



## INCIDENTS INVOLVING THE 1992 FUND

### PRESTIGE

#### Note by the Director

<b>Objective of document:</b>	To inform the Executive Committee of the latest developments regarding this incident.
<b>Summary of the incident so far:</b>	<p>The Bahamas registered tanker <i>Prestige</i> broke in two and sank some 260 kilometres west of Vigo (Spain). Approximately 63 200 tonnes of heavy fuel oil were spilled. The oil had a significant impact on fisheries, aquaculture and tourism businesses in Spain and France. Extensive clean up and preventive measures were carried out in Spain and France. Some preventive measures were also carried out in Portugal.</p> <p>The shipowner's P&amp;I insurer and the 1992 Fund have established Claims Handling Offices in La Coruña (Spain) and Lorient (France).</p> <p>Court actions have been initiated in Spain (section 5) and in France (section 6). A court action was also initiated in the United States by the Spanish State against American Bureau of Shipping (ABS), the Classification Society that certified the <i>Prestige</i>, (section 9).</p>
<b>Recent developments:</b>	<p>The latest claims situation is as follows: claims totalling €1 020.7 million (£894.2 million)<sup>&lt;1&gt;</sup> have been received by the office in Spain (cf sections 3.1 and 4) and claims totalling €109.7 million (£96.1 million) have been received by the office in France (section 3.2). The process of assessing claims both in Spain and France continues.</p> <p>In March 2009 the Criminal Court in Corcubi3n issued a decision declaring the instruction of the case as concluded. According to the decision the civil servant, who had been involved in the decision not to allow the ship into a place of refuge in Spain, is exonerated from liability and the proceedings against the Master, Chief Officer and Chief Engineer of the <i>Prestige</i> are set to continue. Some of the parties to the criminal proceedings have appealed against this decision.</p>

<1> Conversion of currencies has been made on the basis of the exchange rate as at 15 May 2009 (€1 = £0.8761) and 1 US\$ = £0.6363) except in respect of payments made by the 1992 Fund, where the conversion has been made at the rate of exchange on the date of payment.

One judgment was rendered in late March 2009 by the Civil Court in Bordeaux (section 7).

There have been further developments in the proceedings taking place in the United States, referred to above, between the Spanish State and ABS (section 9.2).

**Action to be taken:** Information to be noted.

## 1 Summary of incident

Ship	<i>Prestige</i>
Date of incident	13.11.02
Place of incident	Spain
Cause of incident	Breaking and sinking
Quantity of oil spilled	Approximately 63 200 tonnes of heavy fuel oil
Area affected	Spain, France and Portugal
Flag State of ship	Bahamas
Gross tonnage (GT)	42 820 GT
P&I insurer	London Steamship Owners' Mutual Insurance Association Ltd (London Club)
CLC Limit	€2 777 986 (£20 million)
STOPIA/TOPIA applicable	No
CLC + FC Limit	€171 520 703 (£150.3 million)
<b>Compensation</b>	
Level of payments	15%/30% subject to conditions
Spain	Two payments to Spanish Government totalling €15 million (£91.7 million) minus €1 million (£800 000), subject to: <ul style="list-style-type: none"> <li>• Bank guarantee</li> <li>• Undertaking to pay all claimants in Spain</li> </ul>
France	Level of payments at 30% subject to the French Government standing last in the queue.
Portugal	Payment to Portuguese Government of €328 488 (£222 600), corresponding to 15% of the assessment of its claim for preventive measures. A further payment to the Portuguese Government will be made in the event that the Executive Committee were to increase the level of payments unconditionally.
<b>Outstanding claims</b>	
Spain	The 14 claims by the Spanish Government are being assessed. Some 193 other claims are awaiting a reply from the claimant.
France	28 claims are being assessed, including the French Government's claim.
Portugal	Only one claim was submitted and it has been settled and paid.
<b>Legal proceedings</b>	
Spain	Criminal proceedings against the Master, Chief Officer, Chief Engineer and a civil servant, including some 3 780 compensation claims. In a decision the civil servant has been exonerated by the Court.
France	Civil proceedings in various French courts (232 actions).
Portugal	Legal proceedings were started, but discontinued after settlement with the Portuguese Government.
United States	Proceedings initiated by the Spanish State against ABS, the classification society that certified the <i>Prestige</i> .

## 2 The incident

- 2.1 On 13 November 2002 the Bahamas registered tanker *Prestige* (42 820 GT), carrying 76 972 tonnes of heavy fuel oil, began listing and leaking oil while some 30 kilometres off Cabo Finisterre (Galicia, Spain). On 19 November, whilst under tow away from the coast, the vessel broke in two and sank some 260 kilometres west of Vigo (Spain), the bow section to a depth of 3 500 metres and the stern section to a depth of 3 830 metres. The break-up and sinking released an estimated 63 000 tonnes of cargo. Over the following weeks oil continued to leak from the wreck at a declining rate. It was subsequently estimated by the Spanish Government that approximately 13 800 tonnes of cargo remained in the wreck.
- 2.2 Due to the highly persistent nature of the *Prestige's* cargo, released oil drifted for extended periods with winds and currents, travelling great distances. The west coast of Galicia (Spain) was heavily contaminated and oil eventually moved into the Bay of Biscay affecting the north coast of Spain and France.
- 2.3 Major clean-up operations were carried out at sea and on shore in Spain. Significant clean-up operations were also undertaken in France. Clean-up operations at sea were undertaken off the coast of Portugal.
- 2.4 The *Prestige* had insurance for oil pollution liability with the London Steamship Owners' Mutual Insurance Association Ltd (London Club).
- 2.5 Between May and September 2004 some 13 000 tonnes of cargo were removed from the fore part of the wreck. Approximately 700 tonnes were left in the aft section.
- 2.6 For details of the clean-up operations and the impact of the spill reference is made to the Annual Report 2003 (pages 105-109).
- 2.7 For details of the investigations into the cause of the incident reference is made to the Annual Report 2005 (pages 116-121).

## 3 Claims for compensation

### 3.1 Spain

- 3.1.1 As at 15 May 2009 the Claims Handling Office in La Coruña had received 844 claims totalling €1 020.7 million (£894.2 million). These include 14 claims from the Spanish Government totalling €68.5 million (£848.5 million). The table below provides a breakdown of the different categories of claims:

Category of claim	No. of claims	Amount claimed €
Property damage	232	2 066 103
Clean up	17	3 011 744
Mariculture	14	20 198 328
Fishing and shellfish gathering <sup>&lt;2&gt;</sup>	180	3 610 886
Tourism	14	688 303
Fish processors/vendors	299	20 833 227
Miscellaneous	74	1 775 068
Spanish Government	14	968 524 084
<b>Total</b>	<b>844</b>	<b>1 020 707 743</b>

<sup><2></sup> One claim totalling €132 million (£115.6 million) from a group of 58 associations has been withdrawn following a settlement with the Spanish Government.

3.1.2 As at 15 May 2009, 787 (94.82%) of the claims other than those of the Spanish Government have been assessed for €3.9 million (£3.5 million). Interim payments totalling €27 327 (£461 991)<sup><3></sup> have been made in respect of 173 of the assessed claims, mainly at 30% of the assessed amount. Of the remaining claims three are pending clarification, 166 are awaiting a response from the claimant, 27 are awaiting further documentation, 413 (totalling €29.9 million (£26.2 million)) have been rejected and 19 were withdrawn by the claimants.

### 3.2 France

3.2.1 As at 15 May 2009, 482 claims totalling €109.7 million (£96.1 million) had been received by the Claims Handling Office in Lorient. The table below provides a breakdown of the different categories of claims:

Category of claim	No. of claims	Amount claimed €
Property damage	9	87 772
Clean up	61	10 512 569
Mariculture	126	2 336 501
Shellfish gathering	3	116 810
Fishing boats	59	1 601 717
Tourism	195	25 166 131
Fish processors/vendors	9	301 446
Miscellaneous	19	2 029 820
French Government	1	67 499 154
<b>Total</b>	<b>482</b>	<b>109 651 920</b>

3.2.2 Of the 482 claims submitted to the Claims Handling Office, 94% had been assessed by 15 May 2009. Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. Four hundred and fifty four claims had been assessed for €50 million (£43.8 million) and interim payments totalling €3.3 million (£4.6 million) had been made at 30% of the assessed amounts in respect of 346 claims. The remaining claims await a response from the claimants or are being re-examined following the claimants' disagreement with the assessed amount. Fifty-six claims totalling €3.8 million (£3.3 million) had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident.

3.2.3 In May 2004 the French Government submitted a claim for €67.5 million (£59.1 million) in relation to the costs incurred for clean up and preventive measures. The 1992 Fund and the London Club have provisionally assessed the claim at €31.2 million (£27.3 million). Further documentation has since been provided by the French Government. The Fund's experts are carrying out a detailed further assessment of the claim.

3.2.4 A further 61 claims, totalling €10.5 million (£9.2 million), have been submitted by local authorities for costs of clean-up operations. Fifty-four of these claims have been assessed at €4.6 million (£4 million). Interim payments totalling €1.2 million (£1.1 million) have been made in respect of 41 claims at 30% of the assessed amounts.

3.2.5 One hundred and twenty-six claims have been submitted by oyster farmers totalling €2.3 million (£2 million) for losses allegedly suffered as a result of market resistance due to the pollution. The experts engaged by the London Club and the 1992 Fund have examined these claims and as at 15 May 2009, 120 of them, totalling €2.4 million (£2.1 million), had been assessed at €468 231

<sup><3></sup> Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

(€410 220). Payments totalling €127 539 (£111 740) have been made in respect of 86 of these claims at 30% of the assessed amounts.

3.2.6 The Claims Handling Office has received 195 tourism-related claims totalling €25.2 million (£22 million). One hundred and eighty-five of these claims have been assessed at a total of €2.9 million (£11.3 million) and interim payments totalling €3.7 million (£3.2 million) have been made at 30% of the assessed amounts in respect of 149 claims.

### 3.3 Portugal

In December 2003 the Portuguese Government submitted a claim for €3.3 million (£2.9 million) in respect of the costs incurred in clean up and preventive measures. On the basis of additional documentation submitted in February 2005 the Portuguese Government increased its claim by €1 million (£876 100). The claim was finally assessed at €2.2 million (£2 million). The Portuguese Government accepted this assessment. In August 2006 the 1992 Fund made a payment of €28 488 (£222 600), corresponding to 15% of the final assessment (cf Annual Report 2006, pages 103-106). This payment does not preclude a further payment to the Portuguese Government in the event that the Executive Committee were to increase the level of payments unconditionally.

## 4 Claims by the Spanish Government

### 4.1 General claims

4.1.1 The Spanish Government submitted a total of 14 claims for an amount of €68.5 million (£848.5 million). The claims by the Spanish Government relate to costs incurred in respect of at-sea and onshore clean-up operations, removal of the oil from the wreck, compensation payments made in relation to the spill on the basis of national legislation and the costs incurred therein (Royal Decrees)<sup><4></sup>, tax relief for businesses affected by the spill, administration costs, costs relating to publicity campaigns, costs incurred by local authorities and paid by the Government, costs incurred by 67 towns that had been paid by the Government, costs incurred by the regions of Galicia, Asturias, Cantabria, Basque Country and costs incurred in respect of the treatment of the oily residues.

4.1.2 The 1992 Fund's experts are examining the claims by the Spanish Government.

### 4.2 Removal of oil from the wreck

4.2.1 The claim for the removal of the oil from the wreck, initially for €109.2 million (£95.7 million), was reduced to €24.2 million (£21.2 million) to take account of funding obtained from another source (cf paragraph 4.4.3).

4.2.2 At its February 2006 session the Executive Committee decided that some of the costs incurred in 2003, prior to the removal of the oil from the wreck, in respect of sealing the oil leaking from the wreck and various surveys and studies that had a bearing on the assessment of the pollution risk posed, were admissible in principle, but that the claim for costs incurred in 2004 relating to the removal of oil from the wreck was inadmissible (cf Annual Report 2006, pages 111-114). Following the Executive Committee's decision, the claim has been assessed at €487 996.83 (£8.3 million).

### 4.3 Payments to the Spanish Government

4.3.1 The first claim received from the Spanish Government in October 2003 for €383.7 million (£336.2 million) was assessed on an interim basis by the Director in December 2003 at €107 million (£93.7 million), and the 1992 Fund made a payment of €6 050 000 (£11.1 million), corresponding to 15% of the interim assessment. The Director also made a general assessment of the total of the

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<4> For details regarding the scheme of compensation set up by the Spanish Government reference is made to the Annual Report 2006, pages 109-111.

admissible damage in Spain and concluded that the admissible damage would be at least €303 million (£265.5 million). On that basis, and as authorised by the Assembly, the Director made an additional payment of €41 505 000 (£28.5 million), corresponding to the difference between 15% of €383.7 million or €7 555 000 and 15% of the preliminarily assessed amount of the Government's claim, €16 050 000. That payment was made against the provision by the Spanish Government of a bank guarantee covering the above-mentioned difference (ie €41 505 000) from the Instituto de Credito Oficial, a Spanish bank with high standing in the financial market, and an undertaking by the Spanish Government to repay any amount of the payment decided by the Executive Committee or the Assembly.

4.3.2 In March 2006 the 1992 Fund made an additional payment of €6 365 000<sup><5></sup> (£38.5 million) to the Spanish Government, in accordance with the distribution of the amount payable by the 1992 Fund in respect of the *Prestige* incident, as authorised by the Executive Committee at its October 2005 session (cf Annual Report 2006, pages 103-106).

#### 4.4 Progress on the assessment

4.4.1 Many meetings have been held between representatives of the Spanish Government and of the 1992 Fund and a considerable amount of further information has been provided in support of the Government's claims. Co-operation with representatives of the Spanish Government is continuing and progress is being made on the assessment of all the claims submitted by the Government.

4.4.2 In May 2007 a meeting was held with representatives of the Spanish Government to discuss a provisional assessment carried out in relation to the at-sea and onshore clean-up operations by the Ministries of Defence, of the Environment and of Public Works (Fomento). As a result of the queries raised in this provisional assessment the Spanish Government has submitted further information, which has been analysed by the 1992 Fund's experts and a re-assessment has been issued in this connection.

4.4.3 In June 2007 the 1992 Fund received further information from the Spanish Government regarding the amount of European funding it had received following the incident. The Fund is examining the information provided and its bearing on the assessment of the claims by the Spanish Government.

4.4.4 In November 2007 a meeting was held with representatives of the Spanish Government to discuss a provisional assessment carried out in relation to the losses suffered in the fisheries sector as a result of the incident. A number of queries were raised by the Spanish Government, which were examined by the 1992 Fund's experts. In February 2008 the queries raised by the Spanish Government were discussed with representatives of the Government.

4.4.5 Further discussions between representatives of the Spanish Government and the 1992 Fund are ongoing.

## 5 Legal proceedings in Spain

### 5.1 Investigations into the cause of the incident

5.1.1 Shortly after the incident the Criminal Court in Corcubi3n (Spain) started an investigation into the cause of the incident to determine whether any criminal liability could arise from the events. The Court was investigating the role of the Master, Chief Officer and Chief Engineer of the *Prestige* and of a civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain.

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<5> The Director was authorised to pay the Spanish Government €7 365 000 (£45.7 million) but, as requested by the Spanish Government, the 1992 Fund retained €1 million in order to make payments at the level of 30% of the assessed amounts in respect of the individual claims that had been submitted to the Claims Handling Office in Spain.

- 5.1.2 In March 2009 the Criminal Court in Corcubi3n issued a decision declaring the instruction of the case as concluded. In the decision the Court exonerated from liability the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain and decided to continue the proceedings against the Master, Chief Officer and Chief Engineer of the *Prestige*.
- 5.1.3 Some of the parties to the criminal proceedings have appealed against this decision, pleading that the Appeal court declares the nullity of the Corcubi3n Court's decision in respect of the non-liability of the civil servant mentioned above. The French government has also appealed, pleading that some employees of ABS be incriminated and that proceedings be initiated against them as well.
- 5.2 Claims in court
- 5.2.1 Some 3 896 claims have been lodged in the legal proceedings before the Criminal Court in Corcubi3n (Spain). Six hundred and fifty four of these claims involve persons who have submitted claims directly to the 1992 Fund through the Claims Handling Office in La Coru3a. Details of the claims made in some of these court actions have been provided by the Court and are being examined by the experts engaged by the 1992 Fund. The Claims Handling Office has dealt with 249 of the claims submitted in court, out of which three have been settled and paid for an amount of €24 267 (£21 260).
- 5.2.2 One thousand nine hundred and forty four of these claims have been paid by the Spanish Government under the Royal Decrees<sup><6></sup> or by the 1992 Fund through the Claims Handling Office in La Coru3a. A number of claimants who have been paid by the Spanish Government under the Royal Decrees have withdrawn their claims from the court proceedings. It is expected that more claimants will withdraw their court actions for the same reason.
- 5.2.3 The Spanish Government has itself taken legal action in the Criminal Court in Corcubi3n as well as on behalf of regional and local authorities and 1 878 other claimants or groups of claimants. A number of other claimants have also taken legal actions and the Court is assessing whether these claimants are eligible to join the proceedings.

## **6 Legal proceedings in France**

- 6.1.1 Two hundred and thirty two claimants including the French Government brought legal actions against the shipowner, the London Club and the 1992 Fund in 16 courts in France, requesting compensation totalling some €11 million (£97.2 million), including €7.7 million (£59.3 million) claimed by the Government.
- 6.1.2 Thirty-nine of these claimants have withdrawn their actions, therefore the actions by 193 claimants remain pending in court for compensation claims amounting to a total of €92.6 million (£81.1 million).
- 6.1.3 The courts have granted a stay of proceedings in 28 legal actions either in order to give the parties time to discuss their claims out of court, or until the outcome of the criminal proceedings in Corcubi3n is known.
- 6.1.4 One judgment was rendered in late March 2009 by the Civil Court in Bordeaux (see below).
- 6.1.5 Some one hundred and forty French claimants, including various communes, have joined the legal proceedings in Corcubi3n, Spain.

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<6> Some 397 claims under the Royal Decrees have been rejected by the Spanish Government.

## **7 Judgements by Courts in France**

### **7.1 Civil Court in Bordeaux**

- 7.1.1 The owner of a health spa and hotel located near Biarritz brought an action in the Civil Court of Bordeaux claiming €571 270 (£500 490) for loss of income incurred as a result of the *Prestige* incident. The 1992 Fund had assessed the losses at €183 983 (£161 190) based on the claimant's results between 2000 and 2002. The claimant, who had based his claim on a business plan, did not agree with the Fund's assessment.
- 7.1.2 In a judgement rendered in March 2009, the Court agreed with the 1992 Fund's assessment of the claim. It also took note that any payment of compensation in respect of the *Prestige* incident should currently be limited to 30% of the assessed loss. At the date when this document was issued, the claimant had not appealed against the judgement.

## **8 Court actions in Portugal**

The Portuguese Government took legal action in the Maritime Court in Lisbon against the shipowner, the London Club and the 1992 Fund claiming compensation for €4.3 million (£3.8 million). Following the settlement of the claim referred to in paragraph 3.3, the Portuguese State withdrew its action in December 2006.

## **9 Court actions in the United States**

### **9.1 Background information**

- 9.1.1 The Spanish State has taken legal action against American Bureau of Shipping (ABS) before the Federal Court of First Instance in New York requesting compensation for all damage caused by the incident, estimated initially to exceed US\$700 million (£445.4 million) and estimated later to exceed US\$1 000 million (£636.3 million). The Spanish State has maintained, *inter alia*, that ABS had been negligent in the inspection of the *Prestige* and had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel and had been negligent in granting classification.
- 9.1.2 ABS denied the allegation made by the Spanish State and in its turn took action against the State, arguing that if the State had suffered damage this was caused in whole or in part by its own negligence. ABS made a counterclaim and requested that the State should be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgement against it in relation to the *Prestige* incident.
- 9.1.3 For details about the defence of sovereign immunity, the discovery of the criminal file in Corcubión, of financial records and of e-mail communications reference is made to Annual Report 2007, pages 101 to 104 and Annual Report 2008, page 104.

### **9.2 ABS's defence that it acted as 'the pilot or any other person, (...), who performs services for the ship'**

- 9.2.1 In August 2005 ABS submitted a request to the New York Court (District Court) for a summary judgement dismissing the Spanish State's action. ABS argued that it was an agent or servant of the shipowner or fell under the category of 'the pilot or any other person who, without being a member of the crew, performs services for the ship' and that, therefore, in accordance with Article III.4(a) and (b) of the 1992 Civil Liability Convention (1992 CLC) no claim for compensation for pollution damage could be made against it, unless the damage resulted from its personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. ABS also maintained that under Article IX.1 of the 1992 CLC all actions for compensation, such as that pursued by the Spanish State in the New York Court, could only be brought in the courts of a Contracting State. Since the United States was not a Contracting State to the 1992 CLC and the pollution damage had occurred in Spain, ABS argued that the United States Courts were not competent to hear the case.

- 9.2.2 The Spanish State opposed the request by ABS, arguing that a classification society could not be considered either an agent or servant of the shipowner or a person who performs services for the ship, within the meaning of Article III.4(a) and (b) of the 1992 CLC respectively. As regards Article III.4(b), Spain argued that 'any other person' only referred to a person similar to a pilot or a member of the crew in their relationship with the owner, who performs services of the kind performed by a pilot or a member of the crew of the ship and who is involved in the navigation or operation of the vessel on the incident voyage in question. In support of its argument, the Spanish State relied upon the *ejusdem generis* rule of construction, which provides that when a general word or phrase follows a list of specific persons or things, the general word or phrase shall be interpreted to include only persons or things of the same type as those listed.
- 9.2.3 In support of its motion, Spain submitted declarations from legal experts that had attended the 1969 and 1984 diplomatic conferences which had adopted the original Civil Liability Convention and the Protocol thereto. Both experts' declarations take the position that classification societies were not intended to be covered by Article III.4(b).
- 9.2.4 The Spanish State further argued that since the United States was not a signatory to the 1992 CLC, the jurisdictional provisions of Article IX.1 of the Convention were not binding on its courts.
- 9.2.5 In January 2008 the New York Court accepted ABS's argument that ABS fell into the category of 'any other person who performs services for the ship' under Article III.4(b) of the 1992 CLC. The Court argued that the text of the treaty had to be interpreted in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose. It further argued that the *ejusdem generis* rule of construction did not apply because it was only to be used where there was uncertainty as to the meaning of a particular clause in a statute. The Court found no uncertainty or ambiguity in the wording of Article III.4(b) and, therefore, held it did not need to refer to *ejusdem generis*, negotiation history or other extrinsic sources. The Court further ruled that, under Article IX.1 of the 1992 CLC, Spain could only make claims against ABS in its own courts and it therefore granted ABS's motion for summary judgement, dismissing the Spanish State's claim.
- 9.2.6 In its decision, the New York Court also denied all pending motions as now being non actionable, except for the pending motions over sanctions for Spain's failure to comply with the discovery requests relating to e-mails (cf paragraph 9.1.3 ).
- 9.2.7 The Spanish State has appealed against the New York Court's decision.
- 9.2.8 ABS has also filed an appeal against the Court's decision to dismiss its counterclaims for lack of jurisdiction. The Spanish State has also filed a motion with the Court of Appeal seeking to dismiss ABS's appeal.
- 9.2.9 For details about the appeal by the Spanish State, its request that the Fund present an *amicus curiae* brief and ABS's counter appeal reference is made to Annual Report 2008, pages 104 -105.
- 9.2.10 In March 2009 the Court of Appeal granted a motion allowing the Natural Resources Defense Council to file an *amicus curiae* brief. The Court of Appeal also invited the United States to participate in the oral argument and file an *amicus curiae* brief addressing the following questions:
- Whether the 1992 CLC applies to Spain's action against ABS;
  - Whether ABS, as a classification society, falls within the scope of the 1992 CLC provision that exempts from liability 'the pilot or any other person who, without being a member of the vessel's crew, performs services for the ship'; and
  - Whether the 1992 CLC requires that the Spanish State claim against ABS be adjudicated in a 1992 CLC-Contracting State.

- 9.2.11 The United States Department of Justice declined the Court's invitation to comment on the interpretation of the 1992 CLC, as the United States is not a Party to the Convention. Instead, the Department of Justice commented only on the issue of whether the 1992 CLC could deprive a District court of subject matter jurisdiction over the claim by Spain against ABS. The Department of Justice stated that the 1992 CLC, to which the United States is not a signatory, cannot divest a United States court of its jurisdiction conferred by a United States statute. However, the Department of Justice did offer the opinion that the District Court judge would be free to consider the 1992 CLC in the context of whether to decline to exercise its jurisdiction over the case. While taking no position on the forum selection provision of the 1992 CLC, the Department of Justice noted that said provision could be viewed as analogous to a contractual forum selection clause in a private contract and, as such, might be the basis for a court's decision to decline jurisdiction. The Department of Justice also suggested that a District Court would be free to grant international comity to such a forum provision in an international treaty, or to consider the doctrine of *forum non conveniens* and to decline jurisdiction on that basis.
- 9.2.12 The appeal hearing was held in March 2009. Both Spain and ABS agreed that the basis for the District Court judge's dismissal of the claim by the Spanish State, that is, that the 1992 CLC ousted the United States District Court from jurisdiction over the case, was wrong. Spain argued that this error required a reversal of the District Court's dismissal of its action, while ABS argued that the Court of Appeal could affirm the dismissal on other grounds, finding that the District Court judge had exercised her discretion to decline jurisdiction, either on the basis of extending comity to the jurisdictional provisions of the 1992 CLC or on the basis of *forum non conveniens*. The Court of Appeal has not as yet rendered a decision.

## **10 Action to be taken by the Executive Committee**

The Committee is invited:

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