



INTERNATIONAL
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Agenda item: 4	IOPC/OCT13/4/2 IOPC/APR13/6/3	
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1992 Fund Assembly	92A18	•
1992 Fund Executive Committee	92EC59	
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REPORT ON THE FIFTH MEETING OF THE SIXTH INTERSESSIONAL WORKING GROUP

Note by the Secretariat

Summary:	The sixth intersessional Working Group's fifth meeting, under the chairmanship of Mr Volker Schöfisch (Germany), focused on the one outstanding issue remaining for consideration by the Working Group, namely the funding of interim payments.
Action to be taken:	<u>1992 Fund Assembly</u> Note that the sixth intersessional Working Group has decided to close the Group but that the Director and the International Group of P&I Associations will continue to discuss the issues relating to interim payments with the aim of finding a solution which is acceptable to them both and will submit a recommendation to the 1992 Fund Assembly at a future session. <u>1992 Fund sixth intersessional Working Group</u> Information to be noted.

1 Introduction/Background Information

- 1.1 The sixth intersessional Working Group was established by the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly, at its session in October 2009 to consider, *inter alia*, the funding of interim payments to claimants.
- 1.2 In July 2011 the Working Group established a Consultation Group of a small number of Member States, the Comité Maritime International (CMI), the International Group of P&I Associations (International Group) and the Secretariat to further consider the complex legal and technical issues of subrogation rights and interim payments, and to report back to the Working Group. The Consultation Group met in July and October 2011 to discuss how to proceed and the Director and the International Group decided to jointly commission a study to address, *inter alia*, the following issues:
- (i) the practice that had been followed by the P&I Clubs and the IOPC Funds in making interim payments under the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention, and previously under the 1969 Civil Liability Convention (1969 CLC) and the 1971 Fund Convention;
 - (ii) the problems faced by P&I Clubs when making interim payments; and
 - (iii) the possible solutions to the problems identified in (ii) above.

- 1.3 The Secretariat and the International Group engaged the services of Mr Måns Jacobsson (a former Director of the IOPC Funds) and Mr Richard Shaw of the CMI to carry out the study.
- 1.4 At its April 2012 meeting, the Working Group considered the results of the legal analysis conducted by Mr Jacobsson and Mr Shaw (document [IOPC/APR12/10/1](#), Annex II) as well as a document submitted by the observer delegation of the International Group which contained as an Annex the wording of a draft 1992 Fund Assembly Resolution relating to the practice of making interim payments (document [IOPC/APR12/10/4](#), Annex I).
- 1.5 During the debate which followed the presentation of the documents, there was insufficient support for the draft Resolution proposed by the International Group. One delegation suggested that a Resolution was not required but rather that the matter could be addressed in another form of document. It was agreed that the International Group should continue its discussions with the Director.
- 1.6 At its October 2012 session, the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly, took note of the progress of the work of the Working Group and noted that it had been agreed that the International Group should continue its discussions with the Director and the Secretariat and that the Working Group would meet again during the spring 2013 sessions of the governing bodies.
- 1.7 Since October 2012, the International Group and the Director held a number of constructive and useful meetings on the issue of interim payments with the aim of finding a solution which would be agreeable to both the International Group and the IOPC Funds. Options discussed included a possible amendment to the 2006 Memorandum of Understanding between the International Group and the Funds which did not presently contain any provisions on interim payments, the draft Assembly Resolution proposed by the International Group and an exchange of letters between the International Group and the IOPC Funds.
- 1.8 However, as the subject was complex and difficult, no form of wording suitable to both parties has yet been found. The parties are therefore continuing to discuss the issues with the aim of finding a solution which was acceptable to them both, at which point the Director would submit a recommendation to the 1992 Fund Assembly which could then decide if the recommendation was acceptable.

2 **Participation**

- 2.1 The following Member States were represented at the Working Group's fifth meeting:

Algeria	Germany	Panama
Angola	Ghana	Philippines
Argentina	Greece	Poland
Australia	Grenada	Qatar
Bahamas	India	Republic of Korea
Belgium	Islamic Republic of Iran	Russian Federation
Bulgaria	Italy	Saint Kitts and Nevis
Cameroon	Japan	Singapore
Canada	Kenya	Spain
China ^{<1>}	Liberia	Sweden
Colombia	Malaysia	Tunisia
Cyprus	Marshall Islands	Turkey
Denmark	Mexico	United Kingdom
Dominican Republic	Morocco	Uruguay

^{<1>} The 1992 Fund Convention applies to the Hong Kong Special Administrative Region only.

Ecuador	Netherlands	Vanuatu
Estonia	New Zealand	Venezuela (Bolivarian Republic of)
Fiji	Nigeria	
Finland	Norway	
France	Oman	

- 2.2 Seven non-Member States, Chile, Côte d'Ivoire, Guatemala, Indonesia, Peru, Saudi Arabia and Ukraine, were represented as observers at the meeting.
- 2.3 The following intergovernmental and international non-governmental organisations participated in the Working Group's meeting as observers:

Intergovernmental organisations:

European Commission
International Maritime Organization (IMO)
Maritime Organisation of West and Central Africa (MOWCA)

International non-governmental organisations:

BIMCO
Comité Maritime International (CMI)
Conference of Peripheral Maritime Regions (CPMR)
International Association of Classification Societies Ltd (IACS)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P&I Associations
International Tanker Owners Pollution Federation Limited (ITOPF)
Oil Companies International Marine Forum (OCIMF)
World Liquid Petroleum Gas Association (WLPGA)

3 Documents considered by the Working Group

The following documents were considered by the Working Group:

IOPC/APR13/6/1	Interim payments, submitted by the Secretariat
IOPC/APR13/6/2	The funding of interim payments, submitted by the International Group of P&I Associations

4 Chairman's introduction

The Chairman noted that at previous meetings held in July and October 2011, the Working Group had discussed the role of Member States following an incident and proposed revisions to the 1992 Fund Claims Manual, and had discussed the issues of interim payments. He noted that only the latter issue remained outstanding.

5 Presentation of documents for consideration

5.1 Document IOPC/APR13/6/1, submitted by the Secretariat

- 5.1.1 By way of introduction, the Director noted that the issue under discussion was complex and, as had been confirmed by Mr Jacobsson and Mr Shaw in their legal analysis (document [IOPC/APR12/10/1](#), Annex II), the 1992 Civil Liability and Fund Conventions made no reference to how interim payments made by either party should be apportioned, although it was clear that it remained the intention of the parties that interim payments should be made as it was the only available method of making prompt payment of compensation to victims.

5.1.2 The Director stated that the Secretariat and the International Group had considered a number of possible solutions to the issue including an amendment to the Memorandum of Understanding between the Fund and International Group, and consideration of the draft of an Assembly Resolution, but that at present no solution had been found. The Director noted that the issue was important to both parties and that the intention was therefore to continue discussions with the International Group in order to find a mutually agreeable solution, and then to submit a recommendation to the 1992 Fund Assembly for approval. Furthermore given that this was the only issue outstanding from the work of the Working Group, the Director recommended that Member States agree to close the sixth intersessional Working Group, and that he would report back to the 1992 Fund Assembly at its next session.

5.2 Document IOPC/APR13/6/2, submitted by the International Group

The International Group made the following intervention:

“Thank you Chairman,

As the Director has stated, discussions have taken place with the Fund Secretariat on the issues of concern that we have raised on the funding of interim payments and the issue of overpayment for a number of Working Group sessions now. In fact, the discussions on this issue date back to the 1990s when we first raised our concerns in the Fund meetings.

Despite the constructive discussions that have taken place with the Fund Secretariat to seek an agreement, no such agreement has yet been reached.

Whilst we are open to continuing these discussions with the Director in advance of the Fund Assembly meeting in October, given the length of time that has already been devoted to seeking a solution to our concerns, we agree with the Director that it is probably appropriate to close the sixth intersessional Working Group at this meeting.

We are grateful to States and the Secretariat that they have been prepared to devote a significant amount of time towards consideration of this matter, but it is unlikely that a continuation of the Working Group’s deliberations will result in a solution that is agreeable to both parties. We do not therefore see much merit in continuing these discussions within the context of this Working Group.

We have of course covered our concerns in detail at previous Working Group sessions, and we do not intend to do so again at this meeting, and the Director has explained some of the solutions that have been considered. We would just pick up on one point though that is contained in our paper:

It has been mentioned at previous Working Group meetings that the International Group has not presented, or needs to present, specific cases where the funding of interim payments by the Clubs has resulted in an overpayment on their part. We have however in previous submissions, this submission and in oral interventions, made reference to a number of specific cases where there was a very real risk of overpayment by the Club concerned. This risk was not then realised due to different approaches that were taken in each of these cases, perhaps most notably in the case of the *Prestige*, where the Club followed the terms of the Convention and established a limitation fund, and in the *Hebei Spirit* where the Club and owner reached an agreement with the Korean Government. However, we are trying to avoid the situation in future cases where the funds provided by the Club are unavailable to claimants until a considerable time after the incident, and it is uncertain whether other governments would follow the approach taken by the Korean Government in the *Hebei Spirit*.

There are other matters that we may wish to bring to the attention of the Fund Assembly in October when this Working Group reports, including any possible changes to the procedures by which *pro rata* percentage payments are established; possible impacts for claimants and, as we have mentioned before, the reputation for the CLC/Fund regime.

In terms of actual progress though since the last Working Group meeting, there has been little despite the best efforts of ourselves and the Fund Secretariat, but we remain open to further discussions in that regard prior to the October meeting.”

6 Debate

- 6.1 A number of delegations stated that they agreed that the Working Group had done excellent work and that it had gone as far as it reasonably could at the moment to resolve the remaining issue of interim payments, and therefore they agreed with the Director’s recommendation to close the sixth intersessional Working Group.
- 6.2 They further stated that they had concerns regarding the current impasse between the International Group and the Fund and that there had been a long-standing practice of making interim payments by the P&I Clubs and Fund, and this practice should be continued to ensure that claims were paid promptly and efficiently.
- 6.3 In response to a request from a number of delegations for further explanation of the current impasse between the International Group and the 1992 Fund, the Director explained that the Conventions did not specify precisely how interim payments made by the Club or 1992 Fund were to be apportioned. The Director explained the International Group’s view that interim payments were made on behalf of both the Club and the 1992 Fund, representing both the liability under the CLC and the liability under the 1992 Fund, and that when the 1992 Fund started to make interim payments, the International Group viewed this as the 1992 Fund reimbursing the Club for the part of the payments which it had already paid on the 1992 Fund’s behalf.
- 6.4 The Director stated however that this interpretation would mean that the 1992 Fund would become involved in limitation proceedings and that if national courts did not accept interim payments as counting towards the shipowner’s limitation fund, or if, as had been the case in the Bolivarian Republic of Venezuela, the shipowner had established a limitation fund, and made interim payments but the national court had subsequently held that the shipowner was not entitled to limit his liability, this would mean that the Club and 1992 Fund would have to enter into possibly difficult legal proceedings.
- 6.5 The Director further stated that there was no obligation upon the 1992 Fund to establish a limitation fund but that on occasion the 1992 Fund would become involved in certain aspects of the limitation fund process. Quoting as an example the *Hebei Spirit* incident, the Director confirmed that because the limitation court in the Republic of Korea was dealing with all of the claims submitted and the Fund was appealing a large number of the claims, the 1992 Fund could be said to be taking an active role in the limitation proceedings because it was required to safeguard the interests of the 1992 Fund. Therefore, although the 1992 Fund might sometimes intervene in the limitation proceedings, this did not, however, mean that the 1992 Fund shared the International Group’s view. Whatever the circumstances, the 1992 Fund followed the 1992 Fund Convention and as the 1992 Fund had a maximum liability which was fixed by the Convention (currently 203 million SDR), it was not possible for the 1992 Fund to pay more than this limit.
- 6.6 The Director also highlighted that this point had been raised by Mr Jacobsson and Mr Shaw in their legal analysis (document [IOPC/APR12/10/1](#), Annex II) and that, at present, the 1992 Fund and International Group had not found suitable wording to address this point.

- 6.7 In response to concerns raised by some delegations concerning the possibility that interim payments might not be made in the future, the Director highlighted two scenarios involving, firstly, a Member State which was Party to the 1992 CLC and 1992 Fund Convention, and secondly, a Member State which was Party to the Supplementary Fund Protocol.
- 6.8 For the first scenario, the Director used the example of the *Prestige* incident where he pointed out that the shipowner had established a limitation fund and had not made interim payments. The 1992 Fund did make interim payments, but the amount available to compensate victims through such payments was reduced by the amount of the limitation fund.
- 6.9 In relation to the second scenario where a Member State was Party to the Supplementary Fund Protocol, the Director explained that the impact of the shipowner not making interim payments would be much smaller because the shipowner's limitation fund would form a smaller proportion of the total money available under the Supplementary Fund regime. In that scenario, Member States would be able to authorise the Director to make interim payments if they so wished, albeit that the amount available would be smaller than might otherwise be the case if the shipowner were also to make interim payments.
- 6.10 In response to a query from one delegation, the Director explained the difference between interim payments and provisional payments under the Internal Regulations of the 1992 Fund. The Director explained that the limitation fund was established under the structure of the CLC where a shipowner who wished to benefit from the right to limit his liability was required to deposit the limitation fund in court and it was then for the national court to decide the allocation of the limitation fund between the victims. The Director stated that this meant that when the money was put into court, it was not available to the victims immediately as it was in the hands of a third party, namely the court, and it might take some time to take decisions on the allocation of the limitation fund. It was for this reason that the Clubs had undertaken the practice of making interim payments in order that compensation could flow swiftly. In effect this meant that the Club paid twice: once when it established the limitation fund and once when it made interim payments. The problem occurred if the courts did not accept the interim payments as valid payments, and this was especially an issue if there was not enough money to pay all the claims. The Director stated that some courts might decide that, as they had the limitation fund deposited in court, they would keep those funds for the claimants and the P&I Club would have to pay more than the CLC limit.
- 6.11 The Director noted that, in relation to provisional payments, the conditions thereto were provided in the Internal Regulations, adopted by the Assembly of the Fund, authorising the Director, subject to a number of conditions, to make payments so that victims were paid promptly. This money did not come from P&I Clubs but, as was referred to in Regulation 7 of the Internal Regulations of the 1992 Fund, was coming from the General Fund of the 1992 Fund. The Director stated that Member States could request the Director to make provisional payments.
- 6.12 The International Group commented that the current impasse was also due to the question of indemnification by the 1992 Fund for any overpayments made by the P&I Club. The International Group confirmed that it understood the Director's comments regarding not being able to put the 1992 Fund in a situation where it would pay over its limit of 203 million SDR but that it was a question of principle and fairness as to why the P&I Clubs alone should be expected to work outside the strict wording of the Civil Liability Convention, when the 1992 Fund, quite understandably, followed the wording of the 1992 Fund Convention text. The International Group commented that if Clubs were to follow the same approach and simply follow the wording of the Civil Liability Convention, then interim payments by P&I Clubs would not be made and claimants would suffer a delay in receiving compensation.
- 6.13 Another delegation stated that the fact that there was currently an impasse should not be seen as a failure and that the possibility remained that the two parties would reach a solution in the future.

7 **Conclusions**

- 7.1 In concluding the debate, the Chairman thanked those parties that had contributed to the Working Group and noted that there was support for the proposal that discussions continue between the Director and the International Group on the topic of interim payments, but that the sixth intersessional Working Group could be closed, having made good progress in discussing the problems of a large number of small claims, changes to the Claims Manual, and the toolbox which was available to Member States in the event of an oil spill in their jurisdiction.
- 7.2 The Working Group also thanked the Chairman for his work in chairing the Working Group and helping to make significant achievements in resolving the matters which were set before the Working Group at the outset.

8 **Action to be taken**

8.1 1992 Fund Assembly

The 1992 Fund Assembly is invited to note that the sixth intersessional Working Group has decided to close the Group but that the Director and the International Group of P&I Associations will continue to discuss the issues relating to interim payments with the aim of finding a solution which is acceptable to them both and will submit a recommendation to the 1992 Fund Assembly at a future session.

8.2 1992 Fund sixth intersessional Working Group

The 1992 Fund sixth intersessional Working Group is invited to take note of the information contained in this document.
