



INCIDENTS INVOLVING THE 1992 FUND

PRESTIGE

Note by the Director

Summary:

The document addresses the issue of whether the 1992 Fund should take recourse action against the American Bureau of Shipping (ABS), the classification society of the *Prestige*, and if so, whether the action should be taken in the United States or in Spain. An analysis is made of the advantages and disadvantages of these options. The issue of time bar is discussed.

Action to be taken:

Decide whether the 1992 Fund should take recourse action against ABS and, if so, whether the action should be taken in the United States or in Spain.

1 Introduction

- 1.1 The policy of the IOPC Funds in respect of recourse actions as laid down by the Assemblies can be summarised as follows:

The policy of the Funds is to take recourse action whenever appropriate. The Funds should in each case consider whether it would be possible to recover any amounts paid by them to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle are involved, the question of costs should not be the decisive factor for the Funds when considering whether to take legal action. The Funds' decision as to whether or not to take such action should be made on a case-by-case basis, in the light of the prospect of success within the legal system in question.

- 1.2 The policy of the Funds in respect of recourse actions was considered recently by the 1992 Fund Executive Committee and the 1971 Fund Administrative Council in respect of the *Al Jaziah 1* and *Zeinab* incidents.
- 1.3 In connection with the *Al Jaziah 1* incident most delegations expressed the view that the question of whether or not to pursue a recourse action against the shipowner raised an important issue of principle and that the IOPC Funds should play a part in discouraging the operation of substandard ships and enforcing the 'polluter pays principle'. In recommending that the IOPC Funds should pursue a recourse action those delegations recognised that the prospects of enforcing a favourable judgement were limited, but that it was in their view nevertheless important for the Funds to take a stand. Some delegations considered, however, that the Funds should be realistic and not pursue a recourse action if the shipowner had no assets. The 1992 Fund Executive Committee and the 1971 Fund Administrative Council decided that the Funds should pursue recourse action against the shipowner. They recognised that the decision to pursue a recourse action in this particular case represented a deviation from the Funds' policy of basing the decisions in part on the prospects of recovery in the event of a favourable judgement (documents 92FUND/EXC.18/14,

paragraphs 3.5.8, 3.5.9 and 3.5.11 and 71FUND/AC.9/20, paragraphs 15.10.8, 15.10.9 and 15.10.11).

- 1.4 In relation to the *Zeinab* incident, emphasising that the IOPC Funds should in principle take recourse action in order to discourage the operation of substandard ships, the 1992 Fund Executive Committee and the 1971 Fund Administrative Council decided not to pursue a recourse action against the shipowner on the sole ground that it would be extremely difficult to pursue such an action for legal and practical reasons (documents 92FUND/EXC.24/8, paragraph 3.2.15 and 71FUND/AC.13/8, paragraph 3.2.15).
- 1.5 In previous cases, the IOPC Funds have normally not taken decisions as to whether to pursue recourse actions until the investigations into the cause of the incident by the competent authorities have been completed or the Funds have been able to receive sufficient information in this respect by other means. In some cases, eg the *Erika* incident, the Fund has taken action at an early stage to prevent a recourse action becoming time-barred.
- 1.6 In the case of the *Prestige* incident, the 1992 Fund has so far not been able to obtain any detailed information as to the cause of the incident. The investigations carried out in Spain and France referred to in paragraphs 10.1-10.3 of document 92FUND/EXC.26/8 have not been completed. However, as set out in paragraphs 9.7-9.9 of that document, the Spanish State and the Basque Region have taken action against the classification society of the *Prestige*, the American Bureau of Shipping (ABS), before the Federal Court of first instance in New York.
- 1.7 In the Director's view it is not possible for the 1992 Fund to take a final position as to whether it should pursue recourse actions in relation to the *Prestige* incident and, if so, against which parties until the investigations into the cause of the incident have been completed. However, as the Spanish State and the Basque Region have taken action against ABS, he considers that it would be advisable for the Executive Committee to consider at this stage whether the 1992 Fund should take such an action against ABS.
- 1.8 In this context, consideration would first have to be given as to the prospects of a recourse action against ABS being successful. In the Director's view, there are two main options for the 1992 Fund in respect of choice of jurisdiction, namely the United States, where the defendant is incorporated, and Spain where the major part of the pollution damage occurred. It might be possible to take such action in France, Portugal or the United Kingdom which were also affected by the incident, but the Director does not consider it appropriate or worthwhile for the Fund to take action in these jurisdictions.
- 1.9 In considering whether to take recourse action against ABS, the Executive Committee may wish to address what is the main purpose of the 1992 Fund's taking such an action, ie to make a recovery of a significant part of the amount paid (and to be paid) by the Fund in compensation or to demonstrate that it wishes to contribute to the safety of navigation.

2 Jurisdiction for recourse action

2.1 Recourse action in the United States

United States jurisprudence

- 2.1.1 It is difficult to predict, at this stage, the likelihood of the Fund being successful in a recourse action against ABS in the United States. The United States Courts have in general been reluctant to hold classification societies liable to third parties. Of interest in this context is a judgement rendered in September 2003 by the United States Court of Appeal for the Fifth Circuit in New Orleans in which a classification society was held liable to the purchasers of a vessel where the

society knew that the certificates it was issuing were being relied upon by the purchasers^{<1>}. The Court stated, however, that the liability of classification societies should be strictly and carefully limited for reasons of policy. The Court further stated that a classification society may be liable in tort for negligent misrepresentation if it supplied false information to a particular party for whose benefit and guidance it was intended or actually knew that the information would be used for a business transaction. However, the Court rejected any implication that classification societies could be liable for negligent misrepresentation to parties, including but not limited to seamen, longshoremen, passengers, cargo owners and charterers that may rely on a survey or class certificate, absent actual knowledge by the classification society that its certificate or survey report was being provided for the guidance or benefit of the party. The 1992 Fund's American lawyers have informed the Director that they have so far not been able to identify any other case in the United States where classification societies have been held liable to third parties.

- 2.1.2 The prospects of success for the 1992 Fund in an action in New York can only be assessed properly once the procedure for discovery of documents has been completed in the light of the evidence available. It should be noted that part of the amount claimed by the 1992 Fund in a recourse action would relate to pure economic loss, and the recovery for such losses might meet considerable difficulties in the United States.

Procedural aspects

- 2.1.3 ABS is a legal corporation incorporated in the State of New York with its headquarters in Houston, Texas. Since the Spanish State has taken action against ABS in New York, it might be possible for the Fund to coordinate, at least to some extent, its action with that of the Spanish State. The procedure for discovery of documents in civil cases in the United States would enable the Fund to obtain access to documents which could be of great assistance in the litigation. ABS's assets are mainly located in the United States and it would therefore be relatively easy to enforce a judgement against ABS in the United States.
- 2.1.4 However the discovery procedures would be very time consuming. The costs arising from litigation in the United States are very high, particularly as a result of the extensive discovery procedure. In case of a successful action, the 1992 Fund would normally not be able to recover its costs; on the other hand, if the Fund were to be unsuccessful it would normally not be obliged to pay the costs incurred by ABS.

Applicable law and time bar

- 2.1.5 The questions of applicable law and time bar in an action by the 1992 Fund against ABS in New York are complicated. The 1992 Fund's American lawyers have advised that it is most likely that the New York Court would apply United States federal maritime law. They have also advised that it is likely that the Court would apply the time bar provisions (Statutes of Limitation) under US general maritime jurisdiction, which most likely would result in a time bar period of three years being applied, or US federal diversity jurisdiction which also has a three year time bar period for tort claims. However, under certain circumstances, a US Court might instead apply the 'doctrine of laches' to determine whether an action is time barred. Under this doctrine the Court would weigh up any delay in bringing an action and the reason for the delay against the possible disadvantages to the defendant as a result of the delay. If the disadvantages outweighed the reason for the delay, the claim would be time barred. In applying this doctrine the Courts often look to the analogous statutes of limitation for guidance.
- 2.1.6 The 1992 Fund's American lawyers have advised the Director that, although the time bar period is likely to be three years from the date of the incident, if the Fund were to intend to take an action against ABS in the United States, such action should be taken as soon as possible so as to enable

<1> Otto Candies v Nippon Kaiji Kyokai Corporation, 2003 AMC 2409 (5 Cir., 2003); cf also Cargill v Bureau Veritas, 902 F Sapp 49 (S.D.N.Y. 1995) and Carbotrade v Bureau Veritas, 2000 US App. LEXIS 14618 (2nd Cir. 2000).

the Fund to pursue its action in parallel with the recourse actions taken by the Spanish State and the Basque Region.

2.2 Recourse action in Spain

Spanish jurisprudence

- 2.2.1 With respect to the prospect of an action against ABS in Spain being successful, the Director is unable to express a firm opinion at this stage. The 1992 Fund's Spanish lawyers have not been able to identify any court case where a classification society has been held liable outside contractual relations. However, of interest is a judgement rendered in 2003 by the Spanish Supreme Court in which a classification society and a shipyard were held liable to a shipowner for damage caused as a result of *inter alia* a seriously defective steel structure in the inspected vessel^{2>}. The society had, in the Supreme Court's view, failed to fulfil its obligation to exercise special care in the inspection to ensure that the ship not only conformed to the specifications in the drawings but also to the technical specifications in the society's own rules. Under the contract between the shipowner and the classification society, the society was exonerated from any liability for mistakes or negligence by its staff or experts. Recognising the principle of 'freedom of contract' within the limits of the law, moral and public order, the Supreme Court found nevertheless that in the light of the serious failure to fulfil its obligations the classification society should pay compensation for the damage caused. It should be noted that this judgement dealt with a contractual situation.

Procedural aspects and time bar

- 2.2.2 It appears that the 1992 Fund's action would have to be based on ABS having been negligent in its inspections of the *Prestige*. These inspections were not carried out in Spain. However, the effects of the allegedly negligent inspections, ie the breaking up of the vessel and the ensuing oil pollution, occurred in Spain. The Director has been advised by the Fund's Spanish lawyers that the Spanish Courts are likely to accept jurisdiction over a recovery action by the 1992 Fund against ABS, since the pollution damage occurred in Spain, and ABS which has several offices in Spain operated by a company established in Spain (ABS Europe Ltd.) would not be exposed to an unreasonable burden defending itself in such a case in Spain.
- 2.2.3 An action against ABS would, however, face procedural difficulties. As mentioned in paragraph 9.1 of document 92FUND/EXC.26/8, criminal proceedings have been brought in a Spanish Court in relation to the *Prestige* incident. When a criminal action has been brought, under Spanish law any action for compensation based on the same or substantially the same facts as those forming the basis of the criminal action, whether against the defendants in the criminal proceedings or against other parties, cannot be pursued until the final judgement has been rendered in the criminal case. The Fund's Spanish lawyers have advised that, although a recovery action by the Fund against ABS would not be based entirely on the same facts as those forming the basis of the criminal action, it is likely that the courts would consider that the Fund's action was based on substantially the same facts as the criminal action and that therefore such an action would be suspended pending the termination of the criminal proceedings, which would probably take many years.
- 2.2.4 The time bar issue is also complicated in respect of Spain. The 1992 Fund's Spanish lawyers have advised that criminal proceedings will interrupt the time bar in respect of actions for compensation based on the same or substantially the same facts, whether or not the parties in the two actions are the same. They have further advised that, in the light of Spanish jurisprudence, it is, in their view, likely that the criminal actions in the Court in Concurbi3n has the effect of interrupting the time bar period within which the Fund should take recourse action against ABS, in which case an action against ABS by the 1992 Fund should be brought within one year of the

<> Supreme Court judgement 278/2003 of 20 March 2003;RG 2003/2794

final judgement in the criminal proceedings in the Spanish Courts in relation to the *Prestige* incident.

- 2.2.5 In any event, under a general provision in the Spanish Civil Code, the time bar period for any type of action runs from the date when the claimant could exercise his right, unless there are special provisions to the contrary. The Fund's Spanish lawyers have advised that by bringing actions in the United States within one year of the incident, the Spanish State and the Basque Region interrupted the one-year time bar period in respect of any damage covered by these actions, ie in respect of the quasi-totality of the damage in Spain. When the 1992 Fund pays compensation for any damage covered by these actions, it acquires by subrogation, up to the amounts paid, the rights of the victims, including their rights against ABS.
- 2.2.6 The Spanish legal system does not have any procedure for discovery of documents of the type applicable in the United States. It would therefore be more difficult to obtain access to documents under the control of ABS. It would probably not be possible for the 1992 Fund to obtain access to the documents provided to the Spanish State in the New York proceedings under American discovery procedures, since under the rules governing these procedures the Spanish State would not be entitled to pass such documents to third parties.
- 2.2.7 When an action is brought in a Spanish court, the plaintiff should present the evidence on which the action is based. Therefore, if the Fund were to take action against ABS in Spain, such an action should, in the view of the Fund's Spanish lawyers, not be brought until the results of the investigations into the cause of the incident are available.
- 2.2.8 If the Fund were to obtain a final judgement in Spain in its favour against ABS, ABS has probably no significant assets in Spain and it could be difficult to enforce the Spanish judgement against ABS in the United States.

3 Liability of classification societies in certain European countries

- 3.1 Although, in the Director's view, the only worthwhile option for recourse action by the 1992 Fund would be in the United States or in Spain, the jurisprudence in some other European countries as regards liability of classification societies may nevertheless be of interest. There is no English case where the courts have held a classification society liable in tort, ie in the absence of contractual relations^{<3>}. Some judgements in civil law countries in recent years do, however, suggest that there may be a tendency of the courts being somewhat more prepared to impose such liability.
- 3.2 In a judgement rendered on 18 March 2003 the Court of first instance (Tribunal de Grande Instance) in St Nazaire held a classification society liable to pay compensation to the families of crew members who lost their lives when a ship sank as a result of structural defects^{<4>}. The Court considered that the classification society had failed to identify the defects when issuing the certificate of seaworthiness for the ship. It is understood that the Court of Appeal in Rennes, in a judgement rendered on 23 September 2004, largely confirmed the judgement of the Court of first instance.
- 3.3 In Italy the Criminal Court of first instance in Genoa held a surveyor of a classification society criminally liable for the sinking of a vessel due to its unseaworthiness and also held the classification society civilly liable to the relatives of the crew members who lost their lives as a result of the sinking. However in 1991 the Court of Appeal in Genoa acquitted the surveyor and rejected the action for civil liability of the classification society, but not on the grounds that the

<3> Cf Marc Rich & Co. A.G. v Bishop Rock Marine Co. Ltd. (The "Nicholas H") [1995] 3 All ER307.

<4> Ministère Public et autres c/ Consorts Spitzer et Société Nippon Kaiji Kyokai (Navire "N° 1") DMF 2003, p. 1026.

classification society was not liable in this situation, but because there was not sufficient evidence as to the cause of the sinking.

- 3.4 In Greece, there are several cases in which classification societies have been held liable to third parties (namely relatives of crew members who lost their lives) on the grounds that the classification society had been negligent when carrying out the inspections of the seaworthiness of the ship.

4 Director's considerations

- 4.1. The governing bodies of the 1992 and 1971 Funds have, especially in recent years, taken a firm position on recourse actions, in particular with a view to taking a stand against those who by their unacceptable behaviour cause pollution incidents. When deciding whether the 1992 Fund should take recourse action against ABS and, if so, whether the action should be taken in United States (New York) or in Spain, it is in the Director's view nevertheless necessary to consider the likelihood of the courts of the two jurisdictions holding ABS liable to the 1992 Fund, the procedural difficulties which may arise under the two options and the likely cost implications.
- 4.2. From a procedural point of view, both options have, in the Director's view, advantages and disadvantages.
- 4.3. As for the United States, the 1992 Fund would be pursuing an action in a jurisdiction of a non Member State where litigation is very expensive and where there is considerable uncertainty as to the likelihood of success. On the other hand, the Fund would, through the discovery process, have access to documents which may provide crucial evidence on which to base the action. It would also be relatively easy to enforce a judgement against ABS's assets.
- 4.4. It should be noted that, according to the advice of the Fund's American lawyers, it is unlikely that an action by the 1992 Fund against ABS in New York could be suspended pending the results of the investigations into the cause of the incident or the outcome of the action by the Spanish State against ABS. If the Fund were to commence action in New York, it would therefore incur considerable legal costs from the outset.
- 4.5. It should further be noted that once an action has been taken by the 1992 Fund against ABS in New York, it would, according to the advice of the Fund's American and Spanish lawyers, not normally be possible for the Fund to withdraw that action and commence new proceedings in Spain.
- 4.6. With respect to an action in Spain, it is likely that such an action would be suspended until the criminal proceedings were terminated by a final judgement. In addition, there are in Spain only limited possibilities of getting access to documents in the possession of the defendant. Furthermore, it might be more difficult to enforce a favourable Spanish court judgement against ABS's assets in the United States.
- 4.7. As regards the likelihood of the courts holding ABS liable to the Fund, the jurisprudence in respect of compensation actions outside contractual or quasi-contractual relations is not favourable to the 1992 Fund, neither in the United States nor in Spain. The Director is not aware of any cases in Spain or the United States in which a classification society has been held liable outside contractual or quasi-contractual situations, and an action by the Fund would clearly relate to an extra-contractual situation.
- 4.8. However, in recent years the question of safety of navigation has become a major issue and it is possible that the courts, in particular the European courts, would be more inclined to impose liability also in extra-contractual situations on those who by negligence cause or contribute to pollution incidents. As mentioned above, the recent judgement by the Spanish Supreme Court, although decided in respect of a contractual situation, could indicate that the Spanish courts may in the future be open to holding classification societies liable also in extra-contractual situations.

Certain court decisions in other European countries referred to in paragraphs 3.2-3.4 above do, in the Director's view, indicate a certain tendency towards a more extensive liability for classifications societies outside contractual relations. The evidence which will emerge during any legal proceedings may show that ABS was negligent in its inspections of the *Prestige*.

- 4.9. In considering whether the 1992 Fund should take recourse action against ABS, the Executive Committee may also wish to take into account the following aspects of a non-legal nature. In view of the extent of the pollution damage caused by the *Prestige* incident in Spain, France and Portugal in relation to the total amount available under the 1992 Conventions, the Spanish State (like all other claimants) will be far from fully compensated under the Conventions for the pollution damage suffered by that State. Even if the 1992 Fund's action against ABS – be it in the United States or in Spain – were to be successful, it is doubtful whether the Fund would be able to recover any significant amount. Already the claim by the Spanish State against ABS is for such a high amount that, even if the State's action were only partially successful, it is unlikely that ABS's insurance cover would be sufficient or that ABS itself would be able to pay the balance. A successful recourse action by the 1992 Fund against ABS would result in the Fund competing with the Spanish State and the Basque Region in respect of the funds which may be available to meet judgements against ABS.
- 4.10. In view of the very high legal costs which the 1992 Fund would incur if it were to take recourse action against ABS in the US, the considerable risk that such an action would be unsuccessful and the difficulty for the Fund to recover payments in respect of pure economic loss, the Director considers, on balance, that if recourse action should be pursued, it would be preferable to pursue such an action in Spain. It must be recognised, however, that there is no certainty that an action in Spain would be successful and that there would be procedural difficulties, including issues of time bar.
- 4.11. As for the timing of a recourse action, the Director considers that, if the Executive Committee were to decide that the Fund should take recourse action in Spain, such an action should not be taken until the results of the investigations into the cause of the incident are known. If, on the other hand, the Committee were to decide that a recourse action should be taken in the United States, such an action should, in the Director's view, be taken as soon as possible.

5 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document; and
 - (b) to decide:
 - (i) whether the 1992 Fund should take recourse action against ABS; and
 - (ii) if so, whether such an action should be taken in New York (United States) or in Spain, and when such action should be initiated.
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