



INCIDENTS INVOLVING THE 1992 FUND

INCIDENT IN GERMANY

Note by the Director

Summary:	The owner of the <i>Kuzbass</i> and his insurer have appealed against the Court of first instance judgement which found that the <i>Kuzbass</i> was the source of the pollution that affected the coast of Germany in 1996. At a hearing in December 2004 the Appeal Court stated that on the basis of the evidence submitted to date, the prospects of the shipowner/insurer were significantly better than those of the German Government. The Court strongly recommended that the parties reach an out-of-court settlement.
Action to be taken:	Consider whether the 1992 Fund should conclude an out-of-court settlement with the German Government and the shipowner/insurer.

1 The incident

- 1.1 From 20 June to 10 July 1996 crude oil polluted the German coastline and a number of German islands close to the border with Denmark in the North Sea. The German authorities undertook clean-up operations at sea and on shore and some 1 574 tonnes of oil and sand mixture was removed from the beaches.
- 1.2 Investigations by the German authorities revealed that the Russian tanker *Kuzbass* (88 692 GT) had discharged Libyan crude in the port of Wilhelmshaven on 11 June 1996. According to the German authorities there remained on board some 46 m³ of oil that could not be discharged by the ship's pumps.
- 1.3 The German authorities approached the owner of the *Kuzbass* and requested that he should accept responsibility for the oil pollution. They stated that, failing this, the authorities would take legal action against him. The shipowner and his P&I insurer, the West of England Ship Owners' Mutual Insurance Association (Luxembourg) (West of England Club), informed the authorities that they denied any responsibility for the spill.

2 The 1992 Fund's involvement

- 2.1 The German authorities informed the 1992 Fund that, if their attempts to recover the cost of the clean-up operations from the owner of the *Kuzbass* and his insurer were to be unsuccessful, they would claim against the 1992 Fund.
- 2.2 The limitation amount applicable to the *Kuzbass* under the 1992 Civil Liability Convention is estimated at approximately 38 million SDR (£30.7 million).

3 Legal actions

- 3.1 In July 1998 the Federal Republic of Germany brought legal actions in the Court of first instance in Flensburg against the owner of the *Kuzbass* and the West of England Club, claiming compensation for the cost of the clean-up operations for an amount of DM2.6 million or €1.3 million (£900 000). The claim was subsequently increased to €1.4 million (£968 000) plus interest.
- 3.2 The 1992 Fund was notified in November 1998 of the legal actions. In August 1999, the 1992 Fund intervened in the proceedings in order to protect its interests.
- 3.3 In order to prevent their claims against the Fund becoming time barred at the expiry of the six-year period from the date of the incident, the German authorities took legal action against the 1992 Fund in June 2002. The 1992 Fund applied to the Court to stay the proceedings in respect of this action, pending the outcome of the action by the German authorities against the shipowner and the West of England Club. The stay was granted by the Court in November 2002.
- 3.4 The owner of the *Kuzbass* and the West of England Club presented pleadings to the Court. The position taken by the owner and the Club is summarised below.

The chemical analyses provided by the German authorities have shown only that the oil carried in the *Kuzbass* and the oil found ashore both originated from Libya, without stating that the chemical composition of the oils was identical. The chemical analyses carried out on behalf of the shipowner and the Club, however, demonstrated that the oils were not identical. In particular, the latter analyses showed that, although both oils were of Libyan origin, the oil carried by the *Kuzbass* was Libyan Brega crude oil whereas the polluting oil was not Libyan Brega crude oil.

With respect to the question of whether the oil pollution might have been caused by the washing of the tanks of the *Kuzbass*, tank washing would normally be carried out only in exceptional cases, ie if a tank had to be repaired or if another cargo had to be taken on board that should not come into contact with the residues of the cargo carried on a previous voyage. In the case of the *Kuzbass*, the tanker was proceeding to the Mediterranean to load a cargo of crude oil and the conditions of the tanks were such that they did not require washing. In addition, it would not have been technically possible, nor would there have been sufficient time, to clean the tanks and to pump out the oil that remained on board.

In the period between 18:30 hours on 12 June 1996 and 19:00 hours on 13 June 1996 the *Kuzbass* was lying at anchor to carry out repairs on the ship's cooling system.

The route followed by the *Kuzbass* was far from the areas where the oil that caused the pollution was alleged to have been discharged into the sea. The original Russian sea charts and the ship's logbook and a copy of the course recorder have been provided in support of this position.

As regards the data provided by Lloyd's Maritime Information Services showing that there were no other movements of tankers with Libyan crude oil on board in June 1996 in the area in question, the reports of Lloyd's Maritime Information Services cover only laden tankers, and do not give any information on the movements of unladen tankers which are most likely to carry out tank washing.

- 3.5 The shipowner and the West of England Club have also referred to the results of the investigation of the German police and of the Italian public prosecutor^{<1>}, both of which, according to the owner and the Club, have not found any valid evidence to support the accusation against the *Kuzbass*.

<1> A subsequent port of discharge of cargo was in Italy.

3.6 In their reply to the Court, the German authorities made the following points:

The *Kuzbass* had carried Libyan crude oil. The analysis of samples of the oil on the polluted beaches had established that this oil was also Libyan crude oil. The *Kuzbass* was the only oil tanker passing the North Sea en route to Helgoland Bay during June 1996. There was *prima facie* evidence that the pollution could only have been caused by the *Kuzbass*. The analysis carried out on behalf of the shipowner and the Club did not rebut this *prima facie* evidence. The assertion by the shipowner and the Club that the two oils were not identical was not sustainable, on the basis of current scientific standards. The *Kuzbass* had a leak between a sloptank and a cargo tank. It was no longer maintained that the oil pollution was caused by a single tank washing, but the pollution was caused by the discharge of slops. It must be assumed, therefore, that on a previous laden voyage crude oil cargo had leaked into the slop tank, which had already contained slops originating from previous tank washings, resulting in a mixture of slops highly enriched with crude oil. The *Kuzbass* had then discharged this mixture on the voyage from Cuxhaven to the Mediterranean.

- 3.7 The Court appointed an expert to consider the evidence as to the origin of the oil, and in particular whether the samples of oil and sand mixture contained residues of tank washing and/or residues of slops and whether the residues originated from Libyan El Brega crude oil. The expert concluded that the samples in question contained, without any doubt, residues of crude oil typical of those found in tank washings (slops) from oil tankers. He stated that there was no trace of sludge in the samples. The expert expressed the view that the quantity of oil recovered (ie several hundred tonnes) ruled out that sludge oil had contributed to the pollution. On the basis of the examination carried out by the Federal Maritime and Hydrographic Agency the oil in question was, in his view, without any doubt Libyan crude oil, but it was not possible to relate this oil to a particular well. The expert also stated that it was not possible to establish whether the pollution was caused by the cargo carried by the *Kuzbass* without having access to samples taken from its slops tank.
- 3.8 The Director concurred with the findings of the court expert. However, after studying the analytical data submitted by the Federal Maritime and Hydrography Agency, in particular the mass spectrograms of the pollution samples, he noted that there was a remarkable match with Libyan Es Sider crude as opposed to Libyan El Brega crude, the latter being the oil transported by the *Kuzbass* on the voyage immediately prior to the alleged pollution offence. According to the schedule of Libyan crude exports produced by Lloyd's Maritime Information Services, prior to carrying the cargo of El Brega crude to Wilhelmshaven, the *Kuzbass* had carried two cargoes of Es Sider crude (loaded on 14 February and 28 March 1996) and one cargo of Ras Lanuf crude (loaded on 22 February 1996). If the *Kuzbass* had been the source of the pollution, and if this had resulted from the overboard discharge of slops accumulated over several voyages, this might, in the Director's view, explain why the mass spectrograms of the pollution samples most resembled mass spectrograms of Es Sider crude. On the basis of the evidence presented by the German authorities the Director considered that the pollution was caused by a discharge of crude oil closely resembling Es Sider crude from a tanker and that the *Kuzbass* was the most likely source of the contamination.
- 3.9 In December 2002 the Court rendered a part-judgement in which it held that the owner of the *Kuzbass* and the West of England Club were jointly and severally liable for the pollution damage. The Court acknowledged that the German authorities had failed to provide conclusive evidence that the *Kuzbass* was the vessel responsible, but that the circumstantial evidence pointed overwhelmingly to that conclusion. The Court did not deal with the quantum of the losses suffered by the German authorities and stated that this issue would be considered at the request of one of the parties, but not until the judgement on the liability issue had become final.
- 3.10 The shipowner and the West of England Club appealed against the judgement. In the appeal they argued that the Court of first instance had followed incorrect and irregular procedures in that essential parts of the records of the hearing in December 2002 did not properly reflect the statements made at the hearing. The appellants have further maintained that the Court took evidence from the public prosecutor's office in

relation to the criminal investigation without a court order and without giving them the opportunity to comment on the evidence.

- 3.11 The main grounds for the appellants' appeal as regards substantive issues were that the *Kuzbass* could not have reached the alleged dumping area in the time available, that the chemical analyses of the pollution samples did not provide conclusive proof that the oil originated from the *Kuzbass* and that there were three other vessels in the southern North Sea at the relevant time that had previously carried cargoes of Libyan crude oil and which could therefore have caused the pollution.
- 3.12 The German authorities submitted a statement of response to the appellants' grounds for appeal, which reiterated the circumstantial evidence that had led the Court of first instance to conclude that the *Kuzbass* was the source of the pollution and also addressed the points raised by the appellants in their appeal.
- 3.13 In January 2004 the Fund also submitted a statement of response, which was largely along the same lines as that of the German authorities.
- 3.14 At a hearing in December 2004, the Schleswig-Holstein Appeal Court indicated that on the basis of the evidence submitted to date, it was far from convinced that the *Kuzbass* was the source of the pollution, and in particular drew attention to other potential ship sources that the German authorities had failed to investigate. The Court also raised doubts regarding the correctness of the circumstantial evidence and the Court of first instance's interpretation of that evidence. The Court stated that on the basis of the documentation submitted to date, the prospects of the shipowner/West of England Club succeeding in the appeal were significantly better than those of the German Government. The Court strongly recommended that the parties reach an out-of-court settlement to the effect that the shipowner and the West of England Club would pay the German Government €120 000 (£85 000) and that the recoverable costs would be shared between the German Government and the shipowner/West of England Club on a 92%-8% basis. This recommendation would imply that the 1992 Fund should pay the balance of the admissible amount of the German Government's claim. However, the Court also granted the parties the possibility of submitting further briefs and presenting witnesses.
- 3.15 In February 2005 the Appeal Court ordered the continuation of the case and fixed the date of the next hearing for 6 April 2005. The Court will call two witnesses who had attended the *Kuzbass* at the time of cargo discharge at Wilhelmshaven on 11 June 1996 on behalf of the receivers.
- 3.16 In early February 2005 the Director, in consultation with representatives of the German Government, held without prejudice discussions with the West of England Club with a view to reaching an out-of-court settlement.
- 3.17 The Director will put forward at the session a proposal for a possible out-of-court settlement between the German Government, the shipowner, the West of England Club and the 1992 Fund.

4 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 consider whether the 1992 Fund should conclude an out-of-court settlement with the German Government and the shipowner/West of England Club.
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