



INCIDENTS INVOLVING THE 1992 FUND

HEBEI SPIRIT

Submitted by the Republic of Korea

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| Summary: | This document presents the views held by the Republic of Korea on the recourse action taken against SHI by the Director on 18 January 2009 in the Ningbo Maritime Court in China. |
| Action to be taken: | The Executive Committee is invited to take note of the views presented by the Republic of Korea and to carefully review the Fund's policy regarding any future recourse action. |

1 **Background**

- 1.1 In relation to the *Hebei Spirit* incident, the Director filed a recourse action against Samsung Heavy Industries (SHI) on 18 January 2009 in the Ningbo Maritime Court in China.
- 1.2 The Executive Committee, at its 44th session, endorsed the decision taken by the Director to commence recourse action against SHI and decided to continue this recourse action.
- 1.3 At the same session, the Republic of Korea (ROK) raised concerns about this recourse action and strongly suggested that a decision on whether to continue it should be postponed. The ROK also expressed its intent to prepare and submit a document stating its position on the issue (cf document 92FUND/EXC.44/10, paragraph 3.5.29).
- 1.4 Since the Executive Committee reached its decision during a closed session and thus any issues raised during that session were not recorded in any form, the ROK considered that it was necessary to submit a document to facilitate any future discussion on ways to improve recourse action for the further development of the Fund.

2 **Position taken by the ROK Government**

- 2.1 The ROK Government, in principle, subscribes to and supports the efforts of the Director to mitigate the financial burden on contributors in the Fund's Member States by taking recourse action under the international regime on liability and compensation for oil pollution damage.
- 2.2 However, the ROK Government raises its concern since, in its view, the recourse action filed against SHI at the court of Ningbo in China by the Fund on 18 January 2009 could lead to a potential conflict with the shipowner's liability limitation proceedings under the present international maritime legal system.

- 2.3 On 23 March 2009, the ROK Limitation Court decided to commence the limitation proceedings of SHI, but the ROK Government, as well as the affected local residents, immediately filed for an appeal, of which the ruling is still pending at present. In light of such circumstances, the ROK Government expresses concern that the IOPC Funds, an intergovernmental organisation, may damage the gist of the limitation system already operating in many parts of the world by filing recourse action in the Chinese Court instead of the ROK Court, which reasonably and duly retains jurisdictional rights.
- 2.4 In particular, the 1992 Civil Liability Convention imposes strict liability on shipowners, albeit with very few limited exceptions, and recognises limitation of liability for the benefit of shipowners in balance. In light of this, where the Fund decides to take recourse action pursuant to the spirit of the international community, which undertook complementary measures such as setting up international funds and supplementary fund with premise of limitation of liability recognised, internationally established principles and standards should be applied.

3 Issues pertaining to recourse action taken by the Director

- 3.1 The affected areas are all along the Korean coast, almost all the victims of the incident are Korean residents, the aforementioned SHI is a Korean enterprise and almost all supporting documents are found in the ROK. As such, it is deemed reasonable for the ROK Court to have jurisdiction to rule this case, and it is deemed desirable that the Fund should file its case in the ROK.
- 3.2 The 1976 LLMC (Convention on Limitation of Liability to Maritime Claims) Article 13 stipulates that where a limitation fund has been constituted, all matters are settled in that State (Contracting Party) (cf Annex). Neither the ROK nor China is Contracting Party to the 1976 LLMC, but its regulations pertaining to limitation of liability are known to be incorporated in their respective domestic laws and implemented accordingly.
- 3.3 It is presumed that the main reason for selecting the Ningbo Court as a competent court in this case is the fact that the assets held by SHI are located in China. If in the future, the Fund makes it a standing policy to disregard the jurisdictional rights of the Court of the Contracting Party, which is where the incident occurred, then the Fund's Director will have to make attempts to break the liability limitation by filing a case in the State where the relevant vessel calls or the relevant shipping company's assets are located. If indeed this becomes the case, then the IOPC Funds, an intergovernmental organisation, may be criticised for damaging the basic principle of limitation proceedings already accepted and applied in various States.
- 3.4 Noting the meeting report FUND/EXC.42/11 paragraph 3.1.4 of 1971 Fund Executive Committee and that since then, the Fund's policy on taking recourse action is decided 'case by case'. As such, the Executive Committee needs to seriously consider and discuss whether this 'case by case' principle should be applied to international forum shopping, which is a matter of concern for the international maritime legal system, and whether forum shopping will be incorporated as a Fund policy in other cases.
- 3.5 P&I Clubs and the IOPC Funds have different legal backgrounds. The P&I Club, which is a private enterprise executes its obligation by a private contract with the shipowner, and can independently carry out all possible means to protect its asset. However, the IOPC Funds is an international organisation comprising different State governments. Likewise, it certainly implements all possible measures to mitigate any financial burden on Member States, but needs to respect the international Conventions and the established maritime legal system.
- 3.6 All said, the recourse action taken by the Fund against SHI in the Ningbo Court in China is deemed not suitable for an international organisation, and that it moreover greatly infringes the jurisdictional right set forth by the 1976 LLMC and disregards the internationally recognised limitation of liability regime.

4 Conclusion

- 4.1 In principle, the ROK Government supports the efforts of the Director, who initiated the recourse action to mitigate the financial burden on contributors in the Fund's Member States. At the same time, however, the ROK Government has raised concerns on the matter as a result of the Director's decision to file the case against SHI on 18 January 2009 in the Ningbo Court in China while a limitation case is ongoing in the ROK Court.
- 4.2 It is deemed that the Executive Committee should make a careful investigation into the case so that in present and future cases involving recourse action, the Fund's interests are protected as much as possible and the international limitation framework is respected at the same time.

5 Action to be taken by the Executive Committee

The Committee is invited:

- (a) to take note of the view presented by the Republic of Korea; and
- (b) to review the Fund's policy regarding recourse action taking into account the issues set out in paragraph 3.4.

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ANNEX

Article 13 Bar to other actions

- 1 Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.
 - 2 After a limitation fund has been constituted in accordance with Article 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State. However, such release shall always be ordered if the limitation fund has been constituted:
 - (a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or
 - (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or
 - (c) at the port of discharge in respect of damage to cargo; or
 - (d) in the State where the arrest is made.
 - 3 The rules of paragraphs 1 and 2 shall apply only if the claimant may bring a claim against the limitation fund before the Court administering that fund and the fund is actually available and freely transferable in respect of that claim.
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