Subject: FW: Athens
From: "Lloyd Watkins" <Lloyd.Watkins@InternationalGroup.org.uk>
Date: Tue, 13 Jun 2006 13:47:54 +0100
To: <erik.rosag@jus.uio.no>
CC: "Hare, Jonathan \(Skuld P&I Club\)" <jonathan.hare@skuld.com>, <David.Bolomini@dft.gsi.gov.uk>

Dear Erik,

In response to your last question in your message earlier this month I can report that consultation with Boards is a continuing process. Some Boards have already met, others will not meet formally until September/October while others are seeking to consult by less formal means, for example, by means of a specially constituted committee. In any event Boards need guidance and in the absence of further information, this is difficult to provide. Marsh asked to explain their proposal to Alistair Groom, the Chairman of the International Group, and as a consequence of that meeting were asked in turn to make a similar presentation to the International Group's Compulsory Insurance Sub-Committee. However, very little more detail was provided than was made available at the last meeting of the Legal Committee. In fact, Marsh went further and suggested that they would not be in a position to finalize their proposal until States had decided on the final form of the legislation to be proposed. It seems therefore that several parties are awaiting the outcome of States' deliberations. It would therefore be most helpful if these deliberations could be expedited so that we, and others, may be in a position to make a comprehensive report to the October meeting.

Without further detail it is impossible to comment on the Marsh proposal. We have therefore been engaged in developing an alternative which we think has the merit of simplicity while preserving the level of recovery provided in the Convention in most cases. I am attaching by way of explanation a draft Agenda Note for Boards which has recently been agreed by our Complusory Insurance Sub-Committee together with wording which has been prepared initially by Vaughan Lowe .

You suggested in your e-mail of 3rd June that the position of the International Group in relation to cover and certification had already been set out at the last meeting of the Legal Committee. In fact I went to considerable pains to emphasize that we were a long way short of reaching a final conclusion and could only do so in the light of final conclusions in regard to the terrorism issue. Please see paragraph 122 of the amended Report. At the conclusion of the meeting the Chairman exhorted us to keep matters simple and at the instigation also of your colleague Aud Slettemoen we have attempted to put forward for discussion a proposal which is flexible and workable. We should emphasize that this proposal does not yet have the authority of Boards, but States may nonetheless wish to consider it further. However, consideration of this proposal as well as all the other matters under consideration is certainly hindered by

the lack of detailed explanation in writing and we would certainly endorse the Chairman's request that all proposals be circulated in writing without delay.

We are concerned at the current inactivity of the Correspondence Group and fear that unless States can coalesce around a solution we may not achieve a satisfactory result in October.

I would be glad if you would circulate this message to the Correspondence Group.

Best wishes,

Lloyd

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Draft Agenda Note for Club Boards.

The consultation with all Club Boards which has taken place over the last six months indicates that the requisite majority of Club Boards may be prepared to provide the cover and certification required under the Athens Convention as revised by the Protocol agreed in 2002, provided that this undertaking is limited to vessels carrying no more that 3,600 passengers and provided that a satisfactory solution is found to the issue of terrorism. In relation to this latter proviso Marsh made a proposal to the April session of the Legal Committee which suggested that it would be possible for a separate Certificate of Financial Responsibility (COFR) to be provided in respect of the terrorist risk on the basis that the Convention as revised by reservation clauses would exclude liability in respect of the exclusions current in the War Risk market and provide an overall limit of $500 million. This would be done by creating an entity similar to those that provide COFRs in respect of OPA 90, which would rely on the substantive cover provided under the current War Risk structure coupled with a D.I.C. cover which would respond when the primary cover failed or was exhausted by other claims, for example, crew claims or pollution claims.

In recent submissions which have been made to IMO it has been indicated that if Club Boards decided to provide cover and certification as required under the Athens Convention, this would only be done on the basis that a satisfactory solution was found to the issue of terrorism. Boards may therefore be asked at some point to consider whether the proposal made by Marsh constitutes a satisfactory solution to the terrorist issue. It is not possible to make such a judgement at present since Marsh cannot finalise their proposal until they have held further discussion with States. Further reports will be made to Boards as soon as further legislative proposals are known together with the reaction from Marsh.

In the meantime the suggestion has been made that the problem of cover for terrorism is soluble within existing War Risk cover provided that States are prepared to drop their insistence on certification although the right of direct action may be retained by domestic law. It has long been recognised that the most logical solution would be to exclude all liability in respect of terrorism from the Convention so that terrorism is put on the same footing as war. Both the International Group and shipowner organizations have argued strongly for this solution. However, States have been reluctant to make this concession since, they argue, insofar as cover is currently available in respect of terrorism it would be politically unacceptable for the exclusion to be made with the result that the claimant was no longer able to access that insurance. An attempt has therefore been made to ensure that the existing cover can be utilized in respect of Athens liabilities, thus minimising disruption to the war risks market to the detriment of shipowners as a whole.

Having consulted Professor Lowe the suggestion is made that the issue of terrorism be deleted from the scope of the Convention and be dealt with instead by domestic law in an agreed common form. In substance this proposal would provide a limit of SDR250,000 in respect of the first 1500 passenger claims that might arise in any one incident. If more than 1500 claims were to arise then all claims would be limited to SDR175,000, which is the per capita limit provided in LLMC. This formula has the merit of providing access to

existing market cover for a limit which is identical to the general limit of the Convention in the vast majority of cases. It also avoids the necessity for providing certification. Moreover, given the simplicity of this formulation, it will not be necessary to legislate by reference to the insurance market, which States would prefer to avoid.

Certification would not be required under this proposal since it would be expensive and disruptive of the reinsurance market and is in any event unnecessary: if a passenger carrier is obliged under the Convention to carry insurance and provide a certificate in respect of non-War Risks, it is inconceivable that War Risk cover would not also be arranged. Moreover, mortgagee banks would no doubt insist that cover was in place.

It should be noted that the war risks cover would also have to meet all claims, not just passenger liabilities under the Athens Convention. There is therefore a risk that total claims will exceed the available cover. However such a scheme would go some way to reducing the exposure to levels which are likely to fall within available cover limits except in the most extreme cases.

It remains to be seen whether States would be attracted to this proposal. This would to a large extent depends upon how attractive the Marsh scheme appears. Further reports will be made when further information is available. However it is perhaps worth bearing in mind as a general matter that if the Legal Committee of IMO fails to reach agreement at the next session, which will be held in October, it is likely that the issue of liability in respect of passengers will be taken up in Europe.

THE PROBLEM

There is difficulty in securing insurance cover for liability for losses arising from terrorist activities, but the Athens Convention does not explicitly exclude liability for terrorism in the way that it expressly excludes liability for war risks. On the other hand, it is thought desirable to utilize whatever terrorism cover is available on the market.

THE SOLUTION

The solution proposed here is to make it plain that liability for losses arising from terrorism is treated under the Athens Convention in the same way as war risks, and to establish a simply stand-alone scheme to deal specifically with terrorist losses.

1. <u>The Protocol</u>

"*Declaration regarding to Articles 3(1) and 3(2) and 4bis.*

(1) The Government of ... [, considering it necessary to reach an explicit agreement on the interpretation the *Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974,*] declares that it is ratifying the Protocol on the condition that the exclusion of liability in respect of "act of war, hostilities, civil war, insurrection" in Article 3(1)(a) is interpreted to as to encompass within the scope of that exclusion loss suffered as a result of

(a) death or personal injury resulting from acts of terrorism, or acts related to acts of terrorism, or action to prevent acts of terrorism, or

(b) damage caused by or contributed to or arising from any chemical, biological, bio-chemical or electro-magnetic weapons, or action to prevent the use of such weapons.

This is without prejudice to the meaning of the words "act of war, hostilities, civil war, insurrection" in any other instrument. The exclusions effected by Article 3(1)(a) will be clearly reflected in the certificates issued by States under Article 4bis.

(2) The consent of the Government of ..... to be bound by the Protocol is conditional upon other States Parties making [and maintaining in force] the same declaration. It will not regard the Protocol as entering into force as between itself and any State that

has not both ratified the Protocol and made [and maintained in force] the same declaration."

2. Memorandum of Understanding on Terrorism Losses

1. Each State Party to this Memorandum of Understanding will ensure that under its national law every carrier to whom the Athens Convention 2002 applies and who operates in the State's ports is liable for losses suffered as the result of the death of or personal injury to a passenger arising from terrorism or from measures taken by States to prevent terrorism unless the carrier proves that the incident was wholly caused by an act or omission done with the intent to cause the incident by a third party.

2. The carrier's liability shall be limited in respect of the losses of each passenger arising out of a single incident to SDR 250,000 except when more than 1500 passengers suffer loss arising from a single incident when the carrier's liability shall be limited to SDR 175,000 in respect of the loss of each passenger.

3. Each State Party to this Memorandum of Understanding will make entry to its ports by any foreign merchant ship to which the Athens Convention 2002 applies conditional upon proof that there is in force in respect of that ship insurance cover in respect of liability for terrorism.

4. Each State Party to this Memorandum of Understanding reserves the right to make provision in its own law for a claim for compensation for losses described in paragraph 1 above, which are covered by insurance, to be brought directly against the insurer. The insurer shall be liable only within the financial limits specified in the contract under which the insurance or financial security is provided.