



## INCIDENTS INVOLVING THE 1992 FUND

### HEBEI SPIRIT

#### Note by the Director

**Objective of document:** To inform the Executive Committee of the latest developments in respect of this incident.

**Summary of the incident so far:** On 7 December 2007 the China (Hong Kong Special Administrative Region) flag tanker *Hebei Spirit* (146 848 GT) was struck by the crane barge *Samsung N°1* while at anchor about five miles off Taean on the west coast of the Republic of Korea. About 10 900 tonnes of crude oil escaped into the sea from the *Hebei Spirit*.

The oil polluted, in varying degrees of contamination, three of the four provinces along the western coast of the Republic of Korea. Clean-up operations have been finalised in most affected areas, but in some they are still being carried out. They are expected to be completed shortly.

The *Hebei Spirit* is insured for pollution risks by China Shipowners Mutual Insurance Association (China P&I) and by Assurancéföreningen Skuld (Gjensidig) (Skuld Club).

The Skuld Club and the 1992 Fund have opened a Claims Office (the *Hebei Spirit* Centre) in Seoul to assist claimants in the presentation of their claims for compensation.

The Skuld Club and the 1992 Fund have also appointed a number of Korean and international experts to assess claims in the property damage, clean up, fisheries/mariculture and tourism sectors.

So far, some 3 377 claims totalling KRW 496 524 million (£245.1 million)<sup><1></sup> have been submitted. Two hundred and thirty four claims have been assessed for a total of KRW 47 023 million (£23.2 million). Four hundred and eighty two claims have been rejected. The remaining claims are being assessed or additional information has been requested from the claimants. Further claims are expected (section 11).

<sup><1></sup> In this document conversion of currencies has been made on the basis of the exchange rates as at 11 March 2009 (£1 = KRW 2 025.88, £1 = USD 1.3775, £1 = RMB 9.4223 and SDR 1 = £0.9381), except in respect of payments made by the Fund where the conversion has been made at the rate of exchange on the date of payment.

The losses arising out of this incident are expected to exceed the limitation amount applicable to the *Hebei Spirit* under the 1992 Civil Liability Convention (1992 CLC), ie 89.77 million SDR (£84.2 million).

In March 2008 the Executive Committee, in view of the uncertainty as to the total amount of the admissible claims, decided that payments should for the time being be limited to 60% of the amount of the damage actually suffered by each claimant, as assessed by the 1992 Fund's experts.

In June 2008, the Executive Committee, in view of the increased uncertainty as to the total amount of the admissible claims, decided to reduce the level of payments to 35% of the established claims.

In October 2008, the Executive Committee decided to maintain the level of the 1992 Fund's payments at 35% of the established claims.

In July 2008 the shipowner, the Skuld Club and the Korean Government (Ministry of Land, Transport and Maritime Affairs (MLTM)) concluded a Second Cooperation Agreement, under which the Club undertook to pay claimants 100% of the assessed amounts up to the shipowner's limit of liability under the 1992 CLC, namely 89.77 million SDR (£84.2 million). In return, the Korean Government undertook to pay all claims as assessed by the Club and 1992 Fund in full, as well as all amounts awarded by final judgements under the 1992 CLC and 1992 Fund Convention in excess of the limit so as to ensure that all claimants would receive compensation in full. The Korean Government further undertook to deposit the amount already paid out by the Skuld Club to claimants into Court should the Limitation Court order a deposit of the limitation fund (section 10).

The latest estimate on the total amount of the losses arising as a result of the incident and the level of payments proposed by the Director is contained in document 92FUND/EXC.44/7/Add.1.

***Recent developments***

In January 2009, the owners and insurers of the *Hebei Spirit* and the 1992 Fund commenced recourse action against Samsung C&T Corporation and Samsung Heavy Industries (SHI), the owner and operator/bareboat charterer of the two towing tugs, the anchor boat and the crane barge, in the Court of Ningbo in the People's Republic of China.

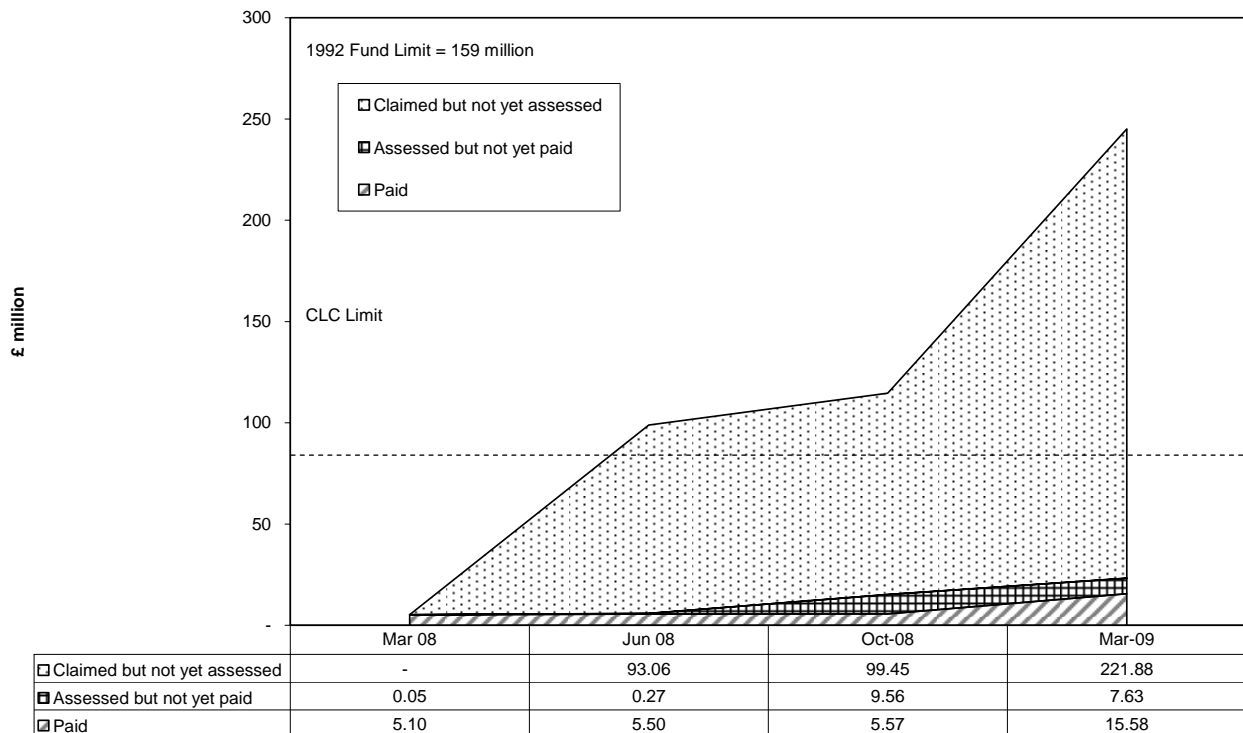
***Action to be taken:***

Decide whether to endorse the Director's decision to commence recourse action against Samsung C&T Corporation and SHI in the Court of Ningbo in China.

## 1 Summary of incident

Ship	<i>Hebei Spirit</i>		
Date of incident	07.12.07		
Place of incident	Taean, Republic of Korea		
Cause of incident	Collision		
Quantity of oil spilled	Approximately 10 900 tonnes of crude oil		
Area affected	The three southerly provinces on the west coast of the Republic of Korea		
Flag State of ship	China (Hong Kong Special Administrative Region)		
Gross tonnage (GT)	146 848 GT		
P&I insurer	China Shipowners Mutual Insurance Association (China P&I)/Assuranceforeningen Skuld (Gjensidig) (Skuld Club)		
CLC Limit	89.77 million SDR (£84.2 million)		
STOPIA/TOPIA applicable	No		
Compensation (£ million):	Claimed but not yet assessed	Assessed but not yet paid	Paid
Clean up/preventive measures	57.25	6.97	15.46
Property damage	1.21	0.08	-
Fisheries/mariculture	121.19	0.38	-
Tourism and other economic damage	41.15	0.20	0.12
Environmental damage	1.08	-	-
TOTAL	221.88	7.63	15.58
Notes:	Further claims are expected.		

## 2 Development of claims



### **3 The incident**

- 3.1 The China (Hong Kong Special Administrative Region) (China (HKSAR)) flag tanker *Hebei Spirit* (146 848 GT) was struck by the crane barge *Samsung N°1* while at anchor about five miles off Taean on the west coast of the Republic of Korea. The crane barge was being towed by two tugs (*Samsung T-5* and *Samho T-3*) when the tow line broke. Weather conditions were poor and it is reported that the crane barge was blown by the strong wind into the tanker, puncturing three of its port cargo tanks.
- 3.2 The *Hebei Spirit* was laden with about 209 000 tonnes of four different crude oils. Due to inclement weather conditions, repairs of the punctured tanks were completed only after four days. In the meantime the crew of the *Hebei Spirit* tried to limit the quantity of cargo spilled through the punctures by creating a list and transferring cargo between tanks. Due to the fact that the tanker was almost fully laden, however, the effectiveness of such actions was limited.
- 3.3 As a result of the collision an estimated total of 10 900 tonnes of crude oil (a mix of Iranian Heavy, Upper Zakum and Kuwait Export) escaped into the sea. The remaining oil in the damaged tanks was transferred to other tanks onboard and to another vessel. Once stabilised, the *Hebei Spirit* proceeded to the Hyundai Oilbank terminal in the port of Daesan (Republic of Korea), where the cargo was discharged.
- 3.4 The *Hebei Spirit* is owned by *Hebei Spirit* Shipping Company Limited. It is insured by China Shipowners Mutual Insurance Association (China P&I) and by Assurancéföreningen Skuld (Gjensidig) (Skuld Club) and managed by V-Ships Limited. It is understood that the crane barge, the two tugs and the anchor boat are owned by Samsung C&T Corporation (Samsung) and operated/bareboat chartered by its subsidiary Samsung Heavy Industries (SHI), which belong to the Samsung Group, the Republic of Korea's largest industrial conglomerate.
- 3.5 The Skuld Club and the 1992 Fund appointed a team of Korean and international surveyors to monitor the clean-up operations and investigate the potential impact of the pollution on fisheries, mariculture and tourism activities.

### **4 Claims Office**

In anticipation of receiving a large number of claims, and after consultation with the Korean Government, the Skuld Club and the 1992 Fund opened a Claims Office (the *Hebei Spirit* Centre) in Seoul to assist claimants in the presentation of their claims for compensation. The Centre has a manager and three supporting staff members. The office became fully operational on 22 January 2008.

### **5 Impact of the spill**

- 5.1 Much of the Republic of Korea's western coast has been affected to varying degrees. Shoreline composed of rocks, boulders and pebbles, as well as long sandy amenity beaches and port installations in the Taean Peninsula and on the nearby islands, were polluted. Over a period of several weeks, mainland shorelines and islands further south also became contaminated by emulsified oil and tar balls. A total of some 375 kilometres of shoreline were affected along the west coast of Korea. A considerable number of commercial vessels were also contaminated.
- 5.2 The west coast of the Republic of Korea hosts a large number of mariculture facilities, including several thousand hectares of seaweed cultivation. It is also an important area for shellfish cultivation and for large-scale hatchery production facilities. The area is also exploited by small and large-scale fisheries. The oil affected a large number of these mariculture facilities, as it passed through the supporting structures, contaminating buoys, ropes, nets and the produce.

- 5.3 The oil has also impacted amenity beaches and other areas of the Taean National Park. The Taean Peninsula is a favourite tourist destination for visitors from the Seoul metropolitan area, with an estimated 20 million visitors every year, mostly in the months of July and August.

## **6 Clean-up operations**

- 6.1 The Korea National Coast Guard Agency, a department of the Ministry of Maritime Affairs and Fisheries (MOMAF), has overall responsibility for marine pollution response in the waters under the jurisdiction of the Republic of Korea. By the first quarter of 2008, responsibility for overseeing onshore clean up had been passed on to the affected local governments, following a restructuring of the Korean Government.

### **6.2 At-sea clean up**

- 6.2.1 The Coast Guard coordinated the response at sea. Over 100 vessels of the Coast Guard, the Navy and the Korean Marine Pollution Response Corporation (KMPPRC) were deployed to carry out clean-up operations. Over 1 500 fishing vessels were also deployed. The Coast Guard applied dispersants from vessels and later helicopters over patches of floating oil. Tens of kilometres of booms were also deployed at sea and along coastal areas.
- 6.2.2 The government-led response at sea was completed within two weeks although a large number of fishing vessels were still deployed in the following weeks to tow sorbent booms and collect tar balls. Some are still being used to transport manpower and materials to offshore islands in support of clean-up operations.

### **6.3 Onshore clean up**

- 6.3.1 The Korean Coast Guard tasked a total of 21 licensed clean-up contractors, supported by local authorities and fisheries cooperatives to undertake shoreline clean-up operations. Onshore clean-up operations were carried out at numerous locations along the western coast of Republic of Korea. Local villagers, army and navy cadets and volunteers from all over Republic of Korea also participated in the clean-up operations. In excess of one million man-days were worked during the first two months.
- 6.3.2 Clean-up operations involved both manual and mechanical removal of bulk oil and the work of a large number of volunteers wiping rocks and pebbles using sorbent materials.
- 6.3.3 The removal of the bulk oil was completed by the end of March 2008. The major part of secondary clean-up operations, involving, among other techniques, surf washing, flushing and hot water high-pressure treatment, were completed by the end of June 2008. Some clean-up operations in remote areas are still planned and expected to be resumed shortly.

## **7 The 1992 Civil Liability and Fund Conventions**

- 7.1 The Republic of Korea is a party to the 1992 Civil Liability Convention (1992 CLC) and a Member State of the 1992 Fund, but not a Member State of the Supplementary Fund.
- 7.2 As a consequence, since it is almost certain that the total amount of damages will exceed the limitation amount applicable under the 1992 CLC, the 1992 Fund will be liable to pay compensation to the victims of the spill.
- 7.3 The tonnage of the *Hebei Spirit* (146 848 GT) is in excess of 140 000 GT. The limitation amount applicable is therefore the maximum under the 1992 CLC, namely 89.77 million SDR (£84.2 million). The total amount available for compensation under the 1992 CLC and the Fund Convention is 203 million SDR (£159 million).

## 8 Level of payments

The latest estimate on the total amount of the losses arising as a result of the incident and the level of payments proposed by the Director is contained in a separate document (92FUND/EXC.44/7/Add.1).

## 9 Actions by the Korean Government

### 9.1 Hardship payments made by the Korean Government

9.1.1 The Korean Government has informed the 1992 Fund that payments totalling KRW 117.2 billion (£58 million) have been made to residents in the affected areas. Out of this amount, the Central Government has provided KRW 76.8 billion (£38 million), the Chungcheongnam Province KRW 15 billion (£7.4 million) and private donors KRW 25.4 billion (£12.5 million). The local authorities in the affected provinces have distributed the payments.

9.1.2 It has been reported in the press that in Taean County, which is one of the most affected areas, a total of 18 757 households received payments between KRW 746 862 (£369) and KRW 2 916 600 (£1 440).

9.1.3 In June 2008 the Korean Government informed the Executive Committee that these payments were made as donations to the affected residents. The payments therefore did not constitute payment of compensation of pollution damage and would not fall within the scope of Article 9.3 of the 1992 Fund Convention.

### 9.2 Payments by local authorities

It is understood that the Taean County and Boryeong City Governments have made payments totalling KRW 4 421 357 479 (£2.1 million) to 14 claimants in the clean-up sector in respect of the cost of villagers' labour in January and February 2008, corresponding to the difference between the amount claimed against the Skuld Club and 1992 Fund and the amount assessed. Further payments totalling KRW 9 740 million (£4.8 million) have been made by the same local authorities to 18 claimants for similar costs incurred during the period March to June 2008. These payments correspond to the amounts claimed against the Skuld Club and 1992 Fund. It is expected that these two local authorities will submit a subrogated claim in respect of the payments made.

### 9.3 Special Law for the Support of the Victims of the *Hebei Spirit* Oil Pollution Incident

9.3.1 In June 2008 the Korean Government informed the Executive Committee that a Special Law for the support of the victims of the *Hebei Spirit* incident had been approved by the National Assembly in March 2008. Under the provisions of the Special Law, the Korean Government was authorised to make payments to claimants, based on the assessments made by the Skuld Club and the 1992 Fund, within 14 days from the moment they submit proof of assessment to the government. Therefore claimants could receive compensation in full for the losses suffered as a result of the incident based on the assessments of claims by the Skuld Club and the 1992 Fund. The Special Law entered into force on 15 June 2008.

9.3.2 At the same session the Korean Government also informed the Executive Committee that if the Skuld Club and the 1992 Fund paid claimants compensation on a pro-rata basis, the Korean Government would pay the claimants the remaining percentage so that they would be paid 100% of their claims as assessed by the Skuld Club and the 1992 Fund (cf document 92FUND/EXC.41/11).

9.3.3 As at 13 February 2009 the Korean Government had made payments totalling KRW 19 477 million (£9.6 million) to 34 claimants in the clean-up sector based on interim assessments provided by the Skuld Club and the 1992 Fund. The Korean Government has submitted two subrogated claims for these payments to the Skuld Club and the 1992 Fund. The Skuld Club has paid the Government KRW 12 960 million (£6.4 million) in respect of one of these claims. The second claim is expected

to be paid by the Skuld Club in the near future.

9.3.4 A new scheme in application of the Special Law has recently been approved by the Korean Government by which victims will receive a loan for an amount fixed in advance if they have not received an offer of compensation from the Skuld Club and the 1992 Fund within six months from the date of submission of their claims

9.3.5 As at 12 March 2009, the Korean Government had granted one loan, for KRW 80 million (£39 000), to a claimant in accordance with the relevant provisions of the Special Law.

#### 9.4 Other loans granted by the Korean Government outside the scope of the Special Law

As a measure to assist victims of pollution damage, the Korean Government has granted loans totalling KRW 1 330 million (£660 000) to 16 clean up contractors through an agreement with the National Federation of Fisheries Cooperatives.

#### 9.5 Korean Government's decision to 'stand last in the queue'

9.5.1 At the June 2008 Session of the Executive Committee the Korean Government informed the Committee of its decision to 'stand last in the queue' in respect of compensation for clean-up costs and other expenses incurred by the central and local governments. The Korean Government further informed the Executive Committee that it expected its claims for which it would 'stand last in the queue' to be in the region of KRW 75 000 (£37 million), but that this figure was likely to increase as the Government continued to incur costs in order to regenerate the local economy, including work to reinstate the environment and promote consumer spending.

9.5.2 The Skuld Club and the 1992 Fund are in frequent contact with the Korean Government to maintain a coordinated system for the exchange of information regarding compensation in order to avoid duplication of payments.

### 10 Cooperation Agreements between the owners/Skuld Club, KMPRC and MOMAF

10.1 In January 2008, discussions took place on compensation issues which resulted in the First Cooperation Agreement concluded between the shipowner, Skuld Club, KMPRC and MOMAF. The 1992 Fund was consulted during the negotiations but is not a party to the Agreement. Details on the contents of the First Cooperation Agreement can be found in document 92FUND/EXC.40/9.

10.2 The Skuld Club also entered into discussions with the Korean Government in order to resolve its concern that Korean courts dealing with the limitation proceedings might not fully take into account payments made by the Skuld Club and that the Club would therefore run the risk of paying compensation in excess of the limitation amount applicable to the ship.

10.3 In July 2008 a Second Cooperation Agreement was concluded between the shipowner, Skuld Club and the Korean Government (Ministry of Land, Transport and Maritime Affairs (MLTM), which had incorporated part of the functions of MOMAF). Under this Agreement, the Club undertook to pay claimants 100% of the assessed amounts up to the shipowner's limit of liability under the 1992 CLC, namely 89.77 million SDR (£84.2 million). In return, the Korean Government undertook to pay all claims in full, as assessed by the Skuld Club and 1992 Fund, as well as all amounts awarded by final judgements under the 1992 CLC and Fund Convention in excess of the limit so as to ensure that all claimants would receive compensation in full. The Korean Government further undertook to deposit the amount already paid out by the Skuld Club to claimants into court should the Limitation Court order a deposit of the limitation fund.

10.4 The Skuld Club had begun making payments in accordance with the second Cooperation Agreement. As of 12 March 2008, the Skuld Club had made payments totalling KRW 31 558 million (£15.6 million) in respect of 93 claims.

## 11 Claims for compensation

11.1 The table below provides an update of the claims situation as at 12 March 2009:

Category of claim	Number of claims	Claimed amount (KRW million)	Claims assessed	Assessed amount (KRW million)	Claim paid	Paid amount (KRW million)	Claim rejected
Clean up and preventive measures	224	161 425	123	45 444	69	31 328	1
Property damage	16	2 619	2	171	-	-	-
Fisheries and mariculture	413	246 263	1	764	-	-	1
Tourism and other economic damage	2 723	84 022	108	644	24	242	480
Environmental damage	1	2 195	-	-	-	-	-
<b>Total</b>	<b>3 377</b>	<b>496 524</b>	<b>234</b>	<b>47 023</b>	<b>93</b>	<b>31 570</b>	<b>482</b>
<b>Total (£ million)</b>		<b>245.1</b>		<b>23.2</b>		<b>15.6</b>	

### 11.2 Clean up

11.2.1 As at 12 March 2009, 224 claims totalling KRW 161 425 million (£79.7 million) have been submitted for clean-up activities carried out as a result of the incident. Of the submitted claims, 123 have been assessed at a total of KRW 45 444 million (£22.4 million). The Skuld Club has made payments for a total amount of KRW 31 328 million (£15.5 million) in respect of 69 of these claims which include a payment to the Korean Government totalling KRW 12 960 million (£6.4 million) in respect of 22 claims paid under the Special Law (cf section 9). The rest of the claims are being assessed or are awaiting further supporting documentation.

11.2.2 Further claims are expected for clean-up activities undertaken both at sea and on shore.

### 11.3 Property damage

11.3.1 Sixteen claims totalling KRW 2 619 million (£1.3 million) have been submitted for damages to fishing boat hulls, nets and other structures. These claims are being assessed.

11.3.2 A number of mariculture and aquaculture facilities suffered contamination of net-supporting and other structures. The Korean Government financed the removal operations of the most affected oyster farms in two bays in the Taean Peninsula. These removal operations were completed in early August 2008.

11.3.3 It is expected that a number of significant claims for property damage will be submitted by claimants in the mariculture sector in the near future.

### 11.4 Fisheries and mariculture

11.4.1 As at 12 March 2009, 413 claims totalling KRW 246 263 million (£121.6 million) had been submitted for losses allegedly incurred in the fisheries and mariculture sectors. These claims are being assessed. The experts appointed by the Skuld Club and the 1992 Fund have been informed that a number of fisheries cooperatives and private surveyor companies are preparing claims on behalf of some 80 000 capture fishermen and hand gatherers. It is expected that these claims will be submitted by the first quarter of 2009.

11.4.2 Claims are also expected for economic losses from the owners of the oyster farms which were removed in the Taean Peninsula, as well as from owners of other oyster farms, located in less affected areas.



11.4.3 The Skuld Club and the 1992 Fund have also been informed that a number of hatcheries and other aquaculture facilities have recently alleged increased mortality of the reared species as a consequence of the incident. Further claims are expected from this sector.

#### 11.5 Tourism and other economic damage

11.5.1 The affected coastline is known to be a tourist destination for the Seoul metropolitan area and is characterised by a high number of small-scale tourism establishments. As at 12 March 2009, 2 723 claims totalling KRW 84 022 million (£41.5 million) had been submitted for losses in the tourism sector and other economic damage. One hundred and eight claims have been assessed at KRW 644 million (£318 000). Four hundred and eighty claims have been rejected. The rest of the claims are being assessed. Most of the claimants have submitted very poor or no supporting documentation. The experts are working in close contact with the Korean Government in order to supplement the information available with official statistics and other data that might help assess the losses of these claimants.

11.5.2 The experts appointed by the Skuld Club and the 1992 Fund have been informed that several thousands of individuals and organisations are preparing supporting documentation and are expected to submit claims in the near future for losses allegedly suffered as a consequence of the contamination. A significant number of claims are therefore expected from the tourism sector.

#### 11.6 Environmental studies

In December 2007, MOMAF instructed the Korean Ocean Research & Development Institute (KORDI) and Chungnam National University to carry out a Marine Pollution Impact Survey and Marine Ecological Restoration. After discussions between MOMAF, the Skuld Club and the 1992 Fund in January 2008, the International Tanker Owners Pollution Federation (ITOPF) was invited to join the surveys which were being carried out by KORDI and to offer technical advice on the activities undertaken in the context of the survey. In February 2008 MOMAF submitted a claim totalling KRW 2 195 million (£1.1 million) for the costs of the survey.

## 12 Investigations into the cause of the incident

### 12.1 Investigation in the Republic of Korea

12.1.1 An investigation into the cause of the incident was initiated soon after the incident by the Incheon District Maritime Safety Tribunal in the Republic of Korea.

12.1.2 In a decision rendered in September 2008, the Incheon Maritime Safety Tribunal considered both the two towing tugs and the *Hebei Spirit* at fault for causing the collision. The Tribunal found that the Master and the Duty Officer of the *Hebei Spirit* were also partly liable for the collision between the crane barge and the *Hebei Spirit*.

12.1.3 A number of defendants, including SHI, the Masters of the tug boats and the Master and Duty Officer of the *Hebei Spirit* have appealed against the decision to the Central Maritime Safety Tribunal.

12.1.4 In December 2008 the Central Maritime Safety Tribunal delivered its decision. The decision of the Central Maritime Safety Tribunal is similar to the one of the Incheon District Maritime Safety Tribunal in that the two towing tugs were found mainly responsible for the collision, and the *Hebei Spirit* was found partly responsible. The Tribunal further found that the Master and the Duty Officer of the *Hebei Spirit* were also partly liable for the collision between the *Hebei Spirit* and the *Samsung N°1*.

## 12.2 Investigation in China (Hong Kong Special Administrative Region) (China (HKSAR))

An investigation into the cause of the incident has also been initiated by the ship's flag state administration in China (HKSAR). The investigation is still ongoing.

## 13 Legal proceedings

### 13.1 Criminal proceedings

#### *Court of First Instance*

13.1.1 In January 2008, the Public Prosecutor of the Seosan Branch of the Daejeon District Court (Seosan Court) brought criminal charges against the Masters of the crane barge and the two tugs. The Masters of the two tugs were arrested. Criminal proceedings were also brought against the Master and Chief Officer of the *Hebei Spirit*. The Master and Chief Officer of the *Hebei Spirit* were not arrested, but they were not permitted to leave the Republic of Korea.

13.1.2 On 23 June 2008 the Seosan Court delivered its judgement to the effect that (i) the Master of one of the tugboats was sentenced to three years imprisonment and a fine of KRW 2 million (£1 000); (ii) the Master of the other tug boat was sentenced to one year imprisonment; (iii) the owner of the two tug boats (SHI); was fined KRW 30 million (£16 600); (iv) the Master of the crane barge was found not guilty; and (v) the Master and Chief Officer of the *Hebei Spirit* were also found not guilty

13.1.3 On 26 June 2008 the Public Prosecutor and the owner of the tug boats filed an appeal against the judgement, pending which the Master and Chief Officer of the *Hebei Spirit* were still not permitted to leave the Republic of Korea.

#### *Court of Appeal*

13.1.4 In December 2008, the Criminal Court of Appeal (Daejeon Court) rendered its judgement. In its judgement, the Daejeon Court reduced the sentence against the Masters of the two tugboats. The judgement overturned the not-guilty judgements for the Master of the crane barge and the Master and Chief Officer of the *Hebei Spirit*. The owner of the *Hebei Spirit* was also given a fine of KRW 30 million (£14 800) and the Master and Chief Officer of the *Hebei Spirit* were arrested.

13.1.5 In January 2009, the Master and Chief Officer of the *Hebei Spirit* were released on bail, but were not permitted to leave the Republic of Korea.

### 13.2 Civil Proceedings

#### *Limitation proceedings by the owners of the Hebei Spirit*

13.2.1 In February 2008, the owners of the *Hebei Spirit* made an application to commence limitation proceedings before the Seosan Branch of the Daejeon District Court (Limitation Court). The Limitation Court decided to postpone its decision on the shipowners' right to limit his liability since the shipowners had not provided evidence that claims in excess of the limitation amount had been submitted and since the results of the criminal investigation had not been presented to the Court.

13.2.2 In August 2008, at a hearing, the owner of the *Hebei Spirit* requested the Court to issue an order granting the shipowner's right to limit his liability. The Court, however, decided not to grant the request and to give time to the victims of the oil spill to register their claims.

13.2.3 In February 2009 the Limitation Court rendered an order for the commencement of the limitation proceedings. According to the Limitation Order, the persons who have claims against the owners of the *Hebei Spirit* shall have to register their claims by 8 May 2009, failing which the claimants will forfeit their rights against the limitation fund.

*Limitation proceedings by the owner of the two towing tugs and the owner of the crane barge*

- 13.2.4 In December 2008, Samsung and SHI, the owner and operator of the two towing tugs, the anchor boat and of the crane barge filed a petition requesting the Seoul Central District Court to issue an order granting the right to limit their liability in the amount of 2.2 million SDR (£2 million). A decision is expected in 2009.
- 13.2.5 In the limitation proceedings it will have to be decided, *inter alia*, whether under Korean law Samsung and/or SHI are entitled to limit liability in respect of the collision of the crane barge *Samsung N°1* with the *Hebei Spirit*. On the basis of legal advice received from the Fund's Korean lawyers, it is very likely that this will be the case, and that therefore a recovery from them would be restricted to relatively small amounts.

*Appointment of court experts*

- 13.2.6 In December 2007, a group of fishery claimants belonging to the Seosan Fisheries Cooperatives made an application to the Seosan Court requesting the Court to order the preservation of evidence and to appoint a court expert to assess the losses.
- 13.2.7 In March 2008, another group of fishery claimants from the area of Boryeong City and Hongsung County made a similar application to the Hongsung Court.
- 13.2.8 The 1992 Fund has instructed its Korean lawyers to intervene in the proceedings to ensure that the interests of the 1992 Fund are protected.
- 13.2.9 In January and April 2008 respectively, the two Courts appointed the Maritime Research Institute of Pukyong National University and the Fishery Science Institute of the Jeonnam University as the court expert tasked with the assessment of the damages arising from the *Hebei Spirit* incident. The Courts ordered that any material that the court experts receive from the claimants is made available to the experts engaged by the Skuld Club and the 1992 Fund who should have unrestricted access to any material necessary to conduct the assessment of losses.

*Injunction against the experts engaged by the Skuld Club and the 1992 Fund*

- 13.2.10 In March 2008, three fishermen and two owners of raw-fish restaurants filed an application for an injunction with the Seoul Central District Court. This was aimed at preventing the experts appointed by the Skuld Club and the 1992 Fund from carrying out the assessments on the grounds that they were not qualified under Korean Law to carry out such work.
- 13.2.11 In April 2008, the Court dismissed the application since the claimants still had the right to bring the claims into court if they did not agree with the assessment. The Court stated that under Korean law the experts engaged by the Club and the 1992 Fund were authorised to carry out the investigation and assessment of damages arising from an oil pollution incident.
- 13.2.12 The claimants appealed against the decision. The first hearing of the Seoul Appeal Court was held in January 2009.
- 13.2.13 In February 2009, the Seoul Appeal Court held a second and final hearing on the matter. A decision is expected in March 2009.

### 13.3 Recourse action against Samsung C&T Corporation and Samsung Heavy Industries

- 13.3.1 Investigations into the cause of the incident so far indicate that a number of seriously negligent acts or omissions on the part of the crane barge, the two towing tugs and the anchor boat (the 'Marine Spread') was the substantive cause of the collision and that there may be grounds to deny the owner and/or operator/bareboat charterer of the Marine Spread, Samsung and SHI, the right to limit their liability for the incident. The 1992 Fund is following developments through its Korean lawyers and is examining the evidence provided.
- 13.3.2 In December 2008 the Skuld Club approached the 1992 Fund's Director, stating that the evidence on the cause of the incident, in their view, showed a series of reckless acts or omissions of the Marine Spread. The Skuld Club based its conclusion, *inter alia*, on the following:
- SHI was responsible for the management of the Marine Spread and of the voyage which ended in the collision.
  - The Marine Spread included two towing tugs when normal industry practice for this type of towage would have required at least three towing tugs. The Marine Spread Lease Agreement concluded between Samsung and SHI also required three towing tugs.
  - The towing wire used by the Marine Spread, which broke and was the origin of the collision with the *Hebei Spirit*, was a luffing wire which was not suitable for towing.
  - It appears that SHI Management instructed the masters of the Marine Spread to commence the voyage even though the weather conditions were known to them to be clearly not suitable for the intended voyage.
- 13.3.3 The Skuld Club also provided the 1992 Fund with advice it had obtained from lawyers in various jurisdictions as to the possibility of bringing recourse action against Samsung and SHI and informed the Director that, on the basis of the legal and technical advice received, it had decided to bring recourse proceedings in the People's Republic of China against Samsung and SHI as soon as possible. The Skuld Club also invited the 1992 Fund to study the legal and technical advice provided with a view to joining the shipowner, its local insurer and the Skuld Club in a recourse action in the People's Republic of China and to bringing its own legal proceedings.
- 13.3.4 The Director then investigated the advice provided, with a view to determining whether recourse action could be taken against the owner and operator/bareboat charterer of the Marine Spread, whether their rights to limit liability could be successfully challenged, and if so, where such action should be taken. The Director also sought legal advice in the Republic of Korea and in the United Kingdom.
- Legal advice on a possible recourse action against Samsung and SHI in Korea*
- 13.3.5 The 1992 Fund has obtained legal advice from its Korean lawyers and has also had access to the legal advice provided to the Skuld Club by its Korean lawyers.
- 13.3.6 The advice received was that as a matter of Korean law, the 1992 Fund would be entitled to bring a recourse action in the Republic of Korea against Samsung and SHI. The time period for bringing recourse action against third parties would in principle be ten years from the date of payment of compensation to victims.
- 13.3.7 Limitation proceedings in the Republic of Korea have a shorter limit for the registration of the claims (including the 1992 Fund's future recourse claims). Accordingly, if the Korean Limitation Court were to grant Samsung and SHI limitation of liability, the actual time limit for the 1992 Fund's recourse claim would be the time limit to be set by the court handling the limitation action.
- 13.3.8 The Korean legislation in respect of the criteria for depriving the shipowner of his right to limit his liability, reflects the provisions of Article 4 of the 1976 Convention on Limitation of Liability for Maritime Claims (1976 LLMC Convention), which states that:

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

13.3.9 The legal advice provided stated that Korean courts would narrowly apply this provision, which would make it difficult for the 1992 Fund to break the owner/operator's right of limitation.

13.3.10 Under these circumstances, based on the evidence available, it was likely that the 1992 Fund would be unable to break Samsung and SHI's right to limit its liability and that, therefore, Samsung and SHI would be entitled to limit their liability to 2 million SDR.

*Legal advice received by the Skuld Club on a possible recourse action against Samsung and SHI in the United States of America*

13.3.11 The Skuld Club provided the 1992 Fund with the legal opinion from one of its US lawyers as to whether it could commence recourse action against Samsung and SHI in the United States of America. The legal opinion they received was that it would be doubtful whether a suit concerning a collision between two foreign registered vessels in a foreign country could ultimately be sustained in a US Court. It would therefore appear from this legal advice that US Courts would be very unlikely to accept jurisdiction on a possible recourse action against Samsung and SHI.

*Legal advice received by the Skuld Club on a possible recourse action against Samsung and SHI in China (HKSAR)*

13.3.12 The Skuld Club provided the Fund with a legal opinion of the Skuld Club's legal expert in China (HKSAR) on a possible recourse action against Samsung and SHI in China (HKSAR).

13.3.13 The legal advice provided by the expert indicated that the legal regime on limitation of liability in China (HKSAR) was based on the 1976 LLMC Convention, which was narrowly applied in China (HKSAR).

13.3.14 In his opinion, the expert considered that, although it was likely that the Court in China (HKSAR) would accept jurisdiction in a recourse action against Samsung and SHI, it was doubtful whether it would be possible to break the limit of liability imposed by the 1976 LLMC Convention in China (HKSAR). It would therefore seem likely that Samsung and SHI would be successful in limiting their liability to 2.2 million SDR

13.3.15 The Skuld Club's lawyer is still considering further evidence on the cause of the incident and therefore his legal opinion could not be considered final.

*Legal advice received by the Skuld Club on a possible recourse action against Samsung and SHI in the People's Republic of China*

13.3.16 The Skuld Club provided the Fund with the legal opinion of the Skuld Club's Chinese lawyer on a possible recourse action against Samsung and SHI in the People's Republic of China.

13.3.17 The legal advice provided by the lawyer indicated that the legal regime on limitation of liability in the People's Republic of China is based on the Chinese Maritime Code, which largely reproduces the 1976 LLMC Convention.

13.3.18 The Skuld Club's Chinese lawyer considered that it was very likely that the Courts in the People's Republic of China would accept jurisdiction in a recourse action against Samsung and SHI in accordance with Chinese law.

13.3.19 The lawyer further considered that, based on the statutory provisions and past cases in the People's

Republic of China, the existence of contributory fault of one ship in a collision would not necessarily mean that the right to limit the other party's liability could not be broken. In particular, the Maritime Courts would consider whether the ship's fault in the collision was caused by the recklessness of the owner and operator/bareboat charterer.

- 13.3.20 On the basis of the available evidence regarding the cause of the incident, the lawyer concluded that it was likely that the 1992 Fund would be able to break Samsung and SHI's right to limit their liability to 2.2 million SDR (£2.2 million).
- 13.3.21 The Director further considered the information provided by the Skuld Club on whether there were assets belonging to Samsung and SHI in the People's Republic of China. The Skuld Club had found that SHI had shares in two shipyards in the People's Republic of China. The value of those shares was some US\$400 million (£290 million). It would therefore be possible to arrest the shares and to prevent Samsung and SHI from disposing of them, thereby securing the enforcement of any possible judgement the 1992 Fund might obtain in the People's Republic of China.

*Director's considerations*

- 13.3.22 The 1992 Fund's policy with regard to recourse actions is:

'to take recourse action whenever appropriate and [that the 1992 Fund should] in each case consider whether it would be possible to recover any amounts paid by it to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle were involved, the question of costs should not be the decisive factor for the Fund when considering whether to take legal action. The Committee's view has been that the IOPC Fund's decision of 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' (cf document 92FUND/EXC.42/11, paragraph 3.1.4).

- 13.3.23 Following the 1992 Fund's policy on taking recourse action and taking into account the circumstances of the case in so far as these are known at the moment, the Director has analysed whether it would be possible to recover, on the basis of the applicable national law, any amounts paid (or to be paid) to victims, in the light of the prospect of success of such action within the legal system in question as well as the likely costs of such action. He has done so, using the legal advice and technical evidence available at the moment, the majority of which has been made available to the 1992 Fund by the Skuld Club.
- 13.3.24 The Director has considered that, as set out above, in all but one of the jurisdictions that were considered, there appeared to be serious doubts, either as to whether the Courts would be likely to assume jurisdiction over the case, or as to whether it would be possible successfully to challenge the right of limitation of the owner and/or operator/bareboat charterer of the Marine Spread, or both. Only in the People's Republic of China did there appear to be both a good prospect of the Court assuming jurisdiction and a reasonable prospect of successfully challenging the right of the owner and/or operator/bareboat charterer of the Marine Spread to limit liability. Although it is, of course, not possible to express the likelihood of success as an exact percentage, the Chinese lawyer engaged by the Skuld Club and the 1992 Fund has indicated, on the basis of his extensive experience with the Chinese legal and Court system and his thorough consideration of the issue, that it is likely that the 1992 Fund would be able to break limitation in this case.
- 13.3.25 The Director has also considered that starting a recourse action in a country where the defendants do not have their main establishment or seat should include adequate measures to ensure that a possible Court decision awarding the 1992 Fund compensation could effectively be enforced. The mechanism for obtaining security for the claim of the 1992 Fund was to attach shares, owned by SHI, in two shipyards in the People's Republic of China and preventing the disposal or depreciation in value of those shares by SHI. Under Chinese law, such attachment is possible but would only be accepted by the Court if countersecurity in an amount of 10% of the 1992 Fund's claim was put up by the

1992 Fund. Such countersecurity would, in principle, have to be maintained until a final judgement was rendered which could take considerable time. Although the need to put up countersecurity can clearly be seen as a drawback in pursuing a recourse action in the People's Republic of China as opposed to doing so in the Republic of Korea in that there will be a significant cost to the 1992 Fund, pursuing a recourse action in Korea does not seem to be a realistic alternative due to the lack of a reasonable prospect of breaking the limit of the Marine Spread.

- 13.3.26 The Director has further considered that the costs of legal fees, fees for technical opinions and assistance, Court costs etc would inevitably be considerable in a complicated case such as this, but that these costs would be outweighed by the very large financial interest at stake for the 1992 Fund. The *Hebei Spirit* incident will exhaust the full limit of the 1992 Fund and, in addition, the costs to the 1992 Fund of the handling of the incident will be considerable as well.
- 13.3.27 The Director has finally considered that commencing a recourse action in the Republic of Korea, being the Member State where the damage occurred and where the defendants have their main seat, could be considered by some a more appropriate course of action for the 1992 Fund. He believes, however, that the legal advice received on the possibility and chances of a recourse action in the Republic of Korea make it clear that such course of action would only lead to the 1992 Fund incurring considerable costs without a realistic prospect of success, which would, in principle, be inconsistent with the Fund's policy on taking recourse action as set out in paragraph 13.3.22 above.
- 13.3.28 On the basis of these considerations, and presented, in December 2008, with a clear statement by the owner and the Skuld Club that they would in any event commence recourse action in the People's Republic of China as soon as possible, the Director decided to protect the interests of the 1992 Fund and commence the 1992 Fund's own recourse action, combined with an attachment of SHI's shares in the shipyards as set out above.
- 13.3.29 In addition to the outline of the merits of the case set out above, the Director should explain that he has taken this decision partly as a protective measure, for the following reasons. A consequence of not commencing a recourse action at the same time as the owner and the Skuld Club would have been that the attachment of SHI's shares in the shipyards would confer no benefit on the 1992 Fund, but on the owner and the Skuld Club only. Should the Fund have decided to postpone a decision and issue proceedings later, thereby allowing time to clarify the cause of the incident or to await a decision by the Executive Committee, there would have been a real risk that Samsung and/or SHI would in the meantime put up sufficient security for the enforcement of a possible judgement in favour of the owner and the Skuld Club and thereby lift the attachment of SHI's shares. This would have enabled SHI again to dispose of these shares or take other measures to prevent the 1992 Fund from securing enforcement of a possible favourable Court decision in the future and would therefore have created a very serious risk that the enforcement by the 1992 Fund of such later judgement would have proved illusory.
- 13.3.30 In view of this consideration, together with the fact that, as set out above, the People's Republic of China is the jurisdiction where there are the best prospects of breaking the limit of the Marine Spread, the Director concluded that not commencing a recourse action in China at the same time as the owner and the Skuld Club would have created a very serious risk of the 1992 Fund being effectively deprived of its only possibility to recover any amounts paid in compensation to the victims of the *Hebei Spirit* incident. The Director was concerned that the position of the 1992 Fund could thus be prejudiced before the Executive Committee had had the opportunity of fully considering possible recourse actions.
- 13.3.31 On 20 January 2009, the Ningbo Maritime Court accepted the two recourse actions filed by the owner/Skuld Club and the 1992 Fund. The total amount claimed by the 1992 Fund is RMB 1 367 million (£145 million) and the claim filed by the owner and the Skuld Club is for approximately the same amount. The 1992 Fund's recourse action will be dealt with by the Ningbo Maritime Court in conjunction with the recourse action by the owner and the Skuld Club. The Court also accepted the two corresponding applications for attachment of SHI's shares in the shipyards.

The Skuld Club has arranged for the deposit of the required countersecurity on behalf of the owners, itself and the 1992 Fund.

13.3.32 On the basis of the considerations set out above, the Director intends to continue the 1992 Fund's recourse action against Samsung and SHI in the Ningbo Maritime Court in China, unless he is otherwise instructed by the Executive Committee.

**14 Action to be taken by the Executive Committee**

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
  - (b) to decide whether to endorse the Director's decision to commence a recourse action against the owner/operator/bareboat charterer of the two towing tugs, the anchor boat and the crane barge (Marine Spread); and
  - (c) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.
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