



International Oil Pollution
Compensation Funds

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INCIDENTS INVOLVING THE IOPC FUNDS — 1992 FUND

BOW JUBAIL

Note by the Secretariat

Objective of document:	To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.
Summary:	<p>On 23 June 2018, the oil and chemical tanker <i>Bow Jubail</i> (23 196 GT) collided with a jetty owned by LBC Tank Terminals 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.</p> <p>At the time of the incident, the <i>Bow Jubail</i> 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). 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).</p> <p>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. The Court assumed that the <i>Bow Jubail</i> qualified as a ship as defined under the 1992 Civil Liability Convention (CLC) and decided not to grant the leave to limit its liability under the Bunkers Convention 2001. The shipowner appealed to the Court of Appeal in The Hague.</p> <p>The Court of Appeal in The Hague rendered its judgment on 27 October 2020, confirming the decision of the Rotterdam District Court that the Bunkers Convention did not apply to the <i>Bow Jubail</i> incident since the shipowner had not proved that the <i>Bow Jubail</i> did not contain residues of persistent oil at the time of the incident and the <i>Bow Jubail</i>, therefore, qualified as a ship as defined under the 1992 CLC. The shipowner has appealed against the judgment to the Supreme Court of the Netherlands.</p> <p>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.</p> <p>The burden of proof on this point lies with the shipowner. If the shipowner cannot prove that the <i>Bow Jubail</i> had no residues of oil in bulk on board, the 1992 CLC would</p>

	<p>apply. The relevant test would be the one applied by local law, in this case, the law of the Netherlands.</p> <p>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, the 1992 Fund Convention could apply to this incident. However, in this scenario, it is unlikely that the Supplementary Fund Protocol would apply as the losses are unlikely to exceed the limit of liability under the 1992 Fund Convention.</p>
Recent developments:	<p>The 1992 Fund has applied to join the appeal proceedings in the Supreme Court. Several claimants have submitted their replies to the Fund's request.</p> <p>A couple of claimants have contacted the 1992 Fund for information on how to submit a claim against the Fund in case the incident was found to fall under the 1992 CLC.</p>
Relevant documents:	<p>The online <i>Bow Jubail</i> incident report can be found via the Incidents section of the IOPC Funds' website.</p>
Action to be taken:	<p><u>1992 Fund Executive Committee</u></p> <p>Information to be noted.</p>

1 Summary of incident

Ship	<i>Bow Jubail</i>
Date of incident	23.06.2018
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 some SDR 14 million.
1992 CLC limit	If the 1992 CLC were to apply, the limit would be some SDR 16 million.
STOPIA/TOPIA applicable	If the 1992 CLC and Fund Conventions were to apply, STOPIA would also apply, with a limit of SDR 20 million.
1992 CLC + 1992 Fund + Supplementary Fund limit	The limit provided under the three Conventions would be SDR 750 million.
Legal proceedings	<p>The Court of Appeal in The Hague confirmed a decision by the Rotterdam District Court that the <i>Bow Jubail</i> 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.</p> <p>The shipowner has appealed to the Supreme Court arguing that the Bunkers Convention 2001 should apply to this case since the <i>Bow Jubail</i> was not a ship under the 1992 CLC. The 1992 Fund has applied to join the proceedings before the Supreme Court.</p>

2 Background information

- 2.1 On 23 June 2018, the oil and chemical tanker *Bow Jubail* (23 196 GT) collided with a jetty owned by LBC Tank Terminals 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.
- 2.2 At the time of the incident, the *Bow Jubail* was in ballast; however, 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.
- 2.3 The shipowner states that the tanks were clean of oil cargo residues at the time of the incident
- 2.4 There is some indication that the claimed amount may be over EUR 80 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 (CLC) 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 CLC would apply. In that case, since the total pollution damage is likely to exceed the limit that would apply to the ship under the 1992 CLC, the 1992 Fund Convention could apply to this incident. However, in this scenario, it is unlikely that the Supplementary Fund Protocol would apply as the losses are unlikely to exceed the limit of liability under the 1992 Fund Convention.
- 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 1992 CLC were 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 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 in the form of a guarantee issued by the shipowner's insurer, Gard P&I (Bermuda) Ltd.

- 4.2 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.
- 4.3 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'.
- 4.4 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.
- 4.5 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.
- 4.6 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 for in Article I(1) of the 1992 CLC. 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 and decided not to grant the shipowner an opportunity to complete 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 and decided not to grant the leave to limit its liability under the Bunkers Convention 2001.
- 4.7 The shipowner appealed to the Court of Appeal in The Hague.
- 4.8 Judgment by the Court of Appeal in The Hague
- 4.8.1 The Court of Appeal in The Hague delivered its judgment on 27 October 2020^{<1>}, confirming the decision of the Rotterdam District Court 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 for in Article I(1) of the 1992 CLC. Accordingly, the Bunkers Convention 2001 did not apply, and the limitation of the shipowner's liability was governed by the 1992 CLC, not the LLMC 76/96.
- 4.8.2 In its judgment, the Court of Appeal considered that there is no generally accepted standard procedure to determine when a ship, which can serve both as an oil tanker under the 1992 CLC and as a chemical tanker under the Bunkers Convention 2001, ceases to be a ship under the 1992 CLC. In the Court's view, consideration should be given by the Parties to the 1992 Fund Convention to the creation of such a standard procedure that could then be followed, with a view to invoking the exception provided for in Article I(1) of the 1992 CLC. The Court further considered that shipowners and their P&I Clubs, as well as the IOPC Funds and those who contribute to them, have an interest in such a procedure.

<1> A translation of the judgment was published in the online *Bow Jubail* incident report, which can be found via the Incidents section of the IOPC Funds' website. A detailed report on the judgment can be found in document IOPC/NOV20/3/12/1.

4.8.3 The shipowner has appealed (filed for cassation) against the judgment to the Supreme Court of the Netherlands.

4.9 Proceedings before the Supreme Court

Application by the 1992 Fund to join the proceedings

4.9.1 The 1992 Fund has applied to the Supreme Court requesting the Court to rule, first, that it may intervene as a party, alternatively that it may be admitted as an interested party in the proceedings, and, in the further alternative, that it may intervene as a party on the shipowner's behalf (joinder) in the appeal in cassation.

4.9.2 In its application, the Fund has argued as follows:

- The Court of Appeal has overlooked the fact that a generally accepted standard of cleanliness procedure exists under the International Convention for the Prevention of Pollution from Ships (MARPOL). In the event that a chemical tanker such as the *Bow Jubail* has (i) been cleaned in accordance with the regulations of and pursuant to MARPOL; and (ii) has discharged or dispensed with washing water and (thus) does not carry on board oil (mixtures) within the meaning of MARPOL, it has been proved in principle (subject to proof to the contrary) that the tanker in question did not carry on board residues of persistent oil as referred to in the 1992 CLC and therefore cannot be considered as a 'ship' under the 1992 CLC.
- Concerning the meaning of 'residues of such carriage of oil in bulk' within the meaning of Article I(1) of the 1992 CLC, it should be noted that the *Bow Jubail* is a relatively modern type of ship which differs significantly from the combination tankers (oil/bulk/ore tanker) referred to when the definition of 'ship' was agreed at the IMO Conference in 1984 and which also differs substantially from dedicated oil tankers of the type referred to in document 92FUND/WGR.2/7, paragraph 4.1 on which the Court based its decision.
- Article 7.4 of the 1992 Fund Convention provides that 'the Fund shall have the right to intervene as a party to any legal proceedings'. The fact that the limitation procedure was not instituted under the 1992 CLC does not detract from this because the concept of 'legal proceedings'—as stated—should be interpreted broadly.
- The decision of the Supreme Court as to whether or not the *Bow Jubail* qualifies as a ship within the meaning of the 1992 CLC will not be subject to appeal and will therefore have consequences not only for the interpretation of the 1992 CLC but also for the 1992 Fund and its Member States and contributors.
- The Court of Appeal considered that it was important for the IOPC Funds to consider designing a standard procedure for assessing whether a ship qualifies as a ship within the meaning of the 1992 CLC. In the opinion of the 1992 Fund, its interest in being admitted as an interested party to the present proceedings has already been given by this legal consideration (*obiter dictum*).
- If the request to be admitted to the proceedings cannot be granted under the 1992 Fund Convention, the request should be granted under the civil procedural law of the Netherlands.
- If the application for intervention or joinder is rejected, the Fund should appear as an interested party in the proceedings. In the first place, the Fund may be required to pay compensation if it is decided that the requested limitation will not be granted because in that case the 1992 CLC applies. It is then likely that the Fund will have a greater financial interest in these proceedings than any

other party. Moreover, it is the Fund's task to monitor and promote the uniform interpretation of the 1992 Civil Liability and Fund Conventions.

- The importance of the case, the possible consequences for the maritime practice in general and the interpretation of the 1992 CLC and the consequences for the Fund, its Member States and the contributors in particular call for a further explanation of the position of the Fund.

Claimants' objections

4.9.3 Several claimants have replied to the Fund's application. In particular, a group of claimants have argued as follows:

- The national procedural law of the Netherlands does not allow for joinder and intervention in the type of application the Fund is relying on (application proceedings).
- According to national procedural law of the Netherlands, a party needs to prove that it has an interest in the outcome of proceedings in order to be allowed to intervene or join. Intervention is not possible in any proceedings before the Supreme Court, although the rule on interested parties under the procedural law of the Netherlands still allows for third parties to be involved.
- Whether interested parties should be called upon is up to the court's own policy.
- The Fund could qualify as an interested party in the cassation proceedings, but it cannot put forward any arguments against the Court of Appeal's ruling because the Fund did not appear in the proceedings before the Court of Appeal while the Fund was aware of such proceedings and interested parties cannot make a counter application for the first time in cassation.
- The Fund can only support the party on whose side it has joined.

Possible timeline

4.9.4 The Supreme Court has instructed the parties to file their complete sets of motions by 19 March 2021. According to the advice received by the Fund's lawyers in the Netherlands, after receipt of all sets, the Court will determine a date on which the advocate general will render his advice to the Supreme Court. It is to be expected that the advocate general will have a term of approximately three months to render his advice. The Supreme Court would then be expected to render a decision in approximately two months after receiving the advice.

5 Claims for compensation

5.1 A refinery located in the Rotterdam Port has expressed its intention of submitting a claim against the 1992 Fund if the 1992 CLC were to apply to this incident. The refinery alleges that as a result of the incident, it suffered damages related to the inaccessibility of its refinery, the pollution of its loading and unloading facilities for ships and had to make adjustments to its operations.

5.2 The Fund has also received another enquiry as to the process of how to submit a claim against the Fund. The potential claimant did not specify the object of the claim.

6 Time bar

6.1 Under the 1992 CLC, rights to compensation from the shipowner and its insurer are extinguished unless legal action is brought within three years of the date when the damage occurred (Article VIII). As regards the 1992 Fund Convention, rights to compensation from the 1992 Fund are extinguished unless the claimant either brings legal action against the Fund within this three-year period or notifies

the Fund within that period of an action against the shipowner or its insurer (Article 6). Both Conventions also provide that in no case shall legal actions be brought after six years from the date of the incident.

- 6.2 The decision of the Supreme Court is not expected until late 2021. If the Supreme Court was to uphold the decision of the Court of Appeal and find that the *Bow Jubail* is a ship as defined under the 1992 CLC, both the 1992 CLC and Fund Convention, together with the Supplementary Fund Protocol, would apply to this incident. In parallel, the *Bow Jubail* incident occurred on 23 June 2018, and so the three-year anniversary of the incident is fast approaching with the consequence that some claimants are beginning to approach the 1992 Fund's lawyers with questions concerning how best to protect their compensation rights against the Fund.

7 Director's considerations

- 7.1 The Court of Appeal confirmed the decision of the Rotterdam District Court, finding that the shipowner had not proved that there were no residues of persistent oil from previous cargoes on board the *Bow Jubail* at the time of the incident and that, therefore, the *Bow Jubail* could be considered as a ship under the 1992 CLC.
- 7.2 The shipowner has appealed against the judgment to the Supreme Court of the Netherlands.
- 7.3 The 1992 Fund has applied to join the proceedings in the Supreme Court in order to request a clarification from the Supreme Court on how the legal test applies as to whether there were residues or not on board the *Bow Jubail*.
- 7.4 The Fund's lawyers in the Netherlands have advised, however, that it will be for the Court to decide whether to allow the 1992 Fund to join the proceedings. The Supreme Court will assess whether the outcome of the proceedings might have an impact on the position of the 1992 Fund. Furthermore, the Court will examine whether the 1992 Fund is allowed to join the proceedings at this stage under the procedural laws of the Netherlands.
- 7.5 The 1992 Fund has a financial interest in this case, as if a final judgment 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 STOPIA, up to a limit of SDR 20 million. However, if the shipowner were successful in their appeal to the Supreme Court, the Bunkers Convention 2001 would apply, and the 1992 Fund would not be involved in this case.
- 7.6 The Director will report on any further developments in this case at the next meeting.

8 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.
