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DEFINITION OF 'SHIP' IN THE 1992 CONVENTIONS

Submitted by the United Kingdom delegation

Summary:	To assist the Working Group's discussions, this document sets out the United Kingdom delegation's views on the interpretation of the definition of "ship" in the 1992 Civil Liability Convention.
Action to be taken:	See paragraphs 33 and 34.

Introduction

1 At its 1st session in October 1998, the Executive Committee of the 1992 Fund discussed the definition of "ship" contained in Article 1(1) of the 1992 Civil Liability Convention<1><2>.

2 The Committee decided that the circumstances in which an unladen tanker would fall within the definition of "ship" needed further study. The Assembly subsequently endorsed a proposal that a Working Group should consider this issue in April 1999<3>.

<1> Document 92FUND/EXC.1/7.

<2> The incident that inspired the discussion was the grounding of the 17 134 GRT tanker *Santa Anna* on Thatcher Rock, north of Torbay (Devon, United Kingdom), on 1 January 1998. While at anchor in the bay, she had dragged her anchor in heavy winds. The tanker was successfully pulled clear of the rocks late on 1 January. A diving survey found four punctures, some hull distortion and damage to the propeller. Although in ballast at the time of the incident, she had some 270 tonnes of heavy fuel oil and 10 tonnes of diesel oil on board. None of this oil escaped. It appears that she carried non-persistent oil in all her cargo tanks during 6 voyages prior to the incident. The incident brought to light generally applicable questions of principle of greater importance than the details of the incident itself.

<3> Document 92FUND/EXC.1/9, paragraphs 4.6.6 - 4.6.15.

3 This document sets out the United Kingdom delegation's views on the interpretation of the definition of "ship" contained in Article 1(1) of the 1992 Civil Liability Convention to inform the Working Group's discussions.

Purpose

4 The purpose of the document is to promote debate. The United Kingdom delegation hopes that, following this debate, the Working Group will agree on the circumstances in which the 1992 Conventions apply to vessels and craft that are not carrying oil in bulk as cargo.

5 Such an agreement will be beneficial for all: tanker owners, their insurers, contributors to the 1992 Fund, the Fund's Secretariat, Member States, and claimants. Without such agreement, none of the interested parties will know how to deal with claims arising from a spill, or the threat of a spill, from the bunkers of an unladen tanker.

Background

6 The definition of "ship" in the 1992 Civil Liability Convention is identical to that originally adopted in the 1984 Protocol to the 1969 Civil Liability Convention. It is at the same time both more restrictive and wider than the original definition in the 1969 Civil Liability Convention.

7 Article 1(1) of the 1969 Civil Liability Convention provides that:

> "ship" means any sea-going vessel and seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo.

8 Article 1(1) of the 1992 Civil Liability Convention provides that:

> "ship" means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

9 The restriction introduced by the new definition is that a "ship" must now be constructed or adapted for the carriage of oil in bulk as cargo. At its 57th session, the Executive Committee of the 1971 Fund decided that the *Pontoon 300* fell within the definition of "ship" in the 1969 Civil Liability Convention<4>. The *Pontoon 300* was a barge that was neither constructed nor adapted for the carriage of oil in bulk as cargo, but was being used (probably illegally) for that purpose. The *Pontoon 300* would probably not be a "ship" for the purposes of the 1992 Civil Liability Convention.

10 The definition in the 1992 Convention is wider than that in the 1969 Convention because, in certain circumstances, it covers vessels and craft that are not carrying oil in bulk as cargo. The aim of the Working Group's deliberations is to try to establish exactly what those circumstances are.

<4> Document 71FUND/EXC.57/15, paragraph 3.11.4.

Issues

11 The Executive Committee considered three issues relating to the interpretation of definition of "ship" contained in Article 1(1) of the 1992 Civil Liability Convention. These issues were:

(a) How should the word "any" in the phrase "any voyage following such carriage" be interpreted?

(b) Who has to prove the absence of residues on board in order for the proviso to apply?

(c) Does the proviso in the definition of "ship" apply only to combination carriers?

(a) Does "any voyage" really mean any voyage?

12 The text prepared by the Legal Committee of IMO and submitted to the 1984 Diplomatic Conference<5> contained the following draft definition:

> "ship" means any sea-going vessel and sea-borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk and during [the] [any] voyage following such carriage [unless it is proved that it has no residues of such carriage of oil in bulk aboard] [if it has residues of such carriage of oil in bulk still on board].<6>

13 The conference decided to use the word "any", rather than "the", to qualify "voyage"<7>. Interventions made by the delegations of France<8> and the United Kingdom<9> suggest that this decision was considered to be consistent with the decision taken on the other words between square brackets (that is, to place the burden of proof regarding the absence of residues remaining from the previous carriage of oil in bulk as cargo on the shipowner). In both cases, the conference preferred the text that provided a wider scope of application.

14 In the view of the United Kingdom delegation, the *travaux préparatoires* clearly indicate that the phrase "any voyage" must be given its literal interpretation. Any vessel or craft to which the proviso applies, and which has once carried oil in bulk as cargo, is therefore a "ship" during that carriage, and on all subsequent voyages, until it is proved that it has no residues of such oil on board.<10>

<5> Document LEG/CONF.6/4

<6> The only change that the Diplomatic Conference made to this definition was to choose between the options indicated by the square brackets.

<7> Document LEG/CONF.6/C.2/SR.18, paragraphs 27 - 32

<8> Document LEG/CONF.6/C.2/SR.2, paragraph 16

<9> Document LEG/CONF.6/C.2/SR.3, paragraph 2

<10> This should not increase shipowners' insurance costs. Members of the International Group of P&I Clubs charge a higher reinsurance premium to owners of ships that carry cargoes of persistent oil. Where a ship does not carry such cargoes regularly, its owner must pay this premium for a quarter even if it does so just once.

(b) Who has to prove the absence of residues?

15 Regarding this issue also, the *travaux préparatoires* and the drafting of the provision clearly indicate which interpretation is the correct one. The 1984 Diplomatic Conference's intention was to place the burden of proof, regarding the absence of residues of the previous carriage of oil in bulk as cargo on board the ship, on the owner (or the IOPC Fund).

16 This would also be the interpretation of the provision under English law (where, generally, it is the person who claims the benefit of an exception, and is able to establish the facts, who has to prove them). In the view of the United Kingdom delegation, therefore, any ship to which the proviso applies, and which has carried oil in bulk as cargo, remains a "ship" on all subsequent voyages until the shipowner (or the Fund) proves that it has no residues of such carriage of oil in bulk as cargo on board.

(c) Does the proviso in the definition of "ship" apply only to combination carriers?

Meaning of "capable of carrying oil and other cargoes"

17 The proviso in the definition of "ship" (that is, the words following the comma) applies to ships "capable of carrying oil and other cargoes". Interpreted literally, in accordance with the definition of "oil" in Article 1(5), this means ships capable of carrying any *persistent* oil and other cargoes. As any tanker capable of carrying persistent oil is capable of carrying non-persistent oil, it follows from this literal interpretation that the proviso applies to all tankers. However, this appears to be at variance with the intended purpose of the definition.

18 In the paper he submitted to the 1st meeting of the Executive Committee<11>, the Director said that the discussions at the 1984 Diplomatic Conference did not give any clear guidance on the interpretation of the proviso in the definition of "ship". Having now read the summary records of the conference, the United Kingdom delegation does not reach the same conclusion.

19 At the end of the main debate on the definition of "ship" which took place at the conference, the Chairman concluded that it seemed that the majority of delegations were in agreement on the principle of extending the definition [of "ship"] to tankers unreservedly and to combination carriers subject to certain conditions<12>. Nothing in the subsequent discussions on the definition suggests that this majority view altered. Indeed, the only relevant decision would appear to be the decision to reject a proposal made by the USSR that would have restricted the extension of the definition of "ship" (extending it to unladen tankers only in the event of their having residues of oil on board from a previous voyage)<13><14>.

<11> Document 92FUND/EXC.1/7, paragraph 3.13

<12> Document LEG/CONF.6/C.2/SR.2, paragraph 41

<13> Document LEG/CONF.6/C.2/SR.18, paragraph 14

<14> Most of the debate on the definition of "ship" took place before the Diplomatic Conference had decided to restrict the definition of "oil" to persistent oils. It is therefore possible that, after agreeing on the definition of "oil", the conference simply overlooked the need for consequential amendments to the definition of "ship".

20 Abecassis[15] confirms this, saying of the definition adopted in 1984:

> Whereas the 1969 definition only covered ships carrying oil in bulk as cargo, this definition extends the Convention to unladen tankers carrying slops or those carrying only bunkers. Combination carriers which can carry oil in bulk as cargo are now covered not only when they are doing so, but on any voyage following such carriage until the slops are fully discharged.[16][17]

21 In the view of the United Kingdom delegation, the definition of "ship" should be interpreted in a manner that properly fulfils the objectives of its drafters. The reference to ships "capable of carrying oil and other cargoes" should therefore be interpreted as referring only to combination carriers, as would appear to have been the intention of the 1984 Diplomatic Conference.

Meaning of "combination carrier"

22 It is not entirely clear exactly what the Diplomatic Conference meant by "combination carrier". It seems likely, however, that many delegates would have called an ore/bulk/oil ship (OBO) a combination carrier. At the time of the conference, many thought that OBOs had a bright commercial future. This is also consistent with the definition in MARPOL: "combination carrier" means a ship designed to carry either oil or solid cargoes in bulk[18].

23 The delegation of the United Kingdom believes that the proviso in the definition of "ship" applies only to combination carriers as defined in MARPOL. We accept that this means that the 1992 Civil Liability Convention applies to some tankers that never carry persistent oil as cargo[19]. However, we cannot see any other way of properly implementing the clear intentions of the 1984 Diplomatic Conference.

Practical implications

24 Of the three issues, it is issue (c) which is most likely to have practical implications for the tanker industry. Issue (c) is whether the proviso in the definition of "ship" applies only to combination carriers.

Proposed Bunkers Convention

25 By the time that the Working Group meets, the IMO Legal Committee may have agreed the draft text of a "Bunkers Convention". The current draft provides explicitly that it would not apply to "pollution damage" as defined in the 1992 Civil Liability Convention.

<15> International Convention on Civil Liability for Oil Pollution Damage, paragraph 10-118

<16> The advice that the United Kingdom Government gave its Parliament during the passage of the legislation that would have implemented the 1984 Protocols interprets the definition of "ship" in the same manner. It states that the new definition would cover all ships capable of carrying oil in bulk as cargo, and that the proviso applies only to combination carriers.

<17> Although not a contemporaneous commentary, Colin de la Rue and Charles B Anderson's *Shipping and the Environment: Law and Practice* (LLP: 1998) interprets the definition in the same manner (pp 79 - 80).

<18> Annex I, Regulation 1(5).

<19> According to information provided by the International Group of P&I Clubs, its members provide some 145 million gross tons of tanker tonnage with the cover needed to carry cargoes of persistent oil. They also provide cover to 40 million gross tons of so-called clean product tankers (the owners of which do not pay the additional premium incurred for the carriage of persistent oils).

26 Therefore, if the Assembly of the 1992 Fund agrees that the proviso in the definition of "ship" only applies to combination carriers, the Bunkers Convention would have no impact on other tankers. This is because any claim arising from an oil pollution incident involving a tanker other than a combination carrier would be a claim for "pollution damage" as defined in the 1992 Civil Liability Convention.

27 However, the Assembly may take the view that the proviso has a wider scope of application. In this case, the Bunkers Convention would apply to any tanker which did not have residues of the previous carriage of a cargo of persistent oil on board.

28 The following table summarises the effect of the Assembly's decision on the scope of the proviso in the definition of "ship".

Scope of proviso	Always CLC	CLC or BC	Always BC
Combination carriers only	dedicated tankers	combination carriers	non-tankers
All tankers	laden tankers	unladen tankers & combination carriers	non-tankers

Insurance requirements

29 Issue (c) has no effect on the insurance requirement under Article VII of the 1992 Civil Liability Convention. Article VII only requires ships carrying more than 2 000 tons of persistent oil as cargo to have insurance cover.

30 The 1992 Civil Liability and Fund Conventions apply to more ships than the insurance requirement of Article VII. Therefore, by agreeing that a tanker that does not carry persistent oil is nevertheless a "ship" for the purposes of the 1992 Civil Liability Convention, the Assembly would not place any new obligation on tanker owners regarding insurance cover.

Summary of the implications

31 In summary, if the Assembly accepts that the 1992 Civil Liability Convention always applies to tankers other than combination carriers, their owners:

- will know that the Bunkers Convention will never apply to their ships; and
- will face no new obligation regarding insurance cover (as at present, insurance will be compulsory only for ships carrying 2 000 tons or more of persistent oil as cargo).

32 If the Assembly does not accept this interpretation of the definition of "ship", tanker owners would have to comply with the 1992 Civil Liability Convention on some voyages and with the proposed Bunkers Convention on others. In this case, they would face new insurance requirements. It may not always be immediately clear, moreover, which regime applied at any particular time. This lack of certainty would be unhelpful for industry, for States, and for claimants.

Proposals

33 The United Kingdom delegation proposes that the Working Group make recommendations to the Assembly on the interpretation of the definition of "ship" contained in Article 1(1) of the 1992 Civil Liability Convention. We propose further that the Working Group recommend the following interpretation, that:

- the reference in the definition of "ship" to a "ship capable of carrying oil and other cargoes" refers only to combination carriers;
- the proviso in the definition of "ship" therefore applies only to combination carriers;
- a combination carrier is any ship designed to carry either oil or solid cargoes in bulk (that is, as defined in MARPOL);
- any sea-going vessel or sea-borne craft, other than a combination carrier, which is constructed or adapted for the carriage (be it exclusively or not) of persistent oil in bulk as cargo is always a "ship" (that is, the 1992 Civil Liability Convention always applies to such a vessel or craft); and
- a combination carrier is a "ship" while carrying persistent oil in bulk as cargo and on all subsequent voyages, until its owner (or the 1992 Fund) has proved that no residues of such oil remain on board<20>.

34 Consequently, we propose that the Working Group agree that the definition of "ship" be interpreted as if drafted as follows:

> "ship" means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage **(be it exclusively or not)** of oil in bulk as cargo, provided that a ship **designed to carry either oil or solid cargoes in bulk** shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

<20> This is the legal position. For practical reasons, the owner of a combination need not regard it as a "ship" if the owner is able to prove that no residues remain on board.