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## DEFINITION OF 'SHIP' IN THE 1992 CONVENTIONS

Note by Republic of Korea, Japan, and Germany

<b>Summary:</b>	The word 'oil' in the proviso in Art. I.1 of the 1992 Civil Liability Convention must be construed to mean persistent hydrocarbon mineral oil as defined in Art. I.5 of the same Convention.
<b>Action to be taken:</b>	To be recommended as such to the Assembly.

### 1 Introduction

- 1.1 This paper is prepared in response to the decision taken by the Assembly in its 4th meeting held in October 1999, in which the Assembly requested, dealing with the point relating to the definition of a ship, to submit documents for its reconsideration in the April Meeting (see, Record of Decisions, paragraph 24.16).
- 1.2 In the course of discussions concerning the definition of a ship so far, it turns out that there are two schools of different thought with regard to the construction of Art. I.1 of the 1992 Civil Liability Convention, which reads as follows:

"1. ship means any seagoing 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 residue of such oil in bulk on board."

## **2 The Two Schools of Thought**

- 2.1 The critical words on which the two schools have different ideas are the underlined words in the previous citation "ship capable of carrying oil and other cargoes", which exist in the phrase after the word "provided" (i.e. in the proviso). The differences between the two schools arose out of the differences of opinion on the meaning of the word "oil" and the remaining "other cargoes".
- 2.2 The first school takes the view that the word "oil" in the said proviso means persistent oil and the term "other cargoes" means other oil and hard cargo, whereas the second school construes that the word "oil" here means any oil and the term "other cargoes" means hard cargo. Thus, the first school argues that a "ship capable of carrying oil and other cargoes" includes, in addition to combination carrier, virtually all dedicated tankers for the reason that it is capable of carrying other oil (than persistent oil) as "other cargoes", whereas the second school argues that they are limited to combination carriers, totally excluding dedicated tankers, for the reason that the ship must be capable of carrying hard cargo as "other cargoes" to come within the proviso. In this sense, the first school, in their view on the scope of a ship in the proviso, takes a wider view, and the second school takes a narrower view.
- 2.3 However, the above quoted words in dispute are included in the proviso as a qualifying part for the whole paragraph, thus limiting the scope of the ships referred to in the main part. Therefore, the net results for the scope of the ships to be covered under the Convention become opposite. The first school is of the opinion, taking a narrow view, that the ships are covered by the Convention if it carries persistent oil as cargo in bulk and any subsequent voyage in ballast with the residue. On the other hand, the second school, taking a wider view, is of the opinion that dedicated tankers are always covered, even if not involved in the business of carrying persistent oil in bulk at all, and combination carriers are covered while carrying persistent oil as cargo in bulk and any subsequent voyage in ballast with the residue.
- 2.4 This document is presented in support of the first school of thoughts taking a narrow view. This is the first paper to be presented to support the narrow view although the view was previously adopted by the Intersessional Working Group. The support rests on mainly two ground, one being the true construction of the related Article and the other, practical implications for the different constructions, which will be considered in turn here below.

## **3 Construction of Article 1.1**

- 3.1 The sponsoring nations are of the opinion that, on the true construction of the above-quoted paragraph 1 of the Article I of the 1992 Civil Liability Convention, the word "oil" in the phrase "ship capable of carrying oil and other cargoes" must mean "persistent oil" and "other cargoes" mean literally all other cargoes including other oil and hard cargo. The sponsoring nations have come to that conclusion mainly for the following two reasons.
- 3.1.1 Firstly, there is a definition of the word "oil" in paragraph 5 of the same Article. This made it unnecessary to go elsewhere for guidance, and the answer is provided nearby in the same Article. The definition is intended to guide us when there is any doubt in the meaning of the word "oil" in the Convention. The definition clearly states that the "oil" "for the purpose of the Convention" means "persistent oil". This naturally leads us to deduce from this that the word "oil" in this context must mean persistent oil. This is a construction based on common sense.
- 3.1.2 Secondly, the word "oil" makes better sense within the paragraph when it is taken to mean persistent oil. In the same proviso in the same paragraph, there is, in another part, the same word "oil". On both occasions, the words "carrying oil" are used. In the first part of the proviso, the actual words used are "capable of carrying oil and other cargoes", and in the second part, the actual words used are "actually carrying oil in bulk as cargo".

- 3.1.3 The term "actually carrying oil in bulk as cargo" is not a new one. It was used in Art I.1 of the 1969 Civil Liability Convention where the word "oil" was always taken to mean persistent oil. The same words were simply reemployed in Art I.1 of the 1992 Civil Liability Convention. In Art.VII.1 of the 1992 Civil Liability Convention, similar words are also used with the oil meaning persistent oil. It is, therefore, reasonable to assume that the word "oil" in the second part of the proviso means persistent oil. In fact, the other school conceded on more than one occasion in our meetings that the 'oil' in the second part was used to mean persistent oil. The word "residue" only makes sense when the word "oil" is used in this sense. And then, it follows that the same word "oil" or "carrying oil" must mean the same kind of oil, that is to say persistent oil. The same words in the same proviso in the same paragraph may not ordinarily possess different meanings.
- 3.2 There is another reason to hold as such in the same proviso. For this purpose, attention is drawn to the word "actually" before the words "carrying oil" in the second part. It seems that the word "actually" here is used to contrast it with the word "capable of" in the first part. It indicates progressively moving from capability to actuality. It is then clear that the progress is with the same oil in the both parts, and the oil in the first part is the same persistent oil as that in the second part.
- 3.3 In short, for the above reasons, we have no choice but to deduce that the words "oil" in the above paragraph all mean the same oil i.e. persistent oil referred to in Paragraph 5 of Article I on the true construction of the above provision.
- 3.4 The sponsoring nations, in this regard, wish to point out that, in construing stipulation in the Convention, the final arbiters are the national courts in the Contracting States, not the decisions of the Assembly. The constructions finally to be confirmed by the Assembly are expected to be in line with the constructions given by the national courts. If the Assembly takes a different view from national courts, a great deal of confusion is bound to occur. For this reason, there is a limit in our construction in radically departing from its ordinary meaning.

#### **4 Practical Implications**

- 4.1 The sponsoring nations believe that such a narrow construction is consistent with the design and character of the whole system and will better serve the whole purpose and intention of the system.
- 4.1.1 For combination carriers, which carry persistent oil and hard cargo, there is no difference in the opinion between the two schools, in that a ship is covered while carrying persistent oil in bulk as cargo or during the voyage in ballast but with the residue. The real difference lies with dedicated tankers, which are capable of carrying persistent oil as well as other oil. The narrow view supports the opinion that a dedicated tanker is covered while carrying persistent oil in bulk as cargo or during the voyage in ballast but with the residue, whereas the wide view claims that the dedicated tankers are always covered not only during the voyage in ballast without residue after carrying persistent oil, but also even though it always carries other oil and never carries persistent oil. The two main reasons are presented below to support the narrow view.
- 4.1.2 It used to be said under the 69 Civil Liability Convention and the 71 Fund Convention that "laden tankers are protected by the Fund". It was assumed without doubt that the words referred to tankers carrying persistent oil in bulk as cargo. When the 92 Protocols to the Conventions were introduced, it was commonly said that, by the Protocols, coverage was extended to unladen tankers. It has been quite naturally assumed that, by the same token, it refers to unladen tankers, which carry persistent oil.
- 4.1.3 The wide view takes the argument off this ordinary assumption, which is based on common sense. By the assertion that the tankers are covered regardless of the cargo it carries, it introduces an element not envisaged under the whole regime. And then, the Fund would stand, not to protect the

victims of the carriage of persistent oil, but to protect the tanker industry. Our contributors would be taken by surprise to learn that, through the Fund, they support the tanker industry which is an industry standing on its own and separate from the oil industry. The oil industry may be prepared to share a burden attendant while carrying its cargo, but it would not be ready to subsidize the tanker industry. In fact, there are no moral, social and economic reasons to require such subsidy. The protection under the 92 Protocols must be limited to the voyages somehow related, however remote, to the carriage of the oil on which contributions are levied by the Fund.

- 4.2 Our second argument is based insurance coverage. Under the current two-tier compensation system, the Fund operates on the assumption that the first chunk of the damages up to a limit is borne by the shipowner, and the compensation up to the limit is guaranteed by compulsory insurance. If the coverage by insurance fails for whatever reasons, the Fund is called to pay the whole damage under Art. 4.1(b) of the 92 Fund Convention. If there is no insurance at all, the burden is likely to fall on the Fund from the beginning. For this reason, it is critically important for the ship to have a valid insurance certificate in place from the viewpoint of the Fund.
- 4.3 However, under Art. VII.1 of the '92 Civil Liability Convention, only the ships carrying more than 2000 tons of persistent oil are required to hold an insurance certificate. According to the provision, the insurance so required is for the whole liability under the '92 Civil Liability Convention. The system, therefore, assumes that, by the check in the port, for a ship coming under its jurisdiction, a valid insurance is in place not only for the voyages carrying the quantity of persistent oil, but also for the whole ballast voyages subsequent or prior to the carrying voyages.
- 4.4 However, there is no port state control to check an insurance certificate in place for the ships, which never carry persistent oil. In fact, it is even uncertain whether such ships are ever required to insure under the '92 Civil Liability Convention or the '92 Fund Convention. In any event, more ships are likely to come to the Fund uninsured and more victims rush straight on to the Fund if the wide view is to be adopted. The only hope is that the Fund is able to cope with them.

## **5 Conclusion**

- 5.1 The sponsoring nations share the views with the other school on the several issues regarding the Article in that, in the said proviso, the expression "any voyage" is not restricted to the first ballast voyage, and the burden of proof for the residue lies on the shipowner/the Fund. However, they differ in the opinion on the meaning of the word "oil" in the proviso. According to their view, the word must be construed for the above reasons to mean persistent oil as defined in Art. I.5 of the same Convention.
- 5.2 The sponsoring nations recognize some merit in the view put forward by the other school. They are also conscious of the environmental protection. They acknowledge that it may be easy to manage by simply holding that all tankers are covered. With its scope, a line would be more easily drawn with the incoming 'Bunker Convention'. But, the weight that such merit carries is not mighty enough to disturb the conclusion based on the logical construction and common sense the sponsoring nations have reached. The decision previously taken by this Working Group should be reaffirmed and maintained.
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