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STUDY

Policy Department Structural and Cohesion Policies

FINANCIAL ASPECTS OF THE PROPOSAL ON THE LIABILITY FOR CARRIERS OF PASSENGERS BY SEA AND INLAND WATERWAYS (COM(2005) 592)

TRANSPORT AND TOURISM

Octobre 2006

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on the liability for carriers of passengers
by sea and inland waterways
(COM(2005) 592)**

Briefing paper

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Financial aspects of the proposal on the liability for carriers of passengers by sea and inland waterways (COM(2005) 592)

Briefing paper

Content:

The Commission proposal (COM(2005) 592) aims at incorporating the Athens Convention directly into EC law and adds some adaptations to it, in particular on its scope of implementation.

This briefing paper seeks to evaluate the financial impact of the proposal since the Athens Convention significantly raises the level of liability for ship owners in the event of shipping accidents.

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Executive summary

The proposal (COM(2005) 592) will entail considerable enhancement of the risk exposure of carriers. At least in the revised version of the rules that have now been agreed in the IMO, insurance solutions are found, both for war and non-war risks. On that basis, the proposal seems sustainable for carriers.

The carriers who will experience the more radical changes are inland carriers and some domestic ferries with very limited insurance cover. One may consider helping these vessels in a transitional period by allowing global limitation regimes to apply to passenger claims where they apply today. Should implementation be difficult, it is recommended to implement the rules for the cruise industry before the ferries.

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1 Introduction

For the insured, liability insurance means paying a regular premium to avoid large and sudden liabilities after an incident. For a third party suffering damage, insurance means that they are likely to recover their loss if entitled to it, regardless of the financial status of the liable party.

This beneficial effect for the third party — the passenger — is one of the reasons why COM(2005) 592 ('the proposal') introduces compulsory liability insurance for carriers of passengers by ship ⁽¹⁾. In addition, this compulsory insurance scheme adds other benefits ⁽²⁾ for the passenger, such as the following.

- They can relate to the insurer directly in specified jurisdictions, and there is money available there, so that they do not have to pursue their claim in remote jurisdictions.
- There are very few defences to a claim, in particular defences relating to the insurance contract (e.g., the insurer would have to pay even if the insurance premium has not been paid).
- There is a discipline in the system, so that an insurer who makes settlements difficult may no longer be allowed to participate in the scheme.

The system is based on a similar compulsory insurance system used for oil pollution ⁽³⁾.

This system has proved to be a success and is well known. It minimises implementation costs but such advantages have their price. This paper discusses the financial costs associated with the implementation of the proposal. This is a complicated exercise.

Firstly, the backdrop for financial costs associated with the proposal is the current law and practice in Member States. This is rather disparate ⁽⁴⁾.

- Some States have adopted the Athens Convention, 1974 or 1990 ⁽⁵⁾, with or without ratification, while others have a special national regime or one based on general contract law.
- For inland waterways, some Member States apply the same rules as for seagoing transport, while others have special national regimes with low limits of liability or apply general contract law.
- In some Member States, special regimes exist for government ferries.
- For many carriers, the package travel directive ⁽⁶⁾ will apply.
- Most Member States do not have existing insurance requirements, but some do ⁽⁷⁾.

⁽¹⁾ The compulsory insurance and the more dramatic changes in the liability regimes only applies to claims for death and personal injury, and discussions on this will be limited here accordingly. Baggage claims, etc., will therefore not be discussed.

⁽²⁾ It will not be discussed here whether these benefits are net benefits, in the sense that the passenger could manage these losses more efficiently himself.

⁽³⁾ See <http://www.iopcfund.org/>

⁽⁴⁾ See Müller, Walter, 'Inland navigation', *International Encyclopaedia of International Law*, Hamburg 2002, p. 20 et seq.

⁽⁵⁾ The text of these Conventions and other useful materials can be found at the Athens Convention website, <http://folk.uio.no/erikro/www/corrgr/index.html>.

⁽⁶⁾ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

⁽⁷⁾ Estonian Maritime Code, Article 59(6).

Secondly, the proposal must be read in association with the new IMO Guidelines for the Implementation of the Athens Convention ⁽⁸⁾. These guidelines recommend that States shall make a reservation to the Convention when ratified, which in fact modifies some of the liability and insurance requirements related to terrorism. As the Convention forms the basis of the proposal, and as these guidelines are based on the assumption that such modifications are strictly necessary in order that the insurance provisions of the Athens Convention, 2002, shall be operable, it is fair to assume that the proposal will be adjusted in the same way ⁽⁹⁾.

Generally, it is difficult or impossible to estimate the costs of each proposed reform or the totality of proposed reforms with such an accuracy that it would be meaningful to measure the costs in money. The study will, however, provide a fairly good basis for a cost-benefit estimate.

In connection with this study, national ship owners' associations and others have been invited to give input on existing law and practice, in particular in respect of inland waterways and special national schemes. Presumably, the more important matters to consider have been brought forward. However, it is not possible to ascertain completeness in this respect. The relative silence may be a reflection on the compromise that had already been reached between industry and the lead governments on the IMO guidelines at the consultation stage (primo September, 2006). When there is a solution all parties find acceptable, there is no particular need to point out possible problems.

⁽⁸⁾ Finally adopted by the IMO Legal Committee at its 92nd session in Paris 19 October 2006. The guidelines can be found at [http://folk.uio.no/erikro/www/corrgr/Athens %20guidelines.pdf](http://folk.uio.no/erikro/www/corrgr/Athens%20guidelines.pdf).

⁽⁹⁾ The guidelines were proposed by the UK, Norway, the International Council of Cruise Lines and the International Chamber of Shipping. The guidelines were discussed among Member States, and several Member States participated in the final adjustments of the text.

2 Liability

The greatest effects of the proposal in respect of the carrier's liability relate to the basis for liability and the extent of the liability. These rules are mandatory. Some Member States do not have mandatory legislation ⁽¹⁰⁾, which means that the carrier can exclude liability within the limits of the unfair contract terms directive ⁽¹¹⁾. Obviously, carriers who can no longer rely on an exemption clause will incur additional costs by the proposal, although one rarely sees that liability has been totally excluded. Passengers will obtain a corresponding benefit.

2.1 Basis for liability

The basis for liability both under the Athens Conventions, 1974 and 1990 and under most other regimes is negligence. The carriers are not liable for damage to passengers unless they or their servants have been careless. Sometimes though, the burden of proof is reversed, so that the passenger can leave to the carrier to prove that he or his servants were not negligent.

The proposal introduces strict liability for the first SDR ⁽¹²⁾ 250 000 (EUR 290 000) of claims after typical shipping incidents, such as grounding. In these cases, the carrier's exposure to liability claims may increase, both because there are fewer defences and the claimants may claim more often when the basis for the claim is less likely to be disputed. However, it is unusual for carriers to refuse to pay after typical shipping incidents, so it is likely that the financial effects of this part of the proposal are marginal.

2.2 Extent of liability

There are several mechanisms in the proposal to limit the extent of the liability. The starting point is that the normal rules in national law for measurement of damages should be applied. But there are exceptions in respect of types of loss covered, per person limitation and per incident limitation.

Firstly, the Athens Convention limits recovery to economic loss only — it disallows punitive or exemplary damages ⁽¹³⁾. This is important in avoiding an increase in the awards similar to what can be seen in the USA. However, at this stage, punitive or exemplary damages are not common in Europe, and the economic effect of this clause is therefore marginal.

Secondly, there is a per person limitation of liability, so that a carrier will not be liable for all losses incurred to passengers. The current framework varies in the Member States. But compared to the Athens Conventions 1974 and 1990, which has limits on SDR 44 000 (EUR 50 000) and SDR 175 000 (EUR 200 000), respectively, and the UK national limit for UK carriers of SDR 300 000 (EUR 350 000) ⁽¹⁴⁾, the limit of the proposal of SDR 400 000 (EUR 460 000) is a considerable increase in exposure for the carriers (and a corresponding benefit for the passengers). The limit exceeds the average settlement after many accidents. The total exposure for a passenger ship of 3 000 passengers would be SDR 132 million

⁽¹⁰⁾ Müller op cit p. 22 et seq.

⁽¹¹⁾ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

⁽¹²⁾ SDR is a weighed average of some currencies, see <http://fx.sauder.ubc.ca/SDR.html>.

⁽¹³⁾ Athens Convention, 2002, Article 3(5)(d).

⁽¹⁴⁾ The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998.

(EUR 154 million) under the Athens Convention, 1974, but SDR 1.2 billion (EUR 1.4 billion) under the proposal.

The IMO implementation guidelines (see above) lead to a capping of terrorism-related liabilities at SDR 250 000 (EUR 290 000) per passenger or SDR 340 million (EUR 397 million) per ship per incident, whichever is the lower. In that case, the increase in exposure is still significant; though less than the general increase.

Thirdly, there are rules (other than the SDR 340 million limit referred to in the previous paragraph) on a maximum passenger liability exposure for a carrier for one ship in one incident ('global limitation'). Currently, these rules vary in Member States; some have the 1976 Limitation Convention or even older conventions with lower limits, some have the 1996 Limitation Convention and the UK does not have global limitation for passenger claims for seagoing ships at all⁽¹⁵⁾. The proposal will not alter this situation — global limitation can still apply⁽¹⁶⁾. The 'considerable increase in exposure' by the new per person limits will therefore be more moderate in many Member States, although still significant.

An alternative way of limiting the maximum exposure per ship would be to establish a one ship limited company. Subject to certain rules on piercing the corporate veil, this is a possibility in all Member States. In that case, the exposure would be reduced further. This is so even if the ship's value may be exposed because of maritime liens and/or the liability of the owner as performing carrier, because the passenger liabilities of the proposal may well exceed the value of the ship.

Altogether, the proposal brings about an increase in passenger liability exposure. However, there is still not a question of unlimited liability, as is well known for cruise lines trading in the United States. The current debate in shipping circles on exposure to passenger liability may have been triggered just as much by a stronger awareness of the unlimited exposure in the United States as the proposal or the Athens Convention, 2002.

2.3 Procedure

As with the rules on basis of liability, the rules of procedure may expose carriers to financial risks. If the settlement procedure is too cumbersome, the carrier would have the choice between incurring the procedural costs or (better for the passenger claimants) to settle the claims at a level that reflects the bargaining position caused by the procedural rules.

There are, of course, great variations in the procedural rules that apply in different Member States. It should, however, be mentioned that the proposal does not include a provision that all claims arising out of one incident should be litigated in the same court. This is supposed to be an advantage to the passenger, who can choose a forum that is convenient for him. But for the carrier, who would incur litigation expenses in a number of different jurisdictions, this would mean added expenses.

⁽¹⁵⁾ The Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998 <http://www.opsi.gov.uk/si/si1998/19981258.htm>.

⁽¹⁶⁾ Athens Convention, 2002, Article 19. The final IMO guidelines did not address any global limitation issues at all, and this provision is therefore fully operational. Note however that there are no general rules of global limitation on inland waterways, see Müller op cit p. 15 et seq.

Similarly, the proposal for advance payments would obviously mean added expenses from the carriers. However, to the extent that advance payment coincides with the area for strict liability, the chances are that payment will have to be made in any event.

2.4 Insurance certificates and risk management

The liability exposure outlined above would be more acceptable if insurable, so that the risk can be properly managed. It is therefore crucial to ascertain whether insurance for this purpose is available (the ‘risk management perspective’). Included in this perspective is also the need for the mortgagee to see that the vessel has liability insurance, so that what he can recover under his mortgage would not be undermined by maritime liens.

The proposal also includes provisions for compulsory insurance on certain conditions, evidenced by certificates. It is therefore important to ascertain that insurance on these conditions are available, and at what cost (the ‘insurance certificate perspective’).

The availability of insurance — the ‘capacity’ in the insurance market — is not a very clear term. Being a market offers change with demand. It is likely that one could insure any one billion one-time risk if one paid in one billion in premium in advance. But this would be unattractively expensive, and would also create great disturbances in the insurance market, because insurers would move from their previous business to this new, lucrative business. The availability of insurance is therefore not something there is or there is not. It is an issue of acceptable cost in respect of insurance premium and in respect of disturbance in the insurance market.

Traditionally, maritime insurance has been separated into war insurance and non-war insurance. Most of the liabilities under the Athens Convention fall within the scope of non-war insurance. But a fraction of the liabilities — liabilities for not having taken the necessary steps to prevent a terrorist attack — fall within the traditional scope of the war insurance.

2.5 Non-war insurance

2.5.1 Risk management perspective

Almost all passenger ships in international trade — and indeed almost all commercial ships in international trade at all — have managed their liabilities in protection and indemnity (P&I) clubs. These clubs operate as mutual insurers. The risks are managed by a combination of pooling and (re)insurance in the commercial market.

The clubs are mainly set up to indemnify their ship owner members. The leading clubs — which are organised in the International Group of P&I Clubs — can certainly sustain a one-time loss of about USD 2 billion (EUR 1.6 billion), which is reinsured. But there is an additional arrangement so that even higher losses can be covered by contribution by all the ship owner members. This mechanism has never been tried, but it is believed that the leading clubs by this facility can cover losses up to USD 4–5 billion (EUR 3–4 billion) ⁽¹⁷⁾.

⁽¹⁷⁾ This ‘overspill’ mechanism is well described in Commission decision of 12 April 1999 (1999/329/EC); a competition decision involving the leading P&I clubs. The maximum amount depends on the entered tonnage, which presumably has grown in the recent years, and the recoverability of the claims.

For most passenger ships, this will suffice for risk management purposes even under the proposal. But a ship owner would generally wish to also cover other liabilities, such as crew claims, that may be triggered by the same incident that triggers passenger liabilities. Then the current P&I cover would not suffice for all claims in respect of a few of the largest ships. However, the cover has been thought sufficient even for cruise lines that are trading in the United States today and which therefore are exposed to unlimited passenger liabilities.

The fact that the P&I clubs generally offer a USD 4–5 billion facility does not necessarily mean that it will be made available. There are examples of exclusions of certain risks or special limits. A typical example is that oil pollution cover is limited to USD 1 billion (EUR 1.3 billion).

Passenger liabilities are not subject to such limits today. But introduction of such a limit is under discussion, most likely due to factors such as:

- a growing awareness of passenger risks;
- positioning in the negotiations on implementation of the Athens Convention;
- a feeling that cruise ships are more hotel-type risks than such shipping risks that P&I deal with;
- the fact that most P&I club members — say more than 95 % — do not run passenger ships and have no interest in mutualising passenger risks.

On the other hand, non-passenger ship owners would hardly like to set themselves up in a situation in which they would have to compete with passenger ship owners in the reinsurance market.

The result of this process is not clear. What is clear is that some clubs already refuse to enter passenger ships, while others continue to enter them. One educated guess is that the clubs will finally limit the passenger exposure to USD 2 billion ⁽¹⁸⁾. In that case, clubs would be able to indemnify ship owners for most liabilities based on the proposal ⁽¹⁹⁾.

It seems then that the P&I clubs would be able to cover most of the passenger carriers' need for risk management in respect of the non-war liabilities pursuant to the proposal — for those who are members. Although the time perspective in the insurance market is shorter than a legislator's time perspective, it is reasonable to consider this cover sustainable.

Whether the carriers would like to use this opportunity for risk management is in itself a matter of commercial choice. The premiums in P&I insurance are individually negotiated and risk based. However, the reinsurance rates for passenger ships have been rising ⁽²⁰⁾, and it is likely that this will be reflected in individual premiums. However, the fact that the vast majority of carriers of passengers by sea in international trade find it worthwhile to maintain P&I membership, should clearly demonstrate that the risk management cost is not unreasonable. As an illustration, the P&I insurance cost of a Norwegian ferry operator with seven to eight ferries of less than 600 passengers is about EUR 80 000 annually ⁽²¹⁾.

⁽¹⁸⁾ Gallagher Global Risks: P&I Confidential Newsletter 31 August 2006 p. 1 and 11 October 2006 p. 2.

⁽¹⁹⁾ This was confirmed by the P&I clubs in the negotiations of the IMO guidelines, see IMO Document LEG 92/WP.7 paragraph 5.22.

⁽²⁰⁾ See <http://folk.uio.no/erikro/www/corrgr/insurance/rates.pdf>.

⁽²¹⁾ Personal information.

A likely effect of the proposal is that passenger carriers that today have not maintained P&I membership, would prefer to become P&I members. Although P&I clubs have no general obligation to accept all carriers that apply for membership, it is likely that most European seagoing tonnage will be accepted, whether in domestic or in international trade. In this way, the consequences of the increase in liability will be mitigated and manageable, though not eliminated.

Similarly, P&I clubs that are not members of the international group would need to align their cover with the international group or see that some members are lost to the major clubs. There are many examples that smaller clubs have obtained cooperation agreements with clubs of the international group to enhance their cover.

Still, there are some situations in which the risk for incurring liability pursuant to the proposal cannot be managed by P&I insurance.

- Firstly, this may happen when P&I membership is refused or extremely expensive due to the risk involved, such as due to the poor standard of the ship or crew. In that case, the problem is not the liability or the problem of P&I cover, but the substandard operation.
- Secondly, the ship may be so big that the P&I cover does not suffice, the vessel may be so small that it falls outside the scope of the activity of the P&I clubs, or it may be an inland waterway vessel not eligible for P&I membership. In that case, additional insurance will have to be bought in the commercial insurance market, either in respect of the carrier's risks or limited to the mortgagee's risks.

It is not possible to say whether such insurance will actually be available on the market. The fact that it is not offered today, when there is no demand for it, is irrelevant. And underwriters and brokers tend not to answer hypothetical questions on insurance availability, or they may provide an opportunistic answer. But there is no reason to believe that the market would not adjust to the increased needs for insurance that the proposal will bring about ⁽²²⁾. A balance will eventually form between the carrier's need for insurance expressed by his willingness to pay and the potential underwriter's offer.

Increased liability exposure does, however, lead to increased demand for insurance. This is likely to make the premiums rise in an offer and demand model. This premium increase will not only affect passenger carriers, but all ship owners.

2.5.2 Insurance certificate perspective

Insurance that is required for risk management purposes does not necessarily fulfil the insurance requirements of the convention. These requirements are, however, limited to SDR 250 000 (EUR 290 000) of the SDR 400 000 (EUR 460 000) liability.

The requirements for the compulsory insurance are that the insurer should waive certain defences (e.g., that the premium has not been paid), that the insurer could be sued directly by the passenger. The insurer would have to confirm this by issuing a so-called 'blue card' to a State party, which on this basis will issue an insurance certificate.

⁽²²⁾ See in this direction the explanations of a leading London firms of brokers in IMO Document LEG 92/5/2 (attached).

It is not obvious that P&I clubs or other insurers will actually issue insurance certificates. As far as the P&I clubs are concerned, they are likely to issue certificates if the terrorism insurance issue is satisfactorily resolved (see below). For other insurers, arrangements with a special focal point, similar to the arrangements described below under war insurance, could be utilised if necessary.

The documentation of the insurance is in itself costly — the insurers and governments must employ people to handle the paperwork, and ships may be detained because of delayed certificates. Such costs may be mitigated by use of electronic certificates and other options allowed in the proposal. Up to this point, P&I clubs have expressed no interest in taking advantage of these options. This may imply that the costs involved with the certificates are fairly moderate.

2.6 War insurance

The liability for risks covered under war insurance is very limited indeed under the proposal ⁽²³⁾. However, arrangements must be made to meet the insurance requirements and for risk management purposes.

2.6.1 Risk management perspective

War insurance in international shipping is usually taken out in several different layers. For pedagogical reasons, the starting point here is a middle layer: The war liability insurance comes with the P&I insurance in the major P&I clubs, but that does not form part of the P&I cover in the sense that the risk is mutualised. This insurance covers, for the time being, USD 500 million (EUR 340 million).

This middle layer — the war cover arranged by the P&I clubs — presupposes a first layer of combined hull/liability war insurance with liability cover for USD 100 million (EUR 80 million) or the value of the hull. On top of the middle layer, ship owners may take out additional insurance in a third layer. This third layer may be taken out in the war insurance market or in specialised war clubs.

War clubs may offer selected ship owners a third layer that will add up to a total cover of about USD 1 billion (EUR 0.8 billion) ⁽²⁴⁾. This amount is by no means reserved only for passenger claims, and does not cover the exposure under the proposal. However, even passenger ships trading in jurisdictions with unlimited passenger liability are not known to take out war passenger insurance exceeding about USD 750 million (EUR 600 million). And with the capping of the liability covered by war insurance — by means of the IMO implementation guidelines — to SDR 340 million (EUR 397 million) or SDR 250 000 (EUR 290 000) per passenger, there should be sufficient insurance available. Indeed these limits are suggested by a London broker as sustainable from an insurance point of view ⁽²⁵⁾.

⁽²³⁾ There is only liability for failure to prevent or mitigate terrorism, see Athens Convention, Article 3.

⁽²⁴⁾ Personal information from brokers.

⁽²⁵⁾ See IMO Document LEG 92/5/2 (attached). The document also describes the set up of the insurance arrangements.

In domestic trade and in trade on inland waterways, only a minimal war insurance required by mortgagees may have been taken out. The liability of the proposal (as amended by the ratification procedure) is not of such a novel type or magnitude that it in itself should increase the need for insurance for risk management purposes.

2.6.2 Insurance certificate perspective

While there is a tradition that the P&I issues insurance certificates in non-war insurance, there is no similar tradition in war insurance. However, a London firm of brokers has offered to organise a focal point — a specially made company — that can issue certificates with the backing of such war insurance as described above. The cost is estimated to about USD 0.10 (EUR 0.08) per passenger per day or voyage ⁽²⁶⁾.

2.7 Availability of insurance

It seems that the required insurance will be available for carriers. The availability of insurance for non-seagoing vessels, which cannot become P&I members, is however questionable.

Basically, one can expect that the insurance will be supported by two ‘blue cards’ from insurers. One will cover war insurance, and will be issued by a specially made limited company backed by existing war insurance and a special policy that covers the difference between existing insurance and the Athens requirements as modified by the implementation guidelines. The other ‘blue card’ will usually be issued by a P&I club, and will cover non-war risks (that is, the more common risks). For the very largest ships, this non-war ‘blue card’ may be issued by a specially made limited company backed partly by P&I insurance and partly by market insurers.

⁽²⁶⁾ Ibid.

3 Sustainability for carriers

From the discussions above, it appears that the liabilities will increase drastically with the proposal, for the benefit of passengers and to the detriment of the carriers. But the risks are, to a large extent, insurable and the required insurance is available.

The requirement will apply to all carriers trading from a Community port. The increased costs will therefore not distort competition. It is therefore fair to conclude that this is sustainable for carriers.

4 Intermediate solutions

If one considers intermediate solutions, one could consider utilising the mechanism of global limitation conventions, or at least to restrict the Member States from enhancing their levels of global limitation. This would not in any event bring about harmonisation of the law, as the UK has already abolished global limitation for passenger claims, and one would probably not wish to reverse that process. However, allowing some Member States to maintain global limits at a certain level — e.g. SDR 175 000 (EUR 200 000) per passenger as per the 1996 Global Limitation Convention — may mitigate the transitional problems for the part of the industry that has the lowest insurance cover today.

It is also possible to reconsider the inclusion of inland navigation in the proposal. This industry has not been party to the development of the rules in the IMO, and has got other and less sophisticated insurance arrangements than the seagoing vessels in general, and in particular the seagoing vessels in international trade. Furthermore, there is not necessarily a global limitation regime applicable to these vessels.

These vessels rarely or never compete with seagoing vessels — their main competitors are probably land carriers. One could therefore consider postponing the application of the proposal for inland carriers, or even to align their liability permanently with what is applicable for land carriers.

In the IMO, there was broad consensus on the implementation guidelines. Therefore, the implementation of the new regime can go more smoothly than one might otherwise have feared. If implementation does appear to be a problem, however, one needs to think of the consequences of detaining ships without insurance certificates in a transitional period. In that case, it would perhaps be advisable to implement the rules for cruise traffic first, in order not to disrupt ferry traffic and thereby the daily activities of Member States.

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Annex I

IMO guidelines for implementation of the Athens Convention

Adopted by the Legal Committee at its 92nd session in Paris 19 October 2006

Reservation

- 1 The Athens Convention should be ratified with the following reservation or a declaration to the same effect:

[1.1] Reservation in connection with the ratification by the Government of ... of the Athens Convention Relating to Carriage of Passengers and Their Luggage by Sea, 2002 ('the Convention')

Limitation of liability of carriers, etc.

[1.2] The Government of ... reserves the right to and undertakes to limit liability under paragraph 1 or 2 of Article 3 of the Convention, if any, in respect of death of or personal injury to a passenger caused by any of the risks referred to in paragraph 2.2 of the IMO Guidelines for the Implementation of the Athens Convention to the lower of the following amounts:

- 250 000 units of account in respect of each passenger on each distinct occasion, or
- 340 million units of account overall per ship on each distinct occasion.

[1.3] Furthermore, the Government of ... reserves the right to and undertakes to apply the IMO Guidelines for the Implementation of the Athens Convention paragraphs 2.1.1 and 2.2.2 *mutatis mutandis*, to such liabilities.

[1.4] The liability of the performing carrier pursuant to Article 4 of the Convention, the liability of the servants and agents of the carrier or the performing carrier pursuant to Article 11 of the Convention and the limit of the aggregate of the amounts recoverable pursuant to Article 12 of the Convention shall be limited in the same way.

[1.5] The reservation and undertaking in paragraph 1.2 will apply regardless of the basis of liability under paragraph 1 or 2 of Article 3 and notwithstanding anything to the contrary in Article 4 or 7 of the Convention; but this reservation and undertaking do not affect the operation of Articles 10 and 13.

Compulsory insurance and limitation of liability of insurers

[1.6] The Government of ... reserves the right to and undertakes to limit the requirement under paragraph 1 of Article 4bis to maintain insurance or other financial security for death or personal injury to a passenger caused by any of the risks referred to in paragraph 2.2 of the IMO Guidelines for the Implementation of the Athens Convention to the lower of the following amounts:

- 250 000 units of account in respect of each passenger on each distinct occasion, or
- 340 million units of account overall per ship on each distinct occasion.

[1.7] The Government of ... reserves the right to and undertakes to limit the liability of the insurer or other person providing financial security under paragraph 10 of Article 4bis, for death or personal injury to a passenger caused by any of the risks referred to in paragraph 2.2 of the IMO Guidelines for the Implementation of the Athens Convention, to a maximum limit of the amount of insurance or other financial security which the carrier is required to maintain under paragraph 1.6 of this reservation.

[1.8] The Government of ... also reserves the right to and undertakes to apply the IMO Guidelines for the Implementation of the Athens Convention including the application of the clauses referred to in paragraphs 2.1 and 2.2 in the guidelines in all compulsory insurance under the Convention.

[1.9] The Government of ... reserves the right to and undertakes to exempt the provider of insurance or other financial security under paragraph 1 of Article 4bis from any liability for which he has not undertaken to be liable.

Certification

[1.10] The Government of ... reserves the right to and undertakes to issue insurance certificates under paragraph 2 of Article 4bis of the Convention so as to:

- reflect the limitations of liability and the requirements for insurance cover referred to in paragraphs 1.2, 1.6, 1.7 and 1.9, and
- include such other limitations, requirements and exemptions as it finds that the insurance market conditions at the time of the issue of the certificate necessitate.

[1.11] The Government of ... reserves the right to and undertakes to accept insurance certificates issued by other States Parties issued pursuant to a similar reservation.

[1.12] All such limitations, requirements and exemptions will be clearly reflected in the certificate issued or certified under paragraph 2 of Article 4bis of the Convention.

Relationship between this reservation and the IMO Guidelines for the Implementation of the Athens Convention

[1.13] The rights retained by this reservation will be exercised with due regard to the IMO Guidelines for the Implementation of the Athens Convention, or to any amendments thereto, with an aim to ensure uniformity. If a proposal to amend the IMO Guidelines for the Implementation of the Athens Convention, including the limits, has been approved by the Legal Committee of the International Maritime Organisation, those amendments will apply as from the time determined by the Committee. This is without prejudice to the rules of international law regarding the right of a State to withdraw or amend its reservation.'

Guidelines

- 2 In the current state of the insurance market, States Parties should issue insurance certificates on the basis of one undertaking from an insurer covering war risks, and another insurer covering non-war risks. Each insurer should only be liable for its part. The following rules should apply (the clauses referred to are set out in Appendix A):

2.1 Both war and non-war insurance may be subject to the following clauses:

2.1.1 Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion Clause (Institute Clause No 370);

2.1.2 Institute Cyber Attack Exclusion Clause (Institute Clause No 380);

2.1.3 the defences and limitations of a provider of compulsory financial security under the Convention as modified by these guidelines, in particular the limit of 250 000 units of account per passenger on each distinct occasion;

2.1.4 the proviso that the insurance shall only cover liabilities subject to the Convention as modified by these guidelines; and

2.1.5 the proviso that any amounts settled under the Convention shall serve to reduce the outstanding liability of the carrier and/or its insurer under Article 4bis of the Convention even if they are not paid by or claimed from the respective war or non-war insurers.

2.2 War insurance shall cover liability, if any, for the loss suffered as a result of death or personal injury to a passenger caused by:

- war, civil war, revolution, rebellion, insurrection, or civil strife arising there from, or any hostile act by or against a belligerent power;
- capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat;
- derelict mines, torpedoes, bombs or other derelict weapons of war;
- act of any terrorist or any person acting maliciously or from a political motive and any action taken to prevent or counter any such risk;
- confiscation and expropriation;

and may be subject to the following exemptions, limitations and requirements:

2.2.1 War Automatic Termination and Exclusion Clause;

2.2.2 In the event that the claims of individual passengers exceed in the aggregate the sum of 340 million units of account overall per ship on any distinct occasion, the carrier shall be entitled to invoke limitation of his liability in the amount of 340 million units of account, always provided that:

- this amount should be distributed amongst claimants in proportion to their established claims;
- the distribution of this amount may be made in one or more portions to claimants known at the time of the distribution; and
- the distribution of this amount may be made by the insurer, or by the court or other competent authority seized by the insurer in any State Party in which legal proceedings are instituted in respect of claims allegedly covered by the insurance;

2.2.3 30 days notice clause in cases not covered by 2.2.1;

2.3 Non-war insurance should cover all perils subject to compulsory insurance other than those risks listed in 2.2, whether or not they are subject to exemptions, limitations or requirements in 2.1 and 2.2.

- 3 An example of a set of insurance undertakings (blue cards) and an insurance certificate, all reflecting these guidelines, are included in Appendix B.
- 4 A State Party should not issue certificates on another basis than set out in paragraph 2 unless the matter first has been considered by the Legal Committee of the International Maritime Organisation.
- 5 The Legal Committee encourages the Depositary of the Convention — if necessary — to make these guidelines known to a State that is about to deposit an instrument of signature, ratification, acceptance, approval or accession.

APPENDIX A CLAUSES REFERRED TO

War automatic termination and exclusion

1.1 Automatic termination of cover

Whether or not such notice of cancellation has been given cover hereunder shall terminate automatically

1.1.1 upon the outbreak of war (whether there be a declaration of war or not) between any of the following:

the United Kingdom, the United States of America, France, the Russian Federation, the People's Republic of China;

1.1.2 in respect of any vessel, in connection with which cover is granted hereunder, in the event of such vessel being requisitioned either for title or use.

1.2 Five Powers War

This insurance excludes:

1.2.1 loss damage liability or expense arising from the outbreak of war (whether there be a declaration of war or not) between any of the following:

the United Kingdom, the United States of America, France, the Russian Federation, the People's Republic of China;

1.2.2 requisition either for title or use.

Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electro-magnetic Exclusion Clause (Clause 370, 10.11.2003)

This clause shall be paramount and shall override anything contained in this insurance inconsistent therewith

1 In no case shall this insurance cover loss damage liability or expense directly or indirectly caused by or contributed to by or arising from:

1.1 ionising radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel;

1.2 the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof;

1.3 any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter;

1.4 the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter. The exclusion in this sub-clause does not extend to radioactive isotopes, other than nuclear fuel, when such isotopes are being prepared, carried, stored, or used for commercial, agricultural, medical, scientific or other similar peaceful purposes.

1.5 any chemical, biological, bio-chemical, or electromagnetic weapon.

Institute Cyber Attack Exclusion Clause (Clause 380, 10.11.03)

- 1 Subject only to Clause 10.2 below, in no case shall this insurance cover loss damage liability or expense directly or indirectly caused by or contributed to by or arising from the use or operation, as a means for inflicting harm, of any computer, computer system, computer software program, malicious code, computer virus or process or any other electronic system.
- 2 Where this clause is endorsed on policies covering risks of war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power, or terrorism or any person acting from a political motive, Clause 10.1 shall not operate to exclude losses (which would otherwise be covered) arising from the use of any computer, computer system or computer software programme or any other electronic system in the launch and/or guidance system and/or firing mechanism of any weapon or missile.

APPENDIX C
XAMPLE BLUE CARDS AND INSURANCE CERTIFICATE

[Example of]

Blue card issued by war insurer

Certificate furnished as evidence of insurance pursuant to Article 4bis of the Athens Convention Relating to Carriage of Passengers and Their Luggage by Sea, 2002.

Name of ship:

IMO ship identification number:

Port of registry:

Name and address of owner:

This is to certify that there is in force in respect of the above named ship while in the above ownership a policy of insurance satisfying the requirements of Article 4bis of the Athens Convention Relating to Carriage of Passengers and Their Luggage by Sea, 2002, *subject to all exceptions and limitations allowed for compulsory war insurance under the Convention and the Implementation Guidelines adopted by the Legal Committee of the International Maritime Organisation in October, 2006, including in particular the following clauses: [Here the text of the Convention and the Guidelines with appendices can be inserted to the extent desirable]*

Period of insurance from: 20 February 2007
to: 20 February 2008

Provided always that the insurer may cancel this certificate by giving 30 days written notice to the above authority whereupon the liability of the insurer hereunder shall cease as from the date of the expiry of the said period of notice but only as regards incidents arising thereafter.

Date:

This certificate has been issued by:

War Risks, Inc.

[Address]

.....
Signature of insurer

As agent only for ***War Risks, Inc.***

[Example of]

Blue card issued by non-war insurer

Certificate furnished as evidence of insurance pursuant to Article 4bis of the Athens Convention Relating to Carriage of Passengers and Their Luggage by Sea, 2002.

Name of ship:

IMO ship identification number:

Port of registry:

Name and address of owner:

This is to certify that there is in force in respect of the above named ship while in the above ownership a policy of insurance satisfying the requirements of Article 4bis of the Athens Convention Relating to Carriage of Passengers and Their Luggage by Sea, 2002, *subject to all exceptions and limitations allowed for non-war insurers under the Convention and the Implementation Guidelines adopted by the Legal Committee of the International Maritime Organisation in October, 2006, including in particular the following clauses: [Here the text of the Convention and the Guidelines with appendices can be inserted to the extent desirable].*

Period of insurance from: 20 February 2007

to: 20 February 2008

Provided always that the insurer may cancel this certificate by giving three months written notice to the above authority whereupon the liability of the insurer hereunder shall cease as from the date of the expiry of the said period of notice but only as regards incidents arising thereafter.

Date:

This certificate has been issued by:

Pandi P&I

[Address]

.....

Signature of insurer

As agent only for ***Pandi P&I***

[Example of]

Certificate of insurance or other financial security

in respect of liability for the death of and personal injury to passengers

Issued in accordance with the provisions of Article 4bis of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002

Name of Ship	Distinctive number or letters	IMO Ship Identification Number	Port of Registry	Name and full address of the principal place of business of the carrier who actually performs the carriage.

This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of Article 4bis of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002.

Type of security

Duration of security

Name and address of the insurer(s) and/or guarantor(s)

The insurance cover hereby certified is split in one war insurance part and one non-war insurance part, pursuant to the Implementation Guidelines adopted by the Legal Committee of the International Maritime Organisation in October, 2006. Each of these parts of the insurance cover is subject to all exceptions and limitations allowed under the Convention and the Implementation Guidelines. The insurers are *not* jointly and severally liable. The insurers are:

For war risks: War Risks, Inc., [address]

For non-war risks: Pandi P&I, [address]

This certificate is valid until

Issued or certified by the Government of

(Full designation of the State)

OR

The following text should be used when a State Party avails itself of Article 4bis, paragraph 3:

The present certificate is issued under the authority of the Government of

(full designation of the State) by (name of institution or organisation)

At On.....

(Place)

(Date)

.....
(Signature and title of issuing or certifying official)

Explanatory notes [from the Convention]:

- 1 If desired, the designation of the State may include a reference to the competent public authority of the country where the certificate is issued.
- 2 If the total amount of security has been furnished by more than one source, the amount of each of them should be indicated.
- 3 If security is furnished in several forms, these should be enumerated.
- 4 The entry 'duration of security' must stipulate the date on which such security takes effect.
- 5 The entry 'address' of the insurer(s) and/or guarantor(s) must indicate the principal place of business of the insurer(s) and/or guarantor(s). If appropriate, the place of business where the insurance or other security is established shall be indicated.

Annex II

INTERNATIONAL MARITIME ORGANISATION



E

LEGAL COMMITTEE
92nd session
Agenda item 5

LEG 92/5/2
15 September 2006
Original: English

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

Technical amendments and explanatory notes to the guidelines on the provision of financial security for the Athens Convention, 2002

Submitted by Norway

SUMMARY

Executive summary: This document, drafted by Marsh Ltd., is submitted by Norway in its capacity as Correspondence Group leader. It explains the basis of the insurance cover in relation to war and terrorism risks. The insurance enables carriers to obtain cover for their liabilities in relation to acts of terrorism under the Athens Convention, 2002. It also clarifies some of the terms used in the guidelines on the provision of financial security in documents submitted by Norway (LEG 92/5) and the United Kingdom *et al* (LEG 92/5/3) respectively

Action to be taken: Paragraph 14

Related documents: LEG 91/4/1, LEG 91/12, LEG 92/5, LEG 92/5/3

Introduction

- 1 Marsh Ltd (hereinafter Marsh) has followed with interest the deliberations of the Legal Committee as it has sought to resolve the problem of providing financial security in respect of damage related to terrorism under the Athens Convention, 2002 (hereafter 'the Convention'). At its 91st session, in April 2006, the Legal Committee concluded that it should not exclude carriers from liability for damage related to terrorism. But in so doing, it left open an **opportunity to align liability with insurance, so that governments, carriers and insurers might reach a compromise solution at the Committee's 92nd session.**

Insurance product

- 2 Marsh is pleased to be able to confirm that it has negotiated with leading (London) underwriters to underwrite the insurance product that will enable carriers to obtain the blue cards as demanded by Article 4bis of the Convention. An outline of the reinsurance proposed by Marsh is attached at annex. The level of support indicated so far, reinforces confidence that the capacity can be found in the market to ensure successful completion of this placing.

Structure

- 3 Marsh undertakes to introduce measures prior to the entry into force date of the Convention, ensuring that States Parties may be satisfied that the requirements of Article 4bis are met. A model exists to meet similar demands imposed by the 1990 Oil Pollution Act in the USA. Marsh proposes to create a special purpose vehicle to act as a guarantor so as to satisfy the insurance and direct action provisions for claims relating to acts of terrorism arising under the Convention.
- 4 The insurance product provides governments the financial security behind the guarantor or entity that will sign the blue card or certificate furnished as evidence of insurance pursuant to Article 4bis of the Convention.

Security and sustainability

- 5 Marsh is one of the leading risk and insurance services firms. It does not rely solely on outside ratings agencies for analyses of the financial condition of all of the insurance companies with which Marsh places business. It has developed in-house systems to assess the security offered by each insurance company. Self-imposed minimum financial guidelines are established obliging Marsh to use only insurers that meet such parameters.
- 6 The insurance market has demonstrated remarkable resilience, adapting in the face of some of the most adverse circumstances, to ensure clients' needs continue to be met. In the immediate past, the industry absorbed the massive impacts of the 2001 terrorist attacks in the United States and the sequence of hurricanes in the Gulf of Mexico in 2005. In both cases — and despite false warnings of numerous insurers slipping into insolvency — the industry re-emerged ready to renew business wherever possible. Rates and coverage were adjusted to take account of the perception of heightened risk. New capital was attracted to the industry following both these scenarios.
- 7 Previously, the war market which writes both marine and aviation war business, traded through the loss of multiple aircraft in Kuwait at the start of the first Iraq War in 1991 and the attack on aircraft parked at Colombo on 24 July 2001.
- 8 In the same way that there is concern that the series of storms experienced in 2005 might be repeated, the war and terrorism market is cautious of the impact of a sustained series of attacks on cruise vessels or ferries resulting in calamitous loss of life. On the other hand, the impact of such attacks will, in the first instance, be felt by the primary war

insurers rather than the contingent insurers involved in underwriting the security behind the war risks blue card for the 2002 Athens Convention. And it will be their reaction that will force carriers to reconsider the continuation of trading rather than the reactions of underwriters behind the insurance product proposed by Marsh.

Costings

- 9 It has been well advertised that market capacity in the war and terrorism sector is constrained. Since the events in New York in September 2001, underwriters have adopted a disciplined approach to assessing their aggregate exposure. The 'Athens risk' introduces further exposure and will be accommodated through a combination of factors. These include the organic increase in the capacity of the market, the introduction of new capital, the opening up of new markets and the pricing of the risk so that attraction to the underwriters supporting is such that they commit capacity on a long-term basis.
- 10 The first year costing will be determined in the months leading up to implementation and it is difficult to predict today the circumstances that will be prevailing at that time. However, were we to be setting the premiums in September 2006, Marsh can state that the anticipated charge on carriers would be less than USD 0.10 per passenger per day, or per voyage not exceeding 24 hours, whilst trading under conditions where the Athens Convention might apply.

Rates will be subject to individual carrier's risk factors, such as trading areas, vessel capacity, vessel type and details of underlying insurances.

Amendments to the text of the guidelines

- 11 With leading Lloyd's underwriters as prospective reinsurers of the guarantor and as the security behind the war certificate of insurance, Marsh has worked to improve the terms of the cover required to meet carriers' liabilities in relation to terrorism under Convention.
- 12 Reinsurers have agreed to replace the text of the war cancellation clause in document LEG 92/5, submitted by Norway, with the war automatic termination and exclusion reproduced below. This has been offered so that the compulsory insurance remains indisputably in force, even in the event that a carrier fails to meet his obligations to reinstate his primary Hull War P&I cover (i.e. following the issuing of a general notice of cancellation to exclude specified areas).
- 13 Consequently, amendments to the guidelines for the implementation of the Athens Convention, contained in document LEG 92/5, dated 11 August 2006, can be effected. Further, if the proposals contained in document LEG 92/5/3, submitted by the United Kingdom et al, are adopted, additional alterations will be necessary. Accordingly, Marsh proposes the following revision to the guidelines:

Replace paragraph 2.2 with the following text:

War insurance shall cover liability for the loss suffered as a result of death or personal injury to a passenger caused by ⁽¹⁾:

- war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power;
- capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat;
- derelict mines, torpedoes, bombs or other derelict weapons of war ⁽²⁾;
- act of any terrorist or of any person acting maliciously or from a political motive, and any action taken to prevent or counter any such risk;
- confiscation and expropriation, and may be subject to the following exemptions, limitations and requirements:

2.2.1 War Automatic Termination and Exclusion ⁽³⁾

2.2.2 In the event that a carrier is entitled to invoke limitation of his liability of USD 500 million (about SDR 340 million) per ship per incident, then:

- this amount should be equitably distributed amongst claimants;
- the distribution of this amount may be made in one or more portions to claimants known at the time of the distribution; and
- the distribution of this amount may be made by the insurer, or by the court or other competent authority seized by the insurer in any State Party in which legal proceedings are instituted in respect of claims allegedly covered by the insurance.

Replace The War Risks 7 days Notice, Automatic Termination of Cover Clause in Annex I, Appendix A of the draft guidelines with the following:

War Automatic Termination and Exclusion

1.1 Automatic termination of cover

Whether or not such notice of cancellation has been given cover hereunder shall terminate automatically

1.1.1 upon the outbreak of war (whether there be a declaration of war or not) between any of the following:

the United Kingdom, the United States of America, France, the Russian Federation, the People's Republic of China;

⁽¹⁾ Marsh express a preference for this text in the interests of consistency as it reflects the opening sentence of Article 3.

⁽²⁾ The risks of strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions are covered by P&I insurers: there is no need for claims arising under these headings to be subject to the reduced limitations of the war insurance certificate and are accordingly deleted.

⁽³⁾ This clause along with radioactive contamination, chemical, biological, bio-chemical and electromagnetic exclusion clause and the cyber attack exclusion clause are deemed in the insurance market as clauses paramount. In simple terms, cessation of cover upon the operation of the stipulated situations assumes precedence over any other circumstances and/or cover is not granted under any circumstances for the specified perils.

1.1.2 in respect of any vessel, in connection with which cover is granted hereunder, in the event of such vessel being requisitioned either for title or use.

1.2 Five Powers War

This insurance excludes:

1.2.1 loss of damage liability or expense arising from: the outbreak of war (whether there be a declaration of war or not) between any of the following:

the United Kingdom, the United States of America, France, the Russian Federation, the People's Republic of China; and

1.2.2 requisition either for title or use.

Action requested of the Legal Committee

14 The Legal Committee is invited to take note of the information contained in this document and its annex and to comment and decide as appropriate.

ANNEX

MARSH

Type: Marine

Form: March 91 slip policy

Reassured: XYZ Guarantor as guarantor as specified by the regulations of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002

Period: Losses occurring during the period 12 months from 00.01 hrs at 20 February 2008 or later date to be confirmed.

Limit: The maximum indemnity payable hereunder shall be the amount for which the reassured as guarantor is liable pursuant to the guarantee which is subject always to:

— **250 000 units of account or SDRs per passenger registered as being on board the vessel at the time of the occasion of the incident, the subject of the claim hereon (per Article 3, para 1)**

or

— **USD 500 000 000,**

whichever the lower on each distinct occasion each vessel as required under the guarantee plus costs, expenses and interest in connection with any actual claim or potential claim or recovery.

Conditions: This reinsurance will indemnify the reassured, as guarantor, in respect of liabilities incurred under Athens Convention

The indemnity payable hereunder is contingent upon either

— the exhaustion of limits of underlying war covers arranged for the carrier or the performing carrier, guaranteed by the reassured by virtue of other valid P&I claims having been settled and having eroded limits otherwise disposable for liabilities qualifying for settlement under Athens 2002

or

— the denial of claims under the underlying war covers arranged for the carrier or the performing carrier through the use of a policy defence or the breach of policy terms and/or conditions

plus costs, expenses and interest in connection with any actual claim or potential claim or recovery.

Maintenance of underlying war cover and rights of subrogation due diligence time for payment

Exemptions from liability:

Other than those defences stated in Article 3 of Athens 2002, reinsurers are exempted from liability only under the following conditions:

- War automatic termination and exclusion
- Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Exclusion Clause (CL.370)
- Institute Cyber Attack Exclusion Clause (CL.380)

European Parliament

Financial aspects of the proposal on the liability for carriers of passengers by sea and inland waterways (COM(2005) 592)

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