

**Subject:** Compromise for LEG 92

**From:** Erik Røsæg

**Date:** Fri, 15 Sep 2006

**To:** Athen-korrgr

Dear Correspondents,

Attached you will find copies of two documents for LEG 92 that were handed in to IMO today.

The paper submitted by UK, Norway ICS and ICCL can hopefully form basis for a broad agreement on Athens at LEG 92. It is based on the Norwegian submission 11 August and is intended to replace it. Rather than relying of global limitation, it caps liability for terrorism related claims to SDR 250,000 per passenger and USD 500 million per ship.

P&I has bee consulted in the drafting, and there are reasons to believe that a satisfactory solution to the terrorism insurance problem has now been found.

The other paper is drafted by Marsh, Ltd, and provides a sample slip, a price estimate and other details of the war insurance arrangements.

Regards,  
Erik Røsæg

**Submitted by the United Kingdom, Norway, ICCL and ICS**

**SUMMARY**

**Executive summary:** The proposals in this paper utilise the capacity in the war risk insurance market and reduce carriers' maximum limit of liability. The proposals use the same solution (through a London Broker,) as that contained in the Correspondence Group paper (LEG92/5[ ]) to provide insurance, certification and the right of direct action, but limits liability to a capped amount so that carriers are not exposed to uninsured risks under the 2002 Convention. These changes are being proposed in order to appeal to the widest possible range of interested parties.

**Action to be taken:** The Committee is invited to consider the text of the proposed amendments to the Reservation and endorse the recommendations at paragraph 11 of this document.

**Related documents:** LEG 91/4/1, LEG 91/12, LEG 92/5/[ ]

**Introduction**

1. The Legal Committee has sought a solution to the long standing problem of how best to provide insurance cover for terrorism related incidents arising under the 2002 Athens Convention.
2. Carriers have argued for an exemption from liability for claims relating to acts of terrorism on the grounds that they are not liable for damage caused by an act of war under Article 3 of the 2002 Athens Convention and should not, therefore, be held liable for damage related to acts of terrorism. More recently, carriers have sought a solution whereby they are not exposed to liabilities they cannot insure.
3. The continued discussions regarding insurance to cover acts of terrorism has to date prevented P&I Club Boards from deciding on the provision of P&I insurance in respect of carriers' non war liabilities. It is, therefore, imperative that at its 92<sup>nd</sup> session the Legal Committee is able to agree a formula that will solve these problems so as to facilitate the entry into force of the 2002 Athens Convention.

**Issue**

4. At its 91<sup>st</sup> session the Legal Committee considered, *inter alia*, 4 options set out in paper LEG 91/4/1 submitted by Norway. The Committee concluded that it should give no further consideration to the fourth option contained in that paper, namely, to exclude carriers from liability and insurance requirements for acts of terrorism (LEG 91/12, paragraph 143 reflects this decision). The Committee did not, however, rule out a partial exclusion of liability, particularly a solution that would enable shipowners to align and limit their liability to an amount available in the war risk insurance market. This document, therefore, sets out a variation of the draft reservation in paper LEG 92/5/[ ] submitted by Norway.

5. Paragraph 1.4 of the draft reservation in paper LEG 92/5 sets out proposals to apply (for claims met by war insurance<sup>1</sup> only) a lower limit of liability consistent with the global limits established by article 7.1 of the Convention on Limitation of Liability for Maritime Claims, as amended by the Protocol of 1996. This partly meets carriers' and insurers' concerns as it will have the effect of limiting liability to SDR 175,000 multiplied by the number of passengers the ship is licensed to carry: it does not seek to limit passenger claims to a per capita limit of SDR 175,000. However, the proposal brings with it a potential risk that in incidents involving substantial passenger casualties on large capacity ships, carriers will be exposed to liabilities that will exceed the total amount of war insurance available.

6. The proposal in this paper seeks to resolve the practical and legal difficulties encountered by carriers and their insurers and aims to meet the main policy objectives of Governments by offering passengers, in relation to acts of terrorism, financial security up to the 2002 Athens Convention compulsory insurance limit of SDR 250,000 subject to a cap of USD500 million (SDR 338 million). This insurance is reserved for passenger claims only. Other claims such as crew claims, pollution and collision damage arising from the same incident will be met by the carrier's P&I or war insurance.

### **Purpose of the draft Reservation**

7. The Reservation aligns liability with insurance. To achieve this outcome the Reservation below provides for Governments to undertake to:

- a. limit the liability of carriers (and consequentially, of insurers) for terrorism losses to a figure of whichever is the lower of 250,000 units of account per passenger or USD 500 million overall per ship (this figure is reserved solely for passenger claims);
- b. require insurance cover for that amount in accordance with paragraph 1 of Article *4bis* of the 2002 Convention;
- c. require certification of the existence of that cover in accordance with paragraph 2 of Article *4bis* of the 2002 Convention;
- d. require acceptance of certificates issued by other States Parties on a similar basis; and
- e. provide that the Guidelines may be amended by the Legal Committee to adapt to changing insurance markets.

### **Capping Proposal**

8. Capping total exposure to a maximum of USD500 million ensures cover for 1,350 passengers based on the premise that each passenger claims and actually receives the 2002 Athens Convention compulsory insurance maximum. If claims were to exceed the capped limit of USD500 million the available funds would be distributed equitably in accordance with paragraph 2.2.2 of the Guidelines.

### **Compliance with Article *4bis***

9. In order that a shipowner can comply with paragraph 1 of Article *4bis* the insurer is required to issue a certificate of insurance or guarantee of financial security (the "Blue Card"). The "Blue Card" in respect of terrorism is separate from, and in addition to, the "Blue Card" issued by the carrier's P&I insurer covering his non war liabilities. Both "Blue Cards" will be

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<sup>1</sup> The term "war insurance" is used to differentiate between insurance cover for terrorism damage and insurance for damage from non terrorism related incidents. The term does not imply liability for damage caused by an act of war at paragraph 1(a) of Article 3.

necessary to enable States Parties to issue a certificate attesting that insurance is in place in accordance with paragraph 2 of Article 4bis of the Convention. It will continue to be the case that, under paragraph 12 of Article 4bis, a carrier operating under the flag of a State Party will not be able to operate without a certificate issued under paragraph 2 of Article 4bis. The insurer will also continue to be the focal point for claimants, as claimants may exercise their right of action directly against the insurer in accordance with paragraph 10 of Article 4bis.

### **Relationship between Reservation and Guidelines**

10. The Guidelines consist of two sections: (1) contains the text of the recommended Reservation, (2) contains more detailed information on the implementation of the Reservation, including technical details regarding insurance clauses and exemptions.

### **Conclusion**

11. The Committee is invited to:

1. consider the merits of the proposal to align liability with insurability and if it agrees
2. endorse the proposed draft Reservation and Guidelines below.

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## **IMO RESERVATION AND GUIDELINES FOR IMPLEMENTATION OF THE ATHENS CONVENTION**

1 The Athens Convention should be ratified with the following reservation clause or a reservation 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 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 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
- USD 500 million 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 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 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
  - USD 500 million 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 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 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
  - to 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 Implementation of the Athens Convention*

- 1.13 The rights retained by this reservation will be exercised with due regard to the IMO Guidelines for Implementation of the Athens Convention with an aim to ensure uniformity. If a proposal to amend the limits referred to in paragraph 1.2

or to amend the IMO Guidelines for Implementation of the Athens Convention has been approved by the Legal Committee of the International Maritime Organization, those amendments will apply accordingly; 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 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

2.2.2 In the event the claims of individual passengers exceed in the aggregate the sum of USD 500 million (about SDR 338 million) per ship on any distinct occasion, the carrier shall be entitled to invoke limitation of his liability in the amount of USD 500 million, always provided that:

- 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.

- 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 Organization.
- 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.

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15 September 2006  
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**Technical amendments and explanatory notes to the Guidelines on the provision of financial security for the 2002 Athens Convention**

**Submitted by Norway**

**SUMMARY**

<b><i>Executive summary:</i></b>	This paper, 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 ensures Carriers are able to obtain cover for their liabilities in relation to acts of terrorism under the 2002 Athens Convention. It also clarifies some of the terms used in the Guidelines on the provision of financial security in papers submitted by Norway and the United Kingdom LEG/92/5[?] and LEG 92/5[?] respectively.
<b><i>Action to be taken:</i></b>	The Legal Committee is invited to consider the information in this paper and amend the Draft Guidelines (Paragraph 13)
<b><i>Related documents:</i></b>	LEG 91/4/1, LEG 91/12, LEG 92/5/[ ]

**Introduction**

1. Marsh Limited (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 2002 Athens Convention. At its meeting in April 2006 the Legal Committee concluded that it should not exclude carriers from liability for damage related to terrorism. But in doing so 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 92<sup>nd</sup> meeting.

**Insurance Product**

2. Marsh is pleased to be able to confirm that it has negotiated with lead [London] underwriters to underwrite the insurance product that will enable carriers to obtain the Blue Cards as demanded by Article 4bis of the 2002 Athens Convention. An outline of the Reinsurance proposed by Marsh is attached at Annex I. 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 2002 Athens 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 Oil Pollution Act 1990 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 2002 Athens 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 4 bis of the 2002 Athens 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 only to use 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 (24/7/2001).

8. In the same way that there is concern that the series of storms experienced in 2005 might be repeated, the War & 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 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 costings 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 US\$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 the 2002 Athens Convention.

12. Reinsurers have agreed to replace the text of the War Cancellation clause in LEG92/5[?] 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 in LEG 91/5/ of 11<sup>th</sup> August 2006 can be effected. Further, if the United Kingdom's paper LEG/92/5/? is 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:<sup>1</sup>

- 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 detention, and the consequences thereof or any attempt thereat,
- derelict mines, torpedoes, bombs or other derelict weapons of war,<sup>2</sup>
- 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<sup>3</sup>

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
- 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:

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

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<sup>1</sup> Marsh express a preference for this text in the interests of consistency as it reflects the opening sentence of Article 3.

<sup>2</sup> 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.

<sup>3</sup> 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 damage liability or expense arising from

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

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

1.2.2 requisition either for title or use.

**ANNEX I**

**MARSH**

TYPE: MARINE

FORM: MAR 91 SLIP POLICY

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

PERIOD: Losses Occurring During the period 12 months from 0001 hrs at 20<sup>th</sup> 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**

- **US\$ 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)