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To the Athens Correspondence
Group

Dear Correspondents,

Summary of the second round of discussions

It is somewhat reassuring that the Correspondence Group now has entered a phase in which old problems are recycled, and even old submissions redistributed. For those of us that wish to resolve the issues, this means that we are getting there.

After a summary, I will discuss the two issues that have been considered to be the remaining ones, firstly the amount issue and secondly the war/terrorism issue. All Correspondence Group submissions are, as before, available at <http://folk.uio.no/erikro/WWW/corrqr/index.html#NYHET>.

1 Summary

In this correspondence group letter, I am asking the correspondents to comment on the following questions:

1.1 The amount issue

Would the correspondents be interested in discussing a global limit on the liability under the Athens Convention that would reduce the overall catastrophic exposure of the carrier, in order to facilitate the P&I Clubs' continued participation in passenger insurance at sea?

If so, what global limits should apply? (My recommendation is that such a global limit should be discussed.)

1.2 The War/terrorism issue

1.2.1 Total or partial exclusion from the insurance requirements of the Athens convention

There seems to be general agreement that States should make a reservation when ratifying the Athens Convention to the effect

that the State may accept exceptions to the compulsory insurance cover. The issue discussed in this letter is the scope of such exceptions: Should governments apply a general exception from the insurance requirement for all terrorism related damage, or should an exception be made only to the extent that this is necessary (due to the fact that the reinsurance market applies such exclusions). (My recommendation is that an exception should only be made to the extent that reinsurance actually is not available)

1.2.2 Exclusion from liability?

When an exclusion from the insurance requirement is applied (see, above in 1.2.1), should the carrier be exempted from liability to the same extent as the insurance requirement is dispensed with? (My recommendation is that this should be done.)

1.2.3 Not entry into force clause

Would a "not entry into force clause" that professor Lowe has proposed be acceptable? (My view is that this is acceptable.)

1.3 Draft reservation

Are there any comments to the draft reservation clause?

2 The amount issue

The amount issue is the issue of whether the amounts of the Athens Convention are too high to be insured, *i.e.*, too high for the capacity of the reinsurance market. The compulsory insurance requirement for a 3,000 passenger vessel is SDR 750 million or USD 1,082 million.

Given that there are appropriate exclusion clauses for terrorism, chemical weapons, etc, some brokers and underwriters, including those suggested to me by P&I, were consulted on whether reinsurance would be available. The results appear in my 13 May letter. None of them stated that capacity would not be available, and some of them positively stated that it would most likely be available.

The analysis offered by P&I in this respect is that they convey a message from an unnamed source in IUMI that this is not so (P&I submission 6 September). With all due respect, this is neither informative nor helpful.

Even if reinsurance is available, P&I may still not wish to make use of this capacity to offer Athens insurance as a part of their package. There is some risk that the majority of shipowner members of P&I - that have no interest in passenger insurance except from the overall interest in keeping shipowners united in the reinsurance market - will hesitate to engage clubs in passenger insurance of this magnitude.

Governments, on the other hand, are likely to prefer that P&I include passenger insurance in their package. The P&I system is a well tested system, which has proven to be extremely efficient in claims handling after larger accidents. Taking advantage of this system would also save the trouble of trying to get the industry to develop an alternative system of claims handling.

There have been some indications by the P&I industry that it might make it easier for them to participate in the implementation of the Athens convention if a global limit on catastrophic passenger claims were ensured. In my view, such a solution, if acceptable to the governments, could probably work as a compromise solution. Such a global limit, as opposed to a per passenger limit, would only come into play in catastrophic events.

A realistic proposal from the industry for such a global limit, for further discussions in the Correspondence Group, would therefore be most welcome. One would certainly need to make use for the powers under LLMC 1996 to set higher national limits for passenger claims, and the limit would need to be uniform. The previous proposals from P&I in this respect - including the one reiterated in their latest submission - seem not to have been considered by governments because the indicated limits have been way too low.

If the P&I Clubs do not wish to accept this invitation, it would be useful to know as soon as possible.

In their letter 7 October P&I suggests that there is a problem in using the LLMC in passenger claims because LLMC (and the Athens Convention) do not require that all claims against the carrier are brought in the same jurisdiction, and that this will cause delay. (LLMC provides one jurisdiction for all limitation issues (article 11), but leaves the adjudication on the substance of claims to the proper jurisdiction(s) of each claim (e.g. article 17 of the Athens Convention).) It is somewhat unexpected to see such a massive attack on the LLMC from P&I quarters, in particular as this criticism of the LLMC is relevant not only in passenger liability cases, but in all cases subject to limitation. However, in respect of passengers, any delay problems could easily be overcome by requiring advance payments, in line with P&I practice. This is expressly provided for in Article 28 of the Montreal Convention on air carriage. In the Athens negotiations, the issue was raised (LEG 78/3/1, paras 29-34), but one decided not to regulate national law in this respect.

3 The war/terrorism issue

3.1 Introduction

The Athens Convention does neither require insurance coverage nor impose liability on the carrier in respect of damage related to war. In respect of damage caused by terrorism not amounting to war, it requires insurance coverage and imposes liability on the carrier for damage where terrorism is involved only in so far there are also other contributing causes.

The approach discussed at LEG 90 was that States should reserve the right to allow for exceptions from the insurance requirement, by making a formal reservation to this respect when

ratifying the Athens Convention, without reducing the carriers' liability.

The exclusions to be applied in accordance with such a reservation would vary over time as the market develops. There seems to be broad agreement over which exclusion clauses are necessary at the time being, namely

- *Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion*
- *Institute Cyber Attack Exclusion Clause*
- *War Risks 7 Days Notice, Automatic Termination of Cover and War and Nuclear Exclusion Clause*
- A maximum limit per incident, without prejudice to the per capita limit of the Convention, of USD 500 million.

These clauses were first suggested (and set out in details) in my letter 14 May on the basis of consultations with brokers and underwriters. They have later been reiterated in submissions by the UK, P&I and ICS, as far as I can see without dissent. Sweden has, in its submission 27 June, suggested a more restrictive approach, but has not opposed the list as such.

There are, however, a few issues that are still being kept alive:

3.2 Total or partial exclusion?

The approach recommended at LEG 90 was that exceptions to the insurance requirement should not be general, but should only be applied to the extent that it would be necessary because there is no insurance available at the time of issuing the certificate. I think there is a widespread agreement among governments that the exclusions should not be more extensive than strictly necessary. The industry has, however, argued that the exclusion should be general and apply to all terrorism related damage.

P&I argues in their letter 7 September that the 7 days notice period of the war risk insurance (see above in 3.1) makes the available terrorism insurance unfit as a basis for an insurance certificate of one year's duration, and that the exclusion must therefore be general. For my part, I cannot see the problem neither for the issuing state nor for the insurer. The notice clause would be included in the undertaking by the insurer (the Blue Card) and in the Insurance Certificate issued by a State Party on the basis of the Blue Card, and works like any other exception clause. The only special thing about it is that it would make the total terrorism exemption effective only after notice/termination, and not from the beginning. This makes sense: Even if the terrorism part of the insurance can be terminated during the duration of the certificate, this is no reason not to take advantage of it until it actually is terminated.

Professor Lowe, who very helpfully has been brought in by the P&I clubs, argues that if terrorism is not totally excluded from the insurance requirement, there may be litigation to determine

which exclusion clauses the market conditions necessitate. I believe this to be a misunderstanding. It will be for the States Parties to make use of the exclusion when issuing certificates as well as when controlling certificates, thus allowing passenger vessels to trade without insurance cover for certain types of incidents. This does not have the effect that where the insurance policy does not cover certain terrorism related acts, the courts may widen the scope of the insurance contract. The Convention simply does not vest this power neither in the courts of the issuing State Party nor in the courts of any other State Party.

If one is in doubt that it is for the governments of the States Parties, and not for the courts, to determine which exemption clauses are necessary, one could easily clarify this in the reservation clause. One way of doing this is to state expressly that it is for the State Party that issue certificates *in its discretion* to determine which exclusion clauses the insurer can include.¹

It is in all events hard to see which legal actions Professor Lowe had in mind. The insurer would in any event not be liable beyond his commitment due to the express wording of Article 4bis (10) (there is direct action only when the claim is "covered by insurance"). And if a port state is dissatisfied with the extent of the insurance of a foreign ship, Article 4bis (9) provides that the proper procedure is to contact the State Party that has issued the certificate, and not rise action against the shipowner. Professor Lowe has not commented on neither of these provisions, and may have overlooked them.

A third argument, which has been implicit in some statements, is that total exclusion of terrorism related claims is necessary in order to obtain uniformity. I do not think so, for two reasons: First of all, because there is no accepted definition of terrorism, and an exclusion of terrorism in itself therefore could not possible create uniformity. And second, because the uniformity in this respect to a large extent will be maintained by the insurance market (and hopefully, the P&I clubs): They will offer the same insurance all over. In any event, it is difficult to see why uniformity is so important that it should keep us from taking advantage of the insurance that is actually offered in the market.

In conclusion, it seems to be difficult to argue that it is necessary to create a general exclusion from the insurance requirement for all terrorism related damage. Therefore, for the benefit of the victims one should make use of the insurance actually available in the market at any given time, even in respect of terrorism-related incidents.

3.3 Carrier's liability

The liability issue concerns whether the carrier should be exempted from liability to the same extent as the insurance requirement is dispensed with. Under the convention the carriers are in any event exempted from liability for damage caused by terrorism that amounts to war, and for other damage where terrorism is involved unless there is also a contributory cause

¹ See drafting below in 4.

other than terrorism for which the carrier is answerable under the other liability rules of the convention. It does not matter whether the contributory cause is a small error or a huge mistake.

The industry has made the argument that the nature of this risk is so that it should be carried by governments or passengers rather than shipowners, and it is argued that this already is established policy. Furthermore, it is argued that even if the carrier is made liable, this will not necessarily give the passenger a maritime lien, and that maintaining liability on the carrier to preserve the maritime lien should be abolished altogether for that reason. In any event it is argued that the banks should have priority over terrorist victims in respect of the benefits of the value of the vessel after the incident; a value which could otherwise perhaps have been secured for the victims by means of a maritime lien.

No particular insurance aspect of this issue has been argued, but the clubs support their members in this issue.

For my part, I am not entirely convinced that the carriers have got the priorities right here, and I know that at least some governments strongly share this view. Likewise, this had not been an issue had the government policy already been settled.

Still, it may be wise not to press this issue, which appears far more important to shipowners than to governments. Perhaps the better approach would be to signal that carriers could be relieved from liability to the same extent as the insurance requirement is waived if - and only if - the clubs can offer an acceptable insurance package in the very near future?

I would appreciate comments to the following question: Would it be acceptable to governments that carriers could be relieved from liability to the same extent as the insurance requirement is waived if the clubs then would offer the necessary insurance?

3.4 Not entry into force-clause

Professor Lowe has proposed a clause that states that no part of the Athens Convention - whether related to the terrorist and insurance issues or not - will enter into force between a State party that has made the reservation and one that has not. I see no problems with this. It is under any circumstances unlikely that a State will ratify without the reservation clause.

4 Drafting

In line with the above conclusions, I have revised the draft reservation clause. The amalgam of the two main proposals which I attempted earlier is abolished, as some found it unclear. The Non entry into force-clause has been added, and some words indicating that it would be for the Issuing State, and not for the courts, to determine whether the state of the insurance market would require an exemption clause. (The discretion of the Issuing State is, of course, *in fact* limited by what is actually

available in the market.) Furthermore, a clause relieving carriers of liability has also been added. Except for this, the clause has been split up into smaller parts in order to be more easily accessible.

"The Government of ... reserves its right to issue insurance certificates with such exceptions and limitations as it finds that the insurance marked conditions at the time of issue of the certificate necessitate, and to accept insurance certificates issued by other States Parties issued pursuant to a similar reservation.

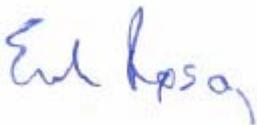
Such insurance market conditions may include the biochemical clause and terrorism related clauses. The providers of financial security should not be exposed to liability in disregard of the exceptions and limitations under which they have committed themselves.

Such exceptions and limitations will be clearly reflected in the certificate. The right retained by this reservation will be exercised with due regard to guidance by relevant bodies with an aim to ensure uniformity.

[The Government of ... further reserves the right not to make carriers and performing carriers liable under the Convention to the same extent as the insurance requirement is dispensed with.]

The Consent of the Government of... to be bound by the Convention is conditional upon other States parties making 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 the same reservation."

Regards,

Handwritten signature in blue ink, appearing to read "Erik Hpsa".