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91st session
Agenda item 4

LEG 91/4/4
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PROVISION OF FINANCIAL SECURITY

(ii) Follow up on resolutions adopted by the International Conference on the Revision of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974

Submitted by the International Group of P&I Associations (P & I Clubs) and the International Union of Marine Insurers (IUMI)

SUMMARY

Executive summary: This document identifies the difficulties inherent in the proposals put forward by Norway and submits that excluding liability in respect of terrorism would be both appropriate as a matter of policy and would also facilitate entry into force of the Athens Convention, 2002

Action to be taken: Paragraph 5

Related documents: LEG 91/4/1, LEG 91/4/2, LEG 91/4/3 and LEG 91/4/5

1 At the Diplomatic Conference in 2002, at which the Protocol to the Athens Convention was agreed, the International Group of P&I Associations (P & I Clubs) advised that, as drafted, article 3(1)(b) would leave the carrier exposed to liabilities arising from acts of terrorism in a manner which would make the Convention unworkable.

2 The P & I Clubs and the International Union of Marine Insurers (IUMI) have reviewed the submission made by the International Chamber of Shipping (ICS) and the International Council of Cruise Lines (ICCL), contained in document LEG 91/4/5, and agree that there are fundamental issues of policy which should lead States to provide carriers with an absolute defence to all terrorism-generated liabilities under the Convention. Accordingly, in this submission, we focus solely on the technical and insurance-related flaws in the proposals submitted by Norway.

3 Our thanks are due to Professor Rosaeg, the Chairman of the Correspondence Group, who has demonstrated considerable ingenuity in attempting to solve the difficulties presented by the terrorism issue. However, despite these efforts, the proposals submitted by Norway remain fundamentally flawed. The principal flaws that have been identified are set out in annex 1 to this document.

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4 Insurers have accumulated unique experience in handling passenger claims, including well known catastrophes involving major loss of life. Insurers have also supported the underlying aims of the Athens Convention. However, we are seriously concerned that the proposals in relation to terrorism will be unworkable in practice, and that potential claimants will face uncertainty and confusion. The P & I Clubs and IUMI therefore submit that the only practical option is for the Legal Committee to agree the terms of a reservation to the Convention which provides carriers with absolute protection from liabilities arising from acts of terrorism. The same view was expressed by Bank Serve Insurance Services Ltd. in their letter of 10 March 2006 to the Correspondence Group (attached at annex 3). The wording to bring about this result is set out in annex 2 to this document.

Action requested of the Legal Committee

5 The Legal Committee is invited to take note of the information contained in this document and to comment or decide as it deems appropriate.

ANNEX 1

The proposals submitted by Norway in document LEG 91/4/1 are unworkable, *inter alia*, in the following respects:

Liability for terrorism

General

1 The proposed liability structure in respect of terrorism represents a major departure from previous compensation regimes. Even though the language of CLC has been employed the results are very different. This gives rise to important issues of principle which will be of concern to P&I Clubs. It also leads into unknown territory in relation to the handling of claims and creates practical and procedural difficulties which may impact adversely on the insurance market.

2 The risks to which carriers are exposed in respect of liabilities resulting from acts of terrorism are uninsurable to the limits contemplated under the Convention.

3 The proposals submitted by Norway in document LEG 91/4/1 suggest that the entities that provide Certificates of Financial Responsibility (COFRs) under the U.S. Oil Pollution Act 1990 (OPA) would also be able to provide the COFRs required under these proposals. It should be noted that the analogy with COFRs under OPA 90 is misleading and inappropriate. In that case the substantive cover was provided on identical terms by the Clubs. War Risk cover is provided on different terms by different underwriters. There is no single underwriter who provides the substantive cover for terrorism-generated passenger liabilities alone. It is therefore much more difficult to align the cover and ensure that the victim is properly compensated.

The proposed limit

4 The proposals proceed on the assumption that the war risks insurance market (which includes terrorism) can provide sustainable cover for terrorism-generated liabilities under the Athens Convention up to US\$400m per event or occurrence. The war risks market has indicated that the sustainable limit would have to cover property, pollution and other damage in addition to death and personal injury claims from passengers including passengers from non-ratifying States. It should not therefore be assumed that the full US\$400m per event or occurrence limit is exclusively available to meet passenger claims under the Athens Convention. It is also uncertain whether any part of the US\$400m could be ear-marked for Athens terrorist liabilities.

5 Although provision is made for capping the carrier's exposure to terrorism liability, the "per event/occurrence" limit will result in the amount available on a per capita basis being dependent on the number of claimants. At an earlier stage in the Legal Committee's deliberations, this was thought to be a politically unacceptable outcome.

6 The handling of claims requires considerably more detail than is provided in document LEG 91/4/1, paragraph 2.2. Is it intended that all claims should be brought to one jurisdiction? If so, how would this be done, given the provisions of article 18? And if not, how would a limitation fund be established after an incident, to which claimants in all the jurisdictions permitted by article 17 could have access?

7 The absence of a concursus provision will result in courts in the various jurisdictions chosen by claimants in accordance with the rights accorded to them under article 17 hearing claims arising from the same incident in accordance with different systems of law operating on different timescales. Where a limitation fund is established in one jurisdiction, the absence of a concursus provision could result in the fund paying out on a “first come, first served” basis, and will potentially leave claimants whose claims are resolved at a slower pace making no recovery at all, because the fund will be exhausted by the time they come to claim from it. Can we be sure that judgements in all courts will be the subject of stays of execution until all claims have been finalized so that the fund can be allocated pro rata?

8 Claimants would face many uncertainties when seeking to pursue their claims. A terrorist incident will give rise to legal proceedings in several different jurisdictions pursuant to article 17. There would seem to be two possible mechanisms for claimants to access a USD 400 million fund:

- (a) claimants who obtain judgments first, can recover from the fund. Claimants who come after the fund has been exhausted make no recovery; and
- (b) claimants obtain judgments in the jurisdiction of their choice. However the judgements are unenforceable except against the fund established by the insurer. The Court which has jurisdiction over the fund will only be able to calculate the pro-rating once final judgments are given in all claims in all jurisdictions. No final distribution of the fund can be made until all claims in all jurisdictions are finalized.

Neither of these options will provide a satisfactory solution from the claimants’ perspective.

Shipowner liability

9 The suggestion that the shipowner should be liable if he has made a “major contribution to the damage” is wholly unworkable in practice. For example, if a watchman fails to do his job so that terrorists gain access to the vessel, is this a “major contribution to the damage” by the shipowner? Courts in different jurisdictions may take different views on this. If claims are brought in four jurisdictions (as permitted by article 17) and two regard the shipowner’s contribution as “major” while two do not, what are the consequences? And how long will a claimant have to wait for this determination?

10 What is the relationship between “major contribution” and the provisions of article 13? Again, different States will interpret these concepts and the relationship between them differently.

11 The Norwegian proposal in document LEG 91/4/1 is based on the assumption that the shipowner should be liable in respect of terrorism only to the extent that cover is available. If cover is withdrawn under the 7 day notice provision and not reinstated, is the shipowner to remain liable even though he has no cover? If cover is terminated at the end of a policy year and not renewed, is the shipowner to remain liable? Is the claimant made to wait while this issue is resolved?

12 There are geographical limits on War Risks cover and prohibited areas may vary from year to year or during a policy year. Is it intended that the shipowner's liability should likewise vary? What happens to the claim of a passenger injured or killed in a prohibited zone?

Notice

13 The proposals provide that the shipowner is to be relieved of liability if the seven day notice has been exercised, but only on condition that notice is given to the State that issued the certificate. If the insurer or COFR provider omits to provide such notice, is the liability of the shipowner to continue?

14 On such an important issue it is necessary to make very detailed provision on how notice should be given, on what terms, by whom, to whom and subject to what periods of notice. Again, the claimant will not be assisted by the lack of clarity.

15 The function of the Certificate is to provide confirmation that insurance cover is in place. The underlying insurance cover for terrorism can be cancelled or geographical exclusions introduced on seven days notice. These changes will not be apparent from the Certificate. Passengers, port State inspectors and others will not be able to establish the scope of cover unless they contact the flag State to find out if any notices have been given. There is a danger that passengers bring claims in reliance on the Certificate but find they cannot make a recovery because notices have been given. The value of the Certificate is therefore undermined.

ANNEX 2

**RESERVATION WORDING TO EXCLUDE LIABILITY FOR
TERRORIST LOSSES ENTIRELY:**

“Reservation to Articles 3(1) and 3(2) and 4bis.

(1) The Government of ... is ratifying the *Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974*, on the condition that neither carriers nor insurers shall be liable under the Convention in respect of loss suffered as a result of:

- (a) death or personal injury resulting from acts of terrorism, or acts related to acts of terrorism, or action to prevent acts of terrorism, or
- (b) damage caused by or contributed to or arising from any chemical, biological, bio-chemical or electro-magnetic weapons, or action to prevent the use of such weapons.

Such exceptions and limitations will be clearly reflected in the certificates issued by States under article *4bis*.

(2) The consent of the Government of to be bound by the Convention is conditional upon other States Parties making [and maintaining in force] the same reservation. It will not regard the Convention as entering into force as between itself and any State that has not both ratified the Convention and made [and maintained in force] the same reservation.”

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10th March 2006

Dear Erik,

You have asked the Correspondence Group for final comments by 8th March, prior to the 91st session of the Legal Committee concerning the implementation of the Athens Protocol 2002. As advised by telephone on 8th March this submission is, for the reasons given, late but I trust will nevertheless be accepted.

The last 20th February meeting of the Correspondence Group failed to reconcile the requirement for passenger liabilities arising from terrorism to be guaranteed, even at the level of a \$400million cap, because of the practical difficulties in guaranteeing an insurance policy that is only underwritten with absolute exclusions and termination of cover provisions and must also cover other liabilities, such as crew, removal of wreck and collision. The \$400million cap proposal for guaranteed passenger liabilities arose from a meeting on 1st February that included underwriters.

I had a meeting with a leading underwriter last Wednesday who had attended the 1st February meeting. He confirmed the \$400million figure was discussed as being an indicative available limit on the basis that \$500million was currently purchased in the market for War P&I excess of hull values by the P&I clubs. This contract could act as a reasonable proxy for what is available in the market but, at all times, subject to the standard war risk exclusions and termination of cover provisions. However, should there be any increase in terrorism activity with subsequent claims the capacity required to support this \$400million level could easily become optimistic. Consequently guaranteeing \$400million to passengers, thereby creating a first loss for passenger liabilities, would risk squeezing out cover for crew, removal of wreck and collision liabilities and is not acceptable.

There is another problem being that the provision of War P&I insurance, covering terrorism liabilities, is fragmented between the commercial war risk markets and the P&I clubs. War P&I insurance is placed in two separate layers with the first layer placed in the commercial markets under a War Risks policy to the ship's hull value and the P&I clubs providing a \$500million excess War P&I. With each ship having a different hull value, there is no commonality of cover limit. Given time, the insurance markets could resolve this issue but, since passenger vessels only account for 5% of the P&I clubs' entered tonnage, there is a low incentive.

Finally, underwriters cannot be guarantors and will not establish a separate guarantee company. Since the International Group of P&I clubs have already declined to guarantee terrorism cover for passengers, the only possibilities for providing the required guarantees are either through the existing OPA '90 COFR guarantors, such as SIGCo or Shoreline, or the establishment of a special purpose Athens Protocol guarantee company for terrorism liabilities for passengers.

In my opinion the cost of setting up a guarantee company authorised to guarantee limits of \$400million will be expensive and not commercially viable on just 5% of the tonnage entered in the P&I clubs. Consequently, the OPA '90 COFR guarantors are the only potentially viable option. With SIGCo, the biggest of the two being predominantly owned by operators of tankers and the trustees of four P&I clubs, I doubt whether their shareholders will permit them to act for passenger vessels. For similar reasons Shoreline are unlikely to be interested, particularly since Carnival, the biggest cruise line, has the capability of establishing their own guarantee company.

I therefore submit that the Athens Protocol 2002 guarantee requirement for passenger liabilities arising from terrorism, restricted to an operator being found to be at fault over lack of security, remains insoluble. Flexibility will therefore be necessary to stop the Athens Protocol 2002 following the fate of the 1990 Protocol and prolong the uncertainty surrounding passenger liabilities for the foreseeable future.

It is incomprehensible that a risk that has claimed just one single life, the "Achille Lauro", can be allowed to frustrate improving the compensation levels to passengers arising from the major maritime risks of fire, collision and sinking that have, since 7th October 1985, claimed 19,380 lives. Despite the universal acknowledgement that passenger liability levels have long been considered derisory, as evidenced in 1987 with the owners of the "Herald of Free Enterprise" arranging additional compensation over and above the limitations under Athens Convention 1974, these limits might continue to prevail. This is likely to result in states following the example of the US by each introducing their own passenger liability laws and regulations.

Yours sincerely



Graham Barnes