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Dear Erik,

Athens

Before making suggestions for possible solutions I should explain the nature of our concern, for the benefit of the Correspondence Group.

The problems in implementing the Athens Protocol which arise from the contraction of the insurance market following 9/11 are, in our view, threefold:

i. The ability of States to issue certificates is compromised because insurance cover is not available to cover liabilities arising under the Convention.
ii. Because of the direct action provisions insurers have a direct liability for which no insurance cover exists.
iii. Passenger carriers also have a liability for which no cover is available.

The third issue will be taken up in the Correspondence Group and we shall look forward to taking part in that debate. However, it is not our intention to deal with that issue here. The first issue may have been addressed by the reservation approach which was agreed at last week's meeting of the Legal Committee. However, the second issue, insurer's liability, remains outstanding and our purpose in this letter is to explain our concern.

This concern can be simply stated. The liability of the insurer is set out in Article 4bis, in particular paragraph 10, which provides "Any claim for compensation covered by insurance or other financial security pursuant to this article may be brought directly against the insurer or other person providing financial security." The basis of the insurers' liability is contained in the main body of the Convention rather than the Certificate. The purpose of the Certificate

is not to define the extent of liability but to provide a mechanism to verify that insurance in place and to identify the insurer who can be sued under Article 4bis.

The resolution which was agreed at last week's meeting of the Legal Committee does not address the issue of liability since it deals only with the issue of certification. As a consequence the insurer's liability remains as stated in the Convention: the claimant's lawyer would not proceed on the basis of the certificate but on the provisions of the Convention itself as implemented in the law of the relevant jurisdiction. In this connection it may be worth recalling that the certificate is not issued to the individual passenger but to each ship (Art 4bis paragraph 2). It follows therefore that there are strong grounds for the claimant to argue that the insurer remains liable under the Convention regardless of the qualifications expressed in the certificate since, merely by providing financial security, the insurer is made liable under the Convention itself for "any claim" including that of terrorism. It should be borne in mind that such an argument will be determined by the court in the heightened atmosphere of sympathy following a tragic incident in which lives have been lost.

Since the potential exposure under Athens is so great, insurers must be confident that their position is clearly understood not only in the Legal Committee or at the IMO Assembly but also in the courts of all relevant jurisdictions. If insurers are to provide evidence of qualified underlying insurance to enable states to provide qualified certification, you will appreciate that they will also need to be certain that their direct exposure to the claimant has been similarly qualified.

Our concern can be illustrated by reference to CLC. Claims by persons who have suffered pollution damage are brought on the basis of Article VII.8 of CLC. Claimants can and do bring claims without making any reference to the Certificate.in their pleadings.

It follows that an accommodation must be found in order to bring the Convention into force and to this end two possible solutions are addressed below:

a) If Article 3.1.a. could be read as also excluding liability for terrorism then the problem would be greatly reduced (although the problem of terrorism in relation to Article 3.2 would still exist), but this route is now closed since presumably it would require a new decision from the Legal Committee.

b) The Correspondence Group is charged with the task of drafting a common reservation clause and it is suggested that suitable additional provision could be made in order to address the issue. The following wording is suggested:
"The Government of reserves its right for as long as insurance market conditions necessitate to issue and accept insurance certificates required under Article 4bis.1. with such exceptions and limitations as those market conditions necessitate at the time of issue of the certificate and to provide in its implementing legislation that the liability of the insurer under the Convention shall also be subject to the same exceptions and limitations. The rights retained by this reservation shall be exercised with due regard to guidance developed by the Legal Committee of the International Maritime Organization and with the aim of ensuring uniformity."

If all States party implement the Convention with the above reservation then the problem of the insurer's liability may have been adequately addressed. However, if one State ratifies or accedes without the commonly agreed reservation or fails to implement in line with the reservation then the problem recurs since, given the broad scope of the jurisdiction provisions in the Convention

(Article 17) it will generally be possible to bring an action in a jurisdiction which would be more favourable to the claimant. Thus, if only one State fails to implement with the agreed reservation then insurance cover would have to be withdrawn generally.

It is recognized that some might object that the terms of reference of the Correspondence Group do not extend as far as developing provisions regarding implementation since the language of the first operative paragraph of the agreed Resolution is restricted to the issue of certificates. However, we believe that this view is unduly pedantic given that both limbs of the reservation are tied to the condition of the market. If this cannot be accomplished we find it difficult to envisage an alternative solution but will look forward to the comments and suggestions of others.

I hope these suggestions are helpful and look forward to further discussion within the Correspondence Group.

Yours sincerely,

D.J.L. Watkins

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Dear Lloyd,

Club exposure under reservation clauses

Thank you for your letter yesterday on the Athens Convention. I think we all agree that it is important that insurers feel confident that Governments actually are able to carry through their intention that Athens insurance should be subject to certain limits and exclusions in addition to those expressed in the Convention. However, I must say that I do not feel there is any reason for concern.

I

The reason for your concern is perhaps that you started in the wrong end. The starting point in respect of the effect of reservation clauses is the principle of the Vienna Convention on the Law of Treaties http://www.un.org/law/ilc/texts/treaties.htm, article 21(1), which states that a reservation has the same effect as a modification of the treaty. Thus the reservation technique will not expose providers of financial security to a greater extent than if the text of the Convention had been altered at the Diplomatic Conference. And I think we agree that a modification of the insurance obligation at that stage would have been satisfactory even for the most prudent insurer.

The new wording of the reservation clause I submitted to you last week makes it clear that the intention of Governments is not only to relax certification, but also to modify the exposure

of the insurers. Hence, the Convention must be considered modified in this way.

If a State Party does not take the reservation, the reservation will still apply if that State accepts the reservations of other States Parties (art 20(1)(b)). And if it does not accept the reservations, the insurance part of the Convention will cease to operate between these parties (art 20(3)). Thus a State Party having made the reservation will not be committed to anything it does not wish to be committed to, including making insurers liable in violation of their exception and limitation clauses.

The jurisdiction clauses of the Athens Convention, to which you refer in your letter, do not alter this. In any event, also these clauses would be modified by the reservation clause so that insurers can be protected.

I think this is quite straight forward and well settled law. There is simply no obstacle that prevents States Parties to carry through their intention to protect insurers.

Many governments would, of course, be grateful for advice on how to draft their implementation legislation, as you suggest. However, I believe that the techniques vary so much that it is difficult to give any general advice. In any event, the implementation problems are not greater or of a different nature when there is a reservation clause than if there is not. The insurers will be protected.

Quite a few states do not need implementation legislation – they have a "monistic" system, making treaties directly applicable. Also this is unproblematic in relation to reservations. For the courts of these states only apply conventions to the extent the state is bound by them; even these governments will, of course, decide for themselves which conventions to accept and which not to accept. That means that the Athens Convention in all events will be applied as modified by the reservation clause, and the insurers will be protected.

II

When one, as I did above, starts in the public international law, the issue of construing article 4bis(10) of the Athens Convention without regard to the reservation clause does not arise. It will always be read together with the reservation. However, even if one had to rely on a construction of article 4bis(10), as you suggest, the insurer would be well protected.

Article 4bis(10)provides that "Any claim for compensation covered by insurance or other financial security pursuant to this article may be brought directly against the insurer or other person providing financial security." It is right that this provision does not refer directly to the certificate. But

it is also clear that it does not refer to any insurer – e.g. the hull insurer of the vessel cannot be made liable. The clause must refer to an insurer that has committed itself in respect of these liabilities.

It follows from this that to the extent the insurer has not committed itself, he is not liable.

One could imagine that there would be an implicit rule that if an insurer was committed for part of the Athens compulsory insurance scheme, he would be liable for it all. However, such implication is not possible. The certificate form – which is an integral part of the Convention – presupposes that there may be more that one insurer, and that each of these insurers may limit their liability (see the Explanatory Notes). Therefore, the individual insurer is never liable beyond his commitment.

III

After this, I believe that whatever starting point one chooses, one will end up with the result that insurers will not be liable in disregard of their accepted limitation and exemption clauses.

IV

I will discuss the drafting of the reservation clause you propose with our Ministry of Foreign Affairs. It seems acceptable to me after a first reading, although some treaty lawyers may find it quite strange to reserve the right of making implementation legislation. In the meantime, would you like our correspondence to be circulated to the Correspondence Group? Or should we perhaps wait a little?

Yours sincerely,

Erik Røsæg