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INCIDENTS INVOLVING THE IOPC FUND

HAVEN

QUESTION OF TIME-BAR

Submitted by the Government of Japan

1.1 For better understanding by other Governments, the Japanese Government feels it appropriate and necessary to repeat its firm position which was stressed on the captioned subject at the 41st Executive Committee and the 17th Assembly meetings last October.

2.1 Article 6.1 of the Fund Convention (FC) reads as follows:

"Rights to compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred".

Under this provision, a claimant's lack of action for compensation or of notification within the period of three years from the date when the damage occurred, causes his right to compensation by the IOPC Fund to be automatically extinguished. His right to compensation, rather than his right of action, unconditionally ceases to exist.

2.2 In this regard, the Japanese delegation explained the reason for such interpretation of said provisions as follows.

In the cases of normal time-bar (prescription d'action) whether or not to invoke time-bar is for the debtor to decide, and if he does not invoke time-bar, the obligation to pay the debt is still effectively existent. In the normal cases of "limitation of action", the effect is only that request for litigation before the Court is barred, and the debt itself does not extinguish. Therefore, the payment made by the debtor after lapse of the time period is construed to be valid payment of debt.

Quite contrary to these cases, the conditions and legal effects of time-bar provided by Article 6 of FC is much different. If actions or notification of actions are not made duly to the Fund in the prescribed period, the right to compensation shall be extinguished. This loss of right will be automatic, after lapse of the prescribed time limit, and the right to compensation would no longer exist in any sense. Therefore, it is impossible to pay compensation based on the Convention for the claims which were submitted after the prescribed period had lapsed.

3.1 The special character which has automatic cause and absolute effect of the provisions of Article 6.1 shall be based upon the comparative and historical consideration of the recent international conventions.

The provisions relating to the time-bar in the various conventions are separated into two types: one period for the right to "action" for claims being lost by lapse of a certain period; and the other provides for the legal effect caused by such a lapse.

3.2.1 The first type appeared, firstly, in the 1910 Collision Convention and Salvage Convention.

These conventions were provided as follows:

(French original text:)

Les actions en réparation de dommages se prescrivent par deux ans à partir.....

L'action en paiement de la rémunération se prescrit par deux ans à partir.....

(English translation thereof:)

Actions for the recovery of damages are barred after an interval of two years from....

A salvage action is barred after an interval of two years from

It seems to us that in the French original texts (the originals are only in French), what is clearly meant is the "prescription d'action" in French law.

As the appropriate vocabulary was not found in the English text, it was expressed as the "action" will "be barred" after a two year "interval".

This is probably because that time-bar is stipulated in the form of limitation of "action" or "statute of limitation" in the English legal system.

3.2.2 The 1961 Passenger Convention has adopted the wording "shall be time-barred" in the English original text. (Article 11.2 "Les actions en réparation... se prescrivent ..." "Actions for damages ... shall be time-barred...")

The English expression created by this Convention has become a precedent of Articles of this type and was inherited in various Conventions up to now.

The following Conventions have the same type provisions.

Luggage Convention 1967,
Athens Convention 1974,
The Hamburg Rules 1978,
Multimodal Convention 1980,
Salvage Convention 1989, and
Terminal Operators Convention 1991,

3.3.1 The second type (provision of effect) appeared firstly in 1924 Hague Rules.

"En tous cas le transporteur et le navire seront déchargés de toute responsabilité pour pertes ou dommages...."

(English translation)

"In any event the carrier and the ship shall be discharged from all liability whatsoever in respect of loss or damage".

3.3.2 Warsaw Convention, 1929 (Air Carriage) stipulated as follows.

"L'action en responsabilité doit être intentée, sous peine de déchéance, dans le délai de deux ans" (Article 29.1 French original)

(English translation)

"The right to damages shall be extinguished if action is not brought within two years."

The English translation does not reflect the French original precisely, and it is not clear if the Convention itself is the variation of the first type (prescription d'action) or the second type (provision of legal effect).

It should be noted that délais préfix is provided here.

This was also inherited to conventions dealing with nuclear liabilities. The Paris Convention 1960 has the similar provisions. The difference is that the Paris Convention has an English original. From this, it seems to be clear that the provision in French, ie "sous peine de déchéance" is a disbenefit of loss of "right of compensation".

However, Article 8(c) provides period for the extinction of the right and "a period of limitation, prescription" parallel and optional, and the distinction between the right of action and the right of compensation is not very clear.

Vienna Convention 1963 has the same provision.

3.3.3 (i) In the second type, a new type which provides the extinction of the claim (or right, droit) appeared in Nuclear Ships Convention 1962 (Article 5.1).

The English text is the same as Article 8(a) of the Paris Convention (right to damages shall be extinguished...)

However, the French text is as follows.

"Le droit à réparation en vertu de la présente Convention est éteint si une action n'est pas intentée dans les dix ans à compter de la date de l'accident nucléaire".

Both in English and French texts, the legal effect of the time-bar of action were stipulated for the first time in the form of extinction (to be extinguished; est éteint) of the right for compensation (droit à réparation).

The period which brings about the legal effect of extinction of right is clearly "délai préfix" and what extinguishes is not the right for action but the right for compensation, and the extinction of right has an absolute effect (no return).

- (ii) This type of provision established by the Article 5.1 of the Nuclear Ships Convention reappears in the 1969 CLC.

The English and French texts are as follows.

"Rights of compensation under the present Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage."

"Le droit à indemnisation prévu par la présente Convention s'éteint à défaut d'action en justice intentée en application des dispositions de celle-ci dans les trois ans à compter de la date où le dommage est survenu. Néanmoins aucune action en justice ne peut être intentée après un délai de six ans, à compter de la date où s'est produit l'événement ayant occasionné le dommage."

Under this provision, unless actions are taken within three years of the date when the damage occurred, the right of compensation will be extinguished. This provision is similar to the one of the nuclear ship with minor differences.

This provision was inherited by the FC 71 (Article 6.1) (The right which will be extinguished is the right to compensation or indemnification to the FUND, and the requirement is the absence of notification or action to the Fund.

CRTD1989 (Article 18.1-2) and draft HNS (Article 29) have the similar provisions.

It should be noted that under this provision the right for compensation shall be extinguished after the absence of action or notification, and the right for compensation ceases to exist after the lapse of the prescribed period (*délai préfix*). Therefore, the payment of compensation after time-bar is payment without obligation.

4 As was seen above, it can be said that the provision under Article 6.1 of the FC is a very peculiar provision as well as Article 8 of CLC.

By this provision, the absence of action for compensation against the Fund and due notification to the Fund of the action against the shipowner, ie a fulfilment of a formalistic requirement, cause the substantial right for compensation against the Fund to be extinguished.

This extinction takes effect automatically and the legal effect is absolute (no return). In other words, by the lapse of the prescribed period, the right of compensation against the Fund ceases to exist.

This means that not only can the claimant not ask for compensation from the Fund, but also a compensation made by the Fund after this time-bar is regarded as a compensation without obligation, and this cannot be construed as one based on the Convention. The fund for the payment of compensation by the IOPC Fund depends on the contributions payable by the contributors.

The obligation to pay contributions is based on the Convention or on the National law which implemented the Convention. If the right for compensation against the Fund does not exist on this basis of the Convention, the IOPC Fund cannot ask the contributors to contribute towards the payments of these (time-barred) claims.

It follows that the contributors no longer have the obligation to pay contributions for the claims which are time-barred.
