 4.2 Shipowners' Liability (No change of title)]

Standard A4.2.1 – Shipowners' liability (at present Standard A4.2 - submitted for information only)

1. *Each Member shall adopt laws and regulations requiring that shipowners of ships that fly its flag are responsible for health protection and medical care of all seafarers working on board the ships in accordance with the following minimum standards:*

(a) *shipowners shall be liable to bear the costs for seafarers working on their ships in respect of sickness and injury of the seafarers occurring between the date of commencing duty and the date upon which they are deemed duly repatriated, or arising from their employment between those dates;*

(b) *shipowners shall provide financial security to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard, as set out in national law, the seafarers' employment agreement or collective agreement;*

(c) *shipowners shall be liable to defray the expense of medical care, including medical treatment and the supply of the necessary medicines and therapeutic appliances, and board and lodging away from home until the sick or injured seafarer has recovered, or until the sickness or incapacity has been declared of a permanent character; and*

(d) *shipowners shall be liable to pay the cost of burial expenses in the case of death occurring on board or ashore during the period of engagement.*

2. *National laws or regulations may limit the liability of the shipowner to defray the expense of medical care and board and lodging to a period which shall not be less than 16 weeks from the day of the injury or the commencement of the sickness.*

3. *Where the sickness or injury results in incapacity for work the shipowner shall be liable:*

(a) *to pay full wages as long as the sick or injured seafarers remain on board or until the seafarers have been repatriated in accordance with this Convention; and*

(b) *to pay wages in whole or in part as prescribed by national laws or regulations or as provided for in collective agreements from the time when the seafarers are repatriated or landed until their recovery or, if earlier, until they are entitled to cash benefits under the legislation of the Member concerned.*

4. *National laws or regulations may limit the liability of the shipowner to pay wages in whole or in part in respect of a seafarer no longer on board to a period which shall not be less than 16 weeks from the day of the injury or the commencement of the sickness.*

5. *National laws or regulations may exclude the shipowner from liability in respect of:*

(a) *injury incurred otherwise than in the service of the ship;*

(b) *injury or sickness due to the wilful misconduct of the sick, injured or deceased seafarer; and*

(c) *sickness or infirmity intentionally concealed when the engagement is entered into.*

6. *National laws or regulations may exempt the shipowner from liability to defray the expense of medical care and board and lodging and burial expenses in so far as such liability is assumed by the public authorities.*

7. *Shipowners or their representatives shall take measures for safeguarding property left on board by sick, injured or deceased seafarers and for returning it to them or to their next of kin.*

Standard A4.2.2 – Treatment of contractual claims; financial security (New)

1. For the purposes of this Standard, the term “contractual claim” means any claim which relates to sickness or injury arising out of or in connection with employment of the seafarer concerned and which is based either on the national laws and regulations or other measures implementing Standard A4.2.1 or on the seafarers’ employment agreement or an applicable collective agreement.
2. Each Member’s laws and regulations shall ensure that shipowners have effective arrangements to receive, deal with and impartially settle contractual claims relating to compensation referred to in Standard A4.2.1 through rapid and fair procedures, including medical boards.
3. Each Member shall ensure that the financial security provided for in accordance with Standard A4.2.1, paragraph 1(b), for compensation for contractual claims relating to the death or long-term disability of seafarers due to occupational injury or hazard, meet the following minimum standards:
 - (a) the contractual compensation, where set out in the seafarer’s employment agreement and without prejudice to (c) below, shall be paid in full and without delay;
 - (b) there shall be no pressure to accept a payment less than the contractual amount;
 - (c) where the nature of the long-term disability of a seafarer makes it difficult to assess the full compensation to which the seafarer may be entitled, an interim payment shall be made to the seafarer so as to avoid undue hardship;
 - (d) in accordance with Regulation 4.2, paragraph 2, the seafarer shall receive payment without prejudice to other legal rights, but such payment may be offset against any damages resulting from any other claim made by the seafarer against the shipowner and arising from the same incident.
4. Any contractual claim for compensation may be brought directly [by the seafarer concerned or a representative of the seafarer or designated beneficiary].
5. Seafarers shall receive prior notification from the provider of the insurance if a shipowner’s financial security is to be cancelled and be notified immediately by the shipowner if it is not to be renewed.
6. Each Member shall require that ships that fly its flag carry on board a certificate issued by the financial security provider. The certificate shall be posted in a prominent position in the seafarers’ accommodation. Where more than one financial security provider provides cover, a certificate from each provider shall be carried on board.
7. [The financial security shall provide for the payment of all contractual claims covered by it which arise during the period for which the certificate is valid].
8. The certificate shall include details of the:
 - a. Name of the ship
 - b. Port of registry of the ship
 - c. Call sign of the ship
 - d. IMO number of the ship
 - e. Name and contact details of the provider/s of the financial security
 - f. Place of business of the provider/s of the financial security
 - g. Name of the shipowner
 - h. Period of validity of the financial security.

i. [An attestation that the financial security meets the requirements of this Standard][The main benefits provided under the financial security and the main conditions to which entitlement to those benefits is subject].

Guideline B4.2

add:

4. To the extent compatible with the Member's national law and practice, the parties to the payment of a contractual claim [should] [may] use the Model Receipt and Release Form (attached as an appendix to Assembly Resolution A.931(22) on claims for personal injury to or death of seafarers adopted on 29 November 2001).