

Professor
ERIK RØSÆG
Scandinavian Institute of
Maritime Law
University of Oslo

Oslo, Norway 14 May 2005
P.O.B. 6706 St. Olavs plass
N-0130 Oslo
Tel.: +47 2285 9752
Fax: +47 9738 4998
Email: erik.rosag@jus.uio.no

Dear Correspondents,

Athens Convention – terrorism issues

The Legal Committee recommended at its 90th session that the issue on compulsory insurance cover of terrorism related risks pursuant to the Athens Convention, 2002, should be resolved by States making a reservation when ratifying the Convention.¹ The Legal Committee Resolution has been forwarded to the Assembly, which will deal with it this fall.

There is a few issues that needs to be resolved, or at least discussed, in the Correspondence Group. They can be addressed and resolved independently of the pending Assembly Resolution. I will try to address them all here.

I hope to receive comments as soon as possible, or at the latest by **15 June, 2005**.

1. Reservation clause (for Governments when ratifying)

At LEG 90, it was agreed that Governments should make a reservation when ratifying the Athens Protocol, 2002, to enable them to issue insurance certificates even when insurers insist on certain exception clauses.

I suggest the following text of the reservation clause:

“The Government of ... reserves its right to issue and accept insurance certificates with such exceptions and limitations as the insurance marked conditions at the time of issue of the certificate necessitate, such as the biochemical clause and terrorism related clauses, *without exposing the providers of financial security to liability in disregard of the exceptions and limitations under which they have committed themselves*. Such exceptions and limitations will be clearly reflected in the certificate. The right retained by this reservation will be exercised with due regard to guidance by relevant bodies with an aim to ensure uniformity.”

¹ See <<http://folk.uio.no/erikro/WWW/corrgr/index.html#NEW!>>.

Any suggestions for improvement would be most welcome.

Wording in italics has been added to explicitly address the concerns of P&I Clubs that their exclusions and limitations may be ignored despite the reservation and the limitations of the insurance certificate.

2. Necessary exception and limitation clauses (for insurers when committing themselves)

Even if the reservation clause referred to under item 1 above is wide, it is the intention that Governments, under guidance of the Legal Committee, should be very restrictive in respect of which exceptions and limitations they allow.

P&I cover for CLC certificates does *not* include any exceptions and has *not* been withdrawn at the latest renewal. On the contrary, the scope of this wide cover has recently been extended.² Still, I do not think it is wise to cont on the same solution in respect of the Athens convention.

The following may convey the right idea of the market situation today in respect of insurance exceptions and limitations in addition to those of the Convention itself (the clauses referred to are attached). Therefore, if issued today, the guidance of the Legal Committee anticipated in its resolution at LEG 90 could read:

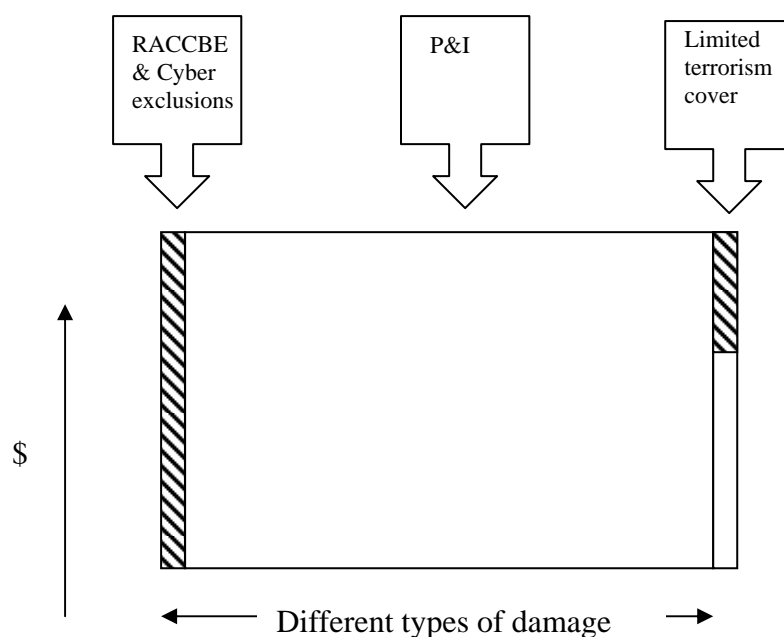
1. All compulsory insurance cover under the Athens Convention may be subject to the following clauses in addition to the limits and defences under the Convention:
 - *Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion Clause* (Institute clause no. 370; RACCBE); and
 - *Institute Cyber Attack Exclusion Clause* (Institute clause no. 380)
2. To the very limited extent this compulsory insurance cover shall include risk related to terrorism at all, the compulsory insurance cover in respect of such events may in addition be subject to:
 - *War Risks 7 Days Notice, Automatic Termination of Cover and War and Nuclear Exclusion Clause*³ (to the extent the insurance is not continued under new terms); and
 - A maximum limit per incident, without prejudice to the per capita limit of the Convention, of USD 500 millions.⁴
3. The insurers may define terrorism⁵, but the definitions under item 1 and 2 above must be clearly consistent, so that no gaps in the insurance cover are created.

² See, e.g., Gard's Rules http://www.gard.no/gard/Publications/statutesandrules/rules/p2_chapter2.html, art. 58(2)(iii).

³ Most of the risks excluded in this clause are already excluded by the war exception of the Convention.

⁴ This will cover the requirements of the Convention in full for ships up to about 1300 passengers (1 USD=0.6 SDR).

The exclusions are rather marginal, and can be illustrated like this:



Any views on which exception and limitation clauses would be strictly necessary would be most welcome.

3. Liability for terrorism related claims

For years, and latest at LEG 90, concern was expressed by observer delegations that carriers are made liable for damage caused by terrorism. They requested a correspondence group discussion of this issue. This issue does not affect the insurance capacity or the insurance certificates, only the liability of the shipowners. The concerns appear to be:

- Although negligence liability (for lack of preventive measures, etc) in these cases perhaps is not unfair, concerns have been expressed that courts most likely would require an unreasonably strict standard of care.
- Article 3(1)(b) of the Athens Convention provides strict liability for damage caused by acts of terrorism (etc.) that do not amount to war. However, this only applies if there is contributory negligence of the carrier or someone he is responsible for, typically by way of failure of preventive measures. (Only then would the damage not be “wholly caused” by terrorism.) The observer delegations argue that this is unfair and that it needs to be clarified which, if any, acts of terrorism amounts to war.
- It is not possible to obtain insurance for all terrorism related damage, and then, the observer delegations argue, it is unfair to make carriers liable.

⁵ The point is to avoid a long discussion on which definition of terrorism is the more appropriate. See some examples of insurance definitions in <http://folk.uio.no/erikro/WWW/corrgr/insurance/terror.pdf>.

For my part, I feel that the two first points mainly amounts to reopening of issues decided at the Diplomatic Conference, and therefore do not warrant much discussion. However, if any correspondent would like to propose how the negligence standard and/or the borderline between war and terrorism could be clarified, that would be most helpful. If and when a broad agreement on any of these clarifications should emerge, the group would have to consider how to implement this view in the application of the Convention.

The third point, on lack of insurance, is correct, albeit war risk insurance is to some extent available. However, 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. So this is hardly a new issue of principle that warrants much discussion now.

In any event, it is important for passenger claimants that the carrier has been made liable. This will ensure that they will have a maritime lien⁶ in the vessel in these cases, where insurance is not available on the part of the passengers either. A maritime lien will secure their claims well in the more common events where the claims do not exceed the value of the vessel after the incident, and this is far better than no security at all. That reason alone may justify the liability of the carrier in these cases.

In addition to this, some governments may also feel reassured when carriers are exposed to liability for claims related to terrorism, so that one can be certain that the market is under a constant pressure to find insurance solutions.

Altogether, it seems like there is room for a clarification on the liability clauses of the Convention relating to terrorism, but hardly to a broad reopening of discussions in principle.

4. Availability of insurance

Governments now expect insurers, and in particular P&I Clubs, to signal that they are ready to back the mandatory Athens insurance, subject to the terrorism related exceptions and limitations outlined above. One would not accept that the item discussed under item 3 above, which does not directly involve insurers, is brought into this issue, or that the renegotiation of the issues agreed at the Diplomatic Conference is sought.

This is a matter of urgency to avoid regional solutions. Could we please get a confirmation that this issue will be put to Club Boards this summer?

Regards,



Erik Røsæg

⁶ International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926, article 2 (No. 4); International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1967, article 4(1)(iii); International Convention on Maritime Liens and Mortgages, 1993, article 4(1)(b).

Appendix A
Institute Radioactive Contamination, Chemical, Biological, Bio-Chemical
and Electromagnetic Weapons Exclusion Clause

(CL 370, 10/11/2003)

This clause shall be paramount and shall override anything contained in this insurance inconsistent therewith.

In no case shall this insurance cover loss damage liability or expense directly or indirectly caused by or contributed to by or arising from

1. ionising radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel
2. the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof
3. any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter
4. the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter. The exclusion in this sub-clause does not extend to radioactive isotopes, other than nuclear fuel, when such isotopes are being prepared, carried, stored, or used for commercial, agricultural, medical, scientific or other similar peaceful purposes
5. any chemical, biological, bio-chemical, or electromagnetic weapon.

Appendix B
Institute Cyber Attack Exclusion Clause

(CL 380, 10/11/03)

1. Subject only to clause 1.2 below, in no case shall this insurance cover loss damage liability or expense directly or indirectly caused by or contributed to by or arising from the use or operation, as a means for inflicting harm, of any computer, computer system, computer software programme malicious code, computer virus or process or any other electronic system.
2. Where this clause is endorsed on policies covering risks of war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power, or terrorism or any person acting from a political motive, Clause 1.1 shall not operate to exclude losses (which would otherwise be covered) arising from the use of any computer, computer system or computer software programme or any other electronic system in the launch and/or guidance system and/or firing mechanism of any weapon or missile.

Appendix C

War Risks 7 Days Notice, Automatic Termination of Cover and War and Nuclear Exclusion Clause

Notwithstanding the provisions of Owners' Policies this insurance is subject to the Notice of Cancellation and Automatic Termination of Cover Clause as follows:

- (i) Cover hereunder in respect of War Risks, etc may be cancelled by either the Underwriters or the Assured giving 7 days notice (such cancellation becoming effective on the expiry of 7 days from midnight of the day on which Notice of Cancellation is issued by or to the Underwriters). The Underwriters agree however to reinstate this insurance subject to agreement between the Underwriters and the Assured prior to the expiry of such notice of cancellation as to new rate of premium and or conditions and or warranties.
- (ii) Whether or not such notice of cancellation has been given cover in respect of war risks etc shall **TERMINATE AUTOMATICALLY**.
 - (a) upon the outbreak of war (whether there be a declaration of war or not) between any of the following countries: United Kingdom, United States of America, France, the Russian Federation, the People's Republic of China
 - (b) in respect of any vessel, in connection with which cover is granted hereunder, in the event of such vessel being requisitioned either for title or use.
- (iii) This insurance excludes
 - (a) loss damage liability or expense arising from:
 - the outbreak of war, (whether there be a declaration of war or not) between any of the following: United Kingdom, United States of America, France, the Russian Federation, the People's Republic of China
 - requisition either for title or use
 - (b) loss damage liability of expenses directly or indirectly caused by or arising from:
 - ionizing radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel.
 - the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof
 - any weapon of war employing atomic or nuclear fission and/or fusion or other reaction of radioactive force of matter.

Cover in respect of the risks of war, etc., shall not become effective if, subsequent to acceptance by the Underwriters and prior to the intended time of attachment of risk, there has occurred any event which would have automatically terminated cover under the provisions of this Clause.