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COMPENSATION
FUND 1971

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Agenda item 4

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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 should be treated as time-barred vis-à-vis the 1971 Fund.

1 Introduction

1.1 At its 60th session, the Executive Committee considered certain issues arising out of the *Sea Prince* incident (Republic of Korea, 23 July 1995), namely whether a claim by the shipowner's P & I insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited (UK Club), for payments made to certain contractors filed in the limitation proceedings had become time-barred vis-à-vis the 1971 Fund.

1.2 In view of the complex legal arguments involved and the limited time which had been available to delegations to examine the issues, the Executive Committee decided to defer to its 61st session further consideration of the UK Club's subrogated claim, as well as claims by three village fishery associations and a claim by the UK Club for indemnification under Article 5.1 of the 1971 Fund Convention (document 71 FUND/EXC.60/17, paragraph 3.5.12).

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, each party to the action 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 are to 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.

3.6 Article 21 of the Act on the Limitation Proceedings for the Shipowner's Liability reads in English translation:

When the limitation court orders the commencement of the limitation proceedings, the court shall immediately issue a public notice containing the following information provided, however, that the court may omit to issue a public notice if the applicant shows with supporting evidence that there do not exist any interested persons except persons other than the applicant who are known to the applicant and who have been reported by the applicant to the limitation court:

- a. Docket number and name of the case
- b. Name, business name and address of the applicant and any person who is entitled to limit liability other than the applicant, and the relationship between these persons and the vessel causing the accident, the salvaging vessel or the salvor;
- c. Conclusion of the order;
- d. Name and address of the administrator;
- e. The limit of liability, the amount deposited or business name of the deposit guarantor;
- f. The period to report or investigate claims subject to limitation;
- g. Request by the limitation court for potential claimants to report to the Court any claims against the applicant and/or against any person who is entitled to limit liability other than the applicant;
- h. Statement that foreign claimants having no place of service in Korea shall appoint a person resident in Korea who is to be served and notify the court of the person so appointed; and
- i. The date of the order.

4 Previous consideration of the time bar issue

4.1 According to Article 6.1 of the 1971 Fund Convention, there are two ways to prevent a claim for compensation under Article 4 and a claim for indemnification under Article 5 from becoming time-barred as regards the 1971 Fund, namely by an action brought against the 1971 Fund or by a notification made to the Fund under Article 7.6.

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 and 3.3.8). This position was not 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 UK Club's claims for payments made to a number of contractors

6.1 Consideration at the Executive Committee's 60th session

6.1.1 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.

6.1.2 The facts were set out in a note by the Director as follows (document 71FUND/EXC.60/6, paragraphs 6.1.1 - 6.1.6):

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.

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

<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

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.

The shipowner and the UK Club did not take legal action against the 1971 Fund. However, on 22 April 1996^{<2>} 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.

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.

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.

6.1.3 In the above-mentioned note the Director made the following analysis:

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.

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.

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.

<2> The correct date is 22 August 1996.

6.1.4 The discussions at the Executive Committee's 60th session were reflected in the Record of Decisions as follows (document 71FUND/EXC.60/17, paragraphs 3.5.4 - 3.5.12):

Some delegations expressed doubts as to whether the UK Club's subrogated claim would have been considered time-barred in their jurisdictions. It was suggested that the views of the Fund's Korean lawyer should be obtained as to the position of Korean law on this issue.

Several delegations made the point that the question was one of implementation of the 1971 Fund Convention and that the national law of the country concerned was not relevant. They emphasised the importance of a uniform application in all Member States of the time bar provision in the Conventions so as to ensure equal treatment of claimants. Other delegations expressed the view that it was necessary to consider the relationship between the Conventions and the applicable national law.

Several delegations stated that in their view the claim by the UK Club was time-barred since the Club had neither taken legal action against the 1971 Fund nor notified the Fund in accordance with Article 7.6 of the 1971 Fund Convention. They took the view that the notification to the Fund on 22 August 1996 by the Court through the serving of the document concerning the limitation proceedings did not fulfil the requirements of Article 7.6, since it did not constitute a notification of the individual claims for compensation which the Club had acquired by subrogation. They also considered that the notification to the Fund on 19 June 1996 of the Court's decision in respect of the Club's claim could not be considered as a notification for the purpose of Article 7.6.

One delegation drew attention to the fact that since the UK Club had acquired the contractors' rights by subrogation, the Club was in the same position as the contractors who had been compensated and was therefore under an obligation to notify the 1971 Fund of each subrogated claim individually.

Some delegations recognised the importance for the Fund of being consistent in the application of the time bar provisions, but nevertheless took the view that there was a difference between the situation in the *Haven* case and the facts of this case.

One delegation drew attention to the fact that Article 7.6 of the 1971 Fund Convention referred only to one type of legal action, namely an action against the shipowner or his insurer. In the view of that delegation it would be appropriate to consider other scenarios to establish whether a claimant in all other cases would have to take legal action against the 1971 Fund. It was argued that it would be appropriate to consider not only the wording of the relevant Articles of the Convention but also the rationale behind those Articles. That delegation noted that the documents relating to the limitation proceedings had been served on the Fund not by the UK Club but by the Court and that those documents did not identify the claims. That delegation drew attention to the fact that the notification of the Court's decision did not give the 1971 Fund the possibility of intervening at a sufficiently early stage in the proceedings. For these reasons, in that delegation's view, the Club had not fulfilled the requirements laid down in Article 7.6.

One delegation argued that the UK Club's claim was time-barred on the grounds that the notification on 19 June 1998 by the Court after the decision on the UK Club's claims could not be regarded as a notification under Article 7.6 because the 1971 Fund had not been put in a position effectively to intervene as a party to the proceedings.

It was pointed out by a number of delegations that the UK Club was well aware of the intricacies of the Conventions and that the Club had access to legal expertise.

6.2 The UK Club's position

In the light of the discussions at the Executive Committee's 60th session, the UK Club has presented its position as follows:

The clear advice of the UK Club's Korean lawyers is that the Club's claims are not time-barred under Korean law. Further, the Club questions whether a time bar issue can or should properly be raised in view of the arrangements for handling and paying claims agreed between the Fund and the Club from the outset.

The fundamental objective of the Convention system is to make rapid payments of compensation for claims which are admissible. The total amount of the claims notified in this incident quickly came to exceed the maximum compensation available from the 1971 Fund. Although experience suggested that a realistic estimate of the admissible claims would be well within the 1971 Fund limit, the Executive Committee sought to protect the 1971 Fund's position by authorising only pro rata payments, until it was clear in February 1998 that full payments could be made.

Where claims exceed the 1971 Fund's limit, also the shipowner and the Club would only be obliged legally to pay a pro rata proportion of each claim and could justify following the same policy as the Executive Committee. Consistent with the policy of a rapid payment of compensation, an arrangement was agreed with the 1971 Fund whereby the shipowner and the UK Club would pay the initial most pressing claims up to the level of the shipowner's limit under the 1969 Civil Liability Convention. It was agreed that the 1971 Fund would reimburse the shipowner and the Club to the extent authorised by the Executive Committee, at the early stages 25%. The only conditions required by the Fund to enable payment to the shipowner and UK Club to take place was that the shipowner had commenced limitation proceedings, which he did on 30 May 1996, and that the claims had been approved by the Director. In practice, this arrangement enabled the shipowner and the Club to fund claims in the first instance totalling in excess of the shipowners' limit, but it was always intended that the ultimate cost to the shipowner and the Club should not exceed the limit under the Civil Liability Convention. A payment on account was made by the 1971 Fund to the UK Club of £2 million in August 1996, pursuant to this arrangement pending further clarification and finalisation of the claims. The UK Club's subrogated claims for the cost of preventive measures associated with the removal of oil from the *Sea Prince* and the removal of the ship itself which were lodged with the Korean court were the subject of ongoing discussions with the 1971 Fund, which in February 1998 requested the Court to defer a decision on these claims, in order to enable settlement discussions to take place with the Club.

With respect to the question of whether the claims of the UK Club and the shipowner have been properly notified in accordance with Korean law, the Club's Korean lawyers have drawn attention to Articles 7.4 and 7.6 of the 1971 Fund Convention which provide that "*Each Contracting State shall ensure that the Fund shall have the right to intervene as a party*" and "*each party to the proceedings shall be entitled to notify the Fund of the proceedings ... in such a manner that the Fund has in fact been in a position to effectively intervene as a party to the proceedings ...*". In their opinion, the purpose of the notification under Article 7 of the Convention is to ensure that the 1971 Fund is given the opportunity to intervene in the proceedings in order to examine and assess the claims made against the Fund before paying any compensation or indemnification. Accordingly, the Club's lawyers have concluded that since the 1971 Fund had already intervened as a party to the proceedings, it was not necessary for a separate notice to be given, as the objective of issuing a notice to the Fund had been achieved. The UK Club's Korean lawyers have further pointed out that even if a separate notice was required within the meaning of Article 7 of the 1971 Fund Convention, notice of the limitation proceedings was made to the Fund through the Korean court. They have maintained that, once the notice of limitation proceedings had been sent to the 1971 Fund, no further notice in relation to Article 23 of the Korean Oil Pollution Law

would be necessary. They have considered that the notice requirements within the meaning of Article 7 of the 1971 Fund Convention have been satisfied in accordance with Korean law. The same reasoning applies to the shipowner's claim for indemnification against the 1971 Fund.

In conclusion, the shipowner issued notification of limitation proceedings to the 1971 Fund via the Korean court pursuant to the Korean court procedures to ensure that the Fund would be given the opportunity to protect its interests. Although this alone would have protected the claims against the Fund, the Fund did in fact participate fully in proceedings. Accordingly, under Article 7.6 the Fund is bound by the decision of the Korean court, whether the claims are direct or subrogated or for indemnification.

In the light of both the agreement reached between the 1971 Fund and the UK Club in relation to claims and the legal position under Korean law, the Club and shipowner do not believe that there is any reasonable basis for the Fund to argue that the claims under consideration are time-barred.

6.3 Opinion by the 1971 Fund's Korean lawyer

The Director has obtained an opinion from the 1971 Fund's Korean lawyer whose views can be summarised as follows:

In the view of the 1971 Fund's Korean lawyer, the word "action" in Article 7.6 would be interpreted by the Korean Courts to include "limitation proceedings". If filing a claim in the limitation proceedings were not to be considered as an action against the shipowner/insurer for the purpose of Article VIII of the 1969 Civil Liability Convention, claimants who filed claims in the limitations proceedings would also have to bring a separate action against the shipowner/insurer before the expiry of the three year time period, and this would in his view be absurd. He notes that Article 37 of the Oil Pollution Act envisages that the interveners in the limitation proceedings have the right to make a notification to the 1971 Fund. Furthermore, he mentions that it is not specified in Article 6.1 who must make the notification but only that the notification must be made pursuant to Article 7.6. He also points out that Article 37 of the Oil Pollution Act does not require that the notification should be made in respect of each individual claim for which compensation is sought. The notification required by the Oil Pollution Act is simply the notification of the pending limitation proceedings with details identifying these proceedings. He takes the view that the Korean Courts would consider that, since the shipowner notified the 1971 Fund of the pending limitation proceedings through the Court on 22 August 1996, no further notification is required by any party who has submitted a claim in these proceedings. He further states that the party who subrogates the other party steps into the shoes of the other party pursuant to the principle of subrogation under Korean law. Since the UK Club has subrogated the shipowner who has made a proper notification pursuant to Article 7.6, the UK Club should in his view be considered having given proper notification even if Article 6.1 is interpreted to mean that the party seeking compensation under the 1971 Fund Convention (in this case the UK Club) has to make notification. He takes the view that this interpretation could be justified by the Courts as being consistent with the purpose of Article 6.1, since once the 1971 Fund had been notified of the limitation proceedings, the Fund had been given the opportunity to protect its interests by intervening in these proceedings. He also expresses the view that the fact that the 1971 Fund actually intervened in the limitation proceedings would have great influence on the Korean's Courts' assessment of the legal situation.

6.4 Director's renewed analysis

6.4.1 The Director has examined the time bar issue further in the light of the observations made at the Executive Committee's 60th session, the opinion of the 1971 Fund's Korean lawyer and the points made by the UK Club.

6.4.2 The sequence of events is as follows:

23.7.1995	Date of incident
30.5.1996	Commencement of limitation proceedings
02.8.1996	The 1971 Fund made an account payment of £2 million to the UK Club
22.8.1996	The 1971 Fund was served notice of the limitation proceedings
24.8.1996	The 1971 Fund intervened in the limitation proceedings and reported to the Court its payment of £2 million to the UK Club
27.8.1996	The shipowner filed a claim in the limitation proceedings relating to payments made or to be made to Korean and non-Korean contractors
26.3.1998	The UK Club reported to the Court its payment to the shipowner of the clean-up expenses and its subrogation in respect of these claims
02.6.1998	The Court rendered its decision in respect of the UK Club's claim
19.6.1998	The 1971 Fund was served with the Court's decision
23.7.1998	Expiry of three year time period

6.4.3 As regards the UK Club's description of the arrangement between the 1971 Fund and the UK Club for the payment of claims, the Director would like to make the following clarifications. The shipowner and the UK Club expressed their willingness to pay certain claims in full provided that the shipowner or the UK Club, as the case might be, was entitled to subrogate the amounts paid against the 1971 Fund. This arrangement was accepted by the Director, since the shipowner and the UK Club in any event would have such a subrogation right. The 1971 Fund did not accept liability for these payments, because the Fund would have such liability only to the extent provided in the 1971 Fund Convention. A number of claims paid by the shipowner/UK Club to the various contractors were approved by the 1971 Fund before payments were made, whereas others were not, due to a lack of documentation. The 1971 Fund's payment of £2 million on account to the UK Club on 2 August 1996 was made on the basis of a provisional assessment of the documents submitted by the shipowner/UK Club. Agreements were reached successively with a number of claimants in the fishery and tourism sectors, and these claims were paid by the shipowner. The 1971 Fund reimbursed the shipowner 25% of the amounts paid. After the 1971 Fund payments were increased to 100% in February 1998, the Director paid the balance of 75% to the shipowner. Further agreements were reached thereafter with other claimants in these groups. The claims were paid by the shipowner, and the 1971 Fund reimbursed the shipowner the amounts paid. There were altogether 34 Settlement Agreements in respect of claims in the fishery and tourism sector, for a total of Won 16 673 million (£8.8 million).

6.4.4 In the Director's view, the arrangements relating to the shipowner's and UK Club's payments did not dispense the shipowner/Club from respecting the provisions of the 1971 Fund Convention on time bar.

6.4.5 The Director agrees with the UK Club on the importance in the *Sea Prince* case of claims being paid in full at an early stage, although the 1971 Fund's payments were pro rated. He also agrees with the UK Club that the flexibility shown by the UK Club in the *Sea Prince* case, and by P & I Clubs in other cases, greatly enhances the proper functioning of the compensation system established by the 1969 Civil Liability Convention and the 1971 Fund Convention. It is important therefore that this close co-operation between the P & I Clubs and the IOPC Funds should be maintained.

6.4.6 However, the issue that the Executive Committee is invited to address in respect of the claims in the *Sea Prince* case is a legal one, ie whether the claims are time-barred under the applicable provisions of the 1971 Fund Convention which deals with the extinction of rights.

6.4.7 The Executive Committee has consistently taken the view that a uniform interpretation of the provisions of the 1969 Civil Liability Convention and the 1971 Fund Convention is important for the functioning of the international compensation system. However, on certain points the Conventions specifically states that the issue in question should be governed by national law. Under Article 7.6 of the 1971 Fund Convention a notification has certain effects if it "has been made in accordance with the formalities required by the law of the court seized".

6.4.8 The UK Club has through its payments to the various contractors acquired their claims by subrogation, and has therefore acquired the same right as these contractors. The contractors had presented their claims against the shipowner/UK Club in the limitation proceedings, and once the shipowner/UK Club had paid these claims, they acquired their rights in these proceedings.

6.4.9 It appears that, if as a matter of Korean law the notification of the limitation proceedings to the 1971 Fund made by the shipowner through the Court on 22 August 1996 is sufficient to satisfy the requirements of Articles 6.1 and 7.6 insofar as the UK Club's subrogated claims are concerned, those claims are not time-barred. As the advice received is that the Korean Courts would decide that this notification does suffice, in the Director's view the 1971 Fund ought not to take the opposite view. This is particularly so since the notification was made in such time and in such manner that the 1971 Fund was able to intervene effectively in the limitation proceedings, and the Fund did in fact present objections in those proceedings to the UK Club's claims.

7 Claims by three Village Fishery Associations

7.1 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.

7.2 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.

7.3 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.

7.4 In the document submitted to the Executive Committee's 60th session, the Director expressed the opinion that 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 took the view that these claims are not time-barred against the 1971 Fund.

7.5 These claims were not examined by the Committee at that session.

7.6 In its submission the UK Club has expressed the view that these claims are not time-barred as far as the 1971 Fund is concerned, because the claims were lodged in the limitation proceedings within the time permitted by Korean law.

7.7 The 1971 Fund's Korean lawyer has expressed the view that although the three Associations did not themselves make a notification to the 1971 Fund, the fact that the shipowner notified the Fund of the limitation proceedings under Article 7.6 and that the Fund actually intervened in the limitation proceedings in respect of the claims by these Associations would result in the Korean Courts considering that the Associations have fulfilled the requirements under Article 6.1 and that therefore these claims are not time-barred. As a result of the 1971 Fund's intervention, the Court fixed the compensation to these Associations at the amounts offered by the 1971 Fund. In the light of these circumstances the Director takes the view that it should be considered that the 1971 Fund was notified of these claims in accordance with Article 7.6 and that the claims should therefore be treated as not time-barred.

8 Claim for indemnification of the shipowner

8.1 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).

8.2 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).

8.3 The UK Club did in discussions with the 1971 Fund refer 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 for the purposes of Article 7.6 of the 1971 Fund Convention.

8.4 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.

8.5 In his submission to the Executive Committee's 60th session the Director stated:

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.

As the claim is one of indemnification, the UK Club could not have 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^{<3>} and the notification on 19 June 1998 of the Court's decision prevented the indemnification claim from becoming time-barred.

8.6 The UK Club's claim for indemnification was not examined by the Committee at its 60th session.

8.7 The UK Club has maintained its position that its claim for indemnification is not time-barred, for the reasons set out in paragraph 6.2 above.

8.8 The 1971 Fund's Korean lawyer has expressed the view that, for the reasons set out in paragraph 6.3 above, the notification of the 1971 Fund made by the shipowner through the Court on 22 August 1996 would be sufficient to prevent also the claim for indemnification from becoming time-barred.

<3> The correct date is 22 August 1996.

8.9 The Director makes the following analysis. He maintains the view expressed in his submission to the Executive Committee's 60th session that there is a difference between a claim for compensation and a claim for indemnification, for the reasons set out in paragraph 8.5 above. However, the Director takes the view that, on the basis of a reasonable interpretation of Articles 6.1 and 7.6, the notification made by the shipowner through the Court on 22 August 1996 prevented the claim for indemnification from becoming time-barred, since this notification made possible for the 1971 Fund to intervene in the proceedings (which the Fund in fact did on 24 August 1996) and enabled the Fund to protect its interests in respect of the claims the payments of which by the shipowner/Club constitute the basis of the Club's claim for indemnification.

9 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 should be treated as time-barred:
 - (i) the UK Club's subrogated claims;
 - (ii) claims by three Village Fishery Associations; and
 - (iii) the UK Club's claims for indemnification under Article 5.1 of the 1971 Fund Convention.
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