

Professor  
**ERIK RØSÆG**  
Scandinavian Institute of  
Maritime Law  
University of Oslo

Oslo, Norway 05/07/2004  
P.O.B. 6706 St. Olavs plass  
N-0130 Oslo  
Tel.: +47 2285 9752  
Fax: +47 9738 4998  
Email: erik.rosag@jus.uio.no

To the Athens Correspondence  
Group

Dear Colleagues,

Athens Convention - Round #2 of intersessional correspondence

Many thanks for all contributions in the first round of discussions, following my letter in May. All correspondence to the group is reproduced at <http://folk.uio.no/erikro/WWW/corrgr/index.html#9-11>. In addition, I have had a number of informal contacts.

In this letter, I will sum up my impressions concerning the terrorism issue and then address the amount issue. Deadline for comments is **Wednesday, 4 August 2002**. I foresee that the work of the Correspondence Group should be reported to the next session of the Legal Committee in three short papers, one on the terrorism issue, one on the amount issue and one with draft texts.

The terrorism issue

In my May letter, I outlined five options for what was called the terrorism issue:

- *Option A*: Leave it to the market, perhaps combined with setting conditions for the licensing of insurers.
- *Option B*: A mandatory pooling arrangement.
- *Option C*: Clarify when a loss is not "wholly caused" by terrorism by reference to the ISPS Code.
- *Option D*: Establish a government (re)insurance scheme (without leaving governments with the final bill).
- *Option E*: Make use of the IOPC Fund and HNS Fund (without leaving them with the final bill).

Option C has got quite a lot of support, but also several words of caution. There has also been interest expressed for options A and B, but they have not been much commented on in substance.

For my part, I think Option C should be developed, the points raised addressed, and a suitable text drafted. This would ensure a rapid and not too difficult entry into force of the Athens Convention, 2002.

From the correspondence, I have gathered the following points:

(i) A clarification of "wholly caused" must be effective. In some states an IMO resolution would do, in others this must be reflected in the implementation legislation. There is, of course, no need to amend already adopted implementation legislation if the courts would follow the rule of interpretation set out in the Vienna Convention in any event.

(ii) There is no way the text of the Convention can be changed by IMO resolution or otherwise. Therefore, there is no option to exclude terrorism attacks in the same way as, e g., war is excluded.

(iii) The idea of Option C is that if the ISPS Code is complied with, then losses should be considered wholly caused by terrorist attacks and thus not compensable under the Convention. A clarification could make the insurance market more willing to accept the risk. The idea, of course, needs elaboration:

- ISPS Code certification of the shipowner cannot do, it must be required that the shipowner actually shall believe that the code is complied with. This does not, however, entail a responsibility that terrorism is effectively prevented. All the Code requires is that reasonable routines for prevention have been established.
- If the carrier has fully complied with the ISPS Code, and a terrorist attack still happens due to failure of governments, ports or the carrier to fulfil their obligations under the Code, the attack is not "wholly caused" by terrorism. Therefore, the carrier is liable under article 3(1) of the Athens Convention. There is nothing much to do about this; under the Convention the carrier has the risk not only for his or her employees. The carrier will thus be liable even for losses caused by negligence in maintaining navigational aids. He may, however, claim recourse from the port, etc., that failed. (I now see that my May letter could have been better worded in this respect.)
- The ISPS Code is not a liability convention, and it may be necessary to supplement the clarifications of the Athens Convention with further duties. However, if those additional duties are not or cannot be specified, the Athens Convention is in fact not clarified, and the point

of our exercise fails. I would therefore suggest that duties to prevent terrorism in addition to the ISPS Code should be specified by those who feel this is important.

- The ISPS Code addresses the terrorism risk, while in the Athens Convention, the same issues arises also in respect of violence with a non-political, e g. personal, motive (acts caused by third parties with the intent to cause damage). That may call for a clarification of further duties (see previous point). But I must say that I cannot imagine routines to prevent this kind of violence.

I look forward to further comments on this option, and the other options.

#### The amount issue

The other issue raised by the P&I Clubs in LEG 88/12/2 was 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. This is correct, and it is no longer open for negotiation.

The 2002 Convention does however include a mechanism that can make its implementation easier in the first phase: Article 19. My personal view is that we should make actively use of this provision in order to get the Athens Convention, 2002, into force as soon as possible without causing too much disturbance in the insurance market.

According to Article 19, the Athens claims are limited by the global liability regimes, such as LLMC. This means that the maximum exposure under the Athens Convention would be the LLMC amount of 175,000 SDR multiplied by the number of passengers the vessel is allowed to carry, and not the Athens amount of 400,000 SDR per passenger. If only a part of the passengers on board the vessel is injured, the Athens limitation amount will still determine the maximum of the individual claims, and improve their position significantly compared to the current law.

I believe the P&I clubs can deliver under to the LLMC. (If not, that convention is, of course, doomed.) The amount issue can therefore be effectively addressed by an understanding between States Parties that they shall stick to the LLMC 1996 amounts for the time being.

There are, of course, states that today have no global limitation for passenger claims. However, the clubs can cope with these exceptions today, and it is likely that they will be able to do so also in the future.

The goal for many states would be to make the position of claimants independent of how many others are injured on board the vessel. However, in order to ensure a rapid entry into force of the Athens Convention this goal would have to wait a short time.

Page 4

I invite comments on this use concerning the LLMC and other aspects of the amount issue.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Eric Hays". The signature is written in a cursive style with a large initial "E".