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COMPENSATION
FUND 1971

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Agenda item 3

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INCIDENTS INVOLVING THE 1971 FUND

SEA PRINCE

Note by the Director

Summary:

The question has arisen whether certain claims filed in the limitation proceedings have become time barred vis-à-vis the 1971 Fund, namely a subrogated claim by the UK Club for payments made to various contractors, and claims by three village fishery associations as well as a claim by the Club for indemnification under Article 5.1 of the 1971 Fund Convention.

Action to be taken:

Decide whether these three claims have become time barred vis-à-vis the 1971 Fund.

1 Introduction

1.1 Claims against the shipowner, the insurer and the 1971 Fund become time-barred three years from the date when the damage occurred, unless the claimant has taken certain legal steps.

1.2 The question has arisen whether certain claims for compensation arising out of the *Sea Prince* incident, which occurred on 23 July 1995 in the Republic of Korea, and the shipowner/insurer's right to indemnification under Article 5.1 of the 1971 Fund Convention have become time-barred. This document deals with the issues involved.

2 Relevant provisions of the Conventions

The question of time bar is governed by Article VIII of the 1969 Civil Liability Convention as regards the shipowner and his insurer and by Article 6 of the 1971 Fund Convention as regards the 1971 Fund. Articles 7.4 and 7.6 of the 1971 Fund Convention are also of interest in this regard. These Articles read:

1969 Civil Liability Convention

Article VIII

Rights of compensation under this 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. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

1971 Fund Convention

Article 6

1 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. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.

2 Notwithstanding paragraph 1, the right of the owner or his guarantor to seek indemnification from the Fund pursuant to Article 5, paragraph 1, shall in no case be extinguished before the expiry of a period of six months as from the date on which the owner or his guarantor acquired knowledge of the bringing of an action against him under the Liability Convention.

Article 7.4

Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings instituted in accordance with Article IX of the Liability Convention before a competent court of that State against the owner of a ship or his guarantor.

Article 7.6

Without prejudice to the provisions of paragraph 4, where an action under the Liability Convention for compensation for pollution damage has been brought against an owner or his guarantor before a competent Court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the Court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgement rendered by the Court in such proceedings shall, after it has become final and enforceable in the State where the judgement was given, become binding upon the Fund in the sense that the facts and findings in that judgement may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.

3 Relevant provisions in Korean legislation

3.1 The 1969 Civil Liability Convention and the 1971 Fund Convention are implemented in Korean law by the Act for the Guarantee of Compensation for Oil Pollution Damage ("Oil Pollution Act").

3.2 Article 23 of the Oil Pollution Act reads in English translation:

Any person who has suffered oil pollution damage may claim against the IOPC Fund for the compensation provided for in Article 4.1 of the Fund Convention, in accordance with the provisions of the Fund Convention, in respect of the portion of the oil pollution damage for which such person has been unable to obtain compensation from the shipowner or the insurer.

3.3 The Oil Pollution Act does not contain any provisions on time bar. The Courts will therefore have to apply the provisions in the 1971 Fund Convention in this regard.

3.4 If an action against the shipowner or his insurer is pending, any party may notify the 1971 Fund of that action. In accordance with Article 26 of the Oil Pollution Act, Article 78 of the Civil Procedure Act applies to such notifications, which shall be made through service effected by the Court.

3.5 Of interest also is Article 37 of the Oil Pollution Act which reads in English translation:

Notification to the Fund of pending limitation proceedings, etc

(1) Where limitation proceedings are pending, the applicant for the limitation proceedings, anyone who is entitled to limit liability other than the applicant or any person who has intervened in the limitation proceedings may give the notification of the pending limitation proceedings to the Fund.

(2) Any person who wishes to make the notification provided for in the paragraph (1) shall submit to the court a document containing the items enumerated in Article 21 of the Act on the Limitation Proceedings for the Shipowner's Liability which is applied *mutatis mutandis* pursuant to Article 41.

(3) The court shall serve the document mentioned in the paragraph (2) upon the Fund.

4 Previous consideration of the time bar issue

4.1 According to Article 6.1 of the 1971 Fund Convention, there are two ways in which a claimant can prevent his claim from becoming time barred as regards the 1971 Fund, namely bringing legal action against the 1971 Fund or by making a notification to the Fund under Article 7.6. Such a notification shall relate to the proceedings in respect of that claim brought against the shipowner or his insurer.

4.2 The issue of time bar was considered in depth by the Executive Committee at its 40th session in connection with the *Haven* incident (document FUND/EXC.40/4). In that case, a number of claimants had presented claims in the limitation proceedings before the Court in Genoa (Italy) but had not notified the 1971 Fund under Article 7.6 of the 1971 Fund Convention. The 1971 Fund had intervened in the limitation proceedings. In the *Haven* case, the Executive Committee took the view that in order to prevent a claim from becoming time barred, a claimant had to bring legal action against the 1971 Fund or notify the Fund under Article 7.6, even if the Fund had intervened in the legal proceedings (document FUND/EXC.40/10, paragraphs 3.3.4, 3.3.8 and 3.3.12). This position has not been accepted by the Italian Courts.

5 Limitation proceedings in respect of the *Sea Prince* incident

5.1 In respect of the *Sea Prince* incident, the shipowner commenced limitation proceedings before the competent Korean Court in Suncheon on 30 May 1996. The limitation amount applicable to the *Sea Prince* is 14 million SDR (£11.9 million)^{<1>}. The limitation fund has not yet been constituted, and the court has not yet fixed the limitation amount in Won.

5.2 The 1971 Fund intervened in the limitation proceedings on 24 August 1996.

6 Claims under consideration

6.1 UK Club's subrogated claim for payments made to a number of contractors

6.1.1 On 27 August 1996 the shipowner filed a claim in the limitation proceedings relating to the payments made or to be made by him in respect of the costs associated with the work carried out for the removal of the ship and related operations and for the cost of certain clean-up operations. The claim was filed by the deadline fixed by the Court (28 August 1996). In March 1998 the UK Club reported to the Court that the Club had reimbursed the shipowner for the costs covered by the shipowner's claim and that the Club had therefore acquired the shipowner's rights by subrogation.

6.1.2 The UK Club's claim is composed of two elements. The Club has claimed on the basis of subrogation for payments made by it to mainly non-Korean contractors (including Smit Tak Ltd and Nippon Salvage Company) for US\$8 827 729 + ¥3 985 753, or approximately £5 330 000. The Club has also claimed on the basis of subrogation for reimbursements made to the shipowner for payments made by him to mainly Korean contractors for US\$22 076 954, corresponding to Won 24 031 688 854 + ¥357 214 (£13 270 000). Since the 1971 Fund has made an account payment to the Club of £2 million, the total amount of the UK Club's claim in the limitation proceedings is approximately £16.6 million.

6.1.3 During the summer of 1996 there was an exchange of correspondence between the UK Club and the 1971 Fund concerning the claim by the shipowner/Club. The UK Club presented significant supporting documentation. On the basis of a preliminary examination of the documents provided by the UK Club, in August 1996 the 1971 Fund made an advance payment to the UK Club of £2 million which corresponded to 25% of the assessed amount, the level at which the Fund's payments were fixed at that time. The UK Club acknowledged receipt of this sum on account in respect of claims against the Fund for payments made to various contractors. In April 1997 the UK Club gave further information on its claims. In a telefax of 11 February 1998 the 1971 Fund instructed its Korean lawyer to request postponement of the Court's decision on the assessment of the shipowner/Club's claim so as to enable the Fund and the shipowner/Club to reach an out-of-court settlement in respect of the claim.

6.1.4 The shipowner and the UK Club did not take legal action against the 1971 Fund. However, on 22 April 1996 the Korean court served documents concerning the limitation proceedings on the 1971 Fund's Korean lawyer, and this service was made in conformity with Article 37, paragraphs 2 and 3 of the Oil Pollution Act. The documents served did not make specific reference to the shipowner's and the UK Club's claims. The Fund later obtained copies of the claim documents from the Korean Court on its own initiative so as to be able to challenge the claim.

6.1.5 At a court hearing held on 1 July 1997 which dealt with the UK Club's claim, the 1971 Fund objected to the claimed amount on the ground that it was not supported by sufficient documentation.

<1> In this document, conversion into pounds sterling has been made on the basis of the rates of exchange as at 31 December 1998, ie £1 = 1.1747 SDR, £1 = US\$1.6638, £1 = ¥187.671 and £1 = Won 2000.66

6.1.6 In a decision dated 2 June 1998 (ie before the expiry of the three-year time period on 23 July 1998), the Court accepted the UK Club's claim for the amount claimed. The 1971 Fund was notified of this decision on 19 June 1998. The 1971 Fund lodged opposition to the decision, on the ground of lack of supporting documentation. The Court has not yet taken any decision on this opposition.

6.1.7 The UK Club has maintained that the fact that the Club presented its claim in the limitation proceedings and the Fund intervened in these proceedings was sufficient to prevent the claims from becoming time barred. The UK Club has stated that its Korean lawyer advised the Club that this would be the position under Korean law.

6.1.8 In the Director's view the situation in respect of the UK Club's claim is different from the situation in the *Haven* case. In the *Haven* case claimants brought legal action against the shipowner and the insurer and the 1971 Fund intervened in these proceedings, but no court decision on the claims was rendered before the expiry of the three-year time bar period. In the *Sea Prince* case the contractors did not take legal action because they had been paid by the shipowner/Club. It was therefore not possible in this case for the UK Club to notify the 1971 Fund of a legal action by the contractors against the shipowner or the Club. However, the Club did notify the Fund formally of the limitation proceedings.

6.1.9 In the Director's view, the notification to the 1971 Fund on 22 August 1996 should be considered as sufficient for preventing the UK Club's claim from becoming time barred against the 1971 Fund. In addition, the Director considers that in any event the notification of the Court's decisions on 19 June 1998 in respect of this claim should in the circumstances be considered as notification under Article 7.6 of the 1971 Fund Convention. The Director takes the view therefore that the claim is not time barred against the 1971 Fund.

6.2 Claims by three Village Fishery Associations

6.2.1 Three Village Fishery Associations have presented claims for loss of income in the limitation proceedings on behalf of their members. They have not brought legal action against the 1971 Fund, nor notified the Fund of the action against the shipowner. As mentioned above, the 1971 Fund has intervened in the limitation proceedings.

6.2.2 The claims were assessed by the 1971 Fund's and the shipowner/UK Club's experts at Won 3 548 390 (£1 700), Won 8 870 975 (£4 400) and Won 1 774 195 (£900), respectively. In May 1998 the 1971 Fund and the shipowner/UK Club made offers for settlements at these amounts which were considerably lower than the amounts claimed, but these offers were rejected.

6.2.3 In a decision dated 2 June 1998, the Court accepted the claims for the amounts offered by the 1971 Fund and the shipowner/UK Club. The 1971 Fund was notified of that decision on 19 June 1998. The claimants lodged oppositions to the Court's decision.

6.2.4 In the Director's opinion, the notification of the Court's decision in respect of these claims should be considered as a notification of the 1971 Fund under Article 7.6 of the 1971 Fund Convention of the claims against the shipowner and his insurer. For this reason, the Director takes the view that these claims are not time barred against the 1971 Fund.

6.3 Claim for indemnification of the shipowner

6.3.1 Under Article 5.1 of the 1971 Fund Convention, the shipowner/his insurer is entitled to indemnification of a portion of the limitation amount under certain conditions. In the *Sea Prince* case the indemnification amounts to £6 667 000 SDR (£5.7 million).

6.3.2 It will be recalled that at its 49th session the Executive Committee considered various issues relating to the cause of the *Sea Prince* incident. The Committee decided that the 1971 Fund would not be relieved by virtue of these issues of its obligation to indemnify the shipowner under Article 5 of the 1971 Fund Convention (document FUND/EXC.49/12, paragraph 3.7.10).

6.3.3 The UK Club has in discussions with the 1971 Fund referred to the question of indemnification. However, the shipowner/UK Club did not take legal action against the 1971 Fund in respect of the claim for indemnification before the expiry of the three year time bar period. The question is whether the shipowner/UK Club have, or should be considered to have notified the 1971 Fund of this claim in the manner set out in Article 7.6 of the 1971 Fund Convention.

6.3.4 The UK Club has taken the view that the Club's claim in the limitation proceedings would from a time bar point of view cover also the claim for indemnification. Consequently, for the reasons set out in paragraph 6.1.7, the UK Club has maintained that the claim for indemnification is not time barred.

6.3.5 In the Director's view there is a difference between a claim for compensation and a claim for indemnification. Claims for compensation can be brought in the limitation proceedings pursuant to the 1969 Civil Liability Convention. Claims for indemnification do not fall under the 1969 Civil Liability Convention and therefore cannot be filed in limitation proceedings, but can only be brought against the 1971 Fund under the 1971 Fund Convention. For this reason, the Director does not agree with the UK Club that the Club's claim in the limitation proceedings would cover also the indemnification claim, although it is recognised that the indemnification payable by the 1971 Fund in this case would relate to payments made by the shipowner/UK Club for costs covered by the subrogated compensation claim in the limitation proceedings.

6.3.6 As the claim is one of indemnification, the UK Club could not have not notified the 1971 Fund of proceedings against the shipowner and his insurer concerning that claim. However, Article 6.1 of the 1971 Fund Convention refers also in respect of indemnification to the possibility of making a notification under Article 7.6 which in its turn refers to actions under the 1969 Civil Liability Convention. It appears therefore that the most reasonable interpretation of Article 6.1, read together with Article 7.6, is that the notification made by the UK Club through the Court on 22 April 1996 and the notification on 19 June 1998 of the Court's decision prevented the indemnification claim from becoming time barred.

7 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document; and
 - (b) to decide whether the following claims are time barred:
 - (i) UK Club's subrogated claim;
 - (ii) claims by three Village Fishery Associations; and
 - (iii) UK Club's claim for indemnification under Article 5.1 of the 1971 Fund Convention.
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