

## International Chamber of Shipping

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Professor Erik Røsæg  
University of Oslo

Dear Erik

### ATHENS CONVENTION

We are writing in response to your letter of 14 May 2005, in which you requested comments by 15 June.

ICS is grateful to the Legal Committee for agreeing that the issue of carrier liability for uninsurable terrorism risks should be studied further in the Correspondence Group. That this remains a key issue is borne out in the correspondence circulated following LEG 90. While the approach of compartmentalising the difficulties encountered by States, insurers, and carriers in the implementation of the Athens Protocol 2000 found favour at LEG 90, the liability of the carrier for uninsurable terrorist risks remains the common source of the difficulties. If that problem were solved, the others would fall away.

In addition to the concerns that you have highlighted in section 3 (Liability for terrorism related claims) of your letter of 14 May, ICS remains particularly concerned that the Protocol imposes **strict** liability on the carrier for an uninsurable risk. We agree that "it was foreseen at the Diplomatic Conference that the carrier might be liable without insurance, namely in respect of his liability in excess of the compulsory insurance scheme", but the Diplomatic Conference was careful to tie **strict** liability for shipping incidents under Article 3(1) to the level of compulsory insurance under Article 4 bis (1). In our view, it is not in the interests of carriers or passengers that the carrier should be strictly liable for an uninsurable risk. In the ultimate, this policy will have the economic effect of forcing carriers to seek to minimise their exposure, i.e. by the formation of single ship companies and other means. A maritime lien will not afford real security for passenger claimants if the vessel is lost or seriously damaged, as might be expected in a terrorist-related shipping incident.

We would be grateful if other correspondents could comment on the policy of imposing strict liability for an uninsurable risk. The Diplomatic Conference did not foresee that one of the long term consequences of 9/11 was that the insurance market would not cover terrorism risks. One may argue that exposing carriers to

liability for an uninsurable risk will ensure that the market is under constant pressure to find insurance solutions and thus engender a feeling of reassurance on the part of governments. But this ignores the reality that insurance solutions are unlikely to be forthcoming and that it is not only carriers, but also passengers, that are exposed. Despite the best efforts of carriers to obtain terrorism cover following 9/11 it is not available, and carriers are not able to influence the reinsurance market.

We have read the opinion of Vaughan Lowe circulated by the International Group on 2 June. We share the view that the most effective solution would be to address the underlying liability under Articles 3(1) and 3(2), and we support the wording proposed at paragraphs 50 and 52, extending the exclusion to carriers. We recognise that this approach has not so far achieved political support in the Legal Committee. However, we hope that it might be considered further in view of the legal issues that have arisen from the attempt to isolate the liability of the carrier from that of the insurer.

We would remind correspondents of our previous letters in which we pointed to developments following the adoption of the Protocol that support the view that strict liability for terrorism should be excluded. These include the adoption by the UN Security Council, acting under Chapter VII of the Charter of the United Nations (“action with respect to threats to the peace, breaches of the peace, and acts of aggression”), of Resolution 1540 aimed inter alia at prevention of proliferation of nuclear, chemical and biological weapons for terrorist purposes. There is also the draft instrument on the carriage of goods wholly or partly by sea prepared by UNCITRAL (UNCITRAL references: A/CN.9/WG.III/WP.32 and A/CN.9/572), which provides the carrier with a defence for “...war, hostilities, armed conflict, piracy, terrorism...”. This indicates that governmental policy today is clearly to put the international terrorist threat on the same level as war and other hostilities, and suggests that liabilities for damage caused by terrorists should be treated in the same way as liabilities for damage caused by war and other hostilities.

We look forward to further discussion within the Correspondence Group, and in particular to comments on the policy of imposing strict liability for an uninsurable risk.

Kind regards  
Yours sincerely

Linda Howlett  
General Manager (Legal)