



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUNDS 1971 AND  
1992

EXECUTIVE COMMITTEE  
60th session  
Agenda item 4

71FUND/EXC.60/12

EXECUTIVE COMMITTEE  
2nd session  
Agenda item 4

92FUND/EXC.2/6  
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**APPORTIONMENT OF COMPENSATION PAYMENTS BETWEEN  
P & I CLUB AND THE IOPC FUNDS**

Note by the Director

**Summary:**

The 1971 Fund's policy has been to start paying compensation only after the shipowner's insurer has paid up to the limitation amount applicable to the ship in question. A P & I Club has proposed that when there is a risk that the total amount of the established claims will exceed the maximum amount of compensation available under the Conventions and the payments are therefore pro-rated, the Fund should from the outset participate in the payment to each claimant in proportion to the estimated respective ultimate liabilities of the Club and the Fund.

**Action to be taken:**

Decide whether the IOPC Funds' policy in respect of the distribution of payments between the Fund and the shipowner/P & I Club should be reviewed in respect of cases where payments are pro-rated.

**1 1971 Fund's present procedure for making payments**

1.1 The 1971 Fund has in the past required the shipowner/P & I Club to pay compensation up to the limitation amount applicable to the ship before the Fund has started paying. In many cases, the exact limitation amount is not known until a considerable time after the incident. The 1971 Fund and the Club make an estimate of the limitation amount as soon as possible after the incident. An adjustment between the 1971 Fund and the Club is made when the exact limitation amount has been determined. This adjustment has often been made in connection with the 1971 Fund's payment of the indemnification of the shipowner under Article 5.1 of the 1971 Fund Convention.

1.2 This procedure appears to function without any complications when it is clear from the outset that the total amount of the established claims will not exceed the total amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, ie 60 million SDR. In this situation the P & I Clubs seem to agree that the procedure followed so far is appropriate.

1.3 A more complicated situation arises in respect of incidents where the total amount of the established claims is expected to exceed 60 million SDR, or where there is a risk that this may occur. In such cases the 1971 Fund has in the past decided to limit its payments to a specific percentage of the established amount of each claim representing a conservative estimate of each claimant's prospective share of the amount available for compensation. The shipowner/Club has normally agreed to pay claims at the same percentage and has continued to make such payments until the shipowner's limitation amount under the 1969 Civil Liability Convention has been reached. The Fund's pro-rated payments have commenced only when the shipowner/Club's payments have reached that amount.

1.4 It should be noted that the shipowner/P & I Club may present subrogated claims against the shipowner's limitation fund in respect of any payments made by them to claimants, once that fund has been established (Article V.5 of the Civil Liability Convention). In the distribution of the limitation fund they will compete with all other claimants (Article V.4) and they will therefore only be able to recover from that fund part of the payments that they have made. The shipowner/Club will normally be able to recover the balance of their payments from the relevant IOPC Fund. However, the shipowner/Club may not be fully reimbursed by the Fund for such non-recovered payments if the pro-rating applied to payments made by the Fund proves to be too high. As a result, the shipowner/Club would pay more than the shipowner's limitation amount.

**2 1992 Fund's procedure for making payments**

The question of the apportionment of compensation payments between the shipowner/P & I Club and the 1992 Fund has not yet been addressed by the 1992 Fund. The Director assumes, however, that the 1992 Fund would adopt the same policy as that followed by the 1971 Fund.

**3 Relevant provisions of the Fund Conventions**

3.1 Of interest in this context is Article 4.1 of the 1971 Fund Convention which reads:

For the purpose of fulfilling its function under Article 2, paragraph 1(a), the Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of the Liability Convention,

- (a) .....
- (b) .....
- (c) because the damage exceeds the owner's liability under the Liability Convention as limited pursuant to Article V, paragraph 1, of that Convention or under the terms of any other international Convention in force or open for signature, ratification or accession at the date of this Convention.

3.2 Article 4.1(c) of the 1992 Fund Convention is identical to the corresponding provision of the 1971 Fund Convention except that the reference to the shipowner's liability relates to the 1992 Civil Liability Convention.

**4 Revised procedure proposed by a P & I Club**

4.1 In one particular case, where claims have been presented for amounts considerably in excess of the maximum amount available under the 1971 Fund Convention, the P & I Club involved has expressed doubts as to whether it is able, without undue risk, to make compensation payments which differ significantly from each claimant's anticipated pro rata share of the shipowner's limitation amount under the 1969 Civil Liability Convention. The Club has proposed that in such cases the shipowner/Club and the respective Fund should from the outset participate in the payment to each claimant, in proportion to their estimated respective ultimate liabilities.

4.2 The P & I Club in question has stated that, in cases where approved claims reach or exceed the Fund limit, each claimant will receive a much greater part of his compensation from the Fund than from the shipowner/Club, because of their respective ultimate liabilities. It has been argued by the Club that, in making payments in accordance with the present procedure outlined in paragraph 1.3 above, the shipowner/Club departs from the formal procedure for distribution of the limitation amount envisaged in the 1969 Civil Liability Convention.

4.3 The P & I Club has argued that if the total amount of the established claims has been underestimated and the percentage paid is therefore too high, the Club would take a significant risk of overpayment. The Club has considered that it should in principle have a right of recourse against the Fund for any amount paid by it in excess of the limitation amount. The Club has mentioned that Article 9.3 of the Fund Convention confers the right of subrogation only on Contracting States and agencies of such States. In the Club's view other parties enjoy rights of subrogation only by operation of national law or by agreement with the claimants. The Club has referred to the fact that claimants have usually been required to sign forms of receipt containing carefully worded subrogation clauses. According to the Club, however, it is not certain that the courts would accept such subrogation in all cases, eg where the total amount of the claims greatly exceeds the maximum available under the applicable Fund Convention.

4.4 The P & I Club's proposal can be illustrated by the following example for the 1971 Fund. The same principle would apply to the 1992 Fund, but the figures would be different.

Given that,		£	
Total amount of compensation available =	60 million SDR =	50 000 000 =	100%
Total compensation payable by 1971 Fund =		45 000 000 =	90%
Total compensation payable by shipowner/Club =		5 000 000 =	10%
Decision taken to pro-rate all claims at 25% of approved amounts			
Payments made so far have not reached shipowner's limit			
And	Claim X has been approved for £1 000 000		
So	Amount payable to Claimant X =	25% of £1 000 000 =	250 000
Then, Claimant X would be paid as follows:			
	<b>Present procedure</b>	£	<b>Club's proposed procedure</b>
	Club: 100% of payable amount =	250 000	Fund: 90% of payable amount =
	Fund: 0% of payable amount =	0	Club: 10% of payable amount =
	<b>Total</b>	<b>250 000</b>	<b>Total</b>
			<b>250 000</b>

4.5 If, in the example set out in paragraph 4.4, the payment of the established claims were to be increased from 25% to 75%, resulting in an additional payment of £500 000, the consequences would be as follows. Under the present procedure, the P & I Club would pay the total additional amount (£500 000) and make any further payments until the shipowner's limitation amount, ie £5 million, is

reached. Under the procedure proposed by the Club, the 1971 Fund would pay £450 000 and the Club £50 000.

4.6 It is understood that the issue dealt with in this document is being discussed among the P & I Clubs and that the International Group of P & I Clubs will submit a document addressing this issue.

## 5 Director's consideration

5.1 It should first be noted that, under Article 4.1(c) of the 1971 and 1992 Fund Conventions, the 1971 Fund should pay compensation only when the total amount of damage exceeds the shipowner's limitation amount. The policy followed for apportionment of payments between the shipowner/P & I Club and the 1971 Fund is based on this premise.

5.2 The Director understands the concerns expressed by the P & I Club in respect of the risk of a Club paying over the limitation amount. However, he believes that this risk would be very limited in most cases, since the Funds normally take a very cautious approach when fixing the percentage to be paid in the early stages of the incident. If the percentage is correct or if the final payments are higher than those resulting from the pro-rating, the Club would not incur any risk of overpayment. In that situation the drawback of the present procedure from the Club's point of view would be one of cash flow.

5.3 It is admitted that, if the percentage were fixed at too high a level, the P & I Club would run the risk of having paid in excess of the limitation amount. However, the risk would to some extent remain even if the Club's proposal were adopted and the Fund participated in the payments to all claimants from the outset.

5.4 The P & I Club has expressed concern that courts may not accept subrogation clauses in certain cases. This risk would be relevant not only to the P & I Club, however, but also to the IOPC Funds. In any event, the problem would still exist even if the Funds were to participate in payments from the outset. In the Director's view, the Funds and the shipowner/Club have to rely on subrogation clauses in receipts being accepted by the courts, as otherwise the Club and the Funds would not be able to make any payments at all on the basis of out-of-court settlements or as provisional payments, and the system of compensation established by the Conventions would not function in the way intended, ie to provide prompt compensation for victims of oil pollution.

5.5 The Director also considers that the procedure would become much more complicated if each claimant were to receive payments from two sources. There would almost certainly be a considerable delay in payments in many cases, in particular in the period immediately after the incident, since the Director would have to obtain the authorisation of the Executive Committee to approve claims and make payments, and the Committee would also have to decide on the level of payments.

5.6 In the light of these considerations, the Director is not in favour of the modification of the payment procedure proposed by the P & I Club as set out in paragraph 4.1. However, he believes that it is important to find practical solutions which can facilitate prompt payments to victims, and would like to examine any proposals to this effect which the International Group of P & I Clubs might wish to make.

## 6 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to consider the information contained in this document; and
  - (b) to decide whether the policy in respect of the apportionment of payments between the Fund and the shipowner/P & I Club should be modified as proposed by the Club.
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