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International Oil Pollution Compensation Funds

Agenda Item 3	IOPC/APR19/**3/8**	
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1992 Fund Assembly	92AES23	
1992 Fund Executive Committee	92EC72	●
Supplementary Fund Assembly	SAES7	

INCIDENTS INVOLVING THE IOPC FUNDS — 1992 FUND

BOW JUBAIL

Note by the Secretariat

Objective of document:	To report on an oil pollution incident that may involve the 1992 Fund.
Summary:	On 23 June 2018, the oil and chemical tanker m.t.v. *Bow Jubail* (23 196 GT) collided with a jetty owned by LBC Tank Terminal in Rotterdam, the Kingdom of the Netherlands. As a consequence of the collision, a leak occurred in the area of the starboard bunker tank, resulting in a spill of fuel oil into the harbour. The ensuing pollution affected vessels in the vicinity, quays and other property, and wildlife. At the time of the incident, the *Bow Jubail* was in ballast. The oil spilled was bunker oil. The shipowner applied before the Rotterdam District Court for leave to limit its liability in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as modified by the 1996 Protocol (LLMC 76/96) (SDR 14 312 384). The shipowner argued that the incident was covered under Article 1.8 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention 2001). In November 2018, the Rotterdam District Court decided that the shipowner had not proved that the tanker did not contain residues of persistent oil at the time of the incident and that therefore the *Bow Jubail* qualified as a ship as per Article I(1) of the 1992 Civil Liability Convention (1992 CLC). The shipowner has appealed to the Court of Appeal in The Hague. The burden of proof on this point lies with the shipowner. If the shipowner cannot prove that the *Bow Jubail* had no residues of oil in bulk on board, the 1992 CLC would apply. The relevant test would be the one applied by local law, in this case, the law of the Netherlands. The ship is insured with Gard P&I (Bermuda) Ltd, which is a member of the International Group of P&I Associations. The limitation amount applicable to the *Bow Jubail* if the 1992 CLC was to apply would be SDR 15 991 676, but the owner of the *Bow Jubail* is a party to the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006 (as amended 2017) whereby the shipowner would indemnify, on a voluntary basis, the 1992 Fund for the difference between the limitation amount applicable to the *Bow Jubail* under the 1992 CLC and the amount of compensation paid by the 1992 Fund, up to a limit of SDR 20 million.

	So far, the shipowner has received some 150 claims. The claims have not yet been quantified but it is likely that the total pollution damage will exceed the limit that would apply to the ship under the 1992 CLC, and in that case, both the 1992 Fund Convention and the Supplementary Fund Protocol could apply to this incident. However, if the shipowner is successful in proving that there were no such residues on board, the incident would fall under the Bunkers Convention 2001, and therefore the limitation amount of the LLMC 76/96 would apply.
Action to be taken:	1992 Fund Executive Committee Information to be noted.

1 Summary of incident

Ship	*Bow Jubail*
Date of incident	23 June 2018
Place of incident	Rotterdam, the Netherlands
Cause of incident	Collision
Quantity of oil spilled	Approximately 217 tonnes of heavy fuel oil
Area affected	Rotterdam Port, the Netherlands
Flag State of ship	Norway
Gross tonnage	23 196 GT
P&I insurer	Gard P&I (Bermuda) Ltd
Bunkers Convention 2001	If the Bunkers Convention 2001 were to apply, the limit would be SDR 14 million
CLC limit	It would be some SDR 16 million
STOPIA/TOPIA applicable	If the 1992 Conventions were to apply, STOPIA 2006 (as amended 2017) would apply, with a limit of SDR 20 million
CLC + 1992 Fund + Supplementary Fund limit	If the Conventions apply the limit would be SDR 750 million
Legal proceedings	The Rotterdam District Court decided that the *Bow Jubail* could qualify as a ship as defined in the 1992 CLC so that the shipowner could not invoke the Bunkers Convention 2001 for its limitation of liability. The shipowner has appealed arguing that the Bunkers Convention 2001 should apply to this case since the *Bow Jubail* was not a ship under the 1992 CLC.

2 Background information

2.1 On 23 June 2018, the oil and chemical tanker m.t.v. *Bow Jubail* (23 196 GT) collided with a jetty owned by LBC Tank Terminal in Rotterdam, the Kingdom of the Netherlands. As a consequence of the collision, a leak occurred in the area of the starboard bunker tank, resulting in a spill of oil into the harbour. The ensuing pollution affected vessels in the vicinity, quays and other property, and wildlife.

2.2 At the time of the incident, the *Bow Jubail* was in ballast.

2.3 The shipowner has so far received some 150 claims. Although the claims have not yet been quantified, there is some indication that the claimed amount may be over USD 50 million.

3 Applicability of the Conventions

3.1 The Netherlands is Party to the 1992 Civil Liability and Fund Conventions and the Supplementary Fund Protocol.

3.2 Article I(1) of the 1992 Civil Liability Convention defines 'ship' as: 'any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage **unless it is proved that it has no residues of such carriage of oil in bulk aboard**'.

3.3 At the time of the incident, the *Bow Jubail* was in ballast. The oil spilled was bunker oil. The question is whether there were any residues of previous cargoes on board. The burden of proof that there were no residues on board lies with the shipowner. The relevant test will be the one applied by local law, in this case, the law of the Netherlands.

3.4 If the shipowner cannot prove that the *Bow Jubail* had no residues of oil in bulk on board, the 1992 Civil Liability Convention (1992 CLC) would apply. In that case, and since the total pollution damage is likely to exceed the limit that would apply to the ship under the 1992 CLC, both the 1992 Fund Convention and the Supplementary Fund Protocol could apply to this incident.

3.5 The ship is insured with Gard P&I (Bermuda) Ltd, which is a member of the International Group of P&I Associations. The limitation amount applicable to the *Bow Jubail* if the the 1992 CLC was to apply would be SDR 15 991 676, but the owner of the *Bow Jubail* is a party to the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006 (as amended 2017), whereby the shipowner would indemnify, on a voluntary basis, the 1992 Fund up to SDR 20 million.

3.6 However, if the shipowner is successful in proving that there were no such residues on board, the incident would fall under the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention 2001), and therefore the limitation amount under the Convention on Limitation of Liability for Maritime Claims, 1976, as modified by the 1996 Protocol (LLMC 76/96) would apply. The liability limit for property damage claims applicable to the *Bow Jubail* under the Bunkers Convention 2001 would be SDR 14 312 384.

4 Limitation proceedings

4.1 The shipowner applied before the Rotterdam District Court for leave to limit its liability in accordance with the LLMC 76/96. The shipowner argued that the incident was covered under Article 1.8 of the Bunkers Convention 2001. Accordingly, the shipowner requested to establish a limitation fund for property damage in the form of a guarantee issued by the shipowner's insurer, Gard P&I (Bermuda) Ltd.

4.2 In response to a Court request, the shipowner submitted a technical report concluding that no oil cargoes and/or their residues, persistent or non-persistent, remained on board the vessel prior to and at the time of the incident.

4.3 A hearing took place on 28 September 2018. At the hearing the shipowner argued that although it may be assumed that on the voyage prior to the incident, from Houston to Rotterdam via Antwerp, the *Bow Jubail* carried 'oil' as referred to in the 1992 CLC, the tanks were clean of oil cargo residues at the time of the incident, and therefore the Bunkers Convention 2001 applied to the incident.

4.4 The shipowner also argued that all tanks in which oil had been carried, had been subject to a MARPOL (International Convention for the Prevention of Pollution from Ships) prewash and an additional 'commercial wash'.

4.5 The majority of the claimants present at the hearing argued that the evidence that had been presented to the Court did not prove that the vessel was free of oil cargo residues and that as a result not the Bunkers Convention 2001 but instead the 1992 CLC with the additional 1992 Fund Convention and the Supplementary Fund Protocol should be governing the incident and the compensation.

4.6 The shipowner argued that the facts of the case should dictate which Convention and which limits should apply, not simply the desire of the claimants to apply the Convention which is more beneficial to the claimants.

4.7 The Court issued its decision in November 2018, holding that the shipowner had not sufficiently substantiated that the tanks of the *Bow Jubail* did not contain residues of persistent oil carried in bulk at the time of the incident, as provided in Article I(1) of the 1992 CLC. The Court denied the shipowner the opportunity to provide further evidence in support of its standpoint that the tanks were clean of oil cargo residues. The Court assumed that the *Bow Jubail* qualified as a ship as defined in the 1992 CLC. In particular, the Court considered the following:

- An applicant in limitation proceedings should sufficiently substantiate its application in a timely and clear way so that the defendants, the interested parties and the Court can discuss the matter properly and in a well-prepared manner and that subsequently, the Court can render its decision.

- In view of the possibility of a further debate in claim validation proceedings or in appeal proceedings, limitation proceedings are not well fit for furnishing proof in the first stage of the proceedings.

- There is no time limit for filing an application for limitation of liability. As the applicant, the shipowner could have taken all the time it needed to prepare and substantiate its application. Even if it realised only after the filing of its application that applicability of the 1992 CLC would also be investigated, the shipowner could have requested for an adjournment of the oral hearing, or it could have withdrawn its application to submit it again after completion. However, the shipowner has not done so.

- For the above reasons, the Court decided to leave the incompleteness of the documents and the lack of clarity with respect to the presence of residues in the sense of the 1992 CLC for the account of the shipowner and decided not to grant the shipowner an opportunity to complete its standpoint.

Shipowner's appeal

4.8 The shipowner has appealed to the Court of Appeal in The Hague. In its appeal the shipowner argues the following:

- All cargo that may qualify as oil in the meaning of the 1992 CLC had been discharged in Antwerp and Rotterdam. The key issue in the appeal is the proviso of the definition of ship in the CLC: Were there any residues of the carriage of oil in bulk on board at the time of the incident? The shipowner's position is that the vessel does not qualify as a 'ship' under the 1992 CLC since there were no residues of persistent oil in bulk aboard.

- A vessel can be a CLC vessel at one stage and a non-CLC vessel at another stage during its lifespan. Cleaning the vessel after the discharge of a cargo of persistent oil in bulk to 'oil free' means that the vessel no longer qualifies as a ship as defined in Article I(1) of the 1992 CLC.

- The vessel's tanks were cleaned in order to be 'oil free' in accordance with the regulations of the MARPOL, and thus under these regulations, she was no longer carrying oil or oil mixture on board. In addition, the vessel also had her tanks cleaned with a so-called 'commercial wash' in order to make the vessel fit to carry new cargo. This means that the vessel no longer was a ship in the sense of the 1992 CLC and therefore the Bunkers Convention 2001 applied. Being 'oil free' according to MARPOL, which is documented in the Oil Record Book, is also free of residues as defined in Article I(1) of the 1992 CLC.

- A vessel actually carrying cargo other than persistent oil has never been regarded as a 'ship' under the 1992 CLC, and consequently a bunker spill from such a vessel has never yet been considered to be governed by that Convention. Only bunker spills from tankers in ballast before cleaning have been considered potentially subject to the 1992 CLC.

4.9 The Court of Appeal judgment is expected in 2019.

5 Director's considerations

5.1 This is an interesting case since there is a doubt in whether it is the Bunkers Convention 2001 or the 1992 CLC which applies. The case is based on the issue of the standard of proof of whether there are residues of previous cargoes of persistent oil in a ship in ballast.

5.2 The burden of proof that the *Bow Jubail* did not have, at the time of the incident, any residues of persistent oil from previous cargoes lies with the shipowner. This burden of proof has not been satisfied according to the judgment by the Rotterdam District Court.

5.3 The shipowner has appealed, and a decision by the Court of Appeal is awaited. If a final judgment of a competent court were to decide that the 1992 Civil Liability and Fund Conventions apply, the 1992 Fund would pay compensation as required and would be indemnified by the shipowner in accordance with the provision under STOPIA. However, if the shipowner were to be successful, the Bunkers Convention 2001 would apply, and the 1992 Fund would not be involved in this case.

5.4 If the 1992 CLC applies, the limitation amount will be paid to pollution damage claims only whereas the limitation amount under the Bunkers Convention 2001, which would be based on the LLMC 76/96, will be paid to other types of claim and therefore the claims would need to compete.

5.5 Claims are likely to exceed USD 50 million, and therefore the Court's decision could have a financial impact on the Fund.

5.6 The Director will continue to monitor this case and will report further developments to the Executive Committee at a later session.

6 Action to be taken

1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited to take note of the information contained in this document.