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To: nifs-athens@jus.uio.no

From: "Cox, Edna" <international.group@internationalgroup.org.uk> (by way of Erik Røsæg <erik.rosag@jus.uio.no>)

Subject: Athens Correspondence Group (IMO Legal Committee): FW: Athens

As we indicated in our last message, we did seek further advice on the position of insurers under the Convention and now attach copy of that advice. Since the Opinion gives no indication I should perhaps explain that Vaughan Lowe is Chichele Professor of Public International Law at Oxford.

We would hope that the Correspondence Group will be prepared to follow the reservation route with the change of emphasis indicated and will look forward to your advice as to how this can best be taken forward.

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

Best regards,

Lloyd Watkins

ATHENS CONVENTION

- 1) I have been asked to advise on the question whether the reservation to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, as amended by the 2002 Protocol, proposed to the Correspondence Group of the Legal Committee, protects the insurer adequately against liability for terrorist-related incidents and whether the insurer can be confident of relying on qualifications contained in the Certificate alone.
- 2) The proposed reservation reads as follows:

"The Government of ... reserves its right to issue and accept insurance certificates with such exceptions and limitations as the insurance market conditions at the time of issue of the certificate necessitate, such as the biochemical clause and terrorism-related clauses, without exposing the providers of financial security to liability in disregard of the exceptions and limitations under which they have committed themselves. Such exceptions and limitations will be exercised with due regard to guidance by relevant bodies with an aim to ensuring uniformity."
- 3) My conclusion is, in summary, that the adoption of such a reservation would not enable insurers to be confident that they would be exempt from liability under the Athens Convention (the 'PAL') for death or personal injury arising from terrorist-related incidents.

The relevant PAL provisions

- 4) The relevant PAL provisions can be summarized as follows:-
 - a) The PAL stipulates in Articles 3(1) and 3(2) conditions under which carriers are liable for death or personal injury to passengers.
 - b) PAL Article 4bis(1) requires that carriers maintain insurance cover (or other financial security) in respect of their liability for death or personal injury to passengers under Article 3(1) and 3(2).
 - c) PAL Article 4bis(2) requires that ships be issued with certificates of such cover in the form described in the PAL Annex.

- d) PAL Article 4bis(10) permits direct actions against insurers in respect of carriers' liabilities, including their liability under Article 3(1) and (2).
- 5) Under PAL Article 17(1) actions against an insurer may be brought before the courts of (a) the State of the insurer's permanent residence or principal place of business, or (b) the State of departure or destination according to the contract of carriage, or (c) the claimant's domicile or permanent residence if the insurer has a place of business and is subject to jurisdiction in that State, or (d) the place where the contract of carriage was made if the insurer has a place of business and is subject to jurisdiction in that State. The claimant may choose between the available fora.

The context of the question

- 6) Any action would be based upon municipal (i.e., domestic, national) law and not on the Athens Convention itself.
- 7) That is evidently so in States whose legal systems require that treaties be implemented by legislation and have no legal force in the absence of legislative implementation. It is also true in at least some of the States whose legal systems give direct effect to treaties.
- 8) The question is, therefore, what effect the reservation would have in the setting of an action in a municipal court. That depends in part upon the effect of the reservation in international law, and in part upon the way in which the municipal court will handle questions of international law.
- 9) It should be said at this stage that this Opinion is based upon the premise that a genuine reservation is made to the PAL. A reservation is defined in Article 2(1)(d) of the Vienna Convention on the Law of Treaties as
- "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."
- 10) The critical point is that the statement purports to exclude or modify the treaty (i.e., the PAL). The alternative is that the State makes what is known as

an 'interpretative declaration': that is, a statement of what the State understands the treaty to say. The State may be wrong in its interpretation of the treaty, and an international tribunal, or the courts of another State, may take a different view. A reservation, on the other hand, is essentially a renegotiation of the treaty: an offer to ratify the treaty on condition that its terms are varied as stipulated in the reservation.

- 11) If a State made an interpretative declaration to the PAL it could not be confident that its interpretation would prevail. Only by making a reservation is it possible for a State to ensure that the treaty is not interpreted in a different manner and applied against it.
- 12) I will address first the question of the legal effect of such a reservation, and then the question of the precise wording of the reservation.

The legal effect of a reservation.

- 13) As a matter of international law the reservation changes the treaty. If the reservation is accepted by another State Party or States Parties, the treaty enters into force between the reserving State and the accepting States as modified by the reservation: Vienna Convention on the Law of Treaties, Article 21(1).
- 14) If the reservation is rejected by another State Party or States Parties the treaty is presumed (rebuttably) to enter into force between them and the reserving State, but the provisions to which the reservation relates are disapplied to the extent of the reservation: Vienna Convention on the Law of Treaties, Article 21(3). This makes perfect sense when it is understood that the reservation is considered as being in effect a counter-offer. If accepted, the treaty is amended: if rejected, there is no consensus on the reserved matters and they are in effect excised from the treaty.
- 15) In the present context the practical effect of acceptance or rejection would be the same. If the reservation excludes liability for terrorist-related death or personal injury, and the reservation is accepted, the PAL is in effect modified by agreement so as to exclude such liability.

- 16) If that reservation is rejected, the PAL provisions to which it relates (which include at least PAL Articles 3 and 4bis) do not apply between the reserving and rejecting States 'to the extent of the reservation' - i.e., in so far as they relate to liability for terrorist-related death or personal injury. As PAL Article 4bis(10) is the legal basis for direct actions against insurers, the disapplication of Articles 3 and 4bis has the effect of excluding the possibility of direct actions against insurers for terrorist-related death and personal injury.
- 17) That is, however, not the crucial point. It is not the effect of the reservation on legal relations between PAL States Parties, but rather its effect upon legal relations between claimants and insurers that is crucial.
- 18) As was noted above in paragraph 6), claims would be based not on the PAL itself but on municipal law. The key question is, therefore, what would be the effect in municipal law of the proposed reservation?
- 19) There are two distinct reasons why the effect that the reservation would have in international law might not be precisely secured in municipal law.
- 20) First, the PAL as revised by the reservation might not be accurately translated into municipal law.
- 21) Ordinarily implementation involves the relatively straightforward task of translating the treaty text itself into municipal law. If that were done in the case of the PAL the effect of the reservations, which are not part of the same document as the treaty text, could easily be missed.
- 22) In such circumstances a domestic court would have to be persuaded to look beyond the treaty text itself. That is in itself a significant potential problem. If the legislation implementing the PAL is regarded by the court as clear and unambiguous, the court may see no need to look to extraneous materials.
- 23) If the court is persuaded to look to extraneous materials including the reservation it is likely that it will require that it be satisfied of four things:
 - (i) the existence of market conditions necessitating the restriction of liability in issue in the case;
 - (ii) the existence of a determination by the other (reserving) State that liability should be restricted in a manner exempting the insurer from the liability in issue in the case;

(iii) the effectiveness of the reservation as a matter of international law to alter the terms of obligations under the PAL as between the reserving State and the forum State; and

(iv) the consequent alteration of the terms of the PAL as incorporated in municipal law.

The last point, (iv), involves a question of municipal law, which may be answered differently in different legal systems.

- 24) In my opinion, it is prudent to suppose that domestic courts may find some difficulty in accepting that as a result of those four steps the plain meaning of a treaty incorporated by legislation into the State's law should be read down so as to exempt insurers from some part of the liability that appears to be expressly attached to them under PAL Articles 3 and 4bis.
- 25) There is here more than the danger of inaccurate transcription and interpretation that is always involved in the domestic implementation of international agreements. The second reason why the reservation might not have the intended effect in municipal law is particular to the relationship between this reservation and the PAL.
- 26) Even if the court is satisfied on all of those points it is not clear that the court would necessarily give effect to the reservation and exclude the insurer's liability accordingly. Take, for example, the hypothetical case of a claim arising from an incident on a ship sailing under the flag of State B and contracted to carry passengers from State A to State B. If State A has made the reservation but State B has not, and the insurer based in State A is sued in the courts of State B under PAL Article 17, why should State B's courts give effect to the reservation? Why should the court not say, "State A may chose to restrict liability but our State, B, does not. State B is concerned to protect passengers on cruises coming into its ports. As courts of State B we must take the same view. There is no justification for subordinating the policy of our State B to that of State A. We will apply the liability provisions of the PAL as they are set out in PAL Articles 3 and 4."
- 27) A similar situation could arise if States A and B both made reservations, but the reservations were of different scope. For example, State A may exclude liability under PAL Articles 3(1) and 3(2) for terrorist-related losses, whereas State B may exclude

liability only for terrorist-related losses arising under Article 3(1). Forum shopping, which is the right of the claimant under PAL Article 17, seems a probable result.

- 28) It should also be noted that if the reservation is adopted by some or most but not all States, the implication will be that in the law of a State that does not adopt the reservation the liability excluded under the reservation continues to attach to the insurer.
- 29) For this reason, too, I think that the insurers could not be confident that the reservation would exempt them from liability for terrorist-related death or personal injury.

The significance of the certificate and the proposed resolutions.

- 30) It has been suggested that the PAL Certificate and/or the Resolutions attached to IMO Doc. LEG 90/6/2 and IMO Doc. LEG 90/WP.3 might remove the risk that insurers would be held liable for terrorist-related death or personal injury. I do not share that view.

The Certificate

- 31) The certificate serves to (a) evidence compliance with the duty to insure, and (b) identify the defendant in claims brought under PAL Article 4bis(10). It does not itself form the basis of a claim.
- 32) I see nothing in the certificate, or in the structure of the PAL, that would permit the certificate to create or remove any legal liability of the insurer that would otherwise exist under PAL Article 3 or 4.
- 33) It is true that the certificate contemplates that there may be two or more insurers. This, however, does not in my view carry any implication (let alone any necessary implication) that those insurers are entitled to exclude certain categories of risk from their liabilities as set out in Articles 3 and 4 of the Convention. Two or more insurers may assume responsibility for different bands of liability without excluding any categories of risk; and this seems a more likely situation to be contemplated in the certificate because it is a situation that is wholly consistent with the assumption of the full range of liabilities set out in PAL Articles 3 and 4.

- 34) The certificate alone would not, in my view, exclude any liability for terrorist risks that might arise under the PAL.

The Resolutions

- 35) The Resolution LEG 90/6/2 in itself has no effect. It is merely a recommendation to PAL States Parties.
- 36) The Resolution LEG 90/6/2 is, moreover, limited to liability arising from 'shipping incidents' [PAL Article 3(1)], which does not cover all terrorist actions. Terrorist-related claims arising under Article 3(2) are not addressed by the Resolution.
- 37) The Resolution LEG 90/WP.3 similarly has in itself no legal effect. It is merely a recommendation to PAL States Parties.
- 38) The Resolution LEG 90/WP.3 is, moreover, limited to the issuance and acceptance of certificates. It does not purport to affect the scope of PAL Articles 3 or 4bis.
- 39) I therefore do not consider that either resolution would in itself exclude any liability for terrorist risks that might arise under the PAL.
- 40) Accordingly, neither the PAL Certificate nor the proposed IMO resolutions can secure the interests of the insurers.

The wording of the proposed reservation

- 41) I turn now to the wording of the proposed reservation, which is as follows:-

"The Government of ... reserves its right to issue and accept insurance certificates with such exceptions and limitations as the insurance market conditions at the time of issue of the certificate necessitate, such as the biochemical clause and terrorism-related clauses, without exposing the providers of financial security to liability in disregard of the exceptions and limitations under which they have committed themselves. Such exceptions and limitations will be exercised with due regard to guidance by relevant bodies with an aim to ensuring uniformity."

- 42) The proposed reservation purports to have two effects:-

- a) it permits (but does not require) issuance and acceptance of 'restricted certificates': that is, certificates with such exceptions and limitations as are necessitated by insurance market conditions at the time of issue of the certificate;
- b) it permits (but does not require) the application in domestic law of those same exceptions to and limitations as regards the liability of the insurer (but not of the carrier).

Both rights are to be exercised "with due regard to guidance developed by relevant bodies" and "with an aim of ensuring uniformity".

- 43) The provision concerning the issuance and acceptance of 'restricted certificates' is not material in this context.
- 44) The provision regarding the exceptions to and limitations on liability are the focus of concern. Even if the reservation were translated accurately into municipal law problems, would remain.
- 45) First, the reservation does not exempt insurers from any liability but is intended to permit States parties to do so.
- 46) Second, it makes the right of States to do so contingent upon the existence of 'market necessity', which may be difficult to prove and may be judged differently in different jurisdictions.
- 47) Third, the reservation does not specify what the scope, in terms of subject-matter or duration, of the exemption shall be.
- 48) Fourth, it does not require that all States Parties adopt the same reservation, or indeed any reservation.
- 49) The reservation also appears to leave the carriers with liability, for which they would probably be unable to obtain cover.
- 50) A simpler, and I think more effective, solution would be to adopt a reservation worded along the following lines:

"Reservation to Articles 3(1) and 3(2) and 4bis.

The Government of is ratifying the PAL subject to the reservation that insurers shall not be liable under the Convention for death or personal injury resulting from acts of terrorism or acts related to acts of terrorism, or action to prevent acts of terrorism."

- 51) By addressing the underlying liability under Articles 3(1) and 3(2), the reservation would automatically deal with the questions of certification under Article 4bis(1) and of direct actions against insurers under Article 4Bis(10).
- 52) If it were decided as a matter of policy that the shipowner should also be granted this exclusion, the following wording might be appropriate: "----that neither carriers nor insurers shall be liable ---"
- 53) If the reservation is accepted by another State Party it will operate so as to amend Articles 3 and 4bis accordingly. If it is rejected by another State Party, as between the reserving and the rejecting State the Convention will enter into force but there will be no agreement on the application of Articles 3 and 4bis to terrorist-related death or personal injury, and so those Articles will not apply to such death and injury.
- 54) The reservation might also be qualified by adding a provision along these lines:-

"The consent of the Government of to be bound by the Convention is conditional upon other States Parties making the same reservation. 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."

- 55) The extra sentences ensure uniformity of application and may make the legal position clearer to national courts called upon to apply the national laws implementing the Convention.

Biological and chemical weapons

- 56) There is a further issue concerning liability for death and personal injury arising from chemical, biological, bio-chemical or electro-magnetic weapons. I understand that insurance cover is not available in respect of this risk.
- 57) In the context of insurance it is natural that such risks should be treated together with risks arising from nuclear incidents. That is dealt with in Article 20 of the PAL. The simple solution would be to add to the reservation suggested in paragraph 50 above a further sentence, stipulating that:

"The Government of is ratifying the PAL subject to the reservation that no liability shall arise under this Convention for 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."

Conclusion

- 58) Because of the difficulties in securing the desired effect of the reservation in international law, coupled with the additional difficulties of securing the desired effect in municipal law and hence in the practice of the courts that would actually apply the PAL, I do not think that insurers can be confident that the proposed reservation protects them adequately against liability for terrorist-related incidents.
- 59) If the reservation route is to be pursued, a reservation drafted in the simpler terms suggested in paragraph 50) above is, in my view, preferable. I think that a reservation in that form would provide a satisfactory solution if, but only if, all States parties adopted the resolution. If any State party did not adopt the resolution insurers would remain exposed to liability for terrorist-related death or personal injury the reasons set out above.
- 60) The exclusion of liability for injuries resulting from the use of chemical, biological, bio-chemical or electro-magnetic weapons could be effected by a similar provision, as described in paragraph 57 above.

Vaughan Lowe

27 May 2005