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INCIDENTS INVOLVING THE IOPC FUND

BRAER INCIDENT

Note by the Owners
and Assuranceforeningen Skuld

1 Introduction

1.1 This Note is submitted jointly by the owners of the *Braer* and by Assuranceforeningen Skuld, the P & I Club involved. It sets out their position on the issue whether the shipowners are entitled to limit their liability for pollution damage caused by the incident.

1.2 The Club appreciates the opportunity to submit this document and hopes it will assist the Executive Committee to have a statement of the Club's and the owner's response to the opinions set out in document FUND/EXC.46/2.^{<1>}

1.3 Unfortunately the Club must state its profound disagreement with the technical advice on which the Secretariat's current assessment is based. This advice is seriously inconsistent with the results of the very thorough investigations into this incident carried out by the flag and coastal states involved. The Fund's experts have not addressed these differences nor explained the reasons for them.

1.4 This document has been prepared in consultation with the technical and legal experts advising the Club and the owners. There is a close similarity between Scottish and English law on this subject, and advice has been obtained not only from lawyers in Scotland but also from specialist maritime lawyers in London with a wealth of experience in investigating shipping casualties.^{<2>} These lawyers,

<1> References in this document to the Club or the owners include in each case both of these parties, unless the context otherwise requires.

<2> The same lawyers have been acting in a similar capacity on behalf of the owners in and P & I Clubs involved in the *Haven* and *Aegean Sea* incidents.

together with the technical experts advising the Club and the owners, arrived in Shetland to commence their investigations within hours of the casualty. They were closely involved in the interviews of the master and crew and in the official inquiries which took place.

2 The causes of the grounding - summary

The causes according to the Club and the owners

2.1 In the opinion of the Club, the causes of the grounding are fully and correctly stated in the detailed findings of the official Inquiries, *i.e.* in the Report of the Marine Accident Investigation Branch of the UK Department of Transport (MAIB), and in the Report of Inquiry of the Commissioner of Maritime Affairs, Republic of Liberia.

2.2 The "immediate" cause of the grounding as stated in the reports was the contamination of the ship's diesel oil supply resulting in loss of main engine propulsion and engine room power. The further causes contributing to the casualty are identified in the full statement of the findings of the Inquiries, and relate in the main to the omissions of the master and crew in failing to prevent the ingress of seawater or discover the contamination at an earlier stage.

2.3 The findings of the official Inquiries contain no suggestion that the incident was (or might possibly have been) caused or contributed to by any factors for which personal responsibility lay with the owners, or with any person who might be considered the *alter ego* of the owners.

2.4 On the basis of these findings it is wholly impossible to contend that the incident resulted in any way from the actual fault or privity of the owner.

The causes of the grounding according to the Fund's experts

2.5 The causes of the grounding according to the Fund's experts are set out in paragraphs 4.17-18 of document FUND/EXC.46/2. There is no disagreement concerning the immediate cause which they identify, namely the contamination of diesel oil. Nor is there any significant disagreement that the contamination might have been avoided if the Master had considered more seriously the possibility of heaving to.^{<3>}

2.6 In the remainder of paragraphs 4.17-18 the Fund's experts attribute blame for the grounding to the owners on the basis of their opinion that -

- (i) the ship was in an unseaworthy condition; and
- (ii) the Master's decision not to heave to was "possibly influenced" by the condition of the ship.

2.7 The Club and the Owners strongly disagree with both of the above statements. They are irreconcilable with the conclusions of the official Inquiries, and there is no evidence to support them. The Club's response to these allegations is set out in more detail in paragraph 7 below.

3 Background information

3.1 The appropriate response to this incident called for close cooperation between the Club and the IOPC Fund. A joint claims office was established in Lerwick, Shetland, within a few days of the grounding.

<3>

Although there is no guarantee that these heavy pipes could have been successfully re-secured or jettisoned, the difficulty of such operation being recognised by the MAIB in paragraph 13.5 of its Report.

3.2 Very soon after the incident it was clear that the aggregate of admissible claims would considerably exceed the amount of any limitation fund established under CLC. Consideration was therefore given at an early stage to the possibility of paying this fund into Court in Scotland. However it was considered, with the support of the Fund, that the commencement of limitation proceedings at that stage would risk creating an unfortunate impression among claimants, and potentially aggravate the magnitude of claims.

3.3 In a number of cases there were powerful reasons for making urgent advance payments to claimants who would otherwise imminently suffer serious financial hardship. The Club provided the funds required for these speedy payments, which were made through the Joint Claims Office. The IOPC Fund did not have funds available at such short notice to make these payments.

3.4 The Club considered it entirely appropriate to co-operate as fully as possible with the Fund in its consideration of the limitation issue. After learning that the Fund had approached the Liberian authorities for copies of background documents, the Club and the owners offered and gave to the Fund all the relevant documentation available to them. The great majority of the documents were supplied to the Fund in December 1994 (supplemented in August 1995 by a few further documents of no relevance to the issues now under discussion). This material was supplied on the understanding that, in the unlikely event of the Fund's advisers entertaining any concerns regarding the right of limitation, such concerns would be explained to the Club and an opportunity given to provide any relevant assistance.

3.5 On the basis of the official Inquiry reports and their own investigations, the Club and the owners took it for granted that there was unlikely to be any serious challenge of the right of limitation. It was therefore with some concern and surprise that they learned from the Fund, in mid-October 1995, that it had received technical and legal advice substantially as set out in document FUND/EXC.46/2. They have appreciated the opportunity to discuss this advice on a 'without prejudice' basis, but regret very much that in the time available it has not been possible to reach a consensus.

4 Legal framework

4.1 The legal advice obtained by the Club is that there are, for present purposes, no material differences on the subject of limitation of liability between the law of Scotland and that of England, with which many delegates will be familiar.

4.2 The Club does not entirely agree with the observation that "the expectations of shipowners and insurers that liability could be limited in most circumstances were not fulfilled."⁴ This may possibly be a fair comment on the outcome of cases referred to the courts, and it is of course true that steps have been taken to strengthen the right of limitation. However it remains the case that only in a small minority of incidents have grounds normally existed for a serious attempt to be made to challenge the shipowner's right of limitation.

Onus of proof

4.3 It is not accepted that the onus of proof is on the owner to demonstrate the absence of conduct barring the right of limitation. There is room for an opposite view, and the terms of the Convention are to be taken into account in deciding any ambiguity on this point. There is a body of opinion that Articles V.1 and V.2 of the Civil Liability Convention are phrased in manner which implies that the onus of proof lies on the party seeking to challenge the right of limitation.

4.4 However for practical purposes it is may not be necessary to debate the legal onus of proof, given the evidence which is available and the investigations which have already taken place. It is

⁴ FUND/EXC.46/2, para 6.2(e).

certainly the Club's position that when a party challenging the right of limitation puts forward a case which is irreconcilable with the results of detailed official investigations, there is for all practical purposes an obvious burden on that party to explain and justify the differences. This is particularly so when that party has not had access to all the evidence available to the investigating authorities, such as the opportunity to interview witnesses.

The 'alter ego' of the owners

4.5 There is no significant difference of opinion on this issue: the owners are content with the formulation that "fault must be identified on the part of a director of the owners or of the management company."^{<5>} Clearly any operational faults on the part of personnel such as the master, or the superintendent engineer sailing on board the ship at the time, would not be sufficient for this purpose.^{<6>}

Causation

4.6 It appears very likely that disagreement may exist on the nature of the link of causation required between an alleged fault and the escape or discharge of oil. The owner does not contend that the issue depends solely on the "immediate" cause of the incident, to the exclusion of any other contributory cause. However it is well established that for the purposes of limitation, the alleged fault must be a "substantial" cause, and not simply a *causa sine qua non*.^{<7>}

4.7 A similar approach has been taken by the Fund to the link of causation required for the admissibility of claims. The Seventh Intersessional Working Group took the view that "a claim for compensation would not be admissible on the sole criterion that the loss or damage would not have occurred but for the oil spill in question."^{<8>}

4.8 The principal hallmark of a *causa sine qua non* is that it operates only in a limited negative sense - as a cause without which, or "but for" which, the incident would not have occurred. The conclusions of the Fund's Scottish lawyers are founded upon technical advice which merely identifies alleged causes "but for" which the incident might not have happened.

5 General information concerning the ship and the owners

5.1 The Club and indeed the Owners wholeheartedly support any move to assist in driving substandard ships from the world's seas, but the *Braer* was in no sense such a ship. Both her managers and the ship herself were well regarded in the oil industry. At the time of her loss the *Braer* was vetted and fully approved by major oil companies including Exxon, Shell, BP, Mobil, Total, Petrofina, Statoil and several others.^{<9>}

5.2 The ship was fully in Class with DNV. In the 12 months prior to the casualty her trading pattern had involved regular voyages between Northern Europe and the US/Canadian East Coast.

<5> FUND/EXC.46/2, para 6.2(d).

<6> The superintendent engineer is described in some documents as a 'Vessel Manager', this being the description which B+H employed. However there is no doubt that he belonged to the owners' technical rather than managerial staff, and he is referred to as a superintendent in the MAIB report. At the time of the incident he was sailing with the vessel on a familiarization trip.

<7> See for example *The Dayspring* [1968] 2 Lloyd's Rep 204, and *The England* [1973] 1 Lloyd's Rep 373.

<8> See the report of the Working Group (FUND/WGR.7/21;FUND/A.17/23).

<9> Other oil companies to whom the vessel was acceptable included Ultramar, BP France, Petro Canada, Fina, Lagoven, Maraven, Esso, Citgo, together with various other oil traders.

Consequently she had inevitably been subject to port state inspections on four occasions during this period in Europe, Canada and the United States. The results of all these inspections was satisfactory. Following a Flag state inspection at Sullom Voe in June 1992 she was again inspected in Canada by her charterers Ultramar.

6 The official Inquiries

6.1 An important question raised by this incident concerns the weight to be attached to the findings and conclusions of official investigations into an incident carried out by the flag and coastal states.

6.2 It is of course not the function of an official Inquiry to determine whether or not a shipowner is entitled to limit his legal liability. However, if there were any grounds in this case for a court to deny a decree of limitation, the facts justifying such a conclusion would naturally have been of central importance in the official Inquiries. The terms of reference of the MAIB officers were to investigate -

"the causes of the engine failure and the actions which were taken both on board the vessel and ashore up to the time that the vessel went aground."^{<10>}

Accordingly the mandate of the investigating officers was not simply to determine "the immediate cause" of the incident; they were also concerned with any other contributing causes, including blame or responsibility for them. These are set out in their detailed conclusions.

6.3 The Club does not suggest that the Fund is strictly bound by the results of the official Inquiries. Different states bring different degrees of expertise, experience and thoroughness to the conduct of such Inquiries into maritime casualties. The weight to be attached to their findings may also be affected in some cases by fresh evidence coming to light only after the official reports have been published.

6.4 At the same time, there are good reasons for attaching due weight to the findings of the official Inquiries in this case.

- (i) The investigating authorities both commenced their Inquiries at the scene of the incident within a day or two of its occurrence.
- (ii) The work of the Inquiries included 10 days of interviews with the Master and crew. The Fund's experts were not present at the investigations and have not had the advantage of seeing the relevant witnesses. It is also very doubtful whether these witnesses will take part in legal proceedings in Scotland, given that they have in the meantime dispersed to their homes in the Philippines and elsewhere.
- (iii) The above considerations are of much importance in this case when the statements of the crew are the primary evidence of the relevant events on board the ship. They are particularly vital in relation to the reasons for the Master's decision not to heave to.
- (iv) It does not appear that there is any relevant evidence which has been available to the Fund's experts, but not to the official Inquiries.
- (v) Both official Inquiries were carried out over a period of many months and their respective reports were both published in January 1994. The report of the MAIB is 76 pages long and that of the Republic of Liberia 32 pages long. The expertise and thoroughness with which both investigations were carried out is evident from the quality of the reports and the detail in which they are written.

^{<10>}

See letter from the Chief Inspector which is reproduced at the front of the Report.

- (vi) It will also be evident to anyone who participated in the official Inquiries that the investigating officers considered various aspects of the matter which, after close examination, were not found worthy of detailed discussion in the report.
- (vii) The United Kingdom is taking the leading role in the work which is being done to examine the possibility of closer cooperation between national investigating authorities and the IOPC Fund. The maritime administrations of the UK and the Republic of Liberia both have long experience in investigating shipping casualties. The results of their official investigations into this case are entitled to the greatest respect.

6.5 The views of the Fund's experts are based entirely on matters fully within the mandate of the official Inquiries, and they are irreconcilable with the conclusions reached. The experts have not focused attention on the differences between their findings and those of the official Inquiries, nor have they offered any explanation for these differences.

7 Technical issues

The Opinion of the Fund's expert that the vessel was unseaworthy

7.1 The conclusion of the Fund's expert that the *Braer* was unseaworthy on sailing from Mongstad runs entirely contrary to the findings of the MAIB and Liberian Inquiries and is based on supposition and speculation rather than the evidence. The MAIB devoted an entire section of its report^{<11>} to the subject of the vessel's seaworthiness and concluded that there was *no* evidence of unseaworthiness. In paragraph 18.12 of their conclusions^{<12>} they say that when the vessel sailed from Mongstad "she was structurally sound with no known significant defects". In paragraph 18.16 they conclude that "there was no evidence of neglect or lack of maintenance".

7.2 The Fund's expert focuses on two issues in support of his theory that the vessel was unseaworthy:

- (a) an allegation that the vessel was over-consuming Diesel Oil (DO) and had insufficient DO to reach Quebec on leaving Mongstad and
- (b) the condition of the "steam plant".

7.3 The expert's theory that the vessel was over-consuming DO is based solely on figures for the alleged consumption^{<13>} on the ballast leg prior to loading at Mongstad. He suggests a consumption figure of 89 MT DO for that trip (instead of his expected figure of 45.2 MT) and he speculates^{<14>} that this might be due either to consumption by the main engine *or* by the boiler. For unexplained reasons he concludes that the cause lay with the boiler. This ignores the evidence made available to him that -

- (a) there was a problem on this ballast leg with the fuel oil pump to No 4 main engine unit (which was completely rectified prior to sailing from Mongstad with new parts arranged by the vessel's Superintendent) and
- (b) there were *no* problems of any substance with the steam plant on this ballast leg.

<11> Section 6, at pages 30-34 of the report.

<12> Set out in the Annex 1 to FUND/EXC.46/2.

<13> Contrary to the expert's suggestion there is no evidence as to the source of the figures he relies upon for DO consumption - the engine log having been lost with the vessel.

<14> Para 4.5.

7.4 The high consumption of DO on the ballast leg to Mongstad is explained by the fact that the main engine was run (according to instructions from the former managers, for a period of about 36 hours) on DO due to a problem with the injector pump supplying FO to the No 4 unit of the main engine. This problem was properly addressed at Mongstad and eliminated prior to sailing. The vessel was not therefore over-consuming DO on departure from Mongstad. The vessel was *not* unseaworthy as the expert suggests nor is there *any* evidence that the Master or any of his crew were in any way concerned about the vessel's consumption of DO.

7.5 As for the allegations relating to the "steam plant", the expert's summary in paragraph 4 suggests the system was riddled with problems. This is extremely misleading. In short the system was experiencing 3 minor problems, all of which were being properly addressed and none of which justified any action other than to be permanently dealt with when the vessel was next taken out of service for routine maintenance work. (This was projected to take place after discharge of her cargo at Quebec).

7.6 The 3 problems were:

- (a) high chlorides were detected in the boiler water on leaving Mongstad; the crew were taking appropriate remedial steps and the MAIB rightly commented in their report that this would not have prevented the vessel sailing from Mongstad (this accords with the very firm technical advice received by the Club on this issue),
- (b) a minor problem with the boiler water feed control (rectification of which by the Third Engineer was described by the MAIB as falling "within the parameters of normal watchkeeping duties"^{<15>}) and
- (c) the economiser was scheduled for cleaning (which not even the Fund's expert would suggest on its own warranted stopping the vessel at Mongstad).

7.7 The condition of the steam plant did not render the vessel unseaworthy nor is there *any* evidence that it caused the Master or any of his crew any undue concern.

The Opinion of the expert that "unseaworthiness" might possibly have influenced the Master's decision not to heave to

7.8 The Master's decision not to heave to in an attempt to attend to the pipes was explored in considerable depth during the 10 days of interviews of the crew by the two government enquiries immediately following the grounding. The evidence was clear: the Master decided it was too dangerous for his men to venture onto deck in an attempt to attend to the pipes. The vessel was rolling viciously, considerable water was being shipped on deck, and the rolling pipes were of such a weight as to pose a very real threat to any crew member willing to approach them.

7.9 Whatever view is taken of that decision - and after the event opinions have been voiced both supporting and criticising it - it was an operational decision taken by the Master without any input from the senior shoreside personnel of either the managers or owners of the vessel. (This would of course be an essential ingredient if this decision is to be relied upon by the Fund in a challenge to the owners' entitlement to limit its liability)^{<16>}.

7.10 The Fund's experts speculate that the decision might have been influenced by a concern about a shortage of DO and a reluctance therefore to use DO to heave to. They admit that this is

<15> Para 11.4 of the MAIB Report (and echoed in Para 18.8 which is reproduced in Annex 1).

<16> Accepted in Para 6.2(g) by the Fund's legal advisers.

speculation,^{<17>} yet they still urge the Fund to challenge the owners' entitlement to limit notwithstanding the absence of any evidence to support their allegation.

7.11 The expert's statement^{<18>} that the Master's explanation for not heaving to due to concern for the safety of his crew is "not acceptable in terms of seamanship" suggests he does not believe the evidence given to the MAIB by the Master (and that he is therefore justified in speculating about other possible factors that might have influenced the Master). However, the expert ignores the findings of the MAIB^{<19>} that "the danger that these loose pipes posed to the integrity of the fuel tank air pipes was not appreciated by him [the Master] or anybody else on board, either at this time or later". The correctness of the MAIB's finding on this point is confirmed by the inability of the Master (or anyone else on board) to identify the source of the contamination once it occurred. Had they in fact foreseen that the loose pipes might lead to an ingress of water they would not later have had any difficulty in identifying the source of ingress.

7.12 The fact that the Master did not turn his mind to the possibility that the loose pipes might cause catastrophic damage explains completely the Master's decision not to risk the safety of his men by sending them on deck. There is no need to look elsewhere for an alternative, speculative explanation.

7.13 The speculation about possible concern regarding consumption of DO can in any event be shown to be entirely misplaced:

- (a) the cause of the high DO consumption on the previous ballast leg had been completely rectified prior to sailing (see 7.6 above);
- (b) the expert suggests that 89 MT DO was consumed on the ballast leg and that this was excessive but the vessel sailed from Mongstad with 179 MT DO -more than *twice* the quantity consumed on the ballast leg;
- (c) contrary to the expert's opinion, there was an ample supply (and reserve) of DO on board; and
- (d) most telling of all, the Master and Chief Engineer demonstrated on several occasions a willingness to run the main engine or the boiler on DO whenever operational reasons required it.

8 The advice of the Fund's Scottish legal advisers

8.1 The legal advice from the Fund's Scottish lawyers on the owner's right of limitation may be divided into two parts:

- (i) conclusions based on the advice of the Fund's technical experts concerning the cause of the grounding, as stated in paragraph 4 of document FUND/EXC.46/2; and
- (ii) conclusions based on other theories developed by the lawyers in paragraph 6 of the document.

(i) Advice based on conclusions in paragraph 4

8.2 The advice of the Fund's technical experts, as set out in paragraphs 4.17-18, is that the

<17> Again accepted by the legal advisers in Para 6.2 (h).

<18> Para 4.14.

<19> Para 18.6 of the MAIB Report.

master's decision to heave to was "possibly influenced" by the condition of the ship. The legal significance of this is developed by the Scottish lawyers as follows:

"... but for the defective plant it would have been an obvious precaution to heave to thereby permitting seamen to secure the loose pipes. Clearly there is an element of speculation as to why nothing was done about the pipes."^{<20>}

This validity of these statements depends very much on the validity of the technical advice on which they are based. This technical advice is disputed for all the reasons set out in para 7 above. The following further observations are made with reference to the above-quoted conclusion -

- (i) It is not accepted that it was an "obvious precaution" to heave to. The master exercised a judgement that it was unacceptably dangerous to send the crew out on deck. Whilst that judgement has been criticized, there is no support for the conclusion statement that this was an "obvious" course of action to take.
- (ii) There is no evidence to justify the speculative statement that the master would have considered this course of action to be obvious "but for" the alleged defective condition of the ship.
- (iii) There is no evidence to justify the statement that heaving to would have permitted the loose pipes to be secured. The MAIB report states -

"...with the vessel rolling heavy seas from the port side, it was clearly out of the question to send the crew out to try to secure the pipes."^{<21>}

Even after heaving to -

"Re-securing the pipes sufficiently well to withstand a resumption of the passage in those weather conditions would have been extremely difficult..."^{<22>}

- (iv) There is certainly no justification for the statement that -

"...there is an element of speculation as to why nothing was done about the pipes."

The official investigations made very specific findings as to the reason for this, viz the master's failure to appreciate the extent of the danger presented to his ship by the loose pipes rolling on deck.^{<23>}

- (ii) *Conclusions based on other theories*

8.3 The Fund's Scottish lawyers express the opinion that -

"it was the drop in steam pressure and the resultant lowering of the temperature of the fuel oil which caused the decision to switch the main engine to diesel...Had it been unnecessary to switch to diesel at this stage, the technical experts conclude that the grounding would not have occurred."^{<24>}

<20> FUND/EXC.46/2, para 6.2(h).

<21> MAIB Report para 13.5.

<22> *Ibid.*

<23> MAIB Report paras 18.6-7.

<24> FUND/EXC.46/2, para 6.2(h).

8.4 The above remarks are subject to the following objections -

- (i) They ignore the conclusions of the MAIB (which are fully supported by the Club's technical consultant) that "the repairs to the control system of the auxiliary boiler, the resultant lowering of steam pressure and the changing of the main engine operation from heavy fuel oil to diesel oil all fell within normal watchkeeping duties."^{<25>}
- (ii) The opinion ascribed to the technical experts relies at best on a *causa sine qua non* - the historical reason why the vessel happened to be sailing on diesel oil at the time of the casualty rather than fuel oil.
- (iii) In fact it cannot even be accepted as a *sine qua non*. Once seawater gained entry the complete loss of power became *inevitable*. The MAIB concluded^{<26>} that even if the main engine had not been running on DO at the time of the casualty -

"the vessel would have continued to operate until such time as the seawater contaminated DO in the service tank affected the running of the generator, when a 'blackout' would have occurred. It is not possible to predict when this 'blackout' would have occurred; *but there is no question that it would have happened sooner or later*. Whether the consequence of such a 'blackout' would have resulted in the vessel going aground is equally unpredictable" (Emphasis added).

It cannot therefore be accepted that "the grounding would not have occurred" but for the fact that the main engine was burning diesel rather than fuel oil.

9 Conclusions

9.1 The Fund's experts came to this investigation late in the day, more than two years after the casualty. Whilst they have had assistance from the Owners in their investigation, they simply have not had the same opportunity as the investigating officers from the MAIB or the Liberian Bureau of Maritime Affairs to consider the primary evidence, particularly the direct oral evidence of the crew and other witnesses.

9.2 Their conclusions must therefore rely unduly on conjecture and speculation in the absence of hard evidence to support their theories, and in such circumstances their theories should be given less weight than the findings of the detailed investigation of the two government Inquiries.

9.3 Large scale litigation between the owners and the Fund will regrettably be unavoidable if the Fund decides to challenge the owner's right of limitation.

9.4 It follows from what has been said that the Club and the owners do not accept that there has been any breach of SOLAS or any other grounds for denying indemnification relief.

9.5 This document has not addressed other issues discussed in FUND/EXC.46/2 concerning possible rights of recourse against the owners or the Club. In the opinion of the Club and the owners these issues simply do not arise.

^{<25>} Para 18.8 of MAIB Conclusions.

^{<26>} Para 11.7 of its Report.