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INCIDENTS INVOLVING THE IOPC FUND

ADMISSIBILITY OF CLAIMS RELATING TO SALVAGE OPERATIONS AND SIMILAR ACTIVITIES

Note by the Director

1 Introduction

1.1 In the *Aegean Sea* and *Braer* cases, the shipowner engaged the services of contractors under Lloyd's Open Form salvage agreement 1990 (LOF 90). The shipowners have in these cases made payments to the contractors based on this agreement.

1.2 The question has arisen of which criteria should be applied to determine the admissibility of claims against the IOPC Fund for the recovery of amounts paid for services rendered under LOF 90. This leads to the wider question of admissibility in general of claims for salvage operations and similar activities. This question is of great importance, as it has relevance beyond the *Aegean Sea* and *Braer* cases.

1.3 The present document recapitulates the policy applied by the IOPC Fund as regards the admissibility of claims for the recovery of costs for operations of this type. It also sets out the legal framework applicable to such operations. The position taken by the shipowners and P & I Clubs concerned is explained.

2 Policy applied by the IOPC Fund

2.1 The admissibility of claims of the type discussed in the present document is to be determined pursuant to Articles I.6 and I.7 of the Civil Liability Convention which defines the concepts of "pollution damage" and "preventive measures" as follows:

> I.6 'Pollution damage' means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.

1.7 'Preventive measures' means any reasonable measures taken by any person after an incident has occurred to prevent or minimise pollution damage.

2.2 Following the *Patmos* case, the Executive Committee considered the relationship between salvage operations and "preventive measures" as defined in the Civil Liability Convention. The Committee took the position that operations could be considered as falling within the definition of "preventive measures" only if the primary purpose was to prevent pollution damage; if the operations had another purpose, such as salving hull or cargo, the operations would not be covered by this definition and would therefore not be admissible. In reaching this decision, the Committee noted that it was necessary to encourage preventive measures. It was noted that the assessment of compensation in respect of operations whose primary purpose was to prevent pollution damage should not be made on the basis of criteria applied for assessing salvage awards, but should be limited to costs (including a reasonable element of profit). This "primary purpose test" was endorsed by the Italian Court of first instance which stated that salvage operations could not be considered as preventive measures since the primary purpose of such operations was that of rescuing the *Patmos* and her cargo; this applied even if the operations had the further effect of preventing pollution.

2.3 This "primary purpose test" was applied in the *Rio Orinoco* case to claims submitted in respect of the removal of the stranded tanker and her cargo.

2.4 Following the *Agip Abruzzo* incident certain activities were undertaken both for the purpose of preventing pollution and for the salvage of ship and cargo, but in respect of which it was not possible to establish with any certainty the primary purpose of the operations. Accordingly the costs were apportioned between pollution prevention and other activities.

2.5 In the *Portfield* case, a claim was submitted for certain operations connected with the salvage of the tanker. The claimant maintained that if his sole purpose had been to salve the tanker, without considering the risk of causing further pollution, he could have chosen a method which would have been both quicker and cheaper. The Executive Committee accepted that the measures had a dual purpose. In the settlement of this claim, the costs were apportioned, with two-thirds attributed to preventive measures and one third to salvage.

2.6 It should be noted that the definition of "preventive measures" has been amended by the 1992 Protocol to the Civil Liability Convention to include also measures taken when there was a grave and imminent danger of pollution damage.

3 International Convention on Salvage, 1989

3.1 The International Convention on Salvage, which was adopted under the auspices of IMO in 1989, will enter into force on 14 July 1996. The provisions of that Convention have been incorporated, however, in standard forms of salvage agreement, such as Lloyd's Open Form.

3.2 Traditionally, the maritime law on salvage was based on the principle of "no cure, no pay". The salvor would thus be able to receive a reward only to the extent that he was successful in salving the property at risk (ie the ship and the cargo).

3.3 The salvage regime based on the 1989 Salvage Convention has changed the international law on salvage in several important respects. Under the Convention, "salvage operation" means any act or activity undertaken to assist a vessel or other property in danger in navigable waters or any other waters whatsoever. The salvor has a duty to the owner of the vessel or other property in danger. The Convention also imposes an obligation on the salvor to exercise due care to prevent or minimize damage to the environment. It contains provisions for the payment of remuneration to the salvor who has taken such measures, regardless of whether he has succeeded in saving property or failed to do so. The relevant provisions are set out in Articles 12, 13 and 14 which read:

Article 12

Conditions for reward

1. Salvage operations which have had a useful result give right to a reward.

2. Except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result.

3. This chapter shall apply, notwithstanding that the salved vessel and the vessel undertaking the salvage operations belong to the same owner.

Article 13

Criteria for fixing the reward

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

(a) the salved value of the vessel and other property;

(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;

(c) the measure of success obtained by the salvor;

(d) the nature and degree of the danger;

(e) the skill and efforts of the salvors in salving the vessel, other property and life;

(f) the time used and expenses and losses incurred by the salvors;

(g) the risk of liability and other risks run by the salvors or their equipment;

(h) the promptness of the services rendered;

(i) the availability and use of vessels or other equipment intended for salvage operations;

(j) the state of readiness and efficiency of the salvor's equipment and the value thereof.

2. Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salved values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.

3. The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salved value of the vessel and other property.

Article 14

Special compensation

1. If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.

2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.

3. Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage

operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).

4. The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.

5. If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.

6. Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

3.4 Under Article 14 measures taken to avoid or minimize damage to the environment are remunerated by awarding "special compensation", if, and to the extent that, these measures cannot be sufficiently remunerated by a traditional salvage award under Article 13.

3.5 Traditional awards under Article 13 are borne by the owners of the property salved, and in practice they are normally paid by underwriters insuring ship, cargo and freight. This remains the case despite the fact that, when such awards are assessed, they may be 'enhanced' to reflect any success in avoiding damage to the environment. Awards of special compensation are borne by the shipowner alone, and this liability is expressly insured under the standard form of P & I cover for pollution risks.

3.6 It should be noted that awards under Article 13 and awards under Article 14 are interlinked. It appears that these two types of awards would have to be examined together for the purpose of determining which criteria for admissibility should be applied by the IOPC Fund.

4 Position of the shipowners and their respective P & I Clubs involved in the *Aegean Sea* and *Braer* cases

4.1 In the discussions with the Director, the shipowners involved in the *Aegean Sea* and *Braer* incidents and their P & I Clubs (the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited and Assuranceföreningen Skuld), respectively, have taken the view that the payments which they have made to the contractors constitute the reasonable cost to them of measures taken to prevent or minimize pollution damage, and that these payments accordingly give rise to admissible claims for preventive measures under the Civil Liability Convention and the Fund Convention. More particularly they have maintained:

(i) the payments made to the contractors are admissible under Article V.8 of the Civil Liability Convention as a claim ranking equally with all other claims against the shipowner's limitation fund; and

(ii) to the extent that the shipowner's claim suffers pro rata reduction under the Civil Liability Convention he is entitled, along with all other claimants with admissible claims, to be compensated under the Fund Convention.

4.2 In both the *Aegean Sea* and the *Braer* cases, the claims under the Civil Liability Convention and the Fund Convention are being made not by the salvage contractors who undertook the relevant measures, but by the parties who engaged them and paid for their services. The contractors were entitled to be paid for their services by those who engaged them in accordance with the terms of the contract. The shipowners and their Clubs now seek compensation under the Conventions on the basis that the payments they have made represent the cost of the measures which were taken.

4.3 The shipowners and the P & I Clubs have raised the question of whether the proper approach should differ according to whether the services were contractual or non-contractual. They have mentioned that it has been maintained that this should not make any difference to the amount of

compensation, if any, to be paid under the Civil Liability Convention and the Fund Convention. Those favouring this approach have argued that if this was the starting-point, it might be thought irrelevant whether the claim was made by the salvor himself, or whether it was made by a shipowner who contracted with him; and it might be thought necessary to disregard the terms of any contract between them.

4.4 The shipowners and the P & I Clubs have stated that they do not agree with such an approach which would entail, in effect, treating the shipowner as if he were subrogated to the rights which the contractor would have had under the Conventions. They have argued, however, that there is in fact no compelling reason for giving equal treatment to contractual and non-contractual services, and that serious problems are involved in a subrogation analysis. They have maintained that the better analysis was that the claimant who engaged the contractor was making a claim in his own right, in the same way as if he had hired any other type of services in response to the incident.

4.5 The shipowners and the P & I Clubs concerned have suggested that it would be appropriate to develop and refine the "primary purpose test" and the "dual purpose test" in cases where the operations have been carried out pursuant to a contract which includes the provisions of Articles 13 and 14 of the 1989 Salvage Convention. They have argued that experience has shown that it can be very difficult to apply these tests in their present form in many cases. They have referred to the preparatory work carried out within the Comité Maritime International (CMI) leading up to the adoption of the 1989 Salvage Convention.

4.6 The shipowners and the P & I Clubs involved have suggested that a more appropriate approach would be to link the criteria of admissibility to the types of awards rendered. In their view, there are good reasons for adopting a solution for determining the admissibility of claims under the Civil Liability Convention and the Fund Convention by considering claims relating to awards rendered under Article 13 of the Salvage Convention as costs incurred for salvage and special compensation awards under Article 14 of that Convention as costs incurred for prevention of pollution.

4.7 The shipowners and the P & I Clubs have mentioned that this solution has been adopted in the so-called Funding Agreement between the International Group of P & I Clubs, the Institute of London Underwriters and Lloyd's Underwriters' Association.

4.8 They have pointed out that the same approach forms the basis of the 1990 revision of the York-Antwerp Rules. Under Rule VI as amended in 1990, expenditure allowed in general average should include any salvage remuneration in which the skill and efforts of the salvor in preventing or minimizing damage to the environment, such as that referred to in Article 13.1(b) of the Salvage Convention, have been taken into account, whereas special compensation paid by the shipowner under Article 14 of that Convention should not be allowed in general average.

5 Director's preliminary analysis of the problem

5.1 The Director takes the view that the "primary purpose test" and the "dual purpose test" have proved to be useful and workable. Nevertheless, he agrees with the shipowners and P & I Clubs involved in the *Aegean Sea* and *Braer* incidents that the entry into force of the 1989 Salvage Convention and the inclusion of the terms of that Convention in standard forms for salvage contracts justify an examination by the IOPC Fund of the issues involved. The above-mentioned amendment to the definition of "preventive measures" in the 1992 Protocol to the Civil Liability Convention also makes such an examination appropriate.

5.2 The submission by the shipowners and the P & I Clubs was only received on 6 September 1995. In view of the importance of the legal issues involved, the Director is not able to present to the Executive Committee at this session a study which would enable the Committee to decide on the policy to be followed by the IOPC Fund in the future.

5.3 At this stage, the following points may be worth noting.

5.4 An important point raised by the shipowners and the P & I Clubs is whether the criteria for admissibility should differ according to whether the services were contractual or not. Their view is that contractual and non-contractual services should be dealt with differently. The question is whether this approach is appropriate.

5.5 The approach to the admissibility of claims proposed by the shipowners and P & I Clubs involved is that amounts of special compensation awarded under Article 14 would be admissible for compensation under the Civil Liability Convention and the Fund Convention whereas amounts awarded under Article 13 would not be admissible. The consequences of adopting such a solution would have to be considered very carefully. For example, as has been recognised by the shipowners and the Clubs, a solution along these lines might nevertheless make it possible for those who have paid the amount fixed in an award under Article 13 (such as cargo owners) to seek recovery in some cases against the IOPC Fund under the Fund Convention.

5.6 The IOPC Fund's policy so far has been to examine each case on its own merits, applying the "primary purpose test" and the "dual purpose test", as appropriate. The question is whether it would be possible to find, within the parameters of the applicable provisions of the Civil Liability Convention, a solution which could be applied in all cases and would lead to an equitable result for all parties involved.

5.7 In view of the importance of the issues dealt with in this document, the Director proposes that he be instructed to make an in-depth study of these issues to be considered by the Executive Committee at a future session.

6 Action to be taken by the Executive Committee

The Executive Committee is invited to:

(a) take note of the information contained in this document; and

(b) give the Director such instructions in respect of the issues involved as the Committee may deem appropriate.