BankServe Insurance Services Ltd

To the Athens Correspondence Group

12th July 2004

Athens Convention & Protocol 2002 - Round #2 of Intersessional Correspondence on:
1. Liabilities arising from Terrorism, and
2. The Limits of Liability to be insured and guaranteed by a carrier's Insurers for compliance under the Protocol, allowing a carrier's vessels to board passengers

Dear Sirs,

At this stage of the ratification process, I recommend the most practical and simplest solutions to the outstanding issues raised in the communication of 5th July '04. Such solutions to fall within the existing terms of the Protocol passed by the IMO in November 2002.

However within these parameters, solutions need to take account of the limitations of the insurance or reinsurance markets, the provision of marine liability cover through the mutual Protection & Indemnity system and the actuarial plus administrative issues as between the insured carrier (or the insured performing carrier), their P&I clubs and the reinsurers of the pool reinsurance programme.

The Terrorism Issue

As previously commentated; I recommend that compliance with the ISPS Code be the determining factor as to whether or not a carrier can be held responsible for liabilities to passengers arising from criminal actions by terrorists, irrespective of motive. Such actions to include any use of bio-chemical weapons.

The ISPS Code sets the security standards required of ships and ports against terrorism. Consequently, where both a ship and ports visited hold certificates of compliance with the ISPS Code then such certificates should be final in absolving carriers from liabilities arising from both terrorism and the effects of bio-chemical weapons. Should this be considered too loose in respect of a carriers potential responsibilities, it must nevertheless apply to the liability insurances.

The Amount Issue

This issue is proposed by Professor Erik Roseag as an interim measure in response to the concerns raised by the P&I clubs over the compulsory insurance amounts to be guaranteed under the 2002 Protocol. This amounts issue proposes the provisional adoption of the lower LLMC '96 limit for the guaranteed compulsory insurance element covering passenger liabilities, provided for under Article 19 of the Protocol.

I welcome this proposal for two reasons. Not only will it reduce the primary guaranteed limit by 30% and ease the capacity concerns but, more importantly, the LLMC limit is fixed for each ship at SDRs 175,000 multiplied by the number of passengers the ship can carry.

Having a fixed guaranteed maximum liability limit per ship will be easier for the P&I clubs to administer and reinsure than will a limit that varies with the number of passengers on board for each voyage, causing a variable possible maximum loss (PML) on the compulsory insurance layer. This particularly applies to ferries that account for around 97% of all passenger voyages, which have extreme variations in passenger levels over the course of a year.

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Without reliable passenger data, underwriters will assume the maximum PML for each risk in underwriting guaranteed policies with no policy defences. Consequently, ferries will tend to be over charged premium.
Lowering the guaranteed limit should not cause concern. SOLAS regulations have probably contributed to there being no record of a single incident in the developed world, outside war, where all passengers have been killed. SDRs 175,000 per passenger, on a ship full to capacity, will guarantee payment of SDRs 250,000 to as many as 70% of the maximum passenger total. Any outstanding liabilities will continue to be payable by the carrier, probably supportable by a maritime lien against the ship plus a "Mareva" injunction on the proceeds of any insurance claim.
Carriers' strict liabilities to remain at SDRs 250,000 per passenger. Liabilities in excess of SDRs 250,000 will also not be affected.
I recommend the adoption of the LLMC '96 passenger liability limits for the compulsory insurance amounts to be guaranteed. Perhaps the Certificate issued, as per Article 4bis, should also state the fixed amount guaranteed whilst this interim measure applies.

The Protection & Indemnity System

I have referred to the Protection & Indemnity system which may need a brief explanation to those not from a shipping or marine insurance background.
Protection & Indemnity (P&I) is unique to shipping, originating from the early days when maritime liabilities could no longer be met by the forfeiture of the ship and cargo, caused by underwriters bring subrogated cargo claims against shipowners and when hull underwriters restricted collision liability cover to 3/4ths.
From 1855 shipowners formed mutual clubs to which each shipowner member paid contributions to a club to the extent of his mutual liabilities and, in return, was indemnified for losses not recovered under the standard marine insurances then available.
These mutual clubs were governed by rules. The foremost of which were firstly, members would only be indemnified for liabilities already paid and secondly, a member was thrown out when he ceased to be able to pay contributions, either upon his bankruptcy or death. These paramount rules continue to be maintained by all P&I clubs, being respectively referred to as the "Pay to be Paid" rule and the "Cesser of Insurance" rule.
The P&I cover is therefore not third party liability and, on its own, provides no security of settlement to third party plaintiffs. The P&I clubs were obliged to address this issue by guaranteeing to pay up to the limit under an applicable shipowners' limitation of liability convention. The issue then turned on whether the convention limits were both at an acceptable level and sufficiently comprehensive. With each succeeding major shipping casualty, the general view has been that the conventions must be updated and extended.

The CLC'92 oil pollution liability limit increased by 50% in November 2003, the LLMC '76 limits were increased from 230% and, by removal of the passenger liability cap, to potentially 1800% from 13th May 2004. New conventions have being introduced, such as HNS '96, for hazardous and noxious substances, a bunker spill pollution convention and the WRC for removal of wreck. However, the Athens Convention '02 Protocol presents the P&I clubs with their biggest challenge in meeting a 535% increase in the guaranteed limits, with absolute limits that top out at levels for which the P&I clubs are currently insufficiently reinsured.

Despite the P&I clubs highly successful record and the loyalty of their members, effecting changes within a mutual system which, through the International Group, is a cartel accounting for 92.5% of all shipowners with varying interests, is difficult. P&I club mangers will need the maximum latitude possible to meet this immediate challenge.

Yours sincerely

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Director