



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUNDS

<b>Agenda item: 3</b>	IOPC/OCT12/3/6/1	
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1992 Fund Assembly	<b>92A17</b>	
1992 Fund Executive Committee	<b>92EC56</b>	•
Supplementary Fund Assembly	<b>SA8</b>	
1971 Fund Administrative Council	<b>71AC29</b>	

## INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

### PRESTIGE

#### Note by the Secretariat

**Recent developments:**

In August 2012, the New York Court of Appeal delivered its judgement in respect of the legal action brought by Spain against the classification society of the *Prestige*, namely the American Bureau of Shipping (ABS). In its judgement, the Court held that Spanish State had not established that ABS had acted in a reckless manner and therefore rejected Spain's claim.

In October 2004 the Executive Committee had decided that the 1992 Fund should not take recourse action against ABS in the United States. It had further decided to defer any decision on recourse action against ABS in Spain until further details surrounding the cause of the *Prestige* incident came to light. The Director had been instructed to follow the on-going litigation in the United States, monitor the on-going investigations into the cause of the incident and take any steps necessary to protect the 1992 Fund's interests in any relevant jurisdiction.

Under French law, a ten-year time bar period would be applicable for a recourse action by the 1992 Fund against ABS in France which means that, since the incident took place on 13 November 2002, the Fund would have to bring an action against ABS in France before 13 November 2012 to avoid a possible recourse action becoming time-barred.

**Action to be taken:**

1992 Fund Executive Committee

Decide whether the 1992 Fund should bring a recourse action against ABS in France prior to 13 November 2012 and thus avoid the action becoming time-barred under French law.

#### 1 **Background information**

For background information on the legal action taken by the Spanish State against the classification society of the *Prestige*, namely ABS, reference is made to the Annex to document IOPC/OCT12/3/6. Background information on legal proceedings in Spain and France and possible recourse actions by the 1992 Fund against ABS is also contained in the same document.

#### 2 **Court action against ABS in the United States**

- 2.1 The New York Court of Appeal delivered its judgement in August 2012. In its judgement the Court held that the Spanish State had not produced sufficient evidence to establish that ABS had acted in a reckless manner. In the absence of such evidence of reckless behaviour, the Court avoided ruling on whether ABS owed a duty to coastal states to avoid reckless behaviour.

2.2 In reaching its decision, the Court of Appeal took note of the following facts:

- In addition to its functions as a not-for-profit classification society, ABS had a for-profit subsidiary that conducted computer analysis of vessels (the SafeHull program) to assess and predict possible areas of future structural failure. The owners of two sister ships<sup><1></sup> of the *Prestige* had SafeHull analyses done on those vessels, but the owners of the *Prestige* did not. The results of the computer analyses of the sister ships were not shared with the *Prestige's* owners nor with the ABS surveyors inspecting the *Prestige*.
- Following the *Erika* incident, ABS proposed that it and other classification societies enact classification rules changes, which would have included the use of the SafeHull computer analysis. The proposals were never implemented. ABS also stated at the time that it was engaged in a review of all vessels it classed which were over 20 years old. However, the evidence showed that no meaningful review was ever conducted.
- In December 2000 the *Castor*, a small tanker classed by ABS, suffered serious structural damage. As a result, in October 2001 ABS stated that certain changes in the classification rules were required, particularly with respect to ballast tanks on older tankers. However, no rule changes had been implemented by the time of the *Prestige's* final annual survey in May 2002.
- The *Prestige's* final Special Survey took place in China in April/May 2001 and its final annual survey was conducted in the United Arab Emirates in May 2002. In both cases the vessel remained in class. Spain contended, and ABS disputed, that in August 2002 the Master of the *Prestige* had sent a fax to ABS giving notice of serious structural and mechanical problems. However, Spain was never able to prove that ABS received that fax.

2.3 On the issue of applicable law, the Court examined the traditional choice of law factors applied in maritime law and concluded that the place of the alleged negligence/recklessness by ABS, the US headquarters of ABS, was the most significant factor and that this justified the District Court's application of US maritime law.

2.4 The New York Court of Appeal did not address the legal issue of whether ABS owed a duty to coastal states to avoid reckless behaviour. Instead, the Court held that Spain had not proved that ABS had acted in a reckless manner. The Court of Appeal's approach leaves the possibility of that legal issue to be decided in another case.

2.5 Had the Court of Appeal affirmed the District Court's ruling that there was no duty, not even for reckless behaviour, that might have barred the possibility of a future recovery by a third party in a case with strong evidence of reckless behaviour by a classification society. The policy adopted by the District Court that ABS did not owe a duty to Spain to avoid recklessness, is a ruling for this case only and is only persuasive, but not binding, as a precedent.

2.6 The judgement in its original English language version is available via the Incidents section of the IOPC Funds' website, [www.iopcfunds.org](http://www.iopcfunds.org).

### **3 Legal action by the French Government against ABS in France**

3.1 In April 2010, the French State brought a legal action in the Court of First Instance in Bordeaux against three companies in the group of ABS, the classification society that certified the *Prestige*. The defendants have opposed this action relying on the defence of sovereign immunity. This question will be dealt with by the Court at a later stage.

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<1> Sister ships are those built to the same design, although there may be small differences.

- 3.2 The legal action has been stayed by the French State pending the outcome of the legal proceedings brought in relation to the *Prestige* incident in France and Spain.

#### **4 Possible recourse actions by the 1992 Fund against ABS in Spain and France**

##### **4.1 Spain**

- 4.1.1 With regard to a possible recourse action in Spain, the Executive Committee noted at its June 2010 session that the Director had been advised by the 1992 Fund's Spanish lawyer that an action against ABS in Spain would face procedural difficulties. Criminal proceedings had been brought in Spain against four parties, namely the Master, the Chief Officer and the Chief Engineer of the *Prestige* and the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain. ABS was not a defendant in the proceedings. Under Spanish law, when a criminal action has been brought, any action for compensation based on the same or substantially the same facts as those forming the basis of the criminal action, whether against the defendants in the criminal proceedings or against other parties, cannot be pursued until the final judgement had been rendered in the criminal case. The criminal proceedings will probably take a number of years.

- 4.1.2 This therefore means that a recourse action by the 1992 Fund against ABS in Spain would not be possible, for procedural reasons, for a number of years.

##### **4.2 France**

*Consideration by the 1992 Fund Executive Committee at its June 2010 session*

- 4.2.1 With respect to a possible recourse action in France, at its June 2010 session the Executive Committee noted that the French State had brought a legal action against three companies in the ABS group in the Court of First Instance in Bordeaux in April 2010. The Executive Committee considered whether this and other developments would give rise to the reconsideration of the position of the 1992 Fund regarding a recourse action in connection with this incident.

- 4.2.2 The Director considered, after consultation with the 1992 Fund's French lawyer, that there appeared to be a number of relevant developments that required further study with a view to determining the prospects and legal implications of a possible recourse action of the 1992 Fund against ABS in France, in particular:

- the publication of two expert reports submitted in the criminal proceedings in Spain, which concluded that the defects of the *Prestige* were due to the negligence of ABS;
- the request by the French State in 2009 that some employees of ABS be incriminated in the legal proceedings in the Criminal Court in Corcubión, and the fact that this request was denied;
- recent jurisprudence in France attaching civil liability to a classification society for the damage caused by the pollution resulting from the *Erika* incident; and
- that the French State had recently brought a legal action against ABS in France.

- 4.2.3 The Executive Committee noted that, in view of the above considerations, the Director intended to further examine, in consultation with the 1992 Fund's French lawyer, the prospects and legal implications of a possible recourse action of the 1992 Fund against ABS in France, with a view to making a recommendation to the Executive Committee at a future session.

- 4.2.4 The Executive Committee also noted that in the *Erika* incident the Criminal Court of Appeal in Paris had decided that Registro Italiano Navale (RINA) (the classification society that certified the *Erika*), together with the representative of the shipowner (Tevere Shipping) and the president of the management company (Panship Management and Services Srl), were criminally liable for the offence of causing pollution. Regarding civil liabilities, the judgement had held these three condemned parties jointly and severally liable for the damage caused by the incident.

- 4.2.5 The Executive Committee further noted that RINA had argued that it could benefit from the channelling provisions under Article III.4 (b) of the 1992 Civil Liability Convention (1992 CLC), but the Criminal Court of Appeal in Paris had held that RINA could not benefit from the channelling provisions in the 1992 CLC.
- 4.2.6 The Executive Committee also noted that the Criminal Court of Appeal had accepted that RINA was entitled to sovereign immunity since, as a classification society it provided a public service on behalf of the Maltese State, but the Court had held that RINA had waived its immunity for not having pleaded it at the commencement of the proceedings.
- 4.2.7 The Director was advised by the Fund's French lawyer that in a possible action against ABS in France in the context of the *Prestige* incident, the Court would most likely apply French Law. If, in the *Erika* incident, the Court of Cassation were to uphold the Criminal Court of Appeal's judgement, RINA would be held liable for the pollution arising from the *Erika* incident. This could be a precedent that would be followed by a French court in an action against ABS in the *Prestige* incident.
- 4.2.8 The question of sovereign immunity would be another uncertainty. In the *Erika* incident the Court recognised RINA's right to foreign state immunity of jurisdiction, but the Court removed that immunity due to RINA's behaviour in not invoking that right at the outset of the proceedings. It is uncertain whether a court, in the context of the *Prestige* incident, would hold that ABS had the right to immunity of jurisdiction. A number of parties appealed the judgement to the French Court of Cassation.
- 4.2.9 Since the Court of Cassation was expected to deliver its judgement in early 2012, the Director had considered that it would be best to wait for that judgement before deciding whether to bring an action against ABS.

*Recent developments*

- 4.2.10 The judgement of the French Court of Cassation in respect of the *Erika* incident was rendered on 25 September 2012. The Director is examining the judgement, which consists of some 320 pages, in detail with the 1992 Fund's French lawyer and will report to the Executive Committee at its spring 2013 session.
- 4.2.11 In the meantime, however, the Director notes that the judgement by the Court of Cassation stated that, in relation to the classification society, RINA, the Court of Appeal had been wrong in deciding that a classification society could not benefit from the channelling provisions contained in Article III.4 of the 1992 CLC. The Court of Cassation decided, however, that the damage had resulted from RINA's recklessness and that therefore RINA could not rely on the protection awarded by the 1992 CLC.
- 4.2.12 The Director also notes that the Court of Cassation did not address the question as to whether the classification society would have been entitled to take advantage of the immunity of jurisdiction, as would the Maltese State (the Flag State of the *Erika*), since RINA was deemed to have renounced such immunity by having taken part in the criminal proceedings.
- 4.2.13 The Director notes that, under French law, a ten-year time bar period would be applicable for a recourse action which means that the 1992 Fund would have until 13 November 2012 to bring an action against ABS in France.

**5 Director's considerations**

- 5.1 As mentioned above, in October 2004 the Executive Committee decided that the 1992 Fund should not take recourse action against ABS in the United States. It further decided to defer any decision on recourse action against ABS in Spain until further details surrounding the cause of the *Prestige* incident came to light. The Director was instructed to follow the on-going litigation in the United States, monitor the on-going investigations into the cause of the incident and take any steps necessary to protect the 1992 Fund's interests in any relevant jurisdiction. The Executive Committee stated that this decision was without prejudice to the Fund's position *vis-à-vis* legal actions against other parties.
- 5.2 The Director notes that the IOPC Funds' policy in respect of recourse action is to take such action whenever appropriate to recover any amounts paid by them from shipowners or other parties on the basis of the applicable national law and that if matters of principle are involved, the question of costs should not be a decisive factor for the Fund when considering whether to take legal action. He further notes that the decision as to whether or not to take such action should be made on a case-by-case basis, in light of the prospect of success within the legal system in question (document [FUND/EXC.42/11](#), paragraph 3.1.4).
- 5.3 The Director considers that a recourse action by the 1992 Fund against ABS in Spain would not be possible, for procedural reasons, for a number of years. The Director also considers that the 1992 Fund should continue to monitor the legal proceedings in Spain and protect its rights of recovery from any other parties who might be held liable for the incident.
- 5.4 The Director considers that it would be prudent to bring a recourse action against ABS in France prior to 13 November 2012 as an interim measure to avoid the action becoming time-barred under French law. He further considers that a decision could then be taken at a future session of the Executive Committee whether to continue the recourse action or withdraw it on the basis of an analysis of the judgement of the Court of Cassation and other additional information received.
- 5.5 The Director therefore recommends that a recourse action against ABS in France be brought prior to 13 November 2012 as an interim measure to avoid the action becoming time-barred under French law.

**6 Action to be taken****1992 Fund Executive Committee**

The 1992 Fund Executive Committee is invited:

- (a) to take note of the information contained in this document;
  - (b) to decide whether the 1992 Fund should bring a recourse action against ABS in France prior to 13 November 2012 to avoid the action becoming time-barred under French law; and
  - (c) to give the Director any other instructions in respect of matters dealt with in this document as it may deem appropriate.
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