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Dear Erik,

Athens

I must apologise for bringing a further matter before the Correspondence Group at this very late stage but feel that we have no alternative but to bring it forward for discussion now that we have been reminded of the point by ICCL. This was raised in ICCL's submission to the Diplomatic Conference but was overlooked by us in our submission in relation to Article 3.1.a.

The problem again concerns liability for terrorism but this time in relation to Article 3.2. The carrier's liability in negligence under Article 3.2. clearly has the potential to extend to liability for acts of terrorism. However the carrier has no cover in respect of such liability because the War Risk exclusion employed by the Clubs and the market explicitly excludes liability for terrorist acts involving contributory negligence – I attach copy of the wording in our Pooling Agreement which, I believe, is standard throughout the market. As a consequence the Clubs are unable to certify that cover is in place under the terms of the Convention. It would seem therefore that this further matter that now exists under Article 3.2 is similar to the problem that exists under Article 3 (1) (a) that we have sought to address in our existing proposal.

In order to align the Convention with the terms of the carrier's cover the either the terms of the War Risk exclusion or the terms of the Convention would have to be modified. The first alternative is not possible. The market is very conscious of the likelihood that negligence of the carrier would inevitably be found in any terrorist incident whether or not involving a shipping incident. The foundation for this concern is well illustrated by

the judgements in the PanAm Lockerbie and Achille Lauro cases. It is therefore extremely unlikely that underwriters would be prepared to consider any revision of the War Risk exclusion which could lead to exposure for terrorism up to the limits contemplated in the Athens Convention.

However, it might be possible, as a matter of construction, to argue that the Diplomatic Conference could only have had in contemplation that the insurance requirements of the Convention would refer to insurance that was available. For this purpose it might therefore be possible to suggest that the insurance requirements of Article 4bis were naturally understood to be limited in this respect. It is not therefore a matter of interpretation but more a clarification of the assumptions made at the Conference. We would therefore propose a resolution agreeing declaratory wording that insurance was limited to 'available insurance' by, for example, agreeing to insert the words "if such insurance or financial security is available" at the end of the first sentence of paragraph 1 of Article 4bis.

Alternatively, it may be possible to amend the existing draft Resolution to include suitable text referring to Article 3 (2) as well as 3 (1) (a) in the first operative paragraph of the draft. This would cover the anomaly that exists between Article 3 (1) and 3 (2) and the shipowner's defences. Such an approach might be acceptable as "an application" of the provisions of the Convention in accordance with Article 31 (3) (a) of the Vienna Convention on the Law of Treaties.

If this cannot be agreed the only other solution that we can envisage would be for States to accept a qualified certificate and issue an indemnity to the Clubs (or other insurer) in respect of the excluded risk. The indemnity would be necessary because insurers would be liable to the full extent under the form of certificate which is annexed to the Convention. This solution is not ideal since, given the considerable exposure under the Convention, it may involve consideration of the acceptability of the security of certain Flag States. However, for the moment we are unable to provide any other solution. We have therefore brought the matter before the Correspondence Group so that further discussion can take place.

I would be obliged if you would kindly circulate this letter to the Correspondence Group.

In view of this development may I suggest that it might be wise to bring forward the proposed meeting of the Correspondence Group to the 25th or 26th April?

Yours sincerely,



D.J.L. Watkins

APPENDIX IV

Excluded Risks - Clause 4

1. War risks

Liabilities, costs or expenses (irrespective of whether a contributory cause of the same being incurred was any neglect on the part of the Insured Owner or his servants or agents) when the loss or damage, injury, illness or death or other accident in respect of which such liability arises or cost or expense is incurred, was caused by:

- (a) war, civil war, revolution, rebellion, insurrection or civil strife arising there from, or any hostile act by or against a belligerent power, or any act of terrorism (provided that, in the event of any dispute as to whether or not, for the purposes of this paragraph (a), an act constitutes an act of terrorism, the decision of the directors of the relevant Association shall be final);
- (b) capture, seizure, arrest, restraint or detainment (barratry and piracy excepted) and the consequences thereof or any attempt thereat;
- (c) mines, torpedoes, bombs, rockets, shells, explosives or other similar weapons of war, provided that this exclusion shall not apply to liabilities, costs and expenses which arise solely by reason of
 - (i) the transport of any such weapons whether on board or not, or
 - (ii) the use of any such weapons, either as a result of government order or with the agreement in writing of the relevant Association where the reason for such use was the avoidance or mitigation of liabilities, costs or expenses which would otherwise give rise to Pool Claims

other than liabilities, costs and expenses of an Insured Owner insofar only as they are discharged by the relevant Association on behalf of the Insured Owner pursuant to a demand made under

- (i) a guarantee or other undertaking given by the Association to the Federal Maritime Commission under Section 2 of US Public Law 89-777, or
- (ii) a certificate issued by the Association in compliance with Article VII of the International Conventions on Civil Liability for Oil Pollution Damage 1969 or 1992 or any amendments thereof,

to the extent such liabilities, costs and expenses are not recovered by the Insured Owner under any other policy of insurance;

and provided always that the relevant Association has provided in its Rules that the Insured Owner agrees that any payment by the Association under any such guarantee, undertaking or certificate in discharge of the said liabilities, costs and expenses shall, to the extent of any amount recovered under any other policy of insurance or extension to

the cover provided by the Association, be by way of loan and that there shall be assigned to the Association all the rights of the Insured Owner under any other insurance and against any third party.

2. Nuclear risks

Liabilities, costs and expenses directly or indirectly caused by or contributed to by or arising from

- (a) ionising radiations from, or the radioactive, toxic, explosive or other hazardous or contaminating properties of
 - (i) any nuclear fuel or any nuclear waste or the combustion of nuclear fuel, or
 - (ii) any nuclear installation, reactor or other nuclear assembly or nuclear component thereof; or
- (b) any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter,

other than liabilities, costs and expenses arising out of carriage of “excepted matter” (as defined in the Nuclear Installations Act 1965 of the United Kingdom or any regulations made thereunder) as cargo in an Insured Vessel.

3. Blockade running etc.

Liabilities, costs or expenses arising out of or consequent upon an Insured Vessel blockade running or being employed in an unlawful trade.

4. Limited liability

Liabilities, costs or expenses arising in respect of Insured Vessels where cover has been given by an Association or a Reinsured Entity to an Insured Owner (other than an Insured Owner subject to a fixed premium) which exceeds the Retention of that Association and is subject to a limit, provided that such liabilities, costs or expenses shall not be Excluded Risks by virtue of this paragraph where

- (a) the relevant limit is consistent with the limits provided for in Appendix III, or
- (b) cover has been given by the Association or Reinsured Entity on the basis referred to above for sound underwriting reasons unrelated to the commercial requirements of the Insured Owner.

5. Oil Pollution risks

Liabilities, costs or expenses arising in respect of oil pollution or the threat thereof where an Insured Vessel is entered only for the risk of oil pollution or the threat thereof.