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Professor Erik Røsæg
University of Oslo

Dear Erik

ATHENS CONVENTION – THE WAR RISK ISSUE

Thank you for your letter of 30 May which provides a good basis for discussion.

We note that you have confined the discussion to the “war risk issue”. We would be grateful for your advice as to when and where the “amount issue” will be discussed because our members are very concerned about that problem.

As regards the war risk issue, we think that your list of options needs to be expanded to include the possibility of a general exemption from liability in the case of incidents caused by terrorism. In our view, a clarification should be made in respect of Article 3(1)(a) to the effect that “act of war, hostilities, etc.” includes “act of terrorism”. The clarification could be issued by the IMO Legal Committee and included in States’ implementation legislation in the same way that you have suggested in relation to your Option C.

Terrorism is very similar to war. As pointed out by Graham Barnes (email to Correspondence Group of 2 June) war (and terrorism) are man made peril(s) not marine risks. The purpose of both war and terrorism is “to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act” (see Article 4 of the draft Protocol to the SUA Convention, proposing a new Article 3bis (1) (a)). The same weapons may be used by terrorists as are employed by States at war, with exactly the same results. It is difficult in the post 9/11 world to clearly differentiate between the two. And just as it is possible to have contributory negligence in the case of terrorism, contributory negligence may be present in war as well.

Accordingly Article 3(1)(a) should be interpreted so as to include “act of terrorism” alongside “act of war, hostilities etc.” thereby giving the carrier a general exemption from liability in all such cases and this should be clarified beyond doubt.

We are concerned that your Option C would be a second best solution and will not provide the carrier (and his insurers) with much comfort. The ISPS Code creates obligations on ports and States as well as carriers, and security can only be guaranteed if all are acting together. The proposed clarification would need to be worded in such a way that it was clear that if the carrier has fulfilled his obligations under the ISPS Code, as evidenced by a valid International Ship Security Certificate (ISSC), he will be exempt from liability in the case of incidents caused by acts of terrorism regardless of whether ports and others have complied.

Your options based on financial cover by governments reflect the fact that terrorist activities are directed at governments. However it is for governments to decide whether to “underwrite” the terrorist risk and accordingly in our view it is more appropriate to exclude terrorism from the carrier’s liability than to ask for government cover.

Finally we would very much welcome the views of war risk insurers on your analysis of the extent of the “bio-chem” exclusion (paragraphs 15 – 19 of your letter). On the face of it the clause plainly extends to damage etc. caused by both intentional and unintentional explosion of such weapons. (In this connection, we note that war policies typically cover loss or damage caused by derelict weapons of war e.g. mines and torpedoes.)

Kind regards
Yours sincerely

Linda Howlett
General Manager (Legal)