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To the Athens Correspondence
Group

Dear Correspondents,

Summary of the first round of discussions

After the 90th session of the Legal Committee, there has been some exchanges in the Correspondence Group (see <http://folk.uio.no/erikro/WWW/corrgr/index.html#ins>) as well as privately. In my view, **this correspondence has confirmed that we are on the right track**. This is still true after the terrible terrorism attacks in the United Kingdom and Egypt.

First of all, the exception clauses referred to in my letter to the Correspondence Group seem to be what was necessary to obtain the desired **insurance capacity**, of course always provided that market conditions may change. One leading underwriter wrote to me:

- "I see no reason why the cover shouldn't be available at a price"

And a well known broker similarly wrote:

- "In my opinion, with the exceptions and exclusions listed below for War P&I risks, the compulsory liability insurance now being proposed to meet the Athens Protocol 2002 for passengers is currently available."

None of my contacts suggested that there would *not* be capacity available.

Secondly, **all involved apparently accept that a reservation clause can do the trick**. This includes the P&I Clubs and the very respected Oxford Professor of international law, Vaughan Lowe. The fact that there is some discussion concerning the exact wording of the clause must not overshadow this fact.

On this basis, I think the remaining core issues are the following:

1 The wording of the reservation clause

The P&I Clubs have, as already referred to, kindly provided an opinion from Professor Vaughan Lowe on the reservation clause. I would like to offer the following observations:

- a. Professor Lowe does **not** suggest that the reservation clause discussed at LEG 90 properly implemented will not protect the clubs from being fully liable in the relevant states.
- b. Professor Lowe suggests that the wording he proposes is **easier to implement** than the one discussed at LEG 90 (paras 19-25). This is not obvious to me, and he does not explain why. The important point is, however, that there is no disagreement that Clubs should be protected from liability in excess of what they have committed themselves to.
- c. Professor Lowe holds out as a problem in respect of the reservation clause discussed at LEG 90 that **perhaps not all States will accept it** (paras 25-29). However, the same possible objection applies to the reservation clause proposed by him and accepted by the Clubs, or indeed to any international instrument.
- d. Professor Lowe's text introduces the drastic change in relation to what was discussed at LEG 90 that **not even the insurance that is available for terrorism related risks should be utilized**. His opinion does not highlight this policy change, or provide a thorough discussion of it. In my opinion, this is the core issue.

Regardless of the wording of the reservation clause, the wording of the resolution proposed by the Legal Committee¹ for adoption at the IMO Assembly this fall can remain the same.

For my part, I would suggest to use Professor Lowe's proposed text as a starting point for the reservation, as insurers apparently will feel more comfortable with that proposal. As his proposal for the main part is not in conflict with the text discussed at LEG 90, this text should also be included. However, governments are likely to insist that the available insurance capacity should be utilized, so that terrorism risks are not excluded altogether, contrary to Professor Lowe's proposal (see (d) above).

In the draft below, the first paragraph reflects the draft discussed at LEG 90, including the rule that insurance must be provided to the extent it actually is available in the market. The second paragraph reflects Professor Lowe's draft, in order to make absolutely clear that insurers shall not be liable in excess of what they have committed themselves to. If the insurer has not committed itself to the extent required by the

¹ See <http://folk.uio.no/erikro/WWW/corrqr/15.pdf>

government pursuant to the first paragraph, supplementary insurance or other financial security must be provided.

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

The Government of ... is ratifying the *Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974*, on the condition that it can issue and accept insurance certificates with such exceptions and limitations as the insurance marked conditions at the time of issue of the certificate necessitate, such as the bio-chemical clause and terrorism related clauses. Such exceptions and limitations will be clearly reflected in the certificate. The right retained by this reservation will be exercised with due regard to guidance by relevant bodies with an aim to ensure uniformity.²

The Government of ... also ratifies on the condition that insurers shall not be liable under the Convention to a greater extent than they have confirmed in the "Blue Card"³ to the State Party that has issued the certificate of insurance in accordance with Article 4bis of the Convention and the previous paragraph. In particular this applies to liabilities in respect of⁴

- death or personal injury resulting from acts of terrorism, or acts related to acts of terrorism, or action to prevent acts of terrorism,⁵ and
- damage caused by or contributed to or arising from any chemical, biological, bio-chemical or electromagnetic weapons, or action to prevent the use of such weapons.⁶

Any comments would be most welcome.

2 Should shipowners be relieved of part of their liability under the Convention?

The shipowners have made an application that they shall be relieved of liability when damage is partly caused by terrorism and partly by the carrier or someone the carrier is liable for. (This is all there is of terrorism related liability in the Convention.) For some government representatives it has, on the other hand, been difficult to grasp why passengers should carry losses caused by shipowners just because terrorists also are involved.

² This paragraph reflects the LEG 90 draft.

³ The "Blue Card" is a letter from the insurers to the State Party that issues the Insurance Certificate. In the "Blue Card," the insurers confirm that insurance is in place. For an example of a Blue Card form, see <http://folk.uio.no/erikro/WWW/HNS/BLUE%20CARD.pdf>

⁴ This paragraph reflects with certain alterations Professor Lowe's note, para 50.

⁵ This subparagraph reflects Professor Lowe's note, para 50.

⁶ This subparagraph reflects Professor Lowe's note, para 57.

I think shipowners should be given the opportunity to justify their application more thoroughly. I believe decision-makers would like to hear the shipowners' views on matters like the following:

- Exemption of shipowners would remove the passengers' maritime lien. Which effect would this have on passengers and mortgagees?
- ICS maintains that before LEG 90, there was a principle that there should be no strict liability for uninsurable risks. What are the policy reasons for this alleged principle, and how has it been expressed before? Why is the alleged old principle more important than the decision at LEG 90?
- Should the exception, in the opinion of shipowners, apply to all terrorism related risks or only to terrorism related risks that in fact are uninsurable?
- What would be the effects on a reservation clause on the strict liability and negligence liability, respectively? Are there any differences between direct and consequential losses in this respect?
- The P&I Clubs support the shipowners in this matter. Does this mean that also uninsured liability affects the insurers directly, or is this a statement of the Clubs as spokesmen for the shipowners' interests?
- The opinion of Professor Lowe has been relied on in this context by some. However, as far as I can see, he does not discuss whether shipowners should be liable - he only (very helpfully) says that *if* governments would like to relieve shipowners, they can do so by a reservation clause (para 52). Or, have I overlooked something?

Correspondents are welcome to reflect on these core issues, other issues mentioned in the correspondence as well as new issues **by 30 August**.

Regards,



Erik Røsæg