



International Oil Pollution
Compensation Funds

Agenda Item 3	IOPC/NOV23/3/2	
Date	27 September 2023	
Original	English	
1992 Fund Assembly	92A28	
1992 Fund Executive Committee	92EC81	●
Supplementary Fund Assembly	SA20	

INCIDENTS INVOLVING THE IOPC FUNDS — 1992 FUND

PRESTIGE

Note by the Secretariat

Objective of document:

To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.

Summary:

In January 2016, the Spanish Supreme Court delivered a judgment finding that the master of the *Prestige* was criminally liable for damages to the environment, with civil liability. The judgment also found that the shipowner had civil liability and was not entitled to limit its liability, and that its insurer, the London P&I Club, had civil liability up to the limit of its policy of USD 1 000 million. In the judgment, the 1992 Fund was found to have civil liability within the limit provided under the 1992 Fund Convention.

In December 2018, the Spanish Supreme Court awarded losses as follows: EUR 1 439.08 million (pollution damage of EUR 884.98 million + pure environmental and moral damages of EUR 554.10 million). The judgment stated that the pure environmental and moral damages were not recoverable from the 1992 Fund.

In accordance with the judgment, and as authorised by the 1992 Fund Executive Committee, the 1992 Fund paid EUR 27.2 million into the Court in La Coruña, which is the amount available from the 1992 Fund under the 1992 Fund Convention, less the amounts already paid by the 1992 Fund, and EUR 804 800 which has been set aside to cover potential liabilities in France and Portugal (see paragraph 3.4.3).

In addition, the 1992 Fund provided the Court with a list of the amounts due to the claimants in the Spanish legal proceedings, pro-rated at 15.22%. This level of payment resulted from dividing the amount awarded by the Court by the amount available for compensation. It is for the Court to distribute the amount available for compensation between the claimants.

The Court in La Coruña has distributed the amount deposited in Court by the 1992 Fund and the amount corresponding to the limitation fund, making payments totalling EUR 51.7 million to claimants in the Spanish legal proceedings, including the Spanish and French States.

In the context of the action by the French Government against the American Bureau of Shipping (ABS), the Court of Cassation in France delivered a judgment in April 2019 deciding that ABS cannot rely on the defence of sovereign immunity.

	The proceedings in the Court of First Instance in Bordeaux brought by the 1992 Fund against ABS, which were stayed pending the resolution of the legal proceedings in Spain, have been reinstated.
Recent developments:	In the French State's action against ABS, the Court has suggested the appointment of a court expert to deliver a new report on the incident's facts. This report could help the Court identify the causes of the incident and the potential liabilities. The 1992 Fund has submitted a motion to stay the examination of the merits in its action against ABS until the above court expert has rendered the report.
Relevant documents:	The online <i>Prestige</i> incident report can be found via the Incidents section of the IOPC Funds' website.
Action to be taken:	<u>1992 Fund Executive Committee</u> Information to be noted.

1 Summary of incident

Ship	<i>Prestige</i>
Date of incident	13.11.2002
Place of incident	Spain
Cause of incident	Breaking and sinking
Quantity of oil spilled	Approximately 63 200 tonnes of heavy fuel oil
Area affected	Spain, France and Portugal
Flag State of ship	Bahamas
Gross tonnage	42 820 GT
P&I insurer	London P&I Club
CLC Limit	EUR 22 777 986
CLC + Fund limit	EUR 171 520 703
Level of payments	15.22%
Compensation	The 1992 Fund has paid the amount available for compensation from the 1992 Fund under the Conventions, retaining EUR 804 800 (see paragraph 3.4.3), i.e. EUR 147.9 million. The London P&I Club paid into Court the amount of the CLC limit i.e. EUR 22.8 million. The Court in La Coruña has distributed the amount available for compensation between the claimants.

2 Background information

The background information to this incident is provided in more detail in the online *Prestige* incident report.

3 Criminal proceedings in Spain

- 3.1 In December 2018, the Spanish Supreme Court delivered its judgment on the quantification of the losses. The total amount awarded, after amendments in January and March 2019, was EUR 1 439.08 million (pollution damage of EUR 884.98 million + pure environmental and moral damages of EUR 554.10 million). The judgment also awarded interest to be quantified by the Court.

3.2 The judgment clarified that pure environmental and moral damages were not recoverable from the 1992 Fund.

3.3 The judgment confirmed its previous decision that the London P&I Club is liable for all the damages caused by the incident, including pure environmental and moral damages, up to the limit of its policy of USD 1 000 million.

3.4 Payment into the Court

3.4.1 The Court in La Coruña issued an order requesting the 1992 Fund to pay the limit of its liability after deducting the amounts already paid by the 1992 Fund, i.e. EUR 28 million.

3.4.2 At its April 2019 session, the 1992 Fund Executive Committee decided to authorise the Director to pay to the Spanish Court EUR 28 million less:

- (i) EUR 800 000 which should be kept available to pay any judgments by French courts; and
- (ii) EUR 4 800 which should also be kept available to pay the Portuguese Government to ensure that the principle of equal treatment between claimants is maintained.

3.4.3 In April 2019, the 1992 Fund paid into the Court some EUR 27.2 million. The 1992 Fund also provided the Court with a list of the amounts due to the claimants in the Spanish legal proceedings pro-rated at 12.65% (for the amounts to be paid under the 1992 Fund Convention) and 2.57% (for compensation available under the 1992 Civil Liability Convention (1992 CLC))^{<1>}.

3.5 Distribution of payments by the Court

3.5.1 In November 2019, the Court in La Coruña issued an order on the distribution of the amount deposited in Court by the 1992 Fund and the amount corresponding to the limitation fund. The distribution of the amounts ordered by the Court largely corresponds with the lists provided by the 1992 Fund of how the compensation available under the 1992 Fund Convention and the 1992 CLC should be distributed among all the claimants in the Spanish legal proceedings.

3.5.2 The Court in La Coruña has made payments totalling EUR 51.7 million to claimants in the Spanish legal proceedings, including the Spanish and French States. The Court is having problems distributing a small portion of the available funds (EUR 39 000) which will be declared abandoned if not claimed by relevant claimants by 2042.

4 Civil proceedings in France

4.1 There are 42 legal actions pending before the French courts. Among these legal actions, the following should be noted:

- (i) Twenty-three actions totalling EUR 5.2 million are by claimants who also brought actions in the legal proceedings in Spain and in respect of which there is a final judgment in Spain. It would be expected that these actions should be withdrawn as far as the damages comprising the claims overlap with those included in the judgment by the Spanish Supreme Court.

<1> See section 2 of document IOPC/APR19/3/2/1.

(ii) There remain 19 actions totalling EUR 1.2 million pending before French courts.

4.2 There are also another 38 actions totalling EUR 824 700 brought by claimants in France, but the 1992 Fund reached agreements with those claimants, and has paid EUR 123 906 at a level of payments of 30% of the established losses, as guaranteed by the French Government's claim standing last in the queue.

4.3 In addition, the French courts have rendered judgments awarding some EUR 1.18 million to claimants in France. The 1992 Fund has paid these claims at a level of payments of 30% of the established losses.

5 Recourse actions

5.1 Legal action by Spain against the American Bureau of Shipping (ABS) in the United States

5.1.1 The Spanish Government took legal action against the classification society of the *Prestige*, namely the American Bureau of Shipping (ABS), before the Federal Court of First Instance in New York requesting compensation for all damage caused by the incident. The Spanish Government maintained that ABS had been negligent in the inspection of the *Prestige* and had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel, and had been negligent in granting classification.

5.1.2 In August 2012, the Court of Appeal for the Second Circuit delivered its judgment, dismissing the claim by the Spanish Government. In its judgment, the Court held that the Spanish Government had not produced sufficient evidence to establish that ABS had acted in a reckless manner^{<2>}.

5.1.3 Spain did not appeal against the judgment and therefore, the judgment is final.

5.2 Legal action by France against ABS in France

5.2.1 In April 2010, the French Government brought a legal action against ABS in the Court of First Instance in Bordeaux. The defendants opposed this action, relying on the defence of sovereign immunity. The Judge referred the case for a preliminary ruling by the Court on the question of whether ABS was entitled to sovereign immunity from legal proceedings.

5.2.2 In April 2019, the Court of Cassation in France rendered a judgment deciding that ABS could not avail itself of the defence of sovereign immunity in this case. The Court considered that the certification and classification work came under different legal regimes and were separable. In the Court's view, only the certification work authorised a private-law company to avail itself of the sovereign immunity of the flag State, which had specially authorised it to issue the statutory certification, on its behalf, to the shipowner.

5.2.3 Following the Court's decision, the case has gone back to the Court of First Instance in Bordeaux to consider the merits of France's claim against ABS.

5.2.4 The Court has suggested the appointment of a court expert to deliver a new report on the incident's facts. This report would help the Court identify the causes of the incident and the potential liabilities.

^{<2>} Detailed information about the legal action of Spain against ABS in the United States can be found in the online incident report.

- 5.3 Legal action by the 1992 Fund against ABS in France
- 5.3.1 Following the decision of the 1992 Fund Executive Committee at its October 2012 session, the 1992 Fund brought a recourse action against ABS in the Court of First Instance in Bordeaux.
- 5.3.2 ABS submitted points of defence alleging that it was entitled to sovereign immunity on the same basis as the flag State of the *Prestige*.
- 5.3.3 The proceedings in the Court of First Instance in Bordeaux were stayed pending the resolution of the legal proceedings in Spain but have been reinstated.
- 5.3.4 A case management hearing took place in January 2020, at which both ABS and the 1992 Fund argued that the issue of sovereign immunity should be dealt with as a priority by the Judge in charge of the merits, together with the other admissibility arguments raised by ABS.
- 5.3.5 ABS has raised the following arguments against the admissibility of the 1992 Fund's action against ABS:
- (i) Sovereign immunity: ABS intends to challenge the question of sovereign immunity up to the level of the Court of Cassation in the hope that it might reverse its judgment of April 2019 in the case of the French State against ABS.
 - (ii) The doctrine of *res judicata* (a matter already judged): ABS argues that since the United States courts have already discharged them from any liability in the *Prestige* case, the United States' court decision rendered in the case of the Spanish State against ABS has *res judicata* authority before any other court. In particular, ABS has argued that, as the 1992 Fund is subrogated into the rights of the Spanish State, which was a party to the United States proceedings, the United States judgment binds the 1992 Fund.
 - (iii) Channelling: In the case of the *Erika* incident, the Court of Cassation expressed the view that the Registro Italiano Navale (RINA), the classification society that certified the *Erika*, was covered under Article III(4) of the 1992 CLC as persons who perform services for the ship (but the protection was denied because the Court decided that the damage had resulted from RINA's recklessness). ABS argues that, on the basis of that decision, ABS would be protected by Article III(4) of the 1992 CLC and therefore the 1992 Fund's action against ABS would not be admissible.
 - (iv) Time bar: The issue of the time bar is linked to the issue of channelling above. ABS argues that the 1992 Fund's action is time-barred under the 1992 Civil Liability and Fund Conventions, according to Article VIII of the 1992 CLC.
- 5.3.6 If the 1992 Fund's action against ABS is considered admissible by the Court, the 1992 Fund will have to prove that ABS was negligent in the way it carried out its work in respect of the classification of the vessel.
- 5.3.7 The 1992 Fund has replied to ABS's arguments as follows:
- (i) Sovereign immunity: ABS cannot benefit from sovereign immunity because ABS is not an emanation of the State of the Bahamas and does not contribute to exercising the sovereignty of that State. In addition, the 1992 Fund has argued that the solution adopted by the Court of Cassation at its April 2019 judgment in the action of France against ABS should be applied in the 1992 Fund's action. In its judgment, the Court of

Cassation stated the principle that even if a classification society conducts activities of certification and classification simultaneously, these activities are severable and the classification society is only entitled to benefit from sovereign immunity in the framework of its activity of statutory certification, but not for its activity of classification. The 1992 Fund's action relates to faults committed by ABS in its classification activity.

- (ii) Authority of *res judicata* of a foreign decision: On this point, the 1992 Fund has had to accept that it would have to renounce its claim for the amounts paid in compensation in Spain, since the decision by the American Court of Appeal in the action by Spain against ABS, rejecting Spain's claim, had the authority of *res judicata*. The 1992 Fund nevertheless maintains the claim in subrogation of the rights of the French claimants and the Portuguese State, totalling EUR 14 365 907.98.
- (iii) Channelling: Classification societies cannot benefit from channelling of liability, because:
 - (a) The classification society is not a 'servant or agent of the owner' of the ship, nor a 'member of the crew' (Article III(4) paragraph (a) of the 1992 CLC). According to the terms of the agreement of classification of vessels, ABS is an independent contractor and cannot act as a servant or agent of any other party.
 - (b) The classification society is not a 'pilot or any other person who... performs services for the ship' (Article III(4) paragraph (b) of the 1992 CLC) since it does not participate in the nautical operation of the ship, and the inspections which it is supposed to carry out on the ship are not services provided to the ship but only to the shipowner, at the latter's request or that of the ship's insurers.
- (iv) Time bar: Since the 1992 CLC does not apply to actions in tort brought against third parties such as ABS, these actions are not governed by the 1992 CLC. The 1992 Fund's action against ABS would therefore be governed by French law, which provides for a 10-year limitation period. This period started to run on 13 November 2002, the date the *Prestige* sank. Since the 1992 Fund brought its action on 30 October 2012, the 1992 Fund's action is not time barred.
- (v) On the merits of the action, the 1992 Fund argues that the liability of classification societies, follows the rule whereby a party who performs a contract badly shall be liable in tort to those who suffer detriment caused by that bad execution. In the case of the *Prestige*, ABS's contractual breach is based on their failure to comply with stipulations laid down in their classification regulation. In addition, in the context of the criminal proceedings in Spain, the Spanish Court concluded, on the basis of the testimony of several experts, that ABS had displayed gross negligence and recklessness.

5.3.8 The 1992 Fund has submitted a motion to stay the examination of the merits in its action against ABS until the court expert has rendered the report in the French State's action.

6 Director's considerations

6.1 The 1992 Fund has paid the amount available for compensation from the 1992 Fund under the Conventions, retaining EUR 804 800 for potential liabilities.

6.2 In the context of the action of the French Government against ABS, the Court of Cassation in France decided that ABS cannot rely on the defence of sovereign immunity. The proceedings continue on the merits of the French Government's claim against ABS.

- 6.3 In the action of the 1992 Fund against ABS in France, ABS has announced its intention to raise again its arguments on sovereign immunity up to the level of the Court of Cassation, with the hope of obtaining, at that level, a decision contradicting the one previously rendered by that Court in April 2019. ABS is also arguing that it can benefit from the channelling provisions in the 1992 CLC. The 1992 Fund has presented submissions opposing ABS's arguments.
- 6.4 The 1992 Fund is working with the French Government in consideration of how to proceed with their respective actions against ABS.

7 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.
