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INCIDENTS INVOLVING THE 1971 FUND

ALAMBRA

Note by the Director

Summary:

The Maltese tanker *Alambra* spilled oil in the Port of Muuga, Tallinn (Estonia) in September 2000. Claims totalling £2.1 million in respect of the costs of clean-up operations and economic losses have been presented to the shipowner as well as a claim by the Estonian State for £1.8 million, which has the character of a fine or charge. All claims in respect of clean-up operations and the claim by the Estonian State have been settled by the shipowner.

The question has arisen as to whether the 1969 Civil Liability Convention and the 1971 Fund Convention have been correctly implemented into Estonian law since they were ratified without parliamentary approval. The Court of first instance held in December 2003 that, since the Government had ratified the 1969 Civil Liability Convention without prior approval by Parliament, the ratification procedure had been in breach of the Estonian Constitution. For this reason the Court decided that the Convention could not be applied in the *Alambra* case and should be declared in conflict with the Constitution. The Court ordered that a constitutional review should be initiated before the Supreme Court. The Estonian Supreme Court decided, however, that before a judicial review could take place the Court of first instance should determine the facts which were of material importance to the case.

Proceedings are pending before the Estonian Court of first instance in respect of two claims for economic losses, and the 1971 Fund has been notified as a third party of these proceedings. In the proceedings the shipowner's insurer has alleged that the shipowner had deliberately failed to maintain the *Alambra* properly and that, therefore, the insurer was not liable for the pollution damage resulting from the incident. In view of the decision by the Supreme Court, the Court of first instance will now consider these legal actions on their merits.

Action to be taken: Information to be noted.

1 The incident

- 1.1 The Maltese tanker *Alambra* (75 366 GT) was loading a cargo of heavy fuel oil in the Port of Muuga, Tallinn (Estonia), when an alleged 300 tonnes of cargo escaped from a crack in the vessel's bottom plating. The *Alambra* was detained by the Estonian authorities pending a decision

by the Tallinn Port Authority to allow the remaining 80 000 tonnes of cargo on board to be removed. The cargo transfer was eventually undertaken in February 2001, and in May 2001 the vessel finally left Estonia for scrapping.

- 1.2 The *Alambra* was entered in the London Steam-Ship Owners' Mutual Insurance Association Ltd (London Club).

2 Limitation of liability

- 2.1 Estonia is Party to the 1969 Civil Liability Convention and the 1971 Fund Convention.
- 2.2 The limitation amount applicable to the *Alambra* under the 1969 Civil Liability Convention is estimated at 7.6 million SDR (£6.3 million).

3 Claims for compensation

- 3.1 The shipowner and the London Club have settled claims for clean-up costs at US\$620 000 (£340 000). The Estonian Court of first instance approved this settlement in March 2004, and all court actions against the shipowner and the Club in relation to claims in respect of clean up were terminated.
- 3.2 A claim by the Estonian State for EEK 45.1 million, which has the character of a fine or charge, was settled by the shipowner and the London Club at US\$655 000 (£365 000). The Court approved this settlement in March 2004, and the proceedings against the shipowner and the Club in relation to this claim were terminated.
- 3.3 A claim for US\$100 000 (£55 000) has been presented to the shipowner and the London Club by a charterer of a vessel said to have been delayed whilst clean-up operations were being undertaken.
- 3.4 The owner of the berth in the Port of Muuga from which the *Alambra* was loading cargo at the time of the incident, and a company contracted by the owner of the berth to carry out oil-loading activities on its behalf, have submitted claims to the shipowner and the London Club for EEK 29.1 million (£1.3 million) and EEK 9.7 million (£440 000) respectively for loss of income due to the unavailability of the berth whilst clean-up operations were being undertaken.

4 Legal actions

- 4.1 In November 2000 the owner of the berth in the Port of Muuga and the company it had contracted to carry out oil loading operations took legal action in the Court of first instance in Tallinn against the shipowner and the London Club and requested the Court to notify the 1971 Fund of the proceedings in accordance with Article 7.6 of the 1971 Fund Convention. Having been notified of the actions in February 2002, the 1971 Fund intervened in the proceedings.
- 4.2 In the context of these legal actions, the question has arisen as to whether the 1969 Civil Liability Convention and the 1971 Fund Convention have been correctly implemented into Estonian national law.

The constitutional issue

- 4.3 On 1 December 1992 Estonia deposited its instruments of ratification of the 1969 Civil Liability Convention and the 1971 Fund Convention with the International Maritime Organization. As a result, the Conventions entered into force for Estonia on 1 March 1993. However, the lawyers acting for the shipowner and the London Club, as well as the Estonian lawyers acting for the 1971 Fund, drew their clients' attention to the fact that, in their view, under the Estonian Constitution, ratification of the Conventions should not have taken place before the Estonian Parliament had given its approval and adopted the necessary amendments to the national legislation. The Conventions were not submitted to Parliament and the necessary amendments to national law

were not made. The Conventions have not been published in the Official Gazette. For these reasons these Conventions did not, in the view of these lawyers, form part of national law and could not be applied by the Estonian courts.

- 4.4 In a Bill containing a proposal for a new Maritime Act, submitted to the Estonian Parliament in 2002, the Government dealt with the constitutional issue referred to above. It is stated in the Bill that the 1969 Civil Liability Convention is a treaty which needs parliamentary approval, since it requires amendments to Estonian national law. The point is made that accession to the Convention was made in contradiction to the Constitution. It is mentioned, however, that on the international level, Estonia is deemed to be a Party to the 1969 Civil Liability Convention. It is stated in the Bill that the same problem arises in respect of the 1971 Fund Convention, which requires ratification by Parliament although it does not require amendments to national law.
- 4.5 The shipowner and the London Club raised this issue in their pleadings in the Court, as did the 1971 Fund in its submission to the Court in order to protect its position, pending the Administrative Council's consideration of this matter. The Director discussed the situation with the Estonian Ministries concerned on the occasion of a visit to Estonia in April 2002.
- 4.6 At the July 2002 session of the Administrative Council the Director expressed the view that it appeared that the procedure for ratification of international treaties laid down in the Estonian Constitution, which had entered into force on 3 July 1992, had not been observed (document 71FUND/AC.8/4). He stated that it was possible, therefore, that the 1969 and 1971 Conventions would be considered by the Estonian courts as not forming part of Estonian law. He mentioned that it could not be ruled out, however, that the courts might find that the Conventions were nevertheless applicable. The Director also expressed the view that, since the purpose of the 1971 Fund was to compensate victims of oil-pollution damage, the Fund should normally not take a formalistic approach in dealing with claims for compensation. For this reason he considered that, if the claims in the *Alambra* case were settled out of court, the issue of the non-applicability of the Conventions should not be raised by the Fund. However, in this case this issue had been raised by the shipowner and the London Club and by the 1971 Fund in the legal proceedings. If the courts were to hold that the claims against the shipowner and the Club could not be pursued under the Conventions but only under other provisions in Estonian national law, the question would arise as to the basis of the 1971 Fund's obligation to pay compensation.
- 4.7 In his pleadings to the Court, the shipowner maintained, *inter alia*, that although the Estonian Merchant Shipping Act provides that the shipowner is liable for pollution damage, the Act's definition of pollution damage does not provide for civil liability for further loss or damage caused by preventive measures. The shipowner also argued that the Estonian Constitution requires that in order for international agreements to be applicable under national law, the agreements must be approved by Parliament. The shipowner further maintained that the relevant provisions in the Act are in conflict with the provisions of the 1969 Civil Liability Convention.
- 4.8 In their pleadings the claimants argued that a provision in the Merchant Shipping Act stipulates that if both an international agreement to which Estonia is a party and the Act apply different legal standards, the standard of the international agreement should be applied. In the claimant's view, the Estonian courts would therefore apply the Convention rather than the Act and the courts should not take into account the restrictions placed by the Constitution as regards the ratification of treaties.
- 4.9 The total of the claims for compensation falls well below the limitation amount applicable to the *Alambra* under the 1969 Civil Liability Convention and also below the amount at which the 1971 Fund may be called upon to pay indemnification to the shipowner. However, as set out below, the London Club has maintained that the incident resulted from the shipowner's intentional wrongful act and that the Club had therefore no liability in this case. It is also doubtful whether the shipowner would be financially capable of meeting his obligations. The Fund might therefore be called upon to pay compensation, and for this reason the issue of the constitutionality of the 1969 Civil Liability Convention is of importance to the 1971 Fund.

- 4.10 In December 2003 the Court of first instance rendered its decision on the constitutional issue in relation to the proceedings commenced by the owner of the berth in the Port of Muuga. The Court held that since the Government had ratified the 1969 Civil Liability Convention without prior approval by Parliament, the ratification procedure had been a breach of the Estonian Constitution. For this reason the Court decided that the Convention could not be applied in the case under consideration and should be declared in conflict with the Constitution. The Court of first instance therefore decided that constitutional review proceedings should be initiated before the Supreme Court.

Constitutional review

- 4.11 In the proceedings before the Supreme Court, the Government of the Republic of Estonia expressed the view that the 1969 Civil Liability Convention did not extend the scope of liability beyond that of the Merchant Shipping Code and that it had therefore not been necessary for the Government to seek Parliament's approval of the Convention. It was pointed out that the Merchant Shipping Act provided that if there were a divergence between an international treaty to which Estonia was a party and the Act, the Act would prevail. The Government argued that the 1969 Civil Liability Convention was in conformity with the Constitution. The Government maintained that it had therefore acted within the limits of its competence and in a legally correct manner. The Government also argued that according to the Vienna Convention on the Law of Treaties (Article 46) an international treaty applied to a State regardless of whether any provisions in respect of the competence of concluding the treaty had been violated when the treaty was ratified, except in cases where the violation was obvious and related to any especially important standards of domestic legislation.
- 4.12 The Minister of Justice presented a submission, at the invitation of the Supreme Court, in which he maintained that it was incorrect of the Court of first instance to refer the issue of constitutional review to the Supreme Court before it had decided the case on its merits. He also made the point that since the 1969 Civil Liability Convention did not extend the scope of liability in comparison with the domestic law in force at the time of the incident, ie the Civil Code, it was not necessary for the Convention to be ratified by Parliament, and accession to the Convention by Estonia had therefore taken place in compliance with the Constitution.
- 4.13 At the invitation of the Supreme Court, the Legal Chancellor of the Republic of Estonia presented a submission in which he expressed the view that since the 1969 Civil Liability Convention had been incorporated into Estonian law without prior approval by Parliament, the accession to the Convention by the Government had been in violation of the Constitution. In the Chancellor's view the Convention was not applicable in Estonia as a properly implemented international treaty. However, the Chancellor stated that the contents of the relevant Articles in the Convention were not in material breach of the Constitution. He expressed the view that the provisions of the Convention reflected generally accepted norms of international law, namely to compensate pollution damage to as full an extent as possible. For this reason, and notwithstanding the formal errors relating to the ratification procedure, these norms should in his view be applied by the Estonian courts.
- 4.14 A hearing was held on 3 March 2004 before the Constitutional Review Chamber of the Supreme Court.
- 4.15 In a decision issued on 1 April 2004, the Supreme Court held that it would not carry out the constitutional review requested by the Court of first instance. The reasons for the Supreme Court's decision can be summarized as follows:

The Supreme Court referred to the fact that the Court of first instance had initiated constitutional review proceedings without making a substantial decision in the case. In earlier decisions the Supreme Court has held that when carrying out a constitutional review, it had first verified whether the provision declared contrary to the Constitution was relevant in resolving the case before the courts, because under the Code of Constitutional Review the Supreme Court should only declare provisions relevant in that sense contrary to the Constitution or invalid. The Supreme Court stated that the decisive factor in determining the issue of relevance was whether the provision in question was of decisive importance in the case, namely whether the case would be decided differently if the provision was considered contrary to the Constitution than if this were not to be the case. The Supreme Court noted that the Court of first instance had issued its decision without determining the facts of material importance to the case. The Supreme Court stated that the Court of first instance could not have been sure at the time of issuing its decision which regulation was applicable and of decisive importance in the case. The Supreme Court held that it could not assess which legal norm was relevant in solving the case and whether that norm was in accordance with the Constitution.

Other issues raised in the legal proceedings

- 4.16 In September 2002 the London Club filed pleadings in court in respect of the claims presented by the Port of Muuga and the contractor for the loading operations, maintaining that the shipowner had deliberately failed to make the necessary repairs to the *Alambra* resulting in the ship becoming unseaworthy and that therefore under the insurance contract as well as under the Merchant Shipping Act, the Club was not liable to pay compensation for the damage resulting from the incident.
- 4.17 In its pleadings the London Club stated that the *Alambra* had a history of corrosion problems both prior and subsequent to its purchase by its owner at the time of the incident in Estonia. It was further stated that in June 2000 the master of the *Alambra* had reported a corrosion hole in the bottom plating of a cargo tank, in spite of which, and in contravention of the classification society's rules, the shipowner had allowed the vessel to load a full cargo. It was also stated that during the laden voyage the vessel made a deviation to Kalamata (Greece) for repairs by divers, although this was not recorded in the vessel's engine or deck log books. It was mentioned that when the vessel arrived at Mohammédia (Morocco), its discharge port, there was a leakage of cargo from one of the cargo tanks, and that the vessel sailed to Algeciras (Spain) for further underwater repairs (which were not reported in the deck log book) before returning to Mohammédia to continue its cargo discharge. The London Club maintained that the shipowner must have been aware of the condition of the vessel, and that in failing to report the holes in the cargo tanks to the classification society, and allowing the vessel to continue trading in such a condition, the pollution in Estonia was a result of the shipowner's intentional wrongful act and that the Club therefore had no liability.
- 4.18 The 1971 Fund filed further pleadings arguing that under Estonian law the concept of wilful misconduct is to be interpreted as an intentional act, not only in respect of the incident but also in respect of the effect thereof, ie that the shipowner deliberately caused pollution damage. The Fund maintained that the evidence presented regarding the condition of the *Alambra* did not establish that the shipowner was guilty of wilful misconduct and that the insurer was therefore not exonerated from its liability for pollution damage.
- 4.19 In view of the decision by the Supreme Court the Court of first instance will consider the merits of the legal actions.

5 Action to be taken by the Administrative Council

The Administrative Council is invited:

- (a) to take note of the information contained in this document; and
 - (b) to give the Director such instructions in respect of this incident as it may deem appropriate.
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