INTERNATIONAL MARITIME ORGANIZATION

IMO

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LEGAL COMMITTEE
90th session
Agenda item 6

LEG 90/6/2
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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 Clubs and the International Union of Marine Insurance (IUMI)

SUMMARY

Executive summary:	This submission explains that in order to provide a defence in respect of terrorism in the Athens Convention 2002 it will be necessary for the IMO Assembly to agree a resolution clarifying that terrorism be regarded as falling within the "Act of War" defence. It will also be necessary to take steps regarding the so-called "bio-chem" exclusion.
Action to be taken:	Paragraph 18
Related documents:	LEG 89/6/2, LEG 89/16

Introduction

1 At the eighty-eighth session of the Legal Committee two issues were identified relating to the insurance provisions of the Athens Convention 2002:

(i) the terrorism issue – that article 3 of the Convention does not expressly exclude a carrier from liability for an act of terrorism whereas such liability is excluded from the cover provided by the Clubs and other liability underwriters; and

(ii) the capacity issue – that the Convention imposes liability and insurance limits on a carrier (or permits States to impose unlimited liability) which the P&I Clubs and the marine insurance market may be unable to cover and therefore unable to certify.

2 This paper focuses solely on the terrorism issue. The eighty-eighth session of the Legal Committee was advised that the capacity issue cannot be considered further until a solution has been found to the terrorism issue (document LEG 89/16, paragraph 179 refers).

Acts of Terrorism

3 At the Diplomatic Conference at which the 2002 Athens Convention was adopted, the International Group reported the considerable difficulty that would be encountered in complying with the insurance requirements of the Convention because of the position adopted in article 3 in relation to terrorism. Article 3(b) only provides a defence in respect of damage "wholly caused" by the act of a third party which means that, in practice, the shipowner is likely to be saddled with some liability in respect of terrorism.

4 This creates a difficulty for liability insurers like the P&I Clubs in the International Group (who insure approximately 90% by tonnage of the world's ocean-going fleet) because war risks have always been excluded from standard P&I cover. The War Risks exclusion in the Clubs' Rules has always been understood to exclude terrorism as well, but this has been further clarified by new wording which was introduced after 9/11. The risks excluded by this clause are insured separately by War Risks underwriters and reinsurers whose policy terms and conditions make it impossible for them to provide certification and whose cover is in any event currently limited to $500million in excess of the hull value.

5 As a consequence, cover sufficient to meet liability under the Athens Convention is unavailable in respect of liabilities excluded by the War Risks exclusion. Since they do not provide cover in respect of this risk, it is not possible for the Clubs in the International Group to certify that cover is in place. Moreover, neither the Clubs nor any other insurer is able to provide cover at the levels required under the Athens Convention.

Bio-chem exclusion

6 In the wake of the terrorist attacks of 9/11 the marine insurance market as a whole (including, therefore, the War Risks market) also introduced an exclusion clause similar to the following:

> *"In no case shall this insurance cover loss, damage, liability or expense directly or indirectly caused by or contributed to by or arising from……..any chemical, biological, bio-chemical, or electromagnetic weapon."*

As a consequence, the International Group anticipates that cover will be completely unavailable in respect of liabilities excluded by this clause, whether as standard liability cover or War Risk. **In this event, neither the International Group nor the wider insurance market (including the War Risks market) will be able to certify that the cover presently required by the Convention is in place.**

7 We understand that leading aviation insurers intend to introduce a similar exclusion in respect of bio-chem and it is anticipated that States will intervene to provide protection for passengers. Is a similar solution possible in relation to maritime passengers? It is suggested that States should accept qualified certificates of insurance in respect of incidents of a non-terrorist nature.

Options

8 The work of the Correspondence Group has now reached a critical stage. The co-ordinator of the Group submitted a report to the eighty-ninth session of the Legal Committee (document LEG 89/6/2) outlining a number of options that could provide a solution to this

problem, some of which have been considered further intersessionally. However the co-sponsors do not believe that any of these options provide a means by which this problem can be overcome and have outlined their concerns as follows, proposing instead a simple and workable solution for consideration by the Committee.

Option A – War Risks Cover

9 The possibility to resolve this issue by insuring in the war risk market has been explored in detail by the Correspondence Group. There are a number of reasons that make it highly unlikely that this market can provide a suitable solution:

- as indicated in paragraph 4 of this document, the P&I Clubs and their re-insurers exclude war risks and terrorism. Such risks are covered by a separate market (War Risks market). The International Group Clubs could not, therefore, provide certification in respect of a liability which they exclude and which is covered by another insurer;

- war risk P&I cover is limited in any event to $500 million in excess of an entered ship's proper hull value (which itself is capped at $100million). This is not sufficient to meet the exposure of the 2002 Athens Convention. Neither the Clubs nor the commercial insurance market would be able to provide War Risk cover in excess of this limit;

- war risk insurance cannot be certified on an annual basis envisaged under the Protocol because it is subject to a seven-day notice of cancellation and automatic cover termination provisions; and

- the so-called "bio-chem" exclusion clause.

Option B – Mandatory, worldwide pool of those shipowners that apply for insurance certificates

10 This option was rejected by some delegations at the eighty-ninth session of the Legal Committee (document LEG 89/16, paragraph 177 refers). The establishment of such a pool would be impossible without reinsurance even if established by Governments, and as has already been explained, such reinsurance is simply not available.

Option C – Provision of Cover on Demand (analogy with the US Oil Pollution Act 1990) (OPA 90))

11 A belief still persists that, in analogy with OPA 90, if the Convention is implemented then commercial pressure will be such that a solution will be found by existing providers of Certificates of Financial Responsibility (COFRs) or other providers. However, this analogy with OPA 90 does not hold. The current position is wholly different since the International Clubs do provide cover in respect of oil pollution risks in the US but do not provide COFRs, whereas **the Group Clubs do not, and never have, provided the cover for terrorism risks.** The COFR system in relation to OPA 90 is workable because it is underpinned by Club cover. The co-sponsors, representing the mutual system and the commercial market, believe that providers of COFRs outside the International Group of P&I Clubs will encounter the same difficulties in obtaining the requisite cover for terrorism on a sustainable basis.

Option D – Clarification of the carrier's duties and compliance with the ISPS Code

12 A fourth option that has been mentioned could be to clarify the carrier's duties in respect of preventing terrorism by reference to the ISPS Code, so that when the carrier has complied with the requirements of the ISPS Code, losses could be considered "wholly caused" by a terrorist act and therefore excluded from the liability of the carrier under article 3(b). The mechanism suggested for such clarification, either through a decision of the Legal Committee or an Assembly resolution, is article 31(3) of the Vienna Convention on the Law of Treaties (informal agreement between all States Parties). However, this option is not practicable. As already explained, insurance cover is simply not available in relation to terrorism whether or not an ISPS certificate is in place and whether or not the carrier has complied with the ISPS Code. The existence of cover for terrorism is not dependent on compliance with international security requirements, it is simply not available.

Possible solution

13 However there is one possible solution that would overcome the problem. The mechanism suggested in relation to option D (see paragraph 12) could possibly be used to better effect by using suitable declaratory language to clarify that an "act of terrorism" is included within the definition of "act of war" in article 3(1)(a) of the Convention. If the policy objective can be achieved by the comparatively simple technique suggested in relation to option D, then the co-sponsors believe that it is possible to use the same technique to provide a workable solution by clarifying the definition of "act of war" in article 3(1) (a).

14 It is not suggested that the text of the Convention be changed, rather that such a clarification provides an interpretation of the scope of the carrier's liability under the Convention which will, in turn, permit insurers to provide financial security. As has been considered for option D, the mechanism for such a clarification is article 31(3) of the Vienna Convention on the Law of Treaties which provides that, as a general rule of interpretation of treaties, any subsequent agreement between State parties regarding the interpretation of a treaty or the application of its provisions shall be taken into account.

15 It is crucial that any such agreement by IMO on suitable declaratory language will be given effect in the courts of all States which are party to the Convention, and that such language is adopted by States in their implementing legislation.

16 It is therefore suggested that agreement by IMO on the necessary declaratory language is undertaken by means of an IMO Assembly resolution, recommending that States Parties agree to interpret that an "act of war" in article 3(1)(a) of the Convention includes an "act of terrorism". In order to meet the concerns expressed in paragraph 15 above, it is equally important that such an agreement be reflected in the implementing legislation of States. This would ensure that such an interpretation is given general effect.

17 The co-sponsors propose that the annexed draft resolution is recommended by the Legal Committee to the IMO Assembly for adoption, and that the interpretation of article 3(1)(a) in the first operative paragraph of the draft resolution is reflected by States in their implementing legislation. The co-sponsors recognise that, at present, there are no States Parties to the 2002 Athens Convention, but that a number of States are currently in the process of drafting their implementing legislation.

Action requested of the Legal Committee

18 In order to cure this defect in the 2002 Athens Convention, the co-sponsors request the Legal Committee to consider the Annexed draft IMO Assembly Resolution with a view to its being forwarded to the IMO Assembly in November 2005 for adoption. The co-sponsors also recommend that the Athens Correspondence Group reports any developments on the terrorism issue from within the marine insurance market or among States to future sessions of the Legal Committee.

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ANNEX

ASSEMBLY [23]
[24th] session
Agenda Item […]

A 23/Res.[..]
[…] 2005
Original; ENGLISH

Resolution A. […] (23)

Adopted on […] 2005
(Agenda item…)

[……]

THE ASSEMBLY,

RECALLING the adoption of the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (hereinafter "the Athens Protocol"),

BEING AWARE that the Athens Protocol is intended to provide a viable and effective compensation system,

CONSCIOUS of the need to ensure the entry into force of the Athens Protocol,

ACKNOWLEDGING that the Athens Protocol excludes liability resulting from an act of war and other specified events but does not expressly exclude liability resulting from an act of terrorism,

RECOGNIZING that insurance cover for liabilities arising from an act of terrorism is either limited or unavailable,

RECOGNIZING FURTHER that, as a consequence, carriers as defined in the Athens Protocol may be unable to obtain the Certificate of Financial Security currently required by the Athens Protocol,

BEING CONVINCED that the carrier should not be liable under the Athens Protocol in respect of acts of terrorism,

BEING AWARE that Article 31 (3) (a) of the Vienna Convention on the Law of Treaties provides that parties to the Athens Protocol may enter into any agreement subsequent to their conclusion regarding their interpretation or the application of their provisions,

1 RECOMMENDS that State parties to the Athens Protocol interpret Article 3 (1) (a) of the Athens Protocol to include an act of terrorism;

2 RECOMMENDS FURTHER that State parties accept this Resolution as an authoritative interpretation of the Article mentioned in paragraph 1, in accordance with Article 31 (3) (a) of the Vienna Convention on the Law of Treaties; and

3 ENCOURAGES IMO Member Governments when implementing the Athens Protocol in their national law to exclude liability resulting from an act of terrorism.

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