

Athens Correspondence Group

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Dear Erik,

19 September 2005

We have followed the correspondence that has so far been submitted to the Athens Correspondence Group with interest.

We would first of all like to reaffirm our support for the draft Resolution which we believe is the first step to agreeing a workable solution.

The issues are complicated. As we understand situation there are two problems relating to insurance for loss arising from an act of terrorism:

- firstly, it is now normal practice for P&I Clubs to exclude cover under a standard clause that excludes cover for terrorism related incidents for other forms of third party liability insurance;
- secondly, there is no insurance available from any source for damage arising from chemical, biological, bio-chemical or electromagnetic weapons (whether such weapons are used in an act of terrorism or not).

It is perhaps easier to deal with the second point - 'biochem' weapons. We accept that insurers should not be liable for a risk that cannot be covered. We could therefore agree to a specific exclusion for damage arising from use of the above-mentioned weapons.

However, with regard to other acts of terrorism it is our understanding that although P&I Clubs do not provide cover for terrorism, there is some capacity, through the War Risks insurers and re-insurers, for damage arising from an act of terrorism. It appears that shipowners, through the P&I Clubs and the War Risks market, are availing themselves of that cover for third party liabilities.

If we take the current War Risks cover of approx \$500 million excess of the value of the hull, then for a ship with 3,600 passengers this would amount to \$166,666 per passenger, approximately 114,116 SDR. This amount is obviously well below the Protocol limits of 250,000 SDR, but it is still significant when compared to the limit of liability under the present Athens regime.

This presents us with a matter of policy. It would be difficult to justify a situation where insurers were not required to pay for loss of life or limb of passengers in the event of a terrorist incident, but, following that same incident, other third parties were able to claim against the insurer for property damages.

A possible solution therefore would be to exclude the insurer from liability for death or personal injury resulting from an act of terrorism *where there is no insurance available* and that this would have to be reflected in the reservation made by States Parties upon ratification of the Protocol.

We suggest that the Correspondence Group should look at how this proposal would work in practice. We consider that it should be down to the insurer to specify the limit of available cover when the Blue Card is issued each year. Perhaps an amount could be put forward at the autumn Legal Committee each year, although for information rather than consideration, as it would be for the insurance market to determine. We invite the insurance industry, through the Correspondence Group, to come forward with an amount which would be sustainable over the market cycle; our own investigations suggestions that something in the region of at least \$400 million would be realistic.

It would also be necessary to consider whether the right of direct action could also be preserved, as the insurance in these circumstances would be provided by the War Risks market rather than the P&I Clubs. We suggest that the Blue Card could indicate the provider of the insurance in respect of terrorism cover and any action would be taken directly against that provider of insurance. Alternatively, the claim could be taken directly against the P&I Club which would then need to recover from the market.

We note that this proposal has its own difficulties: the War Risks cover can be withdrawn at 7 days notice and we may also have to accept the policies and defences of the War Risks market. Nevertheless, we consider that any cover is preferable to none and that this must be explored as a means of providing some protection for passengers

In addition to the capacity of the insurance market, the extent of carrier liability under the Protocol has been raised.

As we read the Protocol, loss as a result of a shipping incident caused by an act of terrorism will fall under the exclusion at article 3(1)(b) the only circumstances where a carrier will be liable for such incidents are those where the incident was not wholly caused by a third party. Our position has not changed since the Diplomatic Conference in 2002 and we consider that a carrier should be able to demonstrate that he has done all that could reasonably be expected to do to avoid such an act. We would be very happy to consider further, through the Correspondence Group, what a carrier would be reasonably expected to do to benefit from the exemption. We would like to explore the extent to which compliance with the International Ship and Port Facility Security (ISPS) Code might provide a basis for consideration.

Yours sincerely,

John Wren