

INTERNATIONAL GROUP OF P&I CLUBS

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Dear Erik,

Athens Convention

Many thanks for your letter of 5th July 2004.

On the amount issue, we would like to explore further your suggestion that it might be possible to employ the global limit of LLMC by utilizing the provisions of Article 19 of the Athens Convention together with Articles 7.1 and 15.3bis of the 1996 LLMC. We would welcome the comments of the Correspondence Group on whether States would be prepared to legislate in this way, particularly those States that may already have a higher limit in force under domestic law. It would certainly be helpful in our presentation to Club Boards if we can advise them that a global limit will be available at the levels set in 1996 LLMC.

On the terrorism issue, we continue to share the view expressed by ICS that it may be worth examining once more the policy that lies behind the Athens provisions concerning war and terrorism. These provisions were carried over wholesale from other Conventions and insufficient consideration may have been given to their true intent and effect, given that circumstances have changed considerably in recent decades. We suspect that the war risk exception which is adopted in order to delineate the strict liability of most modern Conventions was originally based on the terms of hull and cargo insurance policies where it may have been assumed that cover would be available elsewhere for those excluded risks (and that States would provide backing for war risk cover). That assumption

is no longer valid and in any event, as ICS has cogently pointed out, the distinction between war and terrorism has become blurred today. We believe that this issue deserves re-examination as a matter of policy.

It has been suggested that it is not acceptable to re-open the Convention since nothing has changed since the Diplomatic Conference in 2002 when delegates agreed the Protocol despite warnings from the industry that cover was not available. This decision was taken on the assumption that cover would be available and this assumption is now generally accepted as unwarranted. This, in our view, would constitute a change in circumstance sufficient to warrant amending the Athens Convention and indeed all the other Conventions that share the same flaw.

However, the same result could perhaps be achieved in the context of the Athens Protocol by seeking the authority of the Assembly of IMO to rectify the provisions of the Protocol by including terrorism in the war risk exception. If a decision of the Assembly can be employed in order to clarify the provisions of Article 3.1.b. (Option C), why cannot the same technique be employed in order to clarify Article 3.1.a.? You suggest in your letter that “there is no way the text of the Convention can be changed by IMO resolution or otherwise.” However, it seems to us that if it is possible to clarify what constitutes contributory negligence in Article 3.1.b. by resolution, it is equally possible to clarify, for example, that “hostilities” or “insurrection” include acts of terrorism in the same way. In this way it may be possible to avoid all the difficulties which are inherent in establishing absence of negligence, compliance with ISPS etc. Again, we would be interested in the detailed comments of States.

Turning to the Options set out in your letter of 20th May, we have the following comments:

Option A.

As we have explained on previous occasions, war risks (including terrorism) are excluded from Club cover and covered by separate war risk underwriters. However, the Clubs’ reinsuring underwriters have nonetheless agreed, for the time being at least, to continue to provide reinsurance for the exposure of Clubs under the CLC certificate even though the substantive risk is covered by a different set of underwriters. Although this arrangement will work in the short term, it is plainly not satisfactory in the long term. Even if it were possible it would be unwise to attempt to extend this arrangement to cover risks arising under Athens, HNS and Bunkers. Moreover, it is extremely unlikely in the context of a new liability under a new convention that a reinsuring underwriter would be prepared to stand behind a certificate when the substantive cover is placed elsewhere. This is particularly the case where, as under Athens, the amounts at stake are considerably higher than the amounts under CLC. It is also

unlikely that the threat to withdraw a licence, even if administratively achievable, would have much effect on underwriters in their assessment of the risk.

Option B.

Any pool of shipowners would have to be capable of bearing at least one claim of SDR750million. Even if set up by government, this would be impossible without reinsurance, and reinsurance is simply not available.

As mentioned in Hakan Lundquist's letter of 2nd July, the Clubs did try to develop this idea and mutualize the existing exposure under the bio-chem exclusion but even on this limited basis it proved impossible without reinsurance to provide cover in excess of \$20million and then only for crew claims and legal costs, as it was not possible to obtain support for the cover of passengers or other P&I risks. We see no prospect of extending this arrangement to cover the much wider liabilities thrown up by the Conventions which are not yet in force.

Option C.

We suggested in our letter of 24th June that Option C may provide a way forward. However, on further reflection we doubt whether this option is practicable: just as a Club is unable to certify that cover is in place in respect of wilful misconduct of the owner, so the Club is equally unable to certify that cover is in place where the member does not have an ISPS certificate in place. However, the analogy with wilful misconduct is not precise: in the absence of wilful misconduct, cover under the Rules may be available whereas cover is simply not available in relation to terrorism whether or not an ISPS certificate is in place. Standard cover of general P&I risks may have been granted on the basis of compliance with ISPS but if the certificate is withdrawn for whatever reason (or was never obtained) then cover of those general risks will cease to exist and in any event that cover would not extend to liabilities arising from acts of terrorism because of their exclusion from the standard cover. The stumbling block therefore is that if ISPS certification is withdrawn or never obtained, the consequence, so far as concerns any COFR guarantee which might have been given by a Club, is that the Club would then be on risk for terrorist and/bio-chem liabilities, the very risks that Clubs cannot insure or guarantee up to the Protocol levels. These liabilities are not covered or only covered within a band or up to limits (\$400m.excess of Hull value for terrorism risks, \$20m. for restricted bio-chem risks) which do not fulfil the requirements of the Protocol. It is therefore not possible for Clubs to certify that cover is in place in those circumstances. Taken together with the objections outlined by Sweden we feel that Option C as presently understood is probably unworkable. Moreover, as we suggest above, we feel that the mechanism suggested in relation to Option C would probably be better employed to provide a more comprehensive answer by clarifying Article 3.1.a.

Option D.

In our view this option would run up against the same problem as Option B, namely that reinsurance is simply not available. In order to operate satisfactorily a government reinsurance scheme would have to be capable of meeting a claim of SDR750million. It is very unlikely that any finance ministry would be prepared to set aside sufficient funds to make this possible. Reinsurance cover would therefore be sought but would not be available.

Option E.

Although we have no precise knowledge of the amounts currently held on deposit by the IOPC Fund we doubt whether they would be sufficient to meet the obligations under the Athens Convention. Therefore resort would again have to be made to reinsurance, which is simply not available.

Bio-chem Exclusion.

As we mentioned in our letter of 24th June, present indications are that our underwriters will not be in a position to change their stance on this issue at the 2005 renewal. We share your view that in logic the bio-chem exclusion was intended to deal only with war and terrorism. However, the language is plainly wider in effect and this gives rise to a gap in our cover. As indicated above we have tried to put together mutual protection in this respect but can provide no more than the restricted \$20million cover mentioned above, which is obviously inadequate in the context of the Athens Convention.

Like you, we shall look forward to the comments of other members of the Correspondence Group and in the meantime confirm that we are ready to assist in every possible way to bring the Convention into force at an early date. In particular we should perhaps clarify that we wish to be in a position to report fully to Clubs as soon as it appears that a workable solution may be found on the terrorism issues.

Yours sincerely,

Lloyd Watkins