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COMPENSATION  
FUND

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**Genoa Court Decision in the HAVEN Case  
Relating to the  
Maximum Amount Payable by the IOPC Fund**

**Introduction**

In April 1991 a major oil pollution incident occurred when the Cypriot tanker HAVEN exploded and sank off Genoa (Italy). This incident caused serious oil pollution in Italy, France and Monaco. More than 1 300 claims for compensation against the shipowner and his insurer and against the International Oil Pollution Compensation Fund (IOPC Fund) have been submitted to the Court of first instance in Genoa. The claims total approximately Lit1 500 000 million (US\$1 200 million).

In the legal proceedings, an important legal question has arisen, viz the method to be applied for converting the maximum amount payable by the IOPC Fund into Italian Lire.

**Court's Decision**

A judge of the Court of first instance in Genoa, who is in charge of the limitation proceedings, rendered his decision on this issue on 14 March 1992. The judge held that the maximum amount payable by the IOPC Fund should be calculated by the application of the free market value of gold which gives an amount of Lit771 397 947 400 (US\$617 million) (including the amount paid by the shipowner under the Civil Liability Convention), instead of Lit102 864 000 000 (US\$82 million), as maintained by the IOPC Fund, calculated on the basis of the Special Drawing Right (SDR) of the International Monetary Fund.

The judge also considered whether the maximum amount payable by the IOPC Fund should be increased by the addition of interest for the period from the date of the incident to the date of payment. The IOPC Fund has opposed that interest be added, since the Fund Convention uses the wording "the maximum amount payable" by the IOPC Fund. The judge held that the maximum amount payable by the IOPC Fund should not be increased by interest.

As regards the shipowner's limitation fund, which had been established by means of a bank guarantee, the judge decided that the guarantee should also cover interest for the period up to the distribution of the limitation fund and that interest should accrue to the benefit of victims.

The judge's decision is being analyzed by the IOPC Fund which will lodge opposition against the decision. Any opposition will be considered in June 1992 by the Court of first instance composed of three judges. An appeal against the decision of the Court of first instance may be made to the Court of Appeal, and from there an appeal may be lodged with the Supreme Court of Cassation.

## Background

### The Conventions

Compensation in the HAVEN case is governed by two international conventions, the 1969 Civil Liability Convention and the 1971 Fund Convention. The Conventions have been implemented into Italian law. Under the Civil Liability Convention, the shipowner has strict liability for oil pollution damage but is normally entitled to limit his liability to an amount linked to the tonnage of the ship. In order to be entitled to limit his liability, the shipowner must constitute a limitation fund with the Court by depositing the limitation amount or by providing a bank guarantee. If the owner of the HAVEN is entitled to limit his liability, the limit would be Lit23 950 220 000 (US\$19.1 million). Supplementary compensation is provided under the Fund Convention by the IOPC Fund, an inter-governmental organisation with 48 Member States.

The amounts in the 1969 Civil Liability Convention, as well as those in the 1971 Fund Convention, are expressed in (gold) francs (Poincaré francs). Under the Civil Liability Convention, the amount expressed in (gold) francs should be converted into national currency on the basis of the official value of the currency by reference to the franc on the date of the establishment of the shipowner's limitation fund.

In 1976, Protocols were adopted to amend both Conventions. Under the Protocols, the (gold) franc was replaced as the monetary unit by the Special Drawing Right (SDR) of the International Monetary Fund. One SDR was then considered equal to 15 (gold) francs. The value in SDR is to be converted into national currency by referring to its market exchange value. The 1976 Protocol to the Civil Liability Convention entered into force in 1981, whereas the 1976 Protocol to the Fund Convention has not yet come into force.

Under the Fund Convention, the maximum amount payable pursuant to the Civil Liability Convention and the Fund Convention in respect of any one incident is 450 million (gold) francs, including the sum actually paid by the shipowner or his insurer. This amount was increased by the IOPC Fund Assembly in stages to 900 million (gold) francs.

In 1978, the IOPC Fund Assembly, which is composed of Governments of all Member States, adopted a Resolution containing an interpretation of the provisions in the Fund Convention dealing with (gold) francs according to which the amount expressed in francs shall be converted into SDRs on the basis that 15 francs are equal to one SDR. The number of SDRs thus found shall be converted into national currency in accordance with the method of evaluation applied by the International Monetary Fund. The maximum amount payable by the IOPC Fund should thus be 60 million SDR which, in the HAVEN case, corresponds to Lit102 864 000 000 (approximately US\$82 million).

### Position of the Parties

In the court proceedings in Genoa, it has been maintained by some claimants that the conversion should be made by using the free market price of gold, since the 1976 Protocol to the Fund Convention was not in force.

The method of conversion was discussed by the IOPC Fund Executive Committee in October 1991. The Committee took the position that the conversion should be made in accordance with the method set out in the above-mentioned Resolution and opposed the use of the free market price of gold. The reasons for this position can be summarised as follows:

The IOPC Fund has two inter-related purposes: firstly, to pay compensation to victims of pollution damage who are unable to obtain full compensation under the Civil Liability Convention (Article 4) and, secondly, to indemnify the shipowner for a specified portion of his liability to victims under that Convention (Article 5). To achieve these objectives it is necessary to use the same unit of account and the same method of converting the unit into national currencies in the application of both the Civil Liability Convention and the Fund Convention.

The original unit of account (the (gold) franc) in the Civil Liability Convention, which was also adopted for the Fund Convention, was to be converted into national currencies on the basis of the "official value" of gold by reference to the national currencies in question. Since the adoption of that unit, the official value of gold has disappeared from the international monetary system, and it is therefore no longer possible to convert the (gold) franc on the basis laid down in the text of the Civil Liability Convention.

The inclusion of the word "official" in the text of 1969 Civil Liability Convention was made deliberately by the Diplomatic Conference which adopted the Convention in order to ensure stability in the system and was clearly meant to rule out the application of the free market price of gold.

In addition, in Article 1.4 of the Fund Convention it is stated that "franc" means the unit referred to in Article V.9 of the Civil Liability Convention; thus the unit of account must be the same in both Conventions. In view of the fact that the 1976 Protocol to the Civil Liability Convention has entered into force, there can be no doubt that the unit of account in respect of the shipowner's liability in the HAVEN case is to be determined in SDR.

The "market price" of gold is particularly inappropriate as a basis for converting the IOPC Fund's limits into national currencies. In the first place, the market price is very volatile and continually changes in value. Using such a changeable unit as a basis cannot produce the uniformity which was one of the main reasons for the adoption of a common unit of account for use in all Contracting States. In the second place, using the market price of gold would create absurd results in practice. For example, it would mean that the amount of indemnification to be paid to the shipowner by the IOPC Fund would be calculated on a basis different from that used for calculating the shipowner's liability to the victims under the Civil Liability Convention. The indemnification to be paid by the IOPC Fund to the shipowner constitutes a portion of the shipowner's liability under the Civil Liability Convention. Using different units and different methods of conversion for the two Conventions would create complications and could result in the shipowner receiving more or less than the portion which the 1971 Fund Convention provides.

These considerations demonstrate that the only appropriate method for converting the unit of account in the 1971 Fund Convention is to use the SDR method, as provided for in the 1976 Protocol to the Fund Convention and in the above-mentioned Resolution.

The State of Italy, as a Member of the IOPC Fund, is bound by the decision taken by the Assembly of the Fund in which it is stated that the SDR method should be used for converting the limits of the Fund's obligations, pending the entry into force of the 1976 Protocol to the Fund Convention. Furthermore, Italy has ratified the 1976 Protocol to the Fund Convention which provides for the SDR method. Although the latter Protocol is not yet in force, Italy as a Contracting State to the Protocol is under an obligation not to take any action which would defeat the object and purpose of the Protocol, which is to use the SDR method for determining the limits of the IOPC Fund's obligations (Article 18.1 of the Vienna Convention on the Law of Treaties).

In addition, the Resolution adopted by the IOPC Fund Assembly in 1978 has direct effect in Italian domestic law. This Resolution also has to be considered as an agreement between the Parties on a provisional application of the 1976 Protocol to the Fund Convention, in accordance with Article 25.1(b) of the Vienna Convention.

In its pleadings to the Court, the French Government has supported the IOPC Fund's position. The Italian Government has not taken any position as to the method of conversion.

The limitation fund was constituted by the shipowner by means of a letter of guarantee. The IOPC Fund lodged opposition against the acceptance by the Court of the bank guarantee covering only the limitation amount. The reason for the opposition was that no interest accrues on a bank guarantee, whereas if the limitation amount had been paid in cash, it would have been invested by the Court and would have earned interest to the benefit of third parties and the IOPC Fund. For this reason, the IOPC Fund asked the Court either to declare that the guarantee was insufficient and that no limitation fund had been validly established, or to order that the guarantee should be increased to Lit 42 003 500 000, so as to cover interest for a period of five years before the end of which no final judgement could be expected.

### Reasons Given by the Judge

The main arguments given by the judge of the Court of first instance can be summarised as follows:

As early as 1969, the problem of the difference between the official value of gold and the free market price had been noted. In 1969 and 1971, however, the difference between the official value and the market value of gold was very small (in 1971, none). The difference was so small that it did not eliminate the reference to the intrinsic value of the (gold) franc.

The need for stability has two aspects, viz geographically and over time. As for stability between various States, the free market value of gold at any given time does not vary much between the various main gold markets. Application of the free market price would therefore lead to a substantial uniformity worldwide. On the other hand, there have been considerable fluctuations in the free market value of gold in recent years. The fluctuations of the SDR were much smaller. Applying the free market value of gold would significantly affect the stability over the years.

Under Article V.9 of the Civil Liability Convention, referred to in Article 1.4 of the Fund Convention, the conversion of the (gold) franc into national currency should be made on the date of the establishment of the limitation fund. It is therefore not satisfactory to use the SDR, since the conversion from gold to SDR was made about 20 years ago.

The reference in Article 1.4 of the Fund Convention to Article V.9 of the Civil Liability Convention cannot be considered as referring to the changes in the Civil Liability Convention under the 1976 Protocol thereto because, otherwise, there would have been no need for a separate Protocol to the Fund Convention.

The 1980 Resolution has no direct effect in Italian domestic law, nor can it be considered as an agreement between the Parties on a provisional application of the 1976 Protocol to the Fund Convention.

The IOPC Fund Assembly has no power to amend the Fund Convention by replacing the (gold) franc by the SDR as the unit of account.

The provisions of Article 5 of the Fund Convention relating to indemnification of the shipowner must be interpreted as a pro rata contribution by the IOPC Fund. The amounts relating to indemnification should be determined on the basis of the SDR. If the maximum amount payable by the IOPC Fund were to be determined on the basis of the free market value of gold, this would result in the word "official" in the text of the Fund Convention being disregarded. On the other hand, if the maximum amount were to be calculated on the basis of the value of the SDR, this would lead to the substitution of the (gold) franc by the SDR. Either interpretation would in fact modify the 1971 Fund Convention.

The decision in this case will be an interpretation of the Fund Convention implying a modification of its text. When different interpretations are possible, the preferred interpretation should be the one that gives the best protection to the victims. The purpose of the Fund Convention is to provide adequate compensation to victims, and the use of the market value of gold as the basis of calculation meets this purpose better than the SDR method. It is recognised that the SDR method is more consistent with the needs of stability and uniformity within the international system. Nevertheless, as the Convention does not mention the SDR, using the SDR method would mean a rewriting of the text of the Convention. A judge is even less entitled to undertake such rewriting than he is to disregard the word "official".

The maximum amount payable by the IOPC Fund thus amounts to the difference between the IOPC Fund's limit of 900 million (gold) francs, converted into Italian Lire on the basis of the free market value of gold, and the limit of the shipowner's liability, converted on the basis of the SDR.

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