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Professor Erik Røsæg
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Dear Erik

ATHENS CONVENTION 2002

Thank you for your letter dated 26 July 2005 summarising the first round of discussions, and, in particular, giving shipowners the opportunity to justify their position that carriers should not be liable under the Athens Convention 2002 (the "Athens Convention") for terrorist related damage.

1. *The nature and extent of the carrier's liability*

There appears to be some confusion about the nature and extent of the carrier's liability for terrorist related damage under the Convention. At a recent HNSC seminar in London you said that there is no strict liability for terrorism under the HNSC (the relevant provisions of which are similar to the Athens Convention). It has also been said (most recently in your letter of 26 July) that the only terrorism related liability in the Athens Convention is for damage partly caused by terrorism and partly caused by the carrier or someone for whom the carrier is responsible. An International Group of P&I Clubs paper from August 2002 contains the following statement: "The Chairman of the Correspondence Group is on record as stating that he believes that Article 3 as drafted is wide enough to provide the carrier with a defence in the event of an incident caused by an act of terrorism because an act of terrorism is always "done with the intent to cause the incident by a third party.""

At the diplomatic conference, most states shared the view that Article 3(1)(b) would provide a defence for shipowners in respect of terrorism. While the industry welcomed that construction and the policy behind it, we cannot ignore the fact that there is a widely held view that courts may interpret the Athens Convention as imposing:

- (i) strict liability for death or personal injury caused by a shipping incident unless the carrier can prove that the incident was wholly caused by an act or omission done with the intent to cause the incident by a third party (Article 3(1)(b)),

- (ii) fault-based liability (with the burden of proof on the carrier) for loss over and above the strict liability limits (Article 3(1)), and
- (iii) fault-based liability (with the burden of proof on the claimant) for death or personal injury caused by a non-shipping incident (Article 3(2)).

The first case ((i) above) could result in the carrier being liable for terrorist related damage with no fault at all on his part or on the part of someone for whom he is responsible. As Måns Jacobsson implied at the HNSC seminar, the fact that an incident was not wholly caused by a third party does not mean that it must have been caused, or even partly caused, by the carrier. For example, a collision (a shipping incident) involving a passenger ship and a cargo ship may be caused partly by terrorists and partly by a navigational error on the part of the cargo ship. Yet in such a case the carrier will have strict liability under the Athens Convention for any passenger death or personal injury.

In all cases ((i), (ii) and (iii) above), the carrier may be held liable even though his contribution to the cause of an incident was minor. In the first case ((i) above), the carrier may be held liable even if he has fulfilled every obligation under the ISPS Code. To be relieved of strict liability the carrier would have to prove that the damage was “wholly” caused by an act done with intent to cause the incident by a third party. Experience shows that damage caused by acts of international terrorism are typically the result of several causes and the contributory acts of a whole chain of persons including those who are acting within the sphere of responsibility of the carrier himself. Those contributory causes are not necessarily based on negligence, but a contribution from someone within the sphere of responsibility of the carrier will lead to the result that the carrier cannot prove that the incident was “wholly” caused by a third party. That means that the carrier will be liable for 100% of the damage even if the contribution of one of his employees was only 1%.

If, for example, a short blackout of the electrical system on board prevents a message warning that the ship could be a target for terrorism from reaching the master in time to take action to avoid or minimise the danger, the problem on board could be seen as a contributory cause.

Ferry lines are especially vulnerable because in a lot of countries ferries, like other means of public transport, are carrying hundreds of passengers and vehicles that embark/disembark and roll on/off in a relatively short timeframe, which does not allow for every person or package to be checked before boarding.

If a small contribution to a catastrophic incident mainly caused by an intentional act of a third party leads to liability of the carrier for 100% of the damage then the relationship between the responsibility of the carrier and his financial responsibility is clearly inappropriate. The defence (“wholly”) taken from earlier liability conventions is appropriate in so far as it deals with “normal” acts of violence and acts of vandalism. But the defence does not provide an appropriate response to the new phenomenon of international terrorism, which is potentially a catastrophic risk, and which should not trigger the same liability regime as acts of simple violence.

2. The international terrorism risk

At the time of the Diplomatic Conference in 2002, it was hoped that the terrorist attacks of 11 September 2001 were a rare event and that the immediate contraction of insurance cover would soon return to normal capacity. Based on that expectation, the introduction of strict liability and compulsory insurance for rare terrorist activities seemed reasonable despite the scepticism of the industry.

Nowadays it is much clearer than in 2002 that the damaging potential of international terrorists, as assessed by international terrorism risk management experts, has been underestimated. Now we know that the 9/11 events fundamentally changed the perspective on future expected losses from terrorist acts. The attacks in Bali, Madrid, Turkey, London, Egypt and other tourist areas, and the recurrent warnings of terrorism experts, all bear witness to the fact that we are confronted with new forms of international terrorism. This terrorism is characterised by an unprecedented loss dimension, by a transnational nature, and a world-wide geographical scope, with a modus operandi that takes advantage of new technologies, allows for simultaneous attacks in different locations, maximising the destructive potential of attacks with intended ancillary effects on the economy and society as a whole. Such terrorist acts are committed with the intent to influence or destabilise governments or public entities and to provoke insecurity in the population in support of political, religious, ideological or similar goals. Events dictated by terrorists are not predictable generally, but areas with a high concentration of people and values may be targeted to cause the greatest possible damage, which could certainly include one or more passenger ships in different ports or on the high seas.

All of these elements have led to the perception that “acts of terrorism in their latest form represent a new and different class of risk arising from actions akin to acts of war” (OECD: Terrorism risk insurance in OECD Countries 2005, page 269, our emphasis).

This corresponds with the EU Council declaration on terrorism of 25 March 2004, which treated the threat of terrorism as an act against a country and, beyond that, against the international community of states as such. The elements of international terrorism are therefore much closer to the risks of war and hostilities for which the carrier is not liable than to “shipping incidents” for which strict liability is imposed.

In this context, the decision of the UNCITRAL Working Group (Working Group III, Transport Law) to expressly provide the carrier with defences for “...war, hostilities, armed conflict, piracy, terrorism...” in the draft international instrument on carriage of goods (UNCITRAL references: A/CN.9/WG.III/WP.32 and A/CN.9/572) is manifestly correct. We acknowledge that the instrument is presently a draft, as pointed out by Sweden (27 June 2005 letter to the correspondence group), but we cannot agree that a distinction should be drawn between carrier liability for terrorist related damage to property on the one hand and to persons on the other. We are not aware of distinctions being made in other conventions. For example, “damage” in the HNSC includes both property damage and loss of life/personal injury, but the liability regime does not distinguish between the two.

In the recently adopted Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty, an operator is exempted from liability for an act of terrorism.

In Germany, a lower court has held that a tourist operator was not liable in a case of personal injury to his clients caused by a terrorist explosion at Djerba. The decision was based on the assumption that, in a time of growing terrorism, such risks must be treated as a “general risk of life”. (Landgericht Hanover, 27 October 2004.)

Therefore we maintain that it would be more consistent with the political aim of governments at the diplomatic conference to exempt the carrier from liability for acts of international terrorism by interpreting the term “war and hostilities” in the Athens Convention to include acts of terrorism, rather than basing the exemption on Article 3(1)(b).

3. *The protection of passengers*

Passengers are confronted with the same general terrorism threat as the carrier. But neither the carrier nor the passenger is protected if the risk is uninsurable. To make the carrier bear the whole financial risk is not a solution that is favourable for the passenger or the carrier.

As stated in previous correspondence, ICS remains particularly concerned that the Athens Convention imposes strict liability on the carrier for an uninsurable risk. Under CLC, HNSC etc. the liability of the insurer and the shipowner are coterminous (save for wilful misconduct). We have understood that this is to meet the policy objective of ensuring that claimants will always make a recovery (while also avoiding claimants being caught up in arguments over cover, and facilitating prompt settlement of claims). The route which seems to be pursued by the Correspondence Group, however, would leave the carrier strictly liable for terrorism without insurance while possibly exonerating the insurer from direct liability under the Convention. Although this avenue provides welcome protection for the insurer, it is an unsatisfactory solution for passengers, carriers and governments. It is possible that the consequences of this approach have not been considered fully. In the aftermath of a terrorist incident, or an explosion caused by a bio-chemical weapon, national authorities will have to deal with victims who have no obvious means of making a recovery. This is precisely what CLC, HNSC etc sought to avoid.

It has also been maintained that the exemption of carriers from liability for terrorism would remove the passengers’ maritime lien. However, whether a lien is granted or not depends on the applicable national law. Where the national law is based on the 1967 or 1993 Maritime Liens and Mortgages conventions, claims for loss of life or personal injury are secured by a maritime lien only when they occur “in direct connection with the operation of the vessel”. This phrase is not synonymous with “shipping incident” in Article 3 of the Athens Convention. Not every explosion or fire on a ship caused by a terrorist attack will be treated as occurring in direct connection with the operation of the vessel. Accordingly, it is at least questionable whether a maritime lien would be granted for loss of life and personal injury claims caused by international terrorism.

Furthermore, the principle is recognised in the Maritime Liens and Mortgages conventions that the granting of a lien depends on whether other financial resources are available. The 1993 Convention (Article 4(2)(a)) (now in force for the 11 states parties) provides that in connection with the carriage of oil and other hazardous and noxious substances, a maritime lien shall not attach to a vessel to secure claims in respect of loss of life or personal injury, which result from damage for which compensation is payable pursuant to international conventions providing for strict liability and compensation **or other means of securing the claims**; or from radioactive properties of nuclear fuel, radioactive products, or waste. Strict liability and compensation are considered sufficient replacements for the lien in the protection of passengers and/or crew, and so, possibly, would “other means” such as national or international terrorism compensation funds. This could be interpreted as the expression of a general principle which could be applicable to other instances of carriage by sea also where claims in relation to loss of life or personal injury are the subject of international conventions providing for strict liability and compensation.

In addition, there are a number of practical considerations that make it doubtful whether a passenger is really protected by a maritime lien.

In most cases a terrorist attack would result in the ship being severely damaged or perhaps sinking. In such cases, the claims of the passengers or their dependants would not be secured by a maritime lien.

In cases where a ship is only partly damaged, or where passengers are injured or killed by a terrorist attack but the ship itself is undamaged (e.g. poisonous gas), a lien could be the main legal protection for the passenger (depending of course on the applicable national law). The mortgagee then runs the risk of losing its investment. Consequently, mortgagees would be likely to demand either a higher equity capital share, or a much higher risk premium (higher interest rates or, if available, higher mortgage insurance cover for cases where liens could rank before the mortgage). This could result in fewer investments in ferries and other passenger ships.

The carrier's response to an uninsured liability would be to seek to minimise the financial consequences by isolating his assets. One way of reducing the economic consequences of an uninsured liability for catastrophic risks would be to establish single ship companies. However, that could lead to serious economic ramifications because the equity capital invested in the ship would normally be lost in a terrorist attack. The company would go into liquidation and the passenger would not be protected.

Governments have realised that victims of terrorist acts are not sufficiently protected by liability for uninsured claims and have at least partly accepted to serve as an insurer of last resort. States have started from the assumption that (similar to war like operations) their foreign policy has a decisive impact on international terrorism. Consequently, terrorism compensation should be considered part of the portfolio of policy measures to counter the threat of terrorism because such compensation by governments may ameliorate the impact of an attack on those affected. Equity and social solidarity are seen by those states as additional basic principles for terrorism compensation by governments.

Based on those policy principles, the EU Council in its declaration on terrorism of 25 March 2004 has asked EU Member States to implement the Council's Directive of 29 April 2004 on compensation for victims of crime and to apply that Directive to victims of terrorism as well. In addition, the EU Commission has been asked to provide for public compensation funds within the European budget in 2004. On similar grounds the European Convention on compensation for victims of violent crimes (24 November 1983) would be applicable as well, the scope of which goes beyond the EU Member States.

In the aftermath of 9/11, the United States Congress acted quickly to pass the Air Transportation Safety and System Stabilization Act on September 22, 2001 (Public law 107-42). Title IV of this Act created a Victim Compensation Fund administered by a US government appointed special Master. The fund was intended to provide compensation for anyone injured or killed at the World Trade Center in New York, the Pentagon in Washington or on any aircraft hijacked that day. The source of the Victim Compensation Fund was the public funds of the United States of America.

Recently, draft United States regulations regarding the establishment of an International Terrorism Victim Expense Reimbursement Program have been promulgated (OJP Docket No. 1368). The aim of the Program is to reimburse eligible victims of acts of international terrorism that occur outside the United States for expenses associated with that victimization. The Program will be funded by the US Treasury Crime Victims Fund which is financed by fines, fees, penalty assessments paid by US federal offenders, as well as donations from private individuals.

4. *War risk insurance*

In our opinion, a defence for acts of terrorism should apply to all terrorism related risks and not only to those that are uninsurable.

As the P&I Clubs have previously explained, there is a limited amount of war risk cover available, currently up to \$600 million, which is much lower than potential liability under the Convention. The Clubs have also explained that the war risk market is extremely volatile and that capacity can contract rapidly in the event of a terrorist incident. War risk cover is also subject to a seven-day notice of cancellation, which means that it is impossible to provide certification on an annual basis. The problem is compounded by the "bio-chem" exclusion clause introduced by the marine insurance market as a whole (including the war risks market) in the wake of 9/11.

The fact that some war risk cover is available is beside the point. Our contention is that governmental policy today is clearly to put the international terrorist threat on the same level as war and other hostilities. Accordingly, liability in respect of the carriage of passengers by sea for damage caused by terrorism should be treated in the same way as liability for damage caused by war and other hostilities. In both cases the carrier should be afforded a complete defence. Just because there is some (insufficient) cover available for terrorism does not mean that carriers should be liable to the extent of that cover. There is also some cover available for war and no-one has suggested that carriers should be liable for damage caused by war to the extent of available insurance cover. The fact that damage caused by terrorism is essentially uninsurable has compounded the problem, but the root of the problem is the

imposition of carrier liability for such damage. The existence of some insurance capacity for terrorism risks could be exploited by governments for the protection of passengers in ways outside the Athens Convention which are not based on liability, for example, in a public-private compensation scheme; or, by requiring personal accident cover to be taken out by or for passengers.

In conclusion, we remain of the view that the imposition of liability for damage caused by international terrorism is unfair, unjust and, for economic reasons, unsustainable. It is also out of step with the thrust of other international and national instruments. We support the reservation wording recommended by Professor Lowe (in May 2005), which addresses the underlying liability rather than simply the question of insurance certification, with the protection extended to carriers. We repeat the wording below for ease of reference:

“Reservation to Articles 3(1), 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 neither carriers nor insurers shall be liable under the Convention in respect 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*

Such exceptions and limitations will be clearly reflected in the certificates issued by States under Article 4bis.

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.”

Kind regards
Yours sincerely

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