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INCIDENTS INVOLVING THE IOPC FUND

HAVEN

CONVERSION OF (GOLD) FRANCS INTO NATIONAL CURRENCY

Judgement of 26 July 1993 by the Court of First Instance in Genoa

(Translation from Italian)

Following the explosion and sinking in April 1991 of the tanker vessel HAVEN, on 29 May 1991 this Court declared open the procedure for limitation of the liability of the owner VENHA MARITIME LTD and of its underwriter.

The IOPC Fund intervened in the proceedings and more than 1 300 claims were presented by persons who suffered loss as a result of the casualty.

On 14 March 1992 the Judge established the contributions to the compensation fund, stating that:

(A) The limitation amount of Llt 23 950 220 000 should be increased – as far as the shipowner and its underwriter were concerned – by interest from 16 May 1991 to the date of distribution of the said amount to the claimants at the rate payable during the period in question by Banca Commerciale Italiana.

(B) For the limitation amount thus increased there had to be given, the other conditions remaining unchanged, the bank guarantee previously given (for Llt 24 002 000 000) by the shipowner and underwriter, with a supplement to the guarantee to be lodged with the Court Office within five days from the date on which the order establishing the contributions to the compensation fund became final.

(C) The contribution to the compensation fund, as far as IOPC Fund was concerned, should be represented by Llt 771 397 947 400 inclusive of the indemnity to the owner under Article 4.4.a) of the 1971 Fund Convention.

The IOPC Fund commenced an opposition action against the Judge's above order of 14 March 1992, formulating the requests set out in the preamble (action 4694/92). The claimants expressly indicated in the heading of the Judgment appeared in these proceedings, all of them asking for confirmation (even though with a diversity of arguments) of the contested order.

The Agence Judiciaire du Trésor of the French Republic, on the other hand, acting on behalf of five French Ministries, asked for a stay of the proceedings and, in partial amendment of the Judge's order, a declaration that the limitation amount prospectively due by the IOPC Fund was equal to the counter-value in Italian Lire of 60 000 000 SDR.

VENHA MARITIME LTD and its underwriter THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD also appealed against the Judge's order, formulating the requests, as regards interest, set out above.

In this action also (5597/92) numerous claimants, whose names are set out in the heading of the Judgment, entered an appearance requesting that the appeal be rejected.

By an order of 2 July 1992 the Court dealt with some renewals of service of process, adjourning the matter to be heard before a collegiate Court on 3rd December 1992. At that hearing - and at various others which took place between December 1992 and March 1993 - various problems of a procedural nature arose. Having noted that one of the claimants had died at a date prior to the first collegiate hearing, by an order of 1 April 1993 the Court ordered that his heirs should be made parties to the action and served with all documents. The appellants complied with this order.

At the hearing on 18 June 1993, other claimants having entered an appearance in the interim (after the first hearing), the two original actions were set down for hearing together with those (11049/92 and 5778/93) commenced by the IOPC Fund following the above mentioned orders of 2 July 1992 and 1 April 1993.

At the conclusion of the hearing of the arguments of the parties as indicated above, the Court reserved its judgment.

REASONS FOR THE DECISION

....

[Pages 4 to 27 inclusive of the Italian text of the Judgment deal only with procedural matters relating to the issue and service of process, the entering of appearances by a number of the claimants and the relevant time limits and have been omitted from this translation.]

....

If we now turn to an examination of the merits of the appeal put forward by the shipowner and its underwriter, we note that Article 275 CN provides that the debt can be limited to a sum equal to the value of the vessel and to the amount of hire and of all other proceeds of the voyage. Article 621, third paragraph, CN provides, at letters (a) and (b), that the shipowner should lodge, with the application (to the Judge), a statement of value and a list of the gross proceeds of the voyage. This statement (cf Article 621, last paragraph, CN and Article 483 Reg Nav Mar) may also be presented after the judgment which opens the limitation procedure, as regards which (and illustrating the contents of which) Article 623 CN does not refer to the determination of the limitation amount, the calculation of which is remitted under Article 629 CN to the Judge. It follows from this that the aforesaid determination is not within the competence of the Court at the time when it is dealing with the opening of the procedure. In the light of this systematic framework it is easy to understand that, for the purposes of the Judgment of 29 May 1991, the phrase "having considered therefore the adequacy of the fund constituted by the applicants in

the amount of Llt 24 002 000 000" is linked to the preceding paragraph, in which the limit is stated to be "equal to Llt 23 950 220 000". Since this latter sum was less than the fund constituted as above, it is clear that the said fund was already then considered adequate. This does not alter the fact that the Judge, to whom article 629 CN remits the calculation of the limitation amount, may make a finding on the point at the time of establishment of the contributions to the fund. Article 628 CN provides that the contributions to the compensation fund be made on the basis of the statement of value and documents indicated in Article 621 CN, which are already the foundation for the calculation referred to in Article 629 CN. It follows that the Judge, proceeding in accordance with Article 628 CN, may examine valuation elements which have already been considered in accordance with Article 629 CN.

It has been observed that Article V.1 of the Civil Liability Convention imposes a limit, which "shall not in any event" exceed the limit indicated in that provision. In reality, the maximum limit is fixed so that – for tankers of very high tonnage – the *multiplication* of the units of cost by each ton of the ship's tonnage shall not result in over-inflated maximum values. The concept of a limitation amount is compatible with the fact that the same may produce interest, as is demonstrated by the terms of Article 4.4(d) of the Fund Convention, in the text as set out in Article 6.3 of the 1984 Fund Protocol.

It has been further observed that the proceedings referred to in the last part of Article V.3 of the Civil Liability Convention should be limited to cases in which a guarantee other than a bank guarantee is offered. In this connection the shipowner and its underwriter rely on the comma which appears after the words "other guarantee".

The argument does not appear decisive, since in the original French text (produced by the IOPC Fund) there is no comma between "autre garantie" and "acceptable".

The fact that Article 7 of DPR (Decree of the President of the Republic) 504/78 does not mention a deposit in cash is irrelevant, since the national legislature cannot unilaterally delete one of the possibilities envisaged by the above quoted Article V.3. Such omission, in Article 7, can moreover be explained by the fact that a deposit in cash does not require – for its performance – any further provision of a regulatory character and by the fact that, for bank or insurance guarantees, the laws and regulations which authorise and govern bank and insurance services in the national territory must be respected. Again, emphasis has been placed on the disparity of treatment to which the requirement that the limitation amount be increased by interest would give rise in the international context. This is correct, because the considerable differences existing between discount rates (and interest rates) even within economic zones which are, at least relatively, homogeneous, are well known. The greater risk, which (obviously) cannot be determined in advance, may give rise to an increase in insurance premiums, but cannot constitute an important element for the purposes of this decision. With the constitution of the fund there comes into being a separate capital sum, from that time unaffected (cf Article 639 CN) by circumstances concerning the debtor who establishes it. This capital sum remains subject, as regards the treatment of matters incidental to it, to the provisions of law of the country in which the fund is constituted, since the Civil Liability Convention (as opposed to the London Convention of 19 November 1976 on the limitation of liability for maritime claims, which at Article 11.1 provides that the fund should be increased by interest from the date of the casualty to the date of the constitution of the fund itself) is silent on the subject of interest, and neither provides for it nor excludes it. In the absence of a uniform rule which sanctions the non-interest bearing nature of the fund, the above question regarding a possible disparity of treatment, according to the place in which the fund is to be constituted, does not arise, precisely because the contracting parties have not taken a position on the point. Rather however a comparison between a cash deposit (generally interest bearing) and bank guarantees and other types of guarantee implies – because of the evident necessity that the substance of the fund be the same, notwithstanding how it is constituted – that the production of interest by the fund to which Article V.3 refers not only is not excluded, but is implicitly admitted. From another point of view, one cannot see why a fund constituted in accordance with Articles 275 and 621 CN should produce interest (in accordance with the general principles of our system relating to obligations) while, in the case of a fund constituted in accordance with the Civil Liability Convention and in the absence, in this Convention, of any prohibition on the subject, interest should not be produced.

The copious documentation produced by the IOPC Fund demonstrates that, in the TANIO case, the fund constituted by the shipowner produced interest, amounting moreover to considerable sums.

The giving of a guarantee, moreover, is an option for the shipowner, who can also discharge his liability by a cash deposit. If he does not do this, it is evident that the giving of a guarantee is less onerous than a cash deposit. In a system under which the debtor can already avail himself of the benefit of limiting the debt, the non-production of interest by a fund constituted by the giving of a guarantee distorts the comparison between the three hypotheses under Article V.3 of the Civil Liability Convention. In this connection one cannot speak of alternative obligations, in the sense put forward in the proceedings. The shipowner, to take advantage of the benefit of limitation, is bound to constitute a fund in accordance with [one of] the three aforesaid alternative methods. Because these are not methods which have been agreed (even if only in the alternative) by the interested parties (in which case the equivalence or otherwise of such methods would not be relevant) the Court is required to decide whether the guarantee may be "considered to be adequate".

The fact, too, that claims for interest, accrued after the opening of the procedure, can be satisfied only after payment of the capital sums (Article 625 third paragraph CN) does not exclude that, just as the claims are interest bearing, so the limitation fund should also bear interest (on the basis of general principles as to the fruitfulness of money, to which – in the case of a deposit in cash – certainly no exception would be made here, so that there can be no such exception made in relation to the other two alternative forms of constitution). It has been observed that, in a guarantee, no provision is made for the production of interest. Here, however, one has in fact simply to apply Article 1942 Civil Code, according to which a guarantee extends to all matters ancillary to the principal debt.

In substance, therefore, the arguments put forward by the shipowner and its underwriter appear unfounded; they have no interest, moreover, in the subordinate declaration as to whether the interest produced by the fund which they have constituted goes to benefit the IOPC Fund. The question, however, since it has also been raised by the IOPC Fund, should equally be examined here. The problem which arises is not so much that of establishing whether the interest produced by the above fund should accrue in favour of the claimants, as to see whether such interest forms part of "the amount of compensation actually paid" ["montant des indemnités effectivement versées"] referred to in Article 4.4(a) of the Fund Convention. The problem, that is, is to see whether, in the final analysis, such interest should benefit the claimants (if the relevant sum is not included in the calculation of the said "amount") or the IOPC Fund (in the contrary hypothesis). An examination of the preparatory work, which preceded the approval of the 1984 Fund Protocol, shows that, at that time, no doubt arose as to the fact that, as things stand, the interest should go to increase the aforesaid "amount", to the advantage of the IOPC Fund and to the detriment of the claimants. In this sense the document presented by the French Government, which finds authoritative confirmation at f 5 of the note of 20 September 1988 from the Director of the IOPC Fund, is very clear. Of interest is the reference made by the latter to the possibility that, in a procedure of long duration, interest may reach a considerable sum. This is exactly what occurred in the TANIO case, as appears at f.5 of the IOPC Fund Director's note of 20 September 1988. There is no doubt therefore that the common opinion, thus manifested in the proceedings of international organisms, is in favour of the argument put forward in these proceedings by the IOPC Fund. The fact that the argument was put forward during preparatory work for a Convention other than that in which the regulation under examination was introduced does not of itself undermine the argument based on the said common opinion.

Rather, as has already been said, the Civil Liability Convention is silent on the subject of interest and it is necessary to refer to national law on this point. The same 1984 Fund Protocol, when in Article 4.4(d) – new text – of the Fund Convention speaks of interest "que pourrait rapporter" the fund constituted by the shipowner, shows that interest is not due by virtue of uniform regulations, since in such case there would be no reason to use the conditional tense. One may think, however, of national regulations which, for the purposes of the constitution of the fund, envisage only methods corresponding, in Italy, to judicial (non-interest bearing) deposits and this also may justify the formula adopted in the above quoted Article 4.4(d). Things being as they are, however, interest is not included among the "compensation actually paid under the Liability Convention" ["indemnités effectivement versées, en vertu de la Convention sur la responsabilité"] and whether interest is due depends on other factors arising out of

individual national legislation and not out of uniform regulations. It follows from this that the interest produced by the fund constituted in accordance with Article V of the Civil Liability Convention is payable to the claimants and that such interest does not go to form the "amount of compensation actually paid" ["montant des indemnités effectivement versées"] referred to in Article 4.4(a) of the Fund Convention. Castalia SpA has argued that point C-1-(a) of the order of 14 March 1992 relating to contributions to the compensation fund should be amended to provide for an integration of the guarantee based on the "better rate" of interest (or at least the "market rate") paid by Banca Commerciale Italiana on tied deposits of a similar amount.

There is no reason to consider as certain that a deposit, for an amount equal to that for which the guarantee has already been given, could obtain the better rate, since although the notable importance of a similar tied deposit is clear, it cannot be excluded that the better rate may be reserved for customers who carry out even more important operations.

At the aforesaid point C-1-(a) mention is made of "interest ... at the rate payable during the period in question by Banca Commerciale Italiana". In the spirit of the requirement for adequate protection of the claimants (cf point A-17 of the order relating to contributions to the compensation fund) the "rate payable" cannot be the minimum rate nor - as has been seen - does it have to be the maximum rate. It is therefore equal to the average value (ie market value) applied in the period in question by Banca Commerciale Italiana for similar tied amounts.

In such sense therefore, for clarity's sake, the declaration under head (2) of this judgment is made. Moving on to an examination of the appeal put forward by the IOPC Fund, we must exclude that Article 1.4 of the Fund Convention, which refers to Article V.9 of the 1969 Civil Liability Convention (cf Article 1.1 of the Fund Convention), has the character of an inchoate provision. The problems deriving from the fact that, in Article V.9 of the Civil Liability Convention, the adjective "official" appears are known.

It is interesting to note that, in the text prepared by the drafting group which met on 26 November 1969, such adjective did not appear.

In the report of the Conference's drafting committee, which met on 27 November 1969, the insertion of the above adjective was not proposed. Only at the fifth plenary session of the Conference, held in the afternoon of 27 November 1969, the Swiss delegate proposed the addition of the adjective "official", since in general there is a difference between "le taux de charge officiel de l'or et celui du marché libre". The proposal was accepted, even if in the French text of the Civil Liability Convention, as appears at the foot of the Conference's final document (cf f 181 of the "documents officiels de la Conférence juridique Internationale de 1969 sur les dommages dues la pollution des eaux de la mer", published in London in 1975 by the CMI), the adjective "official" does not appear. Although this is a certified conformed copy (12 February 1992) of the aforesaid "documents", the fact that the term "official" appears at f 175 of the corresponding "official records" published in 1973, the fact that the proposal of the Swiss delegate was accepted and the fact that, in the English and French texts certified as conformed on 17 June 1990, the term official appears leads us to consider irrelevant the aforesaid failure to mention the adjective "official".

Certainly, however, the fact that only at the time of final approval of the text of the Civil Liability Convention was it considered opportune ("conviendrait") to add the term "official" shows that the problem of varying quotations for gold, at that time, was not particularly felt. In effect the gap between the official quotation and the market quotation was, then, quite moderate.

Of the two possible parameters of reference, the Conference showed that it wished to adopt that of the "official" value. One could in this connection observe that gold had and has its own commercial value, so that, once its "monetary" function had been lost, it could still be taken as a point of reference for the validity of the gold clause (cf Cass 4/12/84 n°6570). From this point of view, the impossibility of adopting the "official" parameter would lead to the adoption of the "market" parameter.

It has been argued that, if at this point (following the failure of the 1976 Fund Protocol to come into force) there exists a vacuum in the regulations, it is necessary to proceed to the application by analogy of other rules, in particular of those which provide for the SDR to be the unit of account.

In this connection it should be remembered that Cass. 27/4/84 n°2643 upheld the innovative efficacy, and not merely the interpretative efficacy, of Law 26/3/83 n°84. As is known, under this law Italy – although the Montreal Protocol of 25 September 1975 had not yet come into force – substituted for the sums in Poincaré gold francs, referred to in Article 22 of the Warsaw Convention of 12 October 1929, amounts calculated in SDR (on the basis of the ratio 1 SDR equals 15 gold francs). This is the same type of substitution (and in the same measure) of Poincaré gold francs by SDR as was made in the 1976 Fund Protocol.

Thus, the Italian legislature thought fit to approve a law to effect such a substitution, obviously considering that this result could not be arrived at by way of interpretation. The Court of Cassation, in the above mentioned judgment 2643, upheld the innovative nature of this intervention, stating that such substitution is an "operation which could certainly not be carried out by the Judge".

This statement is of great importance in the case under examination, in which the necessity of such a substitution by the Judge has been asserted. According to the Court of Cassation, this is not possible. It follows from this that it is necessary to refer to the "gold at market value" parameter, the adoption of which by the Judge is not in any way precluded, according to the jurisprudence of the Supreme College.

In this connection Dr Mensah has argued that Judgment 2643 of the Court of Cassation could not be usefully cited in the case under examination, because the gold clause in the Brussels Convention of 25 August 1924 is structured differently from Article V.9 of the Civil Liability Convention. In effect, Article IX of the Brussels Convention contemplates that the contracting states in which the pound sterling is not used as a monetary unit should have the option of converting into round figures, according to their respective monetary systems, the sums indicated in pounds sterling in the Convention.

A similar option to convert (Poincaré gold francs) into national currency in round figures is contained in Article 22.4 of the Warsaw Convention.

Such option, on the other hand, is not provided for in the Civil Liability Convention.

It should be noted, however, that the Hague Protocol of 28 September 1955 amended Article 22 of the Warsaw Convention, providing, in paragraph 5, that the conversion of sums from gold francs into national currencies is to be effected according to the gold value of these currencies "at the date of the judgment".

Now, the conversion into national currencies in round figures does not signify the abandonment of the gold parameter (given that, in such case, one could no longer speak of a conversion), but rather the possibility of roundings off, such as not to alter significantly the said gold parameter.

With reference, for example, to the Warsaw Convention and to the indications contained in the judgment of 17 April 1984 of the USA Supreme Court (in the case TWA – Franklin Corp.) the limit in gold francs was equal (as long as the price of gold remained at US$35 per ounce) to US$16.5857445 and the limit in national currency (in accordance with the above quoted Article 22.4) was equal to US$16.534391 (on the basis of US$7.5 per pound weight). This difference is very small, certainly not such as to deprive of meaning the reference to gold, which at the time had an official value. In substance, the aforesaid conversion option certainly did not imply the possibility then of referring, for the purposes of Article IX.2 and of Article 22.4, to market values of gold. It follows that the different formulation of the Civil Liability Convention does not in fact involve (especially with reference to the Hague Protocol) a substantial variation compared with the above mentioned Conventions.

It further follows that it is possible to apply, also in the case here under examination, the principles elaborated by our jurisprudence on the subject of gold clauses with reference to the market price of gold. In such sense, in addition to the above quoted Cass 2643/84, reference should also be made to

Cass 4/12/1984 n°6570. The Constitutional Court also, in number 323 of 6 June 1989, although only by an incidental affirmation, adopted this orientation, when it stated that "by law n°84 of 1983 a drastic reduction of the values previously in force has effectively been made".

One can in fact speak of reduction, in relation to law n°84, only as regards a conversion of the gold franc into national currency on the basis of the market value of gold.

The fact should also be borne in mind that from the 1 April 1978 (when the official parity of currencies as against gold was abolished) to the 8 April 1981 (or 3 June 1983, dates of the entry into force, on the international and internal level, of the 1976 Civil Liability Convention Protocol) there was no official value of gold nor was it yet possible to have recourse to SDR. In that period the only conversion possible seems to have been that based on the market value of gold, unless, in order to take account of the adjective "official", it was considered that shipowners could not limit their liability in accordance with the Civil Liability Convention.

In reality - and this is valid also with reference to a specific request in such sense by the IOPC Fund - the absence of an official value for gold, which the Judge - as has been said - cannot remedy by the adoption - to fill a gap - of SDR, does not make the Convention (the Fund Convention in the case under examination) inapplicable, because of the possibility of referring to the concept of "gold as a commodity" which was always present in the various gold clauses.

Certainly, the failure of the 1976 Fund Protocol to come into force makes it much less simple for the Fund Convention to continue to complement the Civil Liability Convention, as amended by the 1976 Civil Liability Convention Protocol.

In this connection, a primary serious problem concerns the contribution to the shipowner in accordance with Article 5.1 of the Fund Convention. The limit of the contribution is determined as a proportion, with a maximum ceiling of intervention. If the maximum ceiling is expressed in different units of account in the two Conventions, of the two competing criteria the one based on a proportional value remains applicable. It has been observed that, in this way, the contribution of the IOPC Fund ends up by being determined in SDR. The observation is exact, but it should be said that this is a consequence not of the substitution - by the Judge - of SDR for gold francs in the Fund Convention, but of the application of a criterion (of determination of the contribution as a proportional measure) which can be inferred from the figures in the above quoted Article 5.1. Since the criterion based on the difference, as an absolute figure, between the amounts referred to in Article 5.1 is no longer applicable - because of the diversity of the units of account of reference - the proportional criterion implicitly contained in this regulation remains applicable.

Only by operating in this way (unless, obviously, one accepts the argument of the IOPC Fund) is it possible to overcome the difficulty, otherwise insurmountable, deriving from the fact that the threshold of intervention of the IOPC Fund, if calculated - as an absolute figure - with reference to the market value of gold, is very much higher than the limit of liability of the shipowner, determined in SDR.

It has been observed that the same "proportional" criterion could then be applied as regards the maximum ceiling of intervention by the IOPC Fund. In this case, however, the situation is different, because the Fund Convention can in any event operate, notwithstanding the difference between the units of account. It is obviously an anomalous situation, different from that prefigured at the time of approval both of the Fund Convention by the contracting States and of the 1976 Civil Liability Convention and Fund Protocols, given that there is no longer homogeneity between such units.

Notwithstanding this, however, there is no severing of the connection between the limit, in SDR, of the fund constituted by the shipowner and the fund contributed by the IOPC Fund.

From the latter should be deducted the amount of the first fund and, if the indemnity to the shipowner (if due) is taken into account, the amount at the charge of the IOPC Fund is determined by the difference.

This sum, obviously, turns out to be very high, because the intervention threshold is calculated in SDR. It must however be excluded that there can exist a band (from 24 to 179.5 milliard Lire, in the case under examination) for which no compensation is due.

Article 4.4(a) of the Fund Convention refers to amounts of compensation actually paid under the Civil Liability Convention. For those States which adhered to the 1976 Civil Liability Convention Protocol one can no longer speak of amounts of compensation paid in accordance with the Civil Liability Convention, whereas this is possible for those States which are parties only to the Civil Liability Convention and the Fund Convention and for whom the unit of account has remained the gold franc.

For those States which adhered to the 1976 Civil Liability Convention Protocol Article 4.4(a) can operate, where regard is had to the integrating character of the IOPC Fund's intervention in respect of the limitation amount in any event constituted by the shipowner. Here, as also in Article 5.1 of the Fund Convention, the reference to the Civil Liability Convention must be understood to operate not at the values, in units of account, indicated in the latter Convention (and which, for those States adhering to the above mentioned Protocol are no longer valid), but on the basis of the obligation on the part of the shipowner to compensate the victims.

Here also one may consider twofold the effect of the expressions "en vertu de la Convention sur la responsabilité" and "aux termes de la Convention sur la responsabilité" in the sense that these expressions refer to the basis, precisely, of the aforesaid obligation and the determination of the amounts. Since under this second aspect the cross-reference can no longer operate, there remains the first profile, in accordance with which the intervention of the IOPC Fund, although much more onerous, is still possible.

This does not conflict with the fact that it has been held that Article 1.4 of the Fund Convention cannot be deemed to be an inchoate provision, given that, in that case, the reference does not have the aforementioned twofold effect, but has the object of identifying a clearly determined unit of account.

If we turn to the application of a "proportional" criterion, this is necessary to apply Article 5.1 of the Fund Convention. Article 4.4(a) of the latter, on the other hand, is in any event applicable and the adoption of the above criterion could fulfil only the different function of maintaining unaltered the original relationship between maximum limit of the fund constituted by the shipowner and maximum limit of intervention by the IOPC Fund. If one were to operate thus, undoubtedly taking as a term of reference the first limit now expressed in SDR, the said intervention ceiling would be considerably reduced and "disconnected" from that reference in gold terms still existing in the Fund Convention, with a substitution of these terms by SDR. This would occur, even if Article 4.4(a) were still applicable (although not easily), and would affect to a considerable degree the position of the victims.

In the case contemplated by the above quoted Article 5.1, on the other hand, the provision now appears applicable only by the adoption of the proportional criterion and the latter would not be to the detriment of the shipowner, whose undertaking is now to be determined in SDR.

Unlike the above quoted Article 5.1, moreover, from a reading of Article 4 (paragraphs 4 - 5 - 6) of the Fund Convention there does not emerge the consideration of a criterion based (also) on proportion, but rather that of a variable maximum ceiling related to the extent of the damage caused by relevant casualties for the purposes of the same Convention.

At the collegiate hearing on 18 June 1993 the IOPC Fund produced the ordinary supplement to the Official Gazette, n°149 of 30 June 1986 in which were published, among other things, two decrees of 26 June 1986 (86A 4921 and 86A 4922) of the Minister of Posts and Telecommunications. It emerges from these decrees that the conversion of the gold franc, for the purposes of tariffs for international telecommunication services, is made on the basis (in certain cases, of one SDR equals 3.061 gold francs and) of one gold franc equals Lire 609. This is a case, in substance, of the same type of "conventional" conversion - so to speak - provided for by Article V.9(c) of the Civil Liability Convention in the text set out in the 1976 Civil Liability Protocol from which it appears evident that only a determination of this kind, which disregards the market value of gold, can lead to the attribution to the monetary unit referred to in

Article II.2(b) – in the text set out in the aforesaid Protocol – of a value which is "as far as possible" the same as that expressed in SDR. The fact also that the Contracting States provide the communication referred to in the last part of the above quoted Article V.9(c) shows that regard has been had to a conversion criterion having a tendency to stability (differing, therefore, from the reference to the market value of gold).

These are considerations, however, which are of relevance in relation to the 1976 Civil Liability Convention Protocol and not also to the Civil Liability Convention, since – as has already been said with reference to Law 26/3/83 n°84 – the operation (of transition from gold francs to SDR) is of an innovative nature, as is shown also by the fact that (as opposed, for example, to Article 22.4 of the Warsaw Convention, in the text set out in the additional Protocol n°3 made in Montreal on 25 September 1975) the conversion into national currencies of monetary units expressed in gold terms (referred to in Article V.9(b) above) is to be effected – given the tenor of Article V.9(c) – by means such as to exclude the reference (which is on the other hand possible, as indicated above, on the basis of the Civil Liability Convention) to the market value of gold.

In the TANIO case the limitation fund was constituted on 29 April 1980, before the 1976 Civil Liability Convention Protocol came into force.

This explains why, at page 4 of the note of the IOPC Fund Director dated 20th September 1988, one reads that no objection was raised to the conversion, into French francs, of 675 million gold francs or 45 million SDR, on the basis that one SDR equals 5.4388 French francs. Furthermore, again at f 4 of such note one reads that between the IOPC Fund Director, on the one hand, and the French Government, the United Kingdom Club and the Channel Islands, on the other hand, an agreement was reached for the application of the method of conversion indicated in Regulation 2 of the Internal Regulations of the IOPC Fund (1 SDR equals 15 gold francs). In this situation, the value to be attributed to the TANIO case as a precedent must be reappraised and remains restricted to the fact that the President of the Commercial Court of Brest ordered that the shipowner should constitute a fund calculated – notwithstanding the reference, in the application, to gold francs – not on the basis of the value of gold on the free market, but on the basis of SDR (perhaps with a twofold conversion from SDR to pounds sterling and from pounds sterling to francs). In this connection also, however, it should be noted that on 29 April 1980 the 1976 Civil Liability Convention Protocol had not yet come into force.

Certainly, if one has regard to the opinions expressed at international level, the conversion of gold francs, referred to in the Fund Convention, into SDR is the generally accepted theory. This is shown, among other things, by the preamble to the 1984 Fund Protocol (which speaks of the intention to offer "une indemnisation accrue") and by point 2 of the note presented on 24 November 1992 by the Italian delegation to the international Conference for the revision of the Civil Liability and Fund Conventions.

The increased compensation and the higher intervention ceiling of the IOPC Fund are arguable only if one leaves out of account the consideration of gold at the market price and the question relating to the operativity of the CRISTAL agreement should be seen in the same light.

Equally it is undeniable that the SDR (as its adoption in a great number of international Conventions and Protocols shows) is at present the unit of account apt to ensure a substantial uniformity, in time and geographical terms, of the values it expresses.

This, however, is not decisive in this instance, where it is a case of the application (still possible, as we have seen, even though with the problems which have been stated) of a Convention which does not mention SDR.

It has already been seen that, in Italy, both the Legislature and the Supreme College have considered legislative intervention necessary in order to substitute SDR for gold francs in another Convention.

It is a case then of ascertaining whether such substitution, which cannot be operated by way of interpretation, has nonetheless taken place, notwithstanding that the 1976 Fund Protocol has not come into force.

An authoritative argument has been put forward for the direct effect of the IOPC Fund Resolution n°1 of November 1978. It has been said that Article 18.3 of the Fund Convention provides that the Assembly shall adopt Internal Regulations of the IOPC Fund necessary for its proper functioning. The reference to the latter, contained in Article 18.14, would imply the exercise of a regulatory power with effect as regards all the persons and bodies involved in the IOPC Fund system of cover.

The Internal Regulations undoubtedly contain provisions (cf. for all, Regulations 3.10, 3.11 and 3.12) which also affect relations with third parties. These are however very specific provisions of an operational nature, which are subordinate to the main regulatory structure of the Fund Convention.

There obviously cannot be included among these the provision which governs the IOPC Fund maximum intervention ceiling, which is a fundamental point of the system of the Convention and which - as is shown by the documents produced by the IOPC Fund itself - has always constituted a particularly delicate point (even if *one leaves out of consideration* the gold question).

Significantly, moreover, in the final document (point 1) of the 1976 London Conference ("chargée de réviser les dispositions relatives a l'unité de compte" in the Fund Convention) we read that the Conference met, in accordance with Article 45 of the Fund Convention, to examine a proposal tending to "revise" the provisions therein indicated. It was, that is, a case of a true and real amendment of the original text and it was evidently thought then that a Protocol was necessary for the purpose and the IOPC Fund Assembly could not deal with the matter. We have already seen, moreover, that the substitution of gold francs by SDR is not merely an operation of interpretation.

Article 45 of the Fund Convention provides that, in order to "revise" or "amend" the Convention, a Conference should be convened. The cases in which this is not necessary are expressly set out and, in reality, are only matters of adjustment (cf Articles 5.3 and 5.4 and relative decisions taken by the Assembly: f 50 letter B of production 39 of the IOPC Fund), on the basis however (just as for Article 4.6) of an express attribution of relevant powers to the Assembly. The contracting or adhering States, in substance, wished the Assembly to have such powers and, at the time of ratification, the competent constitutional organs of the various countries also accepted this delegation of powers to the Assembly.

The fact that citizens and bodies of States which are parties to the Fund Convention benefit directly from the decision of the IOPC Fund Assembly to raise the maximum ceiling to 900 million gold francs derives from that "delegation" which has been mentioned, but does not imply, correspondingly, that they can deem themselves to be the beneficiaries of a Resolution for which a corresponding regulatory foundation is lacking. From a purely internal point of view, this (foundation) cannot be recognised in Article 11 (Italian) Constitution, which conflicts with the fact that the 1976 Fund Protocol was given executive effect in Italy by Law 22/1/83 n°39, the intervention of the Legislature for this purpose and in accordance with Article 80 Const. evidently having been considered necessary, notwithstanding that Resolution n°1 had already been adopted.

It has been said that this latter Resolution would in substance constitute an international agreement in *simplified form, in that it* was agreed at an Assembly in which all the contracting States participate. In contradiction one may observe that, in such a way, it would make possible, without the control of Parliament, that amendment for which Law 39/83 was approved and that substitution (of gold francs by SDR) for which Law 84/83 was approved.

Not even usage can be relied on as a ground for recourse to SDR. It is one thing that SDR are now commonly adopted as units of account in Conventions and quite another that, for this reason alone, a provision which does not mention them can be considered amended in this way (cf also point 4 of Judgment 323/89 of the Constitutional Court).

It has been argued that the 1976 Fund Protocol had a purely interpretative nature so that the failure of the necessary number of States to ratify it would not matter. The text of the Protocol does not seem to authorise this conclusion, because no mention is made of an "interpretation", while on the other hand it is certain that the London Conference met to "revise" the provisions regarding units of account.

The aforesaid failure to ratify may be explained either by the fact that ratification was considered superfluous (given the allegedly interpretative nature of the 1976 Fund Protocol) or by the fact that there was no wish to ratify. Decidedly more significant is the fact that numerous States did ratify and adhere, which can be explained only by the innovative nature of the said Protocol.

Mention has been made, again, of a temporary application of the Protocol operated on the basis of the above-mentioned Resolution. In the latter, in fact, one reads that the noted method of interpretation of provisions in gold francs (contained in the Fund Convention) was adopted pending the entry into force of the 1976 Fund Protocol. In this connection, however, with reference to what is set out in the two preceding pages, it must be excluded that Resolution n°1 should have, in our system, the validity of a treaty and this is sufficient to exclude the applicability of Article 25.1(b) of the Vienna Convention of 23 May 1969, ratified by Law 12/2/74 n°112.

It is extremely significant, moreover, that the said Resolution ends with the recommendation to the contracting States to "become Parties" to the 1976 Fund Protocol as soon as possible. This recommendation could not be explained if the Resolution itself had really been sufficient finally to resolve all problems.

It has been argued, on a different front, that in accordance with Article 2.2 of the Fund Convention the IOPC Fund is, in our system, a public legal person, whose regulatory activity (to which the adoption of Resolution n°1 is referable) may manifest itself in the form of executive or independent regulations.

In the first hypothesis, it would be a case of exercise of regulatory powers in accordance with Article 18 of the Fund Convention in relation - it is said - to Article 1.4 of the same. Apart from the reference to this last provision, mention has already been made of the limits within which regulatory powers can be recognised as legitimately exercised (also in order to avoid a breach of Article 80 Const).

In the second hypothesis, the IOPC Fund would have exercised the "discretionary functions expressly provided by Article 18" quoted above. It has already been seen that a power, in this specific field, cannot be recognised as belonging to the Assembly, if account is taken of the specific attribution of powers conferred on the Assembly by the Fund Convention. In this connection, in reality, the fact that the IOPC Fund, in accordance with Article 2.2 of the Convention itself, may consider itself a legal person for internal rules does not exclude that the powers of the Assembly are limited as stated above, since it is difficult to recognise the exercise of discretionary functions on a subject considered by the States to be so delicate that it requires the convening of a Conference and the approval of a Protocol to revise the provisions on the subject of units of account.

In substance, the fact that the IOPC Fund (in accordance with Article 2.2 of the Fund Convention) must be recognised as a legal person capable (according to the various national legislatures) of assuming rights and obligations and of being a party in legal proceedings simply means that, for the performance of its institutional functions, it must be made capable of operating in the ways permitted to legal persons by the said legislatures. These institutional functions, however, like the powers given to the IOPC Fund by the Convention, are determined by the latter, since it is unthinkable that, according to the systems of the various States, the decision-making activity and - in the permitted cases (Articles 4.6 and 5.4 of the Fund Convention) - the integration and amendment of the provisions of the said Convention may have different effects, arguably going even beyond the limits laid down by the Convention itself.

Article 2.2 of the Convention, moreover, refers not the exercise of powers but to the different and more limited hypothesis of the assumption of rights (and from this latter viewpoint the provisions contained in the Fund Convention are different). The principal demands of the plaintiff are therefore to be rejected.

The IOPC Fund, in the alternative, has requested the annulment (on the grounds of an essential and recognisable error of law) of its own decisions of 20 April 1979 and 22-24 October 1986 by which the ceiling of cover was increased first to 675 million gold francs and then to 900 million gold francs.

From the set of documents produced by the IOPC Fund it emerges clearly that, when these decisions were taken, it was intended to increase the compensation for victims; and there would be an increase only if Resolution n°1 is considered applicable and reference is therefore to be made to SDR in the ratio 1 to 15 therein indicated.

The increase referred to in Article 4.6 of the Fund Convention, intended to take account both of the extent of the damage caused by previous casualties and of changes in monetary values, in effect brings about a very considerable increase in the said compensation, if regard is had to the market value of gold. In this case, the reference to the market value is already sufficient to compensate changes in monetary values. The same applies to the question of the extent of the damage, it being sufficient to recall what has been said in this connection regarding the intentions of the 1984 Fund Protocol. This having been said, however, the request cannot be accepted.

The request has been founded on the alleged existence of an essential and recognisable error. The rules relating to the annulment of contracts should therefore be applied, on the strength of the cross-reference in Article 1324 Civil Code. However it does not seem right that among the "unilateral inter vivos acts having patrimonial content" can be included the decisions of an international organisation, given the radical differences of structure between the two.

Furthermore, it would give rise to very serious problems (and – for this reason also – it is not arguable) if a national Judge – perhaps going against the views of judges in other States – could affect, by annulling it, an act of an international organisation, since the latter could – if it thought fit – have recourse to its own powers including those of self-protection to remedy the error which had given rise to what was done.

The IOPC Fund, finally, has asked that the verification of the assumptions in Article 4.1(b) and (c) of the Fund Convention should be made an express condition of the operativity of its cover. Article 4, now indicated, provides for the intervention of the IOPC Fund if a person suffering pollution damage "n'a pas été en mesure d'obtenir une réparation équitable des dommages" or "has been unable to obtain full and adequate compensation for the damage". The use of the verb in the past tense shows that the intervention is due when there has not already been adequate relief for the damage. It follows from this that the lack of relief is a condition of the intervention.

Article 4.1 links this lack of relief to three hypotheses which – as appears from the very contents of the provision ("pour l'une des raisons"<1>) are in the alternative (consider also the logical incompatibility between the case under (a) and that under (c)).

The IOPC Fund has argued that, at the outcome of the opposition action against the Judgment of 29 May 1991 the personal fault of the shipowner may emerge, with the exclusion, therefore, of his right to limit his liability. In such case the claimants would have to abide by the provisions of Article 4.1(b) and (c).

In reality, in the case under Article 4.1(c) the claimants do not have to do anything, the intervention of the IOPC Fund depending on a relationship between the extent of the damage and the limit of liability of the shipowner. Where the damage exceeds the limit, the IOPC Fund must intervene.

It could be said that, if there is personal fault on the part of the shipowner, his liability cannot be limited and there cannot be damage exceeding his liability as limited in accordance with Article V of the Civil Liability Convention. However, the limit of liability, although determined with reference to the shipowner in accordance with Article V.1 of this Convention, is the same limit of which the underwriter can in any event avail himself (cf Article VII.8 of the Civil Liability Convention). Since the underwriter also has constituted the fund for an amount corresponding to the said limit, if this limit is exceeded the quoted Article 4.1(c) applies. Article 4.1(b) differs from Article 4.1(c) because it does not refer to damage exceeding the limit, but, in substance, to the impossibility of obtaining from the liable parties the full

<1> Translator's note: not in the English text of the Fund Convention.

amount due under the Civil Liability Convention. This hypothesis can arise either in the case in which those liable have not constituted the fund in order to limit their liability or have constituted it not in cash, but by some sort of guarantee which in practice (because, in theory, on the basis of the combined effect of Article 4.1(b) of the Fund Convention and Articles VII.1 and V.1 of the Civil Liability Convention the problem should not arise) has proved to be inadequate.

Article 4.1(b) envisages that the prejudice for the victims derives from the inability of the shipowner to meet his obligations "and" from the insufficiency of the financial security. If the inability of the former exists but not also such insufficiency, the aforesaid prejudice does not arise and there is no reason why the claimants must take action against the shipowner. In theory, the hypotheses referred to in letters (b) and (c) of Article 4.1 could occur at one and the same time.

In practice, if what has already been said on the subject of interest and also the last part of Article 4.1(b) are borne in mind, with the constitution of the fund also by the underwriter problems pursuant to Article 4.1(b) cannot arise unless in the hypothesis (which is really difficult to advance) that, when the security is enforced, the guarantor bank is unable to meet its obligations.

For the purpose of the contributions to the HAVEN compensation fund what matters are the maximum amount due by the IOPC Fund and the measure of the integrating contribution for which it is liable.

This measure is determined with reference to the financial relief for the shipowner and to the "amount of compensation actually paid". The quantum of such relief has been discussed and the latter amount of compensation corresponds to the entire fund herein constituted, in any case, by the underwriter or to the lesser sum which, in relation to the greater guaranteed amount, the guarantor should pay.

Only on the part of the latter or, possibly, of the underwriter (obviously, in the case in which the alternative hypothesis referred to under letter (c) of Article 4.1 does not arise) would the onus of taking action, which is placed on the claimants by Article 4.1(b), arise.

Precisely because of the relationship existing between the premises for the intervention of the IOPC Fund and the extent of such intervention, and bearing in mind the argument put forward in this connection - by the IOPC Fund - of an alleged onus on claimants to pursue "all the remedies necessary to obtain from the shipowner the satisfaction of their claims", we think fit - by way of integration and clarification of point C-2 of the order relating to contributions to the HAVEN compensation fund - to make the declaration set out in head (3) of this Judgment.

Some claimants have asked the Court to "authorise the payment of a proper provisional amount". In this connection an "authorisation" of the Court is not required nor, moreover, can the Court order the payment of a provisional amount, which is not provided for either by the Code of Navigation or by the Fund and Civil Liability Conventions.

The latter Convention at Article V.5 and V.6 deals with the different hypothesis of payments made to victims before the distribution of the fund, with subrogation in favour of the paying party. This however is provided for on a "voluntary" basis - so to speak - and leaving aside the possibility, which is non-existent, of imposing provisional payments on account.

The request put forward by the Commune of Albissola Marina for judgment for payment of damages and for the division and allocation of the amounts included in the HAVEN compensation fund are outside the scope of these proceedings and are therefore to be rejected.

In these proceedings we can deal only with the opposition to the HAVEN compensation fund. The division and allocation of the fund can take place only when the situation envisaged by Article 636 CN has occurred. The request for payment of damages, moreover, being made against the IOPC Fund, is inadmissible, if its intention is to ask for something other than the aforesaid division and allocation.

The novelty of the questions leads the Court to rule that all parties shall bear their own costs of the action.

This Judgment, being of a declaratory nature, cannot be stated to be provisionally executive between the parties.

FOR THESE REASONS

The Court giving its final judgment and having rejected all contrary arguments:

(1) declares that the Commune of Tolone has not validly made itself a party to the action

(2) by way of integration and clarification of the contributions to the HAVEN compensation fund ordered by the Judge on 14 March 1992 holds - in relation to point C-1 (a) - that by "rate payable" must be understood the "average rate payable for similar tied deposits"

(3) by way of integration and clarification of the contributions to the HAVEN compensation fund ordered by the Judge on 14 March 1992, holds - in relation to point C-2 - that the IOPC Fund is bound to provide its own integrating compensation provided that, in the terms indicated in the reasoning, one of the alternative conditions provided for by letters (b) or (c) of Article 4.1 of the Fund Convention has occurred

(4) rejects the remainder of the appeals against the order of 14 March 1992

(5) rejects the other requests put forward in the proceedings

(6) declares that each party shall bear its own costs of the action.

Genoa 1 July 1993