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HAVEN INCIDENT

METHOD OF CONVERTING THE UNIT OF ACCOUNT LAID DOWN IN THE CIVIL LIABILITY CONVENTION AND THE FUND CONVENTION INTO NATIONAL CURRENCY AND RELATED ISSUES

Note by the Director

1 Introduction

1.1 On 23 May 1992 the IOPC Fund submitted extensive pleadings in respect of the issues dealt with by the judge in the decision dated 14 March 1992. Four of the other parties also submitted pleadings to the court the same day. The parties may submit counter pleadings by 29 May 1992 in respect of pleadings presented by other parties. An oral hearing will be held on 12 June 1992.

1.2 It is expected that the court's decision will be rendered during July 1992.

1.3 The present document sets out the arguments presented by the IOPC Fund in its opposition pleadings, supplementing the presentation in paragraph 8.1 of document FUND/EXC.31/2. It also deals with the position of the parties in respect of the question as to whether the limitation amount applicable to the shipowner should be increased by the addition of interest.

2 Limitation Amount Applicable to the Shipowner

2.1 As regards the judge's decision that the guarantee provided by the UK Club should be increased also to cover interest for the period up to the distribution of the limitation fund (document FUND/EXC.31/2, paragraphs 7.3-7.6), the shipowner and the UK Club have maintained that the judge did not have authority to decide on such an increase in respect of the amount of limitation fixed in the judgement opening the limitation proceedings, since that judgement was rendered by the court (composed of three judges). The judge in charge of the limitation proceedings was not in their view entitled to modify that judgement.

2.2 In its pleadings the IOPC Fund has maintained that the judge did have such power. The IOPC Fund has pointed out that in any event it is the court which will decide on the opposition, and in the IOPC Fund's view there can be no doubt that the court may modify its own previous judgement.

2.3 As to the substance, the IOPC Fund has agreed with the judge's decision on this point. The IOPC Fund has been unable to support the arguments put forward by the shipowner and the UK Club based on Article V.1 of the Civil Liability Convention. The IOPC Fund has pointed out that Article V.1 of the Civil Liability Convention must be read in its entirety. The IOPC Fund has agreed with the judge's conclusion that Article V.1, second sentence, which provides that the aggregate amount of the shipowner's liability shall in no event exceed 14 million SDR, must be read in conjunction with the first sentence of the same paragraph: the second sentence thus only applies to situations in which the application of the first sentence (viz that the limitation amount should be calculated by multiplying the tonnage by 133 SDR) would result in a limitation amount over 14 million SDR. The IOPC Fund has rejected the argument put forward by the UK Club that the Italian legislation only allows the establishment of the limitation fund by means of a guarantee. The IOPC Fund has pointed out that the Italian legislation implementing the Civil Liability Convention refers to Article V of that Convention and that, in the IOPC Fund's view, that reference must relate to Article V in its entirety, ie also paragraph 3 of that Article which allows the establishment of the limitation fund by a cash deposit.

2.4 The shipowner and the UK Club have also argued that if the limitation fund were to be increased by interest, this interest should go to the benefit of the shipowner and the Club. In the IOPC Fund's view this argument is not tenable. The IOPC Fund has reiterated its position that the choice of the shipowner whether to establish the limitation fund by cash deposit or by means of a letter of guarantee should not affect the position of claimants. Since a cash deposit would earn interest, the IOPC Fund takes the view that a limitation fund established by the deposit of a bank guarantee should be increased by interest so as to place the victims in the same position as if the fund had been created by a cash deposit. The IOPC Fund has referred to the fact that the amendments included in the 1984 Protocol to the Fund Convention clearly show that interest should accrue on the limitation amount applicable to the shipowner under the Civil Liability Convention.

2.5 As regards the judge's decision that the interest on the limitation amount should go to the benefit of the victims and not to the benefit of the IOPC Fund, the IOPC Fund has reiterated the arguments reflected in the last sub-paragraph of paragraph 8.1 of document FUND/EXC.31/2. The IOPC Fund has emphasised that under Article 4.4 of the Fund Convention, the total amount payable by the IOPC Fund should be reduced by the amount of compensation actually paid under the Civil Liability Convention. Since the interest added to the limitation amount would be actually paid to the claimants, the payment of interest, in the IOPC Fund's view, should also be taken into account when calculating the IOPC Fund's total cover; the maximum amount of the IOPC Fund's cover should thus be reduced by not only the limitation amount calculated under the Civil Liability Convention but also by any interest on that amount. For this reason it is clear, in the IOPC Fund's view, that the interest on the limitation amount should go to the benefit of the IOPC Fund. The IOPC Fund has also pointed out that the States participating in the 1984 Diplomatic Conference intended to amend the regime in force on this point, since it appeared unfair that interest should be to the benefit of the IOPC Fund; reference has again been made to the documents set out in footnote 7 to document FUND/EXC.31/2.

3 Conversion of 900 million (gold) francs into Italian Lire

3.1 As regards the method to be applied for converting the maximum amount payable by the IOPC Fund into Italian lire, the IOPC Fund has, in its pleadings of 23 May 1992, elaborated the arguments made in the opposition document, as set out in paragraph 8.1 of document FUND/EXC.31/2. These arguments can be summarised as follows:

- (a) The Civil Liability Convention prohibits the application of the free market value of gold when converting gold francs into Italian lire. The legislator inserted the word "official" into the text of the Convention for the purpose of preventing the use of the free market

value of gold. By disregarding the word official the judge violated Article 12 of the Introductory Provisions of the Italian Civil Code as well as Article 31.4 on the Vienna Convention of the Law of Treaties.

- (b) In 1969 there was an official value of gold, and for this reason the reference to the unit of gold franc was not a reference to the intrinsic value of unit. The inclusion of the word "official" was clearly made in order to prevent the reference to the intrinsic value of gold.
- (c) The judge made a decision based on equity which is not allowed under Article 113 of the Code of Civil Procedure.
- (d) Article 4.6 of the Fund Convention, which authorises the IOPC Fund Assembly to increase the limit of the IOPC Fund's cover, mentions "changes in monetary values" as one of the criteria which the Assembly should take into account when considering whether to increase this limit. For this reason, it was not the intention of the legislator that the free market value of gold should be used in order to obtain an automatic adaptation of the limit of the IOPC Fund's cover to changes in monetary values.
- (e) The judge has made reference to Article II.2 of the 1976 Protocol to the Civil Liability Convention, and in particular to the provision relating to the conversion of the unit of account laid down in the Protocol as regards States which are not members of the International Monetary Fund. Under the Protocol this conversion shall be made according to the law of the State concerned, provided however that the conversion should be made in such a manner as to express in the national currency of that State as far as possible the same real value for the amounts in question as expressed in units of account. The judge states that it is not conceivable that in one and the same Protocol two different limits were intended, and since the only clear limit in the Protocol is the one expressed in SDR, it must in the judge's view be excluded that the other limit can be expressed in gold at its market value which is more than seven times greater.
- (f) The conversion of the maximum amount payable by the IOPC Fund should be made on the basis of the value of the Italian Lire in relation to SDR. The reference in Article 1.4 of the Fund Convention to Article V.9 of the Civil Liability Convention includes the amendments to the latter Article made by the 1976 Protocol, since according to the jurisprudence of the Italian Supreme Court of Cassation a reference in blank to an Act refers to the Act including all its amendments. Under Italian jurisprudence this applies also in the field of penal law where a strict interpretation is imposed.
- (g) If it were not accepted that the reference in Article 1.4 of the Fund Convention to Article V.9 of the Civil Liability Convention included the amendments to the latter paragraph, there would be an legislative empty space in the Fund Convention, since the official value of gold no longer exists and Article 1.4 of the Fund Convention would therefore be deprived of any content.
- (h) In such a situation the court should fill the empty space by analogy, and Italian jurisprudence is consistent in this regard. Only the norms of the Civil Liability Convention could be applied by analogy, in view of the close link between the two Conventions. The judge has in fact applied the Civil Liability Convention by analogy in two respects. He applied the procedure for determining the "Stato attivo" laid down in Civil Liability Convention to the determination of the IOPC Fund's cover, although the Fund Convention does not contain any provisions in this regard. The judge also applied by analogy the Civil Liability Convention as amended by the 1976 Protocol to Article 5 of the Fund Convention governing the obligation of the IOPC Fund to indemnify the shipowner for part of his liability. Contrary to what the judge stated, the introduction of the SDR to replace the unit based on the official value of the gold is not a rewriting

of the text of the Fund Convention but a necessary application by analogy in order to fill the legislative empty space left by the demise of the gold parity.

- (i) In addition, the legislative empty space on the point under consideration has been filled by Resolution N°1 of the IOPC Fund Assembly. The Assembly did not change nor construe the Fund Convention but only filled a legislative empty space which would have made the Fund Convention inapplicable and would therefore have made it impossible for the IOPC Fund to operate. The decisions of the Assembly were taken on the basis of Article 18.14 of the Fund Convention giving the Assembly the authority to take any decisions necessary for the proper functioning of the IOPC Fund. The decisions of the IOPC Fund Assembly have direct effect in the national law of the Member States, in particular because the IOPC Fund is an entity created for having direct relationships with individuals in Member States. Even the opponents of the thesis in Italian doctrine that, in general, decisions of organs of international entities have direct effect in Italian law admit that such decisions have direct effect in Italian law if the entity has been created for having direct relationships with individuals in Member States. It is beyond doubt that the IOPC Fund was established for the purpose of entering into direct legal relationships with individuals in Member States; reference is made to Articles 2.2, 4.1, 5, 6, 7 and 10 to 14. The decisions taken by the IOPC Fund Assembly in 1979 and 1986 to increase the maximum amount payable by the IOPC Fund must have direct effect in the domestic law of Member States, and the judge has actually based his decision on that assumption. In Article 18.7 of the Fund Convention, the Assembly has been given the function to approve settlements of claims against the IOPC Fund and the distribution of the amounts available.
- (j) Resolution N°1 also constitutes an agreement between the parties on the provisional application of the 1976 Protocol to the Fund Convention, in accordance with Article 25.1(b) on the Vienna Convention on the Law of Treaties. A number of authors are mentioned in support of this position.
- (k) The judge has stated that the provisional application of a treaty under Article 25.1(b) of the Vienna Convention cannot last for an indefinite period of time. This position is not correct; reference is made to Article 25.2 of the Vienna Convention which governs the procedure for a State wishing to cease to be bound by the provisional application of a treaty by notifying the other States of its intention not to become a party to the treaty. There is nothing in the Vienna Convention which indicates that the provisional application cannot continue for a number of years. No State which participated in the negotiations leading to the adoption of the 1976 Protocol has denounced the provisional application of the Protocol.
- (l) The legislative empty space in the Fund Convention which resulted from the demise of the gold parity has thus been filled in two ways, firstly by Resolution N°1 which has direct application in the national law of Member States and, secondly, by the same Resolution constituting an agreement on the provisional application of the 1976 Protocol to the Fund Convention.
- (m) If the maximum amount payable by the IOPC Fund under Article 4.4 of the Fund Convention should be converted into Italian lire on the basis of the free market value of gold, then the same method of conversion should be applied in respect of the amounts laid down in Article 5.1 governing the obligation of the IOPC Fund to indemnify the shipowner for part of his liability. If this were so, however, there would be no obligation at all for the IOPC Fund to indemnify the shipowner. The application of the free market value of gold for converting the amounts laid down in Article 5.1 of the Fund Convention would give limits which are more than seven times higher than if the amounts were converted on the basis of the SDR. It is obvious that the limit of the shipowner's liability under the 1969 Civil Liability Convention must be determined on the basis of the SDR in the HAVEN case.

- (n) The judge has held that for the purpose of the application of Article 5.1 of the Fund Convention, the amounts should be converted into Italian Lire by using the SDR method. In doing that, the judge has argued that the IOPC Fund's obligation relates to indemnification of a percentage of the shipowner's liability and not a fixed amount. However, this is contrary to the text of Article 5.1. The position taken by the judge results in the Fund Convention having two units of account, the gold franc converted into national currency on the basis of the free market value of gold in respect of the compensation to victims laid down in Article 4 and the gold franc converted by the use of the SDR method in respect of the indemnification of the shipowner under Article 5. Such an interpretation is at variance with Article 1.4 of the Fund Convention which sets one unit of account for the whole Convention. This interpretation is also in conflict with Article 32(b) of the Vienna Convention, since such an interpretation would lead to absurd and illogical results. The judge has stated in another context in respect of the 1976 Protocol that it was not conceivable that in one and the same Protocol two units so different from each other were intended.
- (o) If the judge's decision according to which the maximum amount payable by the IOPC Fund should be converted on the basis of the free market value of gold were to be confirmed, the IOPC Fund has requested the annulment of the decisions by the Fund Assembly of 1979 and 1986 increasing the maximum amount. These decisions were taken on the basis that 450 million gold francs were equal to 30 million SDR. A number of documents issued in connection with the meetings of the IOPC Fund Assembly have been produced to the Court in support of this position. In particular, reference is made to the proposal by the French delegation to raise the maximum cover which was presented to the 1st session of the Assembly; this proposal was made as a result of the amounts claimed in the AMOCO CADIZ case. The French Government clearly based its proposal on the conviction that the maximum amount then applicable to the IOPC Fund, 450 million francs, equalled 30 million SDR. If the French delegation had thought that the limit of 450 million gold francs were to be converted on the basis of the free market value of gold, there would have been no reason to propose any increase. Various studies carried out by the Director on the instruction of the Assembly, which were presented to the 9th session of the Assembly, were also based on this assumption. This was also the understanding that formed the basis of the IOPC Fund Assembly's decision in 1986 to increase the maximum amount payable by the IOPC Fund in stages from 675 million gold francs to 900 million gold francs. The parties to the Cristal Contract have also been of the same opinion, since that Contract states that the maximum amount of the IOPC Fund's cover should be deducted from the Cristal limit of \$135 million when calculating the amount payable under the Contract.
- (p) The mistake made by the Assembly when increasing the maximum cover of the IOPC Fund was a mistake of law which was essential and recognisable by the other parties, and this mistake was the only reason for the decision taken by the Assembly. Reference is made to Articles 1324, 1428, 1429 and 1431 of the Italian Civil Code.
- (q) It is emphasised that the claimants would have to comply with the provisions of Article 4.1(b) and (c) of the Fund Convention and that these conditions should be expressly stated by the judge as a prerequisite for the IOPC Fund's obligation to pay compensation.
- 3.2 The pleadings submitted by the other parties on 23 May 1992 are being examined by the IOPC Fund's lawyer. The IOPC Fund is preparing further pleadings to be submitted on 29 May 1992.
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