

Dear Colleagues,

Athens Convention – the war risk issue

1 This letter is a follow-up of the 88th session of the Legal Committee on the compulsory insurance arrangements of the Athens Convention. If you do not wish to receive further correspondence on the Athens Convention, please notify me.

2 On the substance of the letter, please respond by *25 June, 2004* (see below). It is the intention of the Norwegian delegation to submit a report on the correspondence to the 89th session of the Legal Committee this fall.

3 The links in blue are hot, so that the references can be displayed by clicking on them if you are connected to the Internet. Depending on your own setup, you may have to press, *e.g.*, the control key while clicking.

Our task

4 At the 88th session of the Legal Committee, the International Group of P&I Clubs pointed out two issues relating to the insurance provisions of the Athens Convention, 2002.¹ These are:

- The amount issue; that is the issue that the passenger convention requires a higher amount of compulsory insurance and of liability than former IMO pollution Conventions.
- The war risk issue; that is the issue that article 3 of the Athens Convention² is not strictly confined to non-war P&I insurance, but may also affect war risk insurance. Non-war P&I

¹ See document LEG 88/12/2 <<http://folk.uio.no/erikro/WWW/corrgr/12-2.pdf>>.

insurance is the segment of the market where the P&I clubs has its core business. War risk insurance is the segment of the insurance market that deals with cover for risks against war and terrorism. In this segment, other actors are more important than the P&I clubs.

5 Our task is to clarify these issues, so that the necessary insurance is available in the market when the Athens Convention can enter into force.

The scope of this letter

6 This letter only discusses the *war risk issue*.

7 While the amount issue only relates to the Athens Convention, the war risk issue is similar in several conventions, namely the CLC, HNSC and Bunkers Convention.^{3,4} A discussion of the war risk issue is therefore necessary for the entry into force and upkeep of all these conventions.

Why additional war risk insurance cannot do the job

8 If part of the risk under the compulsory Athens insurance cannot be covered by the non-war P&I because the risks are in the nature of war and terrorism, one may ask why carriers cannot simply purchase additional insurance in the war risk segment of the insurance market. Unfortunately, this is not possible. War risk insurance is traditionally, and in particular in the later years, subject to limitations that one does not find in non-war P&I insurance. These limitations make war risk insurance in its traditional form unsuitable for fulfilling the compulsory insurance requirements in the Athens Convention (and the other conventions referred to above), even if supplemented by non-war P&I Insurance. The war risk limitations include:

- Short cancellation notice, usually a few days,⁵ while Athens insurance certificates cannot be renewed that fast.
- Non-standardized limits, which usually are lower than the limits of the Clubs' P&I insurance⁶ and the Athens' requirements.
- Exemptions for the use of, *i.a.*, biological and chemical weapons,⁷ which may or may not tally with the Athens' requirements.

² The text of the Convention can be found at <<http://folk.uio.no/erikro/WWW/corrgr/index.html>>.

³ See the corresponding articles in CLC article III, HNSC article 7 and Bunkers Convention article 3. All these conventions include provisions for compulsory insurance that are similar to those of the Athens Convention. Links to the texts of these conventions can be found at <<http://folk.uio.no/erikro/WWW/HNS/hns.html>>.

⁴ CLC certificates are now issued by way of exception, see, *e.g.*, Assuranceforeningen Gard's Circular No. 5/2003 <http://www.gard.no/portal/page?_pageid=53,32725&_dad=gard&_schema=PORTAL&p_d_i=-121&p_d_c=&p_d_v=6427&MainMenuID=14&SubMenuID=39>. A similar exception is made for insurance certificates for passenger liability under US law (same reference).

⁵ *E.g.*, the English Institute Protection and Indemnity War Strikes Clauses Hulls – Time provides for 7 days' notice (clause 7). This makes the insurance more of an "outbreak of war insurance" than "permanent war insurance." After notice, the insurance can often be renewed at a higher premium.

⁶ The Clubs offer USD 400 mill in addition to the owner's basic war insurance, which is usually a combined hull and P&I policy where the amounts may vary. See references at <<http://folk.uio.no/erikro/WWW/corrgr/index.html#9-11>>.

9 *It is therefore submitted that one should try to avoid involving the war risk segment of the insurance market in the compulsory Athens insurance scheme. The focus should rather be how to adapt the non-war P&I insurance to correspond better with the requirements in the Athens Convention and vice versa.*

Where does the Athens Convention require cover for war risks in excess of what is currently offered non-war P&I?

10 The compulsory insurance under Athens only needs to cover the carrier's liability (article 4bis). Exemptions to the carrier's liability are also exemptions to the insurance requirements. It is therefore important that there is a general exemption from the carrier's strict liability in case of war and terrorism in article 3:

"...the carrier shall be liable ... unless the carrier proves that the incident:

- (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (b) was *wholly* caused by an act or omission done with the intent to cause the incident by a third party" (emphasis added)

11 The definitions of war and terrorism ("an act or omission done with the intent to cause the incident by a third party") are wider than the definitions used in the corresponding exception clauses in P&I rules.⁸ The exemption even covers violence that is not politically motivated. In this respect there is no problem: War and terror are excluded. Thus neither the carrier nor his insurer would be liable for damage wholly caused by terrorists, and insurance for such damage is therefore not required by the Convention.

12 The terrorism exemption does, however, only apply if the incident was "*wholly*" caused by terrorism: This word can be read to indicate that the Athens Convention requires insurance for losses caused by terrorists if the carrier has contributed to the losses, *e.g.*, by failure to implement adequate security measures. Typical reinsurance clauses, on the other hand, exclude losses *directly or indirectly* caused by terrorism.⁹ Although this is currently not always made very clear in non-war P&I conditions,¹⁰ clubs are naturally reluctant to undertake such risks when there is no reinsurance available.

13 The discussion above relates to the exceptions to strict liability. Similar issues arise in relation to negligence liability, which under the system of the Athens Convention, 2002, applies outside the scope of the strict liability. There is, naturally, no exemption for the negligence liability of the carrier if the negligence is in the nature of lack of security measures.

⁷ See an example of an exclusion clause to this effect in Assuranceforeningen Gard's Circular No. 1/2004 <http://www.gard.no/portal/page?_pageid=53_32725&_dad=gard&_schema=PORTAL&p_d_i=-121&p_d_c=&p_d_v=6575&MainMenuID=14&SubMenuID=39>. This circular also announces that the clubs offer a limited war cover of such risks despite the general exception.

⁸ See reference in footnote 9.

⁹ See examples at <<http://folk.uio.no/erikro/WWW/corrgr/insurance/terror.pdf>>.

¹⁰ See, *e.g.*, Rule 58 of Assuranceforeningen Gard <http://www.gard.no/gard/Publications/statutesandrules/rules/p2_chapter2.html>

14 *Altogether, then, the requirements of the Athens Convention go beyond what the insurance market offer today in that the Convention requires coverage for incidents not "wholly" caused by terrorism, while the marked only offers coverage for incidents not "directly or indirectly" caused by terrorism. This discrepancy must be addressed in order that carriers shall get a realistic possibility to fulfill the Athens requirements.*

A possible additional issue

15 From P&I quarters it has been argued that the issue with establishing insurance to the requirements of the Athens Convention may be even wider than stated in the previous paragraph, because the "Bio-Chem Clause" applies for non-war P&I insurance as well as for war P&I insurance.

16 A typical bio-chem exemption clause reads:

"In no case shall this insurance cover loss damage liability or expense directly or indirectly caused by or contributed to by or arising from ... any chemical, biological, bio-chemical, or electromagnetic weapon"¹¹

17 An actual attack by biological or chemical weapons would be either an act of war or an act of terrorism, which are dealt with above. However, if passengers are injured, *e.g.*, by an unintentional explosion of such weapons, no exception applies in the Athens Convention. Still, the insurance exemption apparently applies. This means that it would be difficult to obtain the required Athens insurance if the insurance marked would insist on such bio-chem clauses also for the non-war P&I insurance.

18 There are, however, reasons to believe that the insurance market would be more flexible:

- The bio-chem exemption is in fact not effectively implemented neither in non-war P&I conditions nor in the pooling agreement of the International Group of P&I Clubs today.¹² (Reinsurers are, however, expected to insist on the bio-chem exemption at the next renewal, in February 2005.)
- The insurance market accepts that CLC certificates and other certificates are issued without the bio-chem exemption.¹³
- The draftsmen of the clause cannot have been very concerned with the non-war and non-terrorist side of the clause. Chances are, therefore, that the scope of the clause could be narrowed so that it would not affect unintentional damage, and thus would not conflict with the Athens Convention. Indications that the draftsmen have not been very concerned about non-intentional damage include:

¹¹ Institute radioactive contamination, chemical, biological, bio-chemical and electromagnetic weapons exclusion clause (CL 370, November 2003).

¹² See, *e.g.*, Rules of Assuranceforeningen Gard

<http://www.gard.no/gard/Publications/statutesandrules/rules/p2_chapter2.html> that do not include the exemption.

¹³ See, footnote 4, above.

- × If the intention had been to exclude damage by chemical or biological weapons also when not used as weapons, the clause would have said so clearly.
- × It would not make sense for the insurers to exclude accidental damages from biological or chemical weapons, but not from the same biological or chemical substances not (yet) incorporated in weapons.

19 *On this basis, the work should continue on the basis that the bio-chem clauses do not represent a particular problem in non-war P&I in relation to the Athens Convention.*

Possible ways forward

20 I do not think it would be appropriate – if at all a possibility – to re-negotiate the Athens Convention. In particular it would be inappropriate negotiate it in to resolve the issues discussed here, as this would involve the creation of an exception for a special kind of negligence of the carrier (namely lack of security measures). The required insurance must be found without altering the Convention.

21 There are, however, other ways to facilitate the smooth implementation of the insurance requirements of the Athens Convention in the insurance market. There seems to be at least five options for measures that can be taken:

- *Option A:* Insist that reinsurers be as flexible in respect of Athens, HNSC and Bunkers as they have been in respect of the CLC, if necessary as a condition for their license under national law to practice as insurers.
- *Option B:* Take advantage of the fact that the risk that is difficult to insure affects virtually all ships (through one or more of the affected conventions), and resolve the issue by creating a mandatory, worldwide pool of those shipowners that apply for insurance certificates. The Athens insurance certificate could then be issued on the basis of this pool membership together with a blue card from a P&I club on their present conditions. The pool could be set up by governments and financed by a surcharge on insurance certificates, but the shipowners would most likely prefer to set it up themselves, perhaps by the help of their P&I clubs or industry associations.
- *Option C:* Meet some of the concerns of the non-war insurance market by defining the scope of their cover better, so that the market will be prepared to back the necessary insurance certificates. One way of doing this is to clarify that when the carrier has complied with the international rules established to prevent terrorism (the ISPS Code¹⁴), losses shall be considered wholly caused by terrorism, and therefore excluded from the liability of the carrier and the issuer of the insurance certificate. A convention may very well be clarified in this way,¹⁵ and there is precedence that the IMO Legal Committee

¹⁴ See International Ship & Port Facility Security Code
<http://www.turkloydu.org/EN/SEA/ISPS_Code_en.pdf>.

¹⁵ See article 31(3) of the Vienna Convention on the Law of Treaties
<<http://www.un.org/law/ilc/texts/treaties.htm>>. In the HNS Convention, this also falls within the powers of the Assembly, see article 26 (letter 1) and LEG 87/11, paragraph 12
<<http://folk.uio.no/erikro/WWW/HNS/LEG87rep.pdf>>.

can issue such clarifications.¹⁶ A further assurance that the clarifications would be accepted by courts could be ascertained by including them in implementation legislation.

- *Option D*: Establish a government (re)insurance scheme against a premium on a profit basis.¹⁷
- *Option E*: Let the IOPC Fund and HNS Fund place their money in this kind of terrorism (re)insurance against a premium on a profit basis, as an alternative to the present investments in bank accounts. All costs should, of course, in the long run be reimbursed to the fund with interest and a profit margin.

I cannot see that the text of the conventions prevents this; indeed the funds already have quite a terrorism risk,¹⁸ as well as available funds and claims handling routines. It would perhaps be particularly attractive for the Oil Fund to sell the CLC cover and for the HNS fund to sell HNS cover, but the engagements of the funds must not necessarily be limited in this way.

22 To me, option C seems to be the best basis for further work. All options are, however, in my view viable.

Conclusion

23 Correspondents are invited to circulate their views on the above conclusions, the suggested options, possible additional options and any other matter concerning the "war insurance issue" by 25 June, 2004. Please use email nifs-athens@jus.uio.no or fax +47 9738 4998.

Regards,



¹⁶ See, e.g., LEG 74/13, para 59 <<http://folk.uio.no/erikro/WWW/HNS/leg74-13.pdf>>.

¹⁷ For an overview of different existing government schemes, see <<http://folk.uio.no/erikro/WWW/corrgr/index.html#9-11>> (in particular the OECD and Partner Re reports).

¹⁸ See FUND Convention article 4(2) compared to CLC article III(2), and HNS Convention article 13(3) compared to article 7(2).