

Subject: Athens Correspondence Group (IMO Legal Committee):
Submission to LEG 91
From: Erik Røsæg <erik.rosag@jus.uio.no>
Date: Tue, 13 March 2006
To: Athen-korrgr <nifs-athens@jus.uio.no>

Dear Correspondents,

Please find attached the Athens papers as submitted to the Legal Committee today.

There has been a request for another intersessional meeting, and **we are happy to invite all interested parties to Oslo Tuesday, 28 March 2006 1-4 pm**. Please indicate whether this would be of interest as soon as possible, and not later than 21 March.

Regards,
Erik Røsæg

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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

Athens Convention – remaining issues

Submitted by Norway

SUMMARY

Executive summary: Proposal for implementation guidelines for the Athens Convention, 2002.

Action to be taken: The Committee is invited to adopt the Implementation Guidelines pursuant to the proposal.

Related documents: LEG 91/4/B, LEG 91/4/C

Introduction

1 This paper is submitted with the aim to promote a suitable basis for discussion, so that the Athens issue can be finalized at the 91st session of the Legal Committee as a matter of urgency.

2 Two key issues need to be resolved before the Athens Convention 2002 can enter into force. One concerns the ability of the insurance markets to provide compulsory insurance cover up the general limits set out at Article 4bis of the Convention up to a maximum of 250,000 SDR per capita, per incident (the “amount issue”). The other concerns the ability of the insurance markets to provide the very limited insurance cover for terrorism required under the Convention (the "war risk issue").

3 The provision of insurance cover on the terms set out in the Convention – including direct action – to meet the carrier's liability will be a precondition of trade applied by States Parties under Article 4bis of the Convention. The Convention also requires States to issue certificates as proof that insurance or other financial security is in place.

4 In response to industry concerns about liability and insurance cover, States and industry in collaboration with the Correspondence Group has developed a draft reservation. Its purpose is to reduce industry concerns about biochemical and terrorism related matters and establish a uniform framework that will apply to States Parties. In April 2005, the Legal Committee, and in December 2005 the IMO Assembly¹, has recommended that the Athens Convention 2002 should be ratified with the reservation that the adaptations that are necessary

¹ LEG 90/15, para 355 et seq. and Assembly Resolution A.988(24).

to obtain the required insurance should be accepted. These limits and exemption clauses are currently:

- *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*²

Will insurance cover be available?

5 Given the exemptions set out above, it is believed that the required insurance cover will be available in the market. War risk insurance is however currently available to shipowners only at a level below the level required by the Convention. A figure of USD 400 million per incident has been suggested as a sustainable figure.

6 At the request of the industry, some provisions have been made for the distribution of this amount between established claims ("limitation procedure;" see point 2.2.1 in the Annex), although such provisions are not common in insurance contracts with limits. States that have LLMC type rules would use this, as the LLMC procedure will apply to the direct claim against the insurer (the figure however being determined by the insurance contract). In other states, LLMC could be used as a model.

Industry Organization of Capacity for War Risks

7 The P&I clubs have stated that they would not like to be involved in war risks insurance in this context.

8 At a meeting held in London on 1 February, 2006 between war risk underwriters, representatives of the P&I Clubs, the UK and Norwegian Governments, a discussion was held to discuss how best the industry could organize the war risk cover required for the operation of the Athens Convention. Industry helpfully agreed further to explore the possibility of organizing the currently available war risk insurance in such a way as to establish an entity similar to the P&I Clubs that could act as the provider of insurance cover. It is envisaged that this entity could issue a financial guarantee *only in respect of the war risk part of the insurance*, and be 100% reinsured in the war risk market. This would enable States to issue certificates as required under Article 4bis. This proposed arrangement is very similar to the process used to issue Certificates of Financial Responsibility (COFRs) under the US Oil Pollution Act, 1990 (OPA 90), but with no P&I involvement.

9 The Athens Convention allows for the State Certificate to be issued on the basis of more than one insurance policy (more than one "Blue Card"). Each insurer would only be liable up to the limit of his or her insured risk and only for the risks insured by him or her.

10 In order to provide an arrangement for certification under the Athens Convention in respect of all risks that can be covered under the available war risks insurance the entity acting as the focal point could be set up, *i.e.*:

- by a broker;

² See further to this and the following the Correspondence Group exchanges at <http://folk.uio.no/erikro/WWW/corrgr/index.html#NYHET>. The clauses are reproduced in a separate document, LEG 91/4/B.

- as an extension of business of the entities that presently provide COFRs under the US OPA 90 (such as SIGCo, <http://www.cofr.com/>);
- by the P&I Clubs, provided that this would be provided as a service to their members with no financial involvement whatsoever by the Clubs;

11 These options are currently being explored by underwriters and insurers. If the outcome of discussions within the market is successful it would resolve the organizational aspects of the war risk issue.

Industry Organization of Capacity for Non-War Risks

12 One can expect that the P&I Clubs will issue Athens certificates when war risks are kept out. This should not be taken for granted, however, as the Club boards will need to approve these proposals and the majority of shipowners do not operate passenger ships. The main concerns expressed are:

- A need for certainty that the exemptions of the clubs included in their Blue Card, which are also inserted in the insurance certificate, will be respected in actions under the Convention;
- A need for certainty that governments will apply a uniform policy in respect of which exemptions will be accepted;
- That the commercial parties should be exempted from liability to the same extent as compulsory insurance is not required.

13 The two first bullet points should be fairly easy to accommodate, as the desire for clarity and uniformity is equally great in government and industry quarters. The third bullet point – on carrier’s liability – is a matter which must be addressed and agreed upon at this session of the Legal Committee.

14 The Resolutions referred to in para 4 above do not explicitly allow reservations in respect of carrier’s liability, but do not disallow them either.

15 In respect of carrier’s liability, the text is drafted in four options. The greatest concern has been that carriers could be made liable for the effects of terrorism because of a minor error in the carrier’s preventive measures. A possible compromise could therefore be that carriers and their agents should not be made liable beyond the mandatory insurance cover unless they actually have caused the damage (option 2). Intersessional work has, however, clearly indicated that Governments do not wish to relieve the carrier of liability.

16 The options on carriers' liability for terrorism related incidents are made on the basis that such situations are *not* excluded from the scope of the Convention. If this were to be excluded from the scope of the convention, it would mean that it is left to national law.

The draft

17 The drafting (in a separate paper) is based on the discussions in the Correspondence Group and informal input. It has not been possible to take into consideration the drafting style preferred by all potential States Parties, as opinion on this varies.

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

Athens Convention – draft Implementation Guidelines

Submitted by Norway

SUMMARY

Executive summary: Draft Implementation Guidelines to the Athens Convention

Action to be taken: The Committee is invited to adopt the draft Guidelines.

Related documents: LEG 91/4/A, LEG 91/4/C

Draft resolution

THE LEGAL COMMITTEE,

ADHERING to the principle that Conventions negotiated under the auspices of the organization should be implemented without reservation;

RECOGNIZING however that the current condition of the insurance market necessitate some reservations to the Athens Convention, 2002, in order to bring it into force;

BEARING IN MIND Assembly Resolution A.988(24) concerning a Reservation Concerning the Issue and Acceptance of Insurance Certificates with Special Exceptions and Limitations;

DESIRING to promote uniformity;

RECOMMENDS that States ratify and implement the Athens Convention, 2002, pursuant to the enclosed Guidelines, which may be revised by the Legal Committee, or the Assembly, from time to time.

Annex [to draft Resolution]

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] Declaration in connection with the ratification of the Government of ... of the Athens Convention Relating to Carriage of Passengers and Their Luggage by Sea, 2002 (“the Convention”).

[1.2] The Government of ... reserves its right to issue insurance certificates under Article 4bis of the Convention 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.

[1.3] Such exceptions and limitations will be clearly reflected in the Certificate issued or certified under Article 4bis of the Convention. The right retained by this reservation will be exercised with due regard to guidance by relevant bodies with an aim to ensure uniformity.

[1.4]

Opt 1	[No provision – full carrier’s liability pursuant to the Convention]
Opt 2	The Government of ... further reserves the right to and undertakes not to make carriers, performing carriers and their servants or agents liable under Articles 3 and 4 of the Convention to the same extent as the insurance requirement is dispensed with or the insurance cover lawfully withdrawn <i>unless any of these parties or their servants or agents have [made a major contribution to the damage] [acted with gross negligence].</i>
Opt 3	The Government of ... further reserves the right to and undertakes not to make carriers, performing carriers and their servants or agents liable under Articles 3 and 4 of the Convention to the same extent as the insurance requirement is dispensed with or the insurance cover lawfully withdrawn.
Opt 4	[Full exclusion of carrier’s liability and insurance requirements for terrorism-related incidents according to some definition of terrorism.]

[1.5] The Consent of the Government of... to be bound by the Convention is conditional upon other States parties making and maintaining the same reservation and undertaking. 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 and undertaking.

[1.6] The Government of ... interprets Article 4bis of the Convention so that a provider of financial security cannot be held responsible under the Convention for liabilities for which it has not undertaken to be liable.”

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. Each part should cover the following (the clauses referred to are set out in Appendix A):

2.1 “Non-war insurance” should cover the liabilities of a provider of financial security under the Convention with the exemptions set out in the following clauses:

- 2.1.1 *Joint Excess Loss Committee Terrorism Exclusion Clause;*
- 2.1.2 *Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion Clause (Institute clause no. 370); and*
- 2.1.3 *Institute Cyber Attack Exclusion Clause (Institute clause no. 380)*

2.2 “War insurance” should cover the liabilities of a provider of financial security under the Convention except what is covered by Non-war insurance, subject to the following exemptions and exemption clauses:

- 2.2.1 The liability per incident shall not exceed USD 400 million (about SDR 280 million) that should, at the request of the liable party, be distributed

proportionally among all established claims by a Court or other competent authority in a State Party in which relevant legal proceedings under this Convention are instituted;

- 2.2.2 *Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion Clause* (Institute clause no. 370);
- 2.2.3 *Institute Cyber Attack Exclusion Clause* (Institute clause no. 380) ;
- 2.2.4 *War Risks 7 Days Notice, Automatic Termination of Cover and War and Nuclear Exclusion Clause*, on the conditions that
 - 2.2.4.1 notice should be copied to the State Party that has issued the Insurance Certificate
 - 2.2.4.2 notice under the clause shall not affect the compulsory insurance cover to the extent the insurance cover is continued under new terms, e.g., an increased premium

3. An example of a set of insurance undertakings ("Blue Cards") and an insurance certificate, all reflecting these guidelines, is included in Appendix B.³

4. A State Party should not issue certificates on another basis than set out in paragraph 2 unless the matter first has been raised in the Legal Committee of the Organization.

5. States Parties should implement the Convention in accordance with these Guidelines pursuant to their tradition, bearing in mind:

5.1 States Parties that implement the Convention by incorporation of its text into their law should also incorporate these Guidelines, as amended, and the declaration made at ratification.

5.2 States Parties that will implement the Convention by transformation into national legal instruments should

5.2.1 leave discretion to the entities that issue certificates to follow any revised version of these Guidelines.

5.2.2 in the transformation of Article 3 of the Convention into a national legal instrument, consider to join paragraphs 1 and 2 with the following addition:

"However, the exemptions and limitation made available to the provider of financial security under Article 4bis only by a special provision in the Insurance Certificate may also be invoked by the carrier [unless the acts or omissions of the carrier, the performing carrier or any of their servants or agents *have [made a major contribution to the damage] [acted with gross negligence]*]."

The text in this point 5.2.1 is dependent on the option selected in 1.4 above.

5.2.3 in the transformation of Article 17 of the Convention into a national legal instrument, consider to add the following:

"When liability is limited per incident, the procedural rules for limitation of shipowners' liability apply *mutatis mutandis*."

³ Here, the examples are reproduced in a separate document, LEG 91/4/C

APPENDIX A

[The clauses below are referred to in the draft Guidelines. They are used in the insurance market, and as such not subject to redrafting in this context.]

Joint Excess Loss Committee Terrorism Exclusion Clause

(16/11/01, XL 2001, 002)

This Contract excludes any loss, damage, liability or expense arising from:

- (a) terrorism; and or
- (b) steps taken to prevent, suppress, control or reduce the consequences of any actual, attempted anticipated, threatened suspected or perceived terrorism.

For the purpose of this clause, “terrorism” means any act(s) of any person(s) or organisation(s) involving:

- (i) the causing, occasioning or threatening of harm of whatever nature and by whatever means;
- (ii) putting the public or any section of the public in fear;

in circumstances in which it is reasonable to conclude that the purpose(s) of the person(s) or organisation(s) concerned are wholly or partly of a political, religious, ideological or similar nature.

Institute Radioactive Contamination, Chemical, Biological, Bio-Chemical and Electromagnetic Weapons Exclusion Clause

(Cl. 370, 10/11/2003)

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

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. ionising radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel
2. the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof
3. any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter
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
5. any chemical, biological, bio-chemical, or electromagnetic weapon.

Institute Cyber Attack Exclusion Clause

(Cl. 380, 10/11/03)

1. Subject only to clause 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 programme 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 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.

War Risks 7 Days Notice, Automatic Termination of Cover and War and Nuclear Exclusion Clause

Notwithstanding the provisions of Owners' Policies this insurance is subject to the Notice of Cancellation and Automatic Termination of Cover Clause as follows:

- (i) Cover hereunder in respect of War Risks, etc may be cancelled by either the Underwriters or the Assured giving 7 days notice (such cancellation becoming effective on the expiry of 7 days from midnight of the day on which Notice of Cancellation is issued by or to the Underwriters). The Underwriters agree however to reinstate this insurance subject to agreement between the Underwriters and the Assured prior to the expiry of such notice of cancellation as to new rate of premium and or conditions and or warranties.
- (ii) Whether or not such notice of cancellation has been given cover in respect of war risks etc shall TERMINATE AUTOMATICALLY.
 - (a) upon the outbreak of war (whether there be a declaration of war or not) between any of the following countries: United Kingdom, United States of America, France, the Russian Federation, the People's Republic of China
 - (b) 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.
- (iii) This insurance excludes
 - (a) 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
 - requisition either for title or use
 - (b) loss damage liability of expenses directly or indirectly caused by or arising from:
 - ionizing radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel.
 - the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof
 - any weapon of war employing atomic or nuclear fission and/or fusion or other reaction of radioactive force of matter.

Cover in respect of the risks of war, etc., shall not become effective if, subsequent to acceptance by the Underwriters and prior to the intended time of attachment of risk, there has

occurred any event which would have automatically terminated cover under the provisions of this Clause.

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

Athens Convention – draft Appendix B to the draft Implementation Guidelines (Examples of Blue Cards and Filled-In Insurance Certificate)

**Submitted by Norway
under the lead country procedure**

SUMMARY

Executive summary: Draft Appendix B to the draft Implementation Guidelines.

Action to be taken: The Committee is invited to adopt the Appendix B to the Implementation Guidelines pursuant to the proposal

Related documents: LEG 91/4/A, LEG 91/4/B

This document provides example insurance documentation pursuant to the Implementation Guidelines for the Athens Convention, 2002. The two first documents are Blue Cards, i.e. undertakings by insurers to Governments. Governments – or an entity authorized by them – issue the third document – the insurance certificate – on the basis of such Blue Cards.

[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 war insurers under the Convention and the Implementation Guidelines adopted by the Legal Committee of the International Maritime Organization in April, 2006.*

Period of insurance from:
to: 20 February

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:

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 Organization in April, 2006.*

Period of insurance from:
to: 20 February 200...

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 Organization in April, 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
 organization)

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.
