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CRITERIA FOR THE ADMISSIBILITY OF CLAIMS FOR COMPENSATION

Note by the International Group of P & I Clubs

1. Introduction

1.1 The International Group of P&I Clubs welcomes the opportunity to submit this note in connection with the considerations of the Seventh Intersessional Working Group.

1.2 As insurers of the shipowners' liabilities under the Civil Liability Convention, the P&I Clubs in the International Group have always recognised the importance of their relationship with the IOPC Fund and are fully supportive of the co-operation which has developed between the P&I Clubs and the IOPC Fund Secretariat. In view of the link between the Civil Liability Convention and the Fund Convention the importance of this continuing co-operation and agreement on the admissibility of claims is clearly recognised.

1.3 The International Group of P&I Clubs is therefore pleased to submit the following observations on the work which has already been done at the previous meeting of the Working Group in the hope that it will be of assistance in resolving some of the difficult issues with which the Working Group is concerned.

1.4 The views of the International Group as expressed in this note should not however be taken as determinative of the position in respect of claims in any particular incident since the individual P&I Club concerned with any particular incident and the shipowner must retain the ultimate right to determine questions of the admissibility of particular claims in the circumstances of an incident.

2. Background

2.1 P&I Clubs in the International Group have traditionally taken the view that claims for compensation for pollution damage following an incident to which the CLC applies should be settled and paid subject to the limits and other applicable terms of the Convention provided always that those claims are reasonable.

2.2 In determining the extent to which a particular claim is recoverable, the P&I Clubs either directly or through the experts and lawyers appointed on behalf of their Members have sought to analyse the claims as presented and where necessary seek further supporting evidence or documentation. Frequently this process in itself will lead either to the conclusion that the claim is reasonable and should be settled or that the claim or individual elements of the claim can not be supported by the requisite degree of proof of loss. This process in turn has traditionally led to a negotiation with the claimant as to the extent to which his claim is properly admissible.

2.3 Traditionally the claims which have been presented have not caused great difficulties as to the ability of the claimant to make a claim which is admissible in principle. In certain instances, individual elements of a claim within a recognised category may create doubts as to admissibility but such doubts are frequently combined with difficulties in the claimant's ability to prove a loss to the requisite standard of proof. In the course of discussions with claimants, it has frequently proved possible either to persuade the claimant that his claim or elements of it are not admissible or to achieve a mutually satisfactory settlement. Where a claim can be settled by agreement, there is no need from the point of view of the P&I Clubs to state a definitive decision or admission as to the principle on which acceptance of the claim has been made.

2.4 In cases where there is genuine doubt as to the legal admissibility of a particular claim under the Civil Liability Convention, the P&I Clubs have customarily been guided by the advice of a local lawyer as to the interpretation which the national court is likely to give to the Convention as in force in that jurisdiction.

2.5 The relative success of the traditional approach of the P&I Clubs towards settlement of claims can be judged by the scarcity of recorded judgements in member states regarding issues of interpretation of the Convention.

2.6 However, the P&I Clubs appreciate that the pragmatic approach which they have adopted in the light of each case and the claims arising, is not satisfactory when the IOPC Fund may be involved since this approach may in time lead to inconsistency in the treatment of claims between one member state and another.

2.7 In addition, recent cases have clearly demonstrated that the categories of claimants and types of claim are expanding, not least in the wake of the publicity which can be expected to follow an incident. In these circumstances a clear determination of the principles of admissibility of claims under the Civil Liability Convention and Fund Convention becomes increasingly necessary. The International Group of P&I Clubs therefore believes that the study of the Working Group is extremely timely and hopes that the conclusions of the Working Group will provide guidance on these difficult issues of admissibility. The P&I Clubs are also aware of the studies being undertaken by the Comité Maritime International on this subject and are conscious of the desirability of compatibility between the results of these studies.

3. General Approach

3.1 The P&I Clubs fully support the view that a uniform interpretation of the definition of "pollution damage" is essential for the proper functioning of the regime of compensation established by the Civil Liability Convention and the Fund Convention. While it must be recognised that claims ultimately are to be determined by the national courts, the P&I Clubs are of the view that the development of criteria for the admissibility of claims by the IOPC Fund Assembly and Executive Committee should be given due weight by national courts in accordance with the principles laid down in the Vienna Convention, and that the IOPC Fund's decisions are also important in the context of the Civil Liability Convention in view of the identical wording of the relevant definitions.

4. Causation

4.1 Any consideration of a uniform interpretation of "pollution damage" must start with the definition set out in the Conventions. The Working Group has already noted the importance of the expression "caused by contamination". The P&I Clubs are fully in agreement that losses which flow generally from an incident (as opposed to contamination resulting from the escape or discharge of oil) do not fall within the definition. In this respect it seems clear that "contamination" does not give rise to any doubt as to the physical nature of the contact by oil which is required. However, it is evident that substantial difficulty arises in determining the correct principle of causation which should be applied to the causal connection between the contamination and the loss or damage. Obviously there is no difficulty in the concept of direct causation where property is physically damaged by contamination. Similarly, there seems little difficulty in demonstrating a direct link of causation between contamination and resulting loss of income of fishermen, notwithstanding that such fishermen's nets or boats may not have been physically contaminated.

4.2 Conversely, a causal connection between contamination and the loss or damage may involve one, or indeed several, intermediate events so as to form a series of links in the chain of causation and the question will inevitably arise as to how many such links are permissible before the damage can no longer be properly said to be "caused by contamination".

4.3 Since all national courts and systems of law can be expected to apply an appropriate test of causation in order to resolve this question, it is perhaps theoretically possible for such a test of causation to be developed in such a way as to give the desired degree of uniformity of interpretation. However, when expressing a theoretical principle of causation, it would appear necessary and helpful to include reference to other principles, such as remoteness, foreseeability, or proximity when refining and explaining the principle of causation.

4.4 Although it is therefore likely that the ultimate justification for the admission or rejection of a particular claim may be framed in the context of such a theoretical principle of causation, the development of general criteria for admissibility of claims in the context of actual examples of types of claims seems to be more helpful than the pursuit of a theoretical single test of causation against which each claim's admissibility must be judged.

The comments which follow are therefore addressed to the various categories of claim which have already been addressed by the Working Group or by the Executive Committee in the context of specific examples.

5. Types of Claims for Compensation

5.1 Property Damage

Since the causal connection between the contamination and the damage to property is normally clear and direct, such claims pose no difficulty in principle although in some cases it may be that the factual question of whether or not there has been contamination is difficult to determine. In this connection, the P&I Clubs support the view previously expressed in the Working Group that the decision of a government or competent authority that particular property is to be destroyed or otherwise treated to remove contamination should not, of itself, be regarded as conclusive evidence of contamination. In any such case, the factual and scientific evidence on which the decision has been based is the relevant criterion and not the decision itself.

5.2 Clean-up Costs and Measures to Prevent Physical Damage

The P&I Clubs are in agreement with the conclusions of the Working Group at its previous meeting as to the criteria for assessing the reasonableness of operations carried out to prevent physical damage and on the issues of reasonableness of cost.

5.3 Pure Economic Loss

5.3.1 In the development of the criteria for the admissibility of such claims, the P&I Clubs have noted the elements which were referred to at the first meeting of the Working Group. It is hoped that the following general observations may be of assistance in the development of these criteria. The previous practice of the P&I Clubs in settlement of claims is consistent with that of the IOPC Fund in that the P&I Clubs have not sought rigidly to apply the "bright line" rule in the context of the Civil Liability Convention so as to exclude all economic loss which does not accompany physical damage to property. Claims for pure economic loss from fishermen, whose ability to fish in a contaminated area has been restricted, have customarily been paid whether or not there has been accompanying damage to the property of the fishermen, such as nets or boats. However, the P&I Clubs also clearly recognise the need to draw a line between those claims for pure economic loss which are recoverable and those which are not admissible. As noted above, the P&I Clubs have not generally felt the need to express a consistent legal principle by which all such claims can be judged but they have, not surprisingly, had similar difficulties in many instances in justifying the admission or rejection of a particular claim by reference to such a legal test.

5.3.2 To the extent that the "bright line" rule is applicable, the P&I Clubs would agree that in the context of pollution damage there should be limited exceptions to that rule for example in respect of claims from fishermen and those immediately dependent on tourism in a contaminated area where there has been a proven reduction in tourist activity as a result of contamination.

5.3.3 Similarly, if the relevant test is that of causation, the P&I Clubs have not sought to restrict the claims which are eligible for compensation to pure economic loss directly caused by contamination, in the sense that only one link in the chain of causation is permitted. However, even though claims for pure economic loss may be admissible, for instance when there has been an intervening cause such as a reduction in tourism, the P&I Clubs would still look to a sufficiently close causal relationship between the contamination and the loss before agreeing that a claim can be admissible.

5.3.4 The P&I Clubs are of the view that this concept is well expressed by the expression "a reasonable degree of proximity" used in guideline number 6 of the CMI's draft guidelines and that the criteria referred to in that section of the draft CMI guidelines are helpful in determining the issue of whether the relevant degree of proximity does in fact exist.

5.4 Measures to Prevent Pure Economic Loss

5.4.1 The P&I Clubs have noted with some concern the suggestion at recent meetings of the Executive Committee that the costs of measures to prevent pure economic loss can be considered as "preventive measures" and thus qualify as "pollution damage". This concern becomes more acute when the concept is extended to loss or damage caused by such "preventive measures" as suggested in the note of the French delegation, WGR.7/6/Add.1, when addressing the question of claims from redundant employees.

5.4.2 Although claims for pure economic loss may qualify in the circumstances described above as "pollution damage", not all claims for pure economic loss so qualify. It must therefore follow that, at best, measures to prevent pure economic loss could only qualify as "preventive measures" if the loss which they are intended to avoid or minimise would itself qualify as "pollution damage".

5.4.3 However, it may also be that even this interpretation goes too far. It has been previously noted that measures to prevent pure economic loss were probably not envisaged as "preventive measures" at the time the Conventions were drafted. This impression is supported by the French language text of the Convention which defines "preventive measures" as "toutes mesures rasionnables prises par toute personne après la survenance d'un événement pour prévenir ou limiter la pollution". Significantly, the French text does not refer to "dommage par pollution". As a result, it must be queried whether measures taken to prevent even such pure economic loss as would qualify as "pollution damage" can properly be brought within the definition of "preventive measures", although the costs may be admissible if they are incurred in mitigating a loss which is admissible.

5.4.4 The P&I Clubs would accept that in certain circumstances the costs of a marketing campaign to prevent or reduce "pollution damage" can be admissible. However, this view is based on the universally accepted duty of injured parties to take reasonable steps to mitigate their damage. The criteria developed in the Executive Committee for admissibility of such marketing expenses appear to be entirely consistent with the manner in which courts would expect an injured party to act to mitigate his damage. Where an injured party has taken reasonable measures to mitigate his loss or damage it seems unobjectionable that the cost of those measures should be added to any eventual loss or form a claim in substitution for a loss which would otherwise have been admissible. Furthermore, even if the measures are not as successful as may have been originally anticipated, the claimant may still recover those costs if he had a reasonable expectation that they would prevent or minimise his loss at the time they were taken.

5.4.5 In this way, the costs of a reasonable marketing campaign, subject to the criteria previously set out by the Executive Committee, could still be properly admissible as part of a claim for pollution damage.

5.4.6 A restrictive approach to measures taken to prevent economic loss becomes even more important when it is considered that the Convention permits the recovery as "pollution damage" of "further loss or damage caused by preventive measures".

5.4.7 The owner of a fish processing plant or a restaurant is under the same duty to mitigate his loss if he has a claim for pollution damage. As part of the steps taken to minimise his loss he may temporarily reduce his labour force if, in all the circumstances, that is a reasonable step to take. However, the Clubs find difficulty in accepting that such an action can qualify as a preventive measure so as to give rise to a claim by the employee for "further loss or damage caused by preventive measures". If that were the case, every party who suffers any form of reduction in income as a result of a claimant's reasonable action to mitigate his loss would also be entitled to compensation is this way, even when it is abundantly clear that the loss he has suffered could not qualify as "pollution damage".

5.4.8 For these reasons, the P&I Clubs would urge a cautious and restrictive approach to the criteria for "preventive measures" when considering pure economic loss.

5.5 Employment-related Questions

5.5.1 The P&I Clubs have no difficulty with the conclusions reached by the Executive Committee in respect of the cost of maintaining staff of fish farmers and fish processors in the BRAER case as set out in paragraphs 2.1 and 2.2 of the Director's note WGR.7/12. The criteria adopted by the Executive Committee as set out in paragraph 2.2.2 appear entirely consistent with the principle that a claimant has a duty to take reasonable steps to mitigate his loss. It is accepted that considerations other than pure economics may be relevant in determining whether the steps taken by a particular claimant are reasonable and it seems impossible to determine the issue of reasonableness other than in the light of all the circumstances of the particular claim.

5.5.2 However, when the claimant such as a fish processor or restaurateur makes staff redundant, or reduces overtime which might otherwise have been anticipated, the consequence to the employee poses considerably more difficulty in terms of admissibility.

5.5.3 As explained above, the P&I Clubs are not attracted to the view that such losses could be treated as "further loss or damage caused by preventive measures".

5.5.4 Viewed strictly as a question of causation, the causal connection between the employee's loss and the contamination contains one further link in the chain than is the case with the fish processor or restaurateur's own claim. In addition, there can be expected to be many other providers of services or materials to the processing plant or restaurant who may suffer a loss of income or profit as a result of the fish processor's or restaurant's reduction in activity. Such losses, which may or may not depend on a contractual relationship with the fish processor or restaurateur, stand on exactly the same level of causation as the losses of the employee. If therefore it is considered that claims, for example, from the suppliers of electricity to the plant or wine to the restaurant are too remote to be admissible, the same conclusion should also apply to the loss of the employee.

5.5.5 It therefore appears that the claims of such employees would not be admissible unless either some special exception is made in respect of the status of employees (see CMI draft guideline 8(a)) or because the relationship between the contamination and the losses suffered by the employees (as opposed to other suppliers of services or materials to claimants who have admissible claims) is sufficiently proximate to justify the admissibility of such claims in accordance with the criteria suggested for determining the necessary degree of proximity.

5.6 Environmental Damage

5.6.1 The P&I Clubs fully support the position taken in Fund Resolution No 3 and the subsequent decisions of the Executive Committee in relation to environmental damage. The P&I Clubs would however like to reiterate the view previously expressed that any such claim would fall within the definition of "pollution damage" in the Civil Liability Convention but compensation is not payable when the claim is not quantifiable by reference to an actual economic loss.

5.6.2 In view of the increasing importance which can be expected to attach to issues of restoration in the light of the 1992 Protocol revision, the P&I Clubs would also like to commend to the Working Group the views expressed in the note submitted by ITOPF for the first meeting of the Working Group (WGR.7/9/3) and the comments of the CMI in WGR.7/17 in this respect.