REGERINGSKANSLIET

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Ministry of Justice
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Prof Erik Røsæg

Dear Erik,

Athens Convention – the War Risk Issue

Thank you for your letter of 20 May and for providing us with an opportunity to comment upon it. The letter provides a good basis for discussion of this important and difficult subject.

We have noted the five options put forward in paragraph 21 of your letter. We have also taken note of the views expressed by the UK, the International Group of P&I Clubs, ICS, and others.

To begin with, we agree with your opinion that it would not be appropriate to re-negotiate the Athens Convention. The Convention represents what the negotiating States could agree upon when the 2002 Athens Protocol was adopted. The States then decided among other things that the carrier is liable unless the incident was *wholly* caused intentionally by a third party. The proposal for a general exemption from liability in the case of incidents caused by terrorism did not get enough support. We can not see that the circumstances have changed since then so that there is reasonable grounds to believe that a re-opening of the negotiations on this subject matter would lead to a different result. Such a general exemption as sought by the industry is thus not an option at this stage. Therefore, as you say, the required insurance arrangements must be found without altering the Convention.

Regarding the different options that you have listed we initially doubt whether option E is a realistic alternative. Even though the text of the conventions might not explicitly prevent that kind of arrangement, we find the suggested scheme hardly compatible with the objectives and purpose of the conventions.

As regards option D, we believe that the international liability regime established by the Athens Convention makes an international solution to the war risk issue preferable. It seems to be very difficult though to establish an international government-sponsored insurance scheme in which the State Parties to the Athens Convention take part. We suppose that it therefore would be for each State Party to create some kind of national state

mechanism to provide insurance or re-insurance against terrorism risks. Such a suggestion would probably meet strong opposition from our Ministry of Finance. There is also a risk that a government intervention would hold back private sector responses and delay the adaptation of the insurance market.

We have also concerns with option C. With respect to the formalities we have not yet had time to consider the appropriate procedure for such an agreement. We have noted the information from the UK that an agreement could take the form of an IMO Assembly Resolution. Such an agreement appears to be not a minor "clarification" but rather an agreement regarding the interpretation or the application of Article 3 in the Convention. It is doubtful if the rectification of Article 12.5 of the HNS Convention at the 74th session of the Legal Committee which you refer to in your letter can be used as a precedence here.

More importantly though, we have also concerns of a substantial nature:

- It must be borne in mind that the person liable according to the Athens Convention is not always the person who is responsible for the security measures. The Carrier in the Athens Convention means a person who is a party to the contract of carriage. The Company which is responsible for part of the security arrangements according to the ISPS Code could in some cases be the contracting carrier but in other cases be someone else, e.g. a performing carrier. This means that the carrier under the Athens Convention does not necessarily have any obligations according to the ISPS Code. The suggested "clarification" under option C should not entail that the carrier is exempt from liability due to the fact that there are no security requirements applicable to him. In this context we also note Article 4.2 in the Convention that provides, among other things, that the carrier shall, in relation to the carriage performed by the performing carrier, be liable for acts and omissions of the performing carrier and of his servants and agents. A question which arises here is if the interpretation suggested under option C would affect the application of Article 4.2.

- In most practical cases we suppose that when a carrier has complied with the rules established to prevent terrorism the incident would be considered to have been wholly caused by a third party and the carrier thus be exempt from liability. However, we do not believe that it would be reasonable to establish a rule that provides that the carrier is exempted from liability in all such cases, without regard to other circumstances which could be relevant in the individual case. The international rules established to prevent terrorism are not a complete set of rules for how to behave to prevent terrorism or to minimize damages in every conceivable situation. There should always be scope for considering the specific circumstances in the individual case.

- The crucial elements would be if the carrier in the individual case has complied with the security rules and acted diligently and with due care with respect to the risk for damage in the individual case. A ship security certificate could have some value as evidence for compliance, perhaps depending on the date of issue, but the certificate should not be regarded as conclusive evidence. The claimant shall always be able to present evidence to contradict the assertions made by the carrier or his insurer.

- Would it be possible to agree on an interpretation of Article 3.1 b without also agreeing on a definition of "terrorism"? To us this seems necessary also in order to screen out other acts committed by a third party where the interpretation and exoneration of liability can not reasonably be meant to apply (e.g. a discontent former employee of a cruise line taking vengeance for the loss of his job by assaulting the crew or the passengers). Or is the purpose to include such acts in the interpretation?

Thus we have some concerns with option C. We do not want to close the door for this option though and are of course ready to discuss it further.

In our view option A and B are the most appealing options. It is encouraging that the issue with respect to CLC has been solved in cooperation between P&I and the re-insurers. If there is an ambition there should be a way in which the issue could be solved in a similar manner with respect to the Athens Convention. We suppose that the market with time will become better equipped to meet the insurance requirements.

As regards option B, we have noted the information in Circular No. 1/2004 from Gard that the International Group Clubs have recently decided that they should provide cover for two risks through the Group's Pooling arrangements for which there would otherwise be no cover. Why can not this arrangement be developed to include terrorism risks so that the carriers will have a possibility to fulfil the Athens requirements?

In our view it would be very useful if especially the International Group of P&I Clubs and ICS would take their time to express their views on options A and B in greater detail so that we will have a better understanding of what their concerns really are.

Best regards,
Håkan Lundquist