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92nd session
Agenda item 5

LEG 92/5/3
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PROVISION OF FINANCIAL SECURITY

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

Submitted by the United Kingdom, Norway, the International Council of Cruise Lines (ICCL) and the International Chamber of Shipping (ICS)

SUMMARY

Executive summary: The proposals in this document utilize 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 document (LEG 92/5, submitted by Norway), to provide insurance, certification and the right of direct action, but limit liability to a capped amount, so that carriers are not exposed to uninsured risks under the 2002 Athens Convention. These changes are being proposed in order to appeal to the widest possible range of interested parties

Action to be taken: Paragraph 11

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 have, 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 ninety-second 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.

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Issue

4 At its ninety-first session the Legal Committee considered, *inter alia*, four options set out in document 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 (document 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 (at annex) a variation of the draft reservation in document LEG 92/5 submitted by Norway.

5 Paragraph 1.4 of the draft reservation in document LEG 92/5 sets out proposals to apply (for claims met by war insurance¹ 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, 1976, 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 document 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:

- (i) 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 USD500 million overall per ship (this figure is reserved solely for passenger claims);
- (ii) require insurance cover for that amount in accordance with paragraph 1 of article 4*bis* of the 2002 Convention;
- (iii) require certification of the existence of that cover in accordance with paragraph 2 of article 4*bis* of the 2002 Convention;

¹ 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.

- (iv) require acceptance of certificates issued by other States Parties on a similar basis; and
- (v) 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 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: section 1 contains the text of the recommended reservation and section 2 contains more detailed information on the implementation of the reservation, including technical details regarding insurance clauses and exemptions.

Action requested of the Legal Committee

11 The Legal Committee is invited to consider the merits of the proposal to align liability with insurability and, if it agrees, to endorse the proposed draft reservation and guidelines attached at annex.

ANNEX

**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 the 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
- USD500 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 4*bis* 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
- USD500 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 USD500 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 USD500 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 ratification, approval acceptance or accession.
