INTERNATIONAL OIL POLLUTION COMPENSATION FUND

FONDS INTERNATIONAL D'INDEMNISATION POUR LES DOMMAGES DUS A LA POLLUTION PAR LES HYDROCARBURES

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DISCUSSION OF SETTLEMENT OF CLAIMS ARISING OUT OF THE TANIO INCIDENT

Note by the Director

1 The Executive Committee may wish to consider whether the IOPC Fund shall try to break the shipowner's limitation on the basis of the fact that the TANIO incident may have occurred as the result of the actual fault or privity of the owner, and/or whether the IOPC Fund shall seek recourse from any person other than the owner.

2 The chances of success of any action against the owner or any other person depend on the answers to several factual and legal questions. In co-operation with the French Government, the Director formulated certain legal questions which may be relevant in this context. The questions were put to Mr E du Pontavice, Professor of Maritime Law at the University of Law, Economy and Social Sciences in Paris. These questions and the answers given by Professor Pontavice are reproduced in the Annex.

3 The Executive Committee is invited to take note of this information.

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ANNEX

LEGAL QUESTIONS AND ANSWERS REGARDING THE TANIO INCIDENT

A - Unlimited Liability of Owner

Is the owner obliged to provide the master with sufficient information on the distribution of the cargo and, assuming such an obligation was not complied with and the lack of information contributed to the incident, could an omission of such information deprive the owner of the right to limit his liability?

In this particular case the owner (LOCAFRANCE INTERNATIONAL) is not the manager. The presumption set out in Article 2 of the law of 2 January 1969 is a simple presumption which lapses by virtue of the bareboat charter party.

Under French law (law of 18 June 1966, Article 10) the bareboat charterer "undertakes in return for payment of a hire fee to place a specific ship without crew or equipment or with incomplete crew or equipment at the disposal of a charterer". It is probable that the law of the flag (Malagasy law) does not differ substantially from French law on this point.

The booklet entitled "Tanker Lorraine - loading conditions and swell fatigue calculations revised for new draught" was prepared on 28 February 1969 by the shipbuilder and handed to the owner.

That notice ought undoubtedly to have been provided by the owner to the charterer and handed by the latter to the master.

Thus the question arises as to whether the notice was actually on board the TANIO. The denial of the two chief officers has only a relative value and might be contradicted by other evidence given in court. The absence of such documents would undeniably involve the liability of the owner and that of the bareboat charterer (the charter party being a possible means of determining who was liable) but proof would appear to be difficult to establish.

In the last analysis and in view both of the role played by the owner (the company LOCAFRANCE INTERNATIONAL, being a leasing company, is essentially of a financial nature) and of the difficulty of proof, it would seem risky to attempt to bring in the liability of the owner.

B - Liability Resulting from Insufficient Loading

Assuming,

a that insufficient cargo distribution contributed to the incident,

b that the distribution of the cargo in the ship's tanks at the port of loading is the master's (sole) responsibility, and

c that the master could or should have been aware of the insufficiency of loading,

1 Can the master of the TANIO be considered as "servant or agent" of the owner and, if so, would this exclude his liability under the applicable national law according to Article III.4 of the CLC?

Under the terms of Article III, paragraph 4, of the 1969 Convention, a servant of the owner is exonerated from liability.

In the present case the master is a servant of the manager and may thus limit his liability (Article 6 of the 1957 Convention and Article 69 of the law of 3 January 1967). In any case and even in the case of a personal act or omission by the master it is not possible to rule out the limitation of compensation (Article 69, paragraph 2, of the law of 3 January 1967).

Moreover a nautical error does not enable the liability of the manager to be ruled out: as loading is carried out under the sole responsibility of the master*, the only means of ruling out the limitation of compensation lies in proving the absence of documents relating to loading (liability of the owner) or the incompetency of the master (liability of the manager).

2 If the master is not "servant or agent" of the owner, would he, or his heirs, be liable for the damage?

The reply is affirmative subject to the limitation of compensation laid down by the 1957 Convention and by the French law of 3 January 1967.

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* If one discounts the law of the contract of carriage of goods, where the question is disputed.

3 Can the bareboat charterer be considered as the owner's "servant or agent"?

The reply is negative. The bareboat charterer cannot avoid all liability on the basis of Article III, paragraph 4, of the 1969 Convention.

4 Is the bareboat charterer, as the master's employer, responsible under the applicable national law for negligent acts or omissions of the master?

A nautical error by the master gives the manager the right to limit compensation. In order to involve the unlimited liability of the manager it would be necessary to prove a personal act or omission by him; such an act or omission may consist either in an error in recruiting the master or the crew (Article 4 of the law of 3 January 1969) or in an error concerning the technical and commercial management of the ship.

5 Is the bareboat charterer liable under the applicable law for damage because of the employment of an incompetent master (assuming the master's incompetency for ships like the TANIO and trades actually performed by her)?

As a general rule, if recruitment takes place in compliance with the law of the Flag State no error is committed. In this particular case this was so.

Furthermore it is clear from the report of the board of enquiry that if the TANIO had been chartered under the French flag the exemptions from which the master and the first officer ought to have benefited would not have been in any way exceptional. On the other hand the authors of the report took the view that the theoretical training of the master was inadequate in regard to the technique of loading the ship.

Incompetency on the part of the master or the crew undeniably involves the liability of the bareboat charterer who recruited them. It would appear, however, relatively difficult, in particular in view of the report of the board of enquiry, to prove that the master was incompetent.

6 Is the time/voyage charterer, assuming he knew or should have known the master's incompetency, liable for leaving the loading to incompetent crew? Should the cargo inspector have noticed the insufficiency of cargo distribution and would negligent omission of report of insufficiency lead to liability towards third parties?

The reply is negative as regards the voyage charterer.

As regards the time charterer the terms of the charter party need to be studied. The liability of the bareboat charterer can be ascertained by studying that text and the obligations that devolve on the bareboat charterer and his managers.

7 Does the time charterer and/or voyage charterer or port authority at port of loading have responsibility for the loading?

Responsibility for loading normally falls on the master. The time charterer is not in general responsible for loading but a definitive ruling would require familiarity with the charter party and with the factual circumstances in which the time charterer was able to ascertain the conditions of loading.

The voyage charterer and the port authority take no part in loading. Their liability might be involved only on the assumption that they interfered in the loading operations.

8 What is the limitation period for claims against bareboat and time charterer?

As regards claims against the owner the requirement set forth in Article VIII of the 1969 Convention would have to be applied: "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".

As regards the manager, the shipyard or the classification society, ordinary law and the thirty-year requirement must be applied.

9 Are bareboat and/or time charterer entitled to limit their liability?

Under Article 6, paragraph 2, of the 1957 Convention, the charterer may limit his liability (to an amount which is considerably lower than the amount provided by the 1969 Convention).

C - Liability Arising from the Weakness of the Hull

1 Assuming that the hull was too weak to carry a full load of cargo, is the bareboat charterer liable for providing an unseaworthy ship?

In general any inadequacy in the structure of the ship involves the liability of the owner. In order to give a definitive ruling on the liability of the bareboat charterer it would be necessary to know the terms of the charter party regarding the maintenance of the ship (in French law the charter party clauses cannot be invoked against third parties unless they have been published. It would be necessary to know the law of the flag on this point).

2 Assuming that the repair work done in summer 1979 was insufficient, the following questions arise:

a Would the shipyard be liable under the applicable national law or are they exempt from liability as "servants or agents" of the owner?

A shipyard can in no case be regarded as a servant or agent of the owner or the charterer. It cannot limit its liability either under the 1957 Convention or under the 1969 Convention.

The report seems to establish that the welding done by the Italian shipyard failed and may have been the cause of the shipwreck.

b Which law would be the law applicable for actions against the Italian shipyard?

This is a particularly complex question.

It may be considered that if other proceedings were brought before the French courts, they would consider themselves competent with regard to the proceedings against the shipyards under the principle of connexity (Article 22, paragraph 3, of the European Convention of 1968). French private international law refers to the law of the place of damage. If one assumes that the incident occurred on the high seas that might complicate the reply to be given but the view may be taken that as the place where the damage occurred was French territory the French courts would apply French law.

On the other hand, if proceedings were brought only against the shipyard the competent court would be an Italian court which would apply the rules of Italian international private law.

c What is the limitation period and would the shipyard be entitled to limit liability?

Under French law the shipyard cannot limit its liability. The thirty-year time-bar requirement would normally be applicable.

3 Assuming the repair work was insufficient and this could or should have been known to the classification society, the following questions arise:

a Does the classification society have a duty to check whether the extent of the repair work was not unduly limited?

On the theoretical level there is no doubt that the liability of the classification society may be involved. A recent case (cass. cirm. 30 May 1980) accepted as much even though the facts established that the manager was mainly liable. The liabilities of the classification society are restricted in the main to periodic verifications for the maintenance of the classification mark, the approval of programmes of work, control of the technical competence of the shipyard chosen and spot checks on the work carried out.

As a general rule legal practice only accepts the liability of classification societies on the basis of a serious fault.

It must be added that proceedings against the classification society would be opposed, inter alia, by the following facts:

- the fact that Bureau Veritas was unaware of the previous grounding of the TANIO and of its possible consequences;
- the interpretation which diverges from that of the court of enquiry relating to the incident itself;
- the defective loading and its effects on the strength of the hull.

b Do they have to make a thorough check of all work carried out?

A judgement handed down by the appeal court of Toulouse, in the court of appeals for minor offences, on 14 January 1971, in relation to an aircraft stated: "The official task of Bureau Veritas comprises in particular ensuring that components and the entire assembly of the aircraft are in conformity with the manufacturing plans and carrying out checks at all stages of manufacture. Considering that the performance of such a control task would be deprived of serious purpose and effectiveness if it were restricted to a superficial

examination of aircraft whose faults can be concealed, as they were in this case, under a layer of paint it also behoves the representative of Bureau Veritas to ascertain the conditions of manufacture, the nature of internal controls carried out by the firm and of any mishaps during manufacture; ...". However, the court stated that the official of Bureau Veritas must carry out spot checks, which clearly shows that the official concerned does not have to make a complete check of all work carried out.

c Do they have a responsibility to reclassify the ship if there is reason to believe that the ship no longer complies with its previous classification standards?

The reply is affirmative.

d Would the non-compliance with these responsibilities make the classification society liable for damage towards third parties?

The reply is affirmative on condition that a grave error is proved.

e Can the classification society be considered as "servant or agent" of the owner?

The reply is negative.

4 Assuming that the compromise on the extent of the repair work restricted the extent unduly, the questions arise:

a Does the bareboat charterer, in restricting the extent of the work, incur tort liability towards victims of oil pollution damage?

b Was the bareboat charterer negligent in accepting insufficient work and would that result in liability towards third parties?

To the extent that the bareboat charterer is responsible for maintaining the ship, any inadequacies in the programme of work would be likely to result in his being liable towards third parties.

D - Liability from Combination of Different Aspects

Would possible aspects contributing to the incident, which do not lead by themselves to a person's liability, create liability as a combination of aspects?

There is a doubt in French law as to the choice between two bases of causality in the law of civil liability but one thing is certain: if an action taken in

isolation does not constitute a fault giving rise to a damage for another person, the circumstance that the cumulative effect of several actions together results in a loss for another party does not give rise to liability for the authors of each of the isolated actions. In other words there is no collective liability stemming from an accumulation of actions none of which on its own would be wrongful.