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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

SOME THOUGHTS REGARDING THE LIABILITY OF SHIPOWNERS AND CARGO RECEIVERS

Submitted by the French delegation

Summary:	Further to document 92 FUND/WGR.3/2/1, submitted at the first meeting of the Working Group, the purpose of this document is to set out various points relating to owners' liability cover and the position of cargo receivers in the international system.
Action to be taken:	Include these items among those deserving closer scrutiny by the Working Group.

It is noted, in respect of the current situation, that the progress represented in 1969 by recognition of the principle of a shipowner's strict liability coupled with an obligation to maintain insurance which could be made directly available to victims, has been completely undone in the Protocols of 1992 by the amendment of the conditions under which this liability applies.

1. The spirit which prompted the drafting of the 1969 CLC-1971 IOPC Fund regime

The law on the liability of shipowners is governed by several principles: a principle which has never been called into question to date, the owner's right to limit his liability, and a principle which pertains to the basis of this liability.

Traditionally, the existence of fault is the precondition for recognising liability. But in view of the particular risks to society from the trade in oil, the international community has elaborated a regime of

strict liability which provides that the shipowner is *a priori* liable for damage caused during the use of his ship, irrespective of the existence of fault.

In order to ensure that a regime of this kind had real substance, an obligation to maintain insurance was also introduced. This last point constituted such an innovation in the world of traditional maritime transport that, in order to mitigate its impact, the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage provided for a mechanism whereby the Fund bore the difference between the amount due from the owner under the 1969 Civil Liability Convention and what he would have had to pay under general conventions on the limitation of liability for maritime claims (what was usually termed "roll-back").

2. The rules on the limitation of liability in the 1969 and 1992 Conventions

As far as the right of the owner to limit his liability is concerned, a big development took place between the 1969 Convention and that of 1992.

Article V, paragraph 2 of the 1969 Convention stipulated that "*If the incident occurred as a result of the actual fault or privity of the owner, he shall not be entitled to avail himself of the limitation provided for in paragraph 1 of this Article.*" The owner's personal fault was not, however, defined in the Convention.

In the 1992 Protocol (Article 6.2) the owner is no longer denied the right to limit his liability save when "*it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.*"

Whereas under the old Convention mere negligence on the part of the owner made it possible to deny him the right to limit his liability, the renegotiation in the 1992 Protocols of amounts of cover by shipowners and their protection and indemnity (P & I) Clubs has led to this possibility being reserved solely for cases of intentional or inexcusable fault.

This alteration of the original conditions, according to which the owner became liable if he was at fault, is making the victims' lot worse due to the rules applied by the P & I Clubs.

3. The contractual rules linking P & I Clubs to their members

In the rules commonly applied by the P & I Clubs affiliated to the International Group of P & I associations, several clauses concern cover for pollution damage and the insurer's exemption from liability.

First, the general clause applying to all claims for compensation of any kind, provides that if the owner is entitled to limit his liability, the insurer shall bear the costs only up to that limit.

Secondly, the special clause on cover for the risk of pollution, which specifies that when the above-mentioned clause does not apply (in other words, when the owner is not entitled to limit his liability) the cover offered by the insurer for each incident is US$1 000 million.

Lastly, the clause laying down that the insurer does not cover damage caused by the shipowner when such damage results from his personal act or omission, committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result.

The combined effect of these rules is that if the framework set up in 1969 is retained, when the owner is not entitled to limit his liability for personal fault which is neither intentional nor inexcusable, the assurer is bound to provide him with cover and victims have access to cover of US$1 000 million.

On the other hand, according to the framework set up in 1992, the only certain cover available is that established by the Convention, ie 59.7 million Special Drawing Rights (SDR) at the most, since, moreover, the clause of the Convention which makes it possible to deny the owner any right to limit his

liability is that same which permits the P & I Club to withdraw its cover. It is therefore no longer worth the victim's while to prove the owner's fault, because the victim would have no guarantee of compensation.

4. Scope of the obligation to maintain insurance

Many of the incidents with which the Fund has had to deal in recent years have often involved old, small or medium-sized ships which are not subject to compulsory insurance, or which bear only a fraction of the damages in view of their tonnage. Furthermore, the Civil Liability Convention sets the ceiling to the obligation of the owners of the largest ships at 44% of the amount available under the two Conventions.

From the point of view of the gradation of compensation under the Civil Liability Convention, a discrepancy therefore exists between the international system and the special P & I cover clause, which does not take account of the criterion of tonnage. Once a ship has "joined" a P & I Club, its owner is supposed to receive cover for pollution damage of up to US$1 000 million.

Although it does not seem that, to date, the special clause on cover for pollution damage in P & I contracts has ever been applied, its existence means that the Club agrees to be exposed to the risk of having to pay US$1 000 million per incident.

In practice, for the reasons explained above, it may be taken that when the insurer assesses the financial risk of insuring a ship, he can confine that risk to the amount of the limitation fund.

The latter may, however, bear no comparison to the extent of the damage for which compensation has to be paid.

A wide divergence is therefore noted between theoretical commitments (US$1 000 million) and the real obligations of P & I Clubs (the amount of the limitation fund).

This divergence is not understood by third parties who wish to claim under the P & I special cover for pollution damage. To that end, an increase of the amount of insurer's obligations would offer two advantages. First, it would narrow the above-mentioned gap and, secondly, it would undoubtedly influence the quality of ships given P & I cover.

5. Calculation of the limit of the shipowner's liability

As mentioned above, the calculation of the amount of the liability limitation funds could be revised.

Several paths can be explored in order to find a new balance between the burdens borne by the shipowner and those of the cargo receiver.

As pointed out, while the principle of the gradation of the amount of the owner's limitation fund with a ceiling of 44% of the maximum amount available under the Conventions achieves an acceptable balance when large ships are involved, it is based on a premise which might prove to be wrong, as the incidents of the *Tanio*, *Nakhodka* and *Erika* have shown, since a calculation resting solely on tonnage does not reflect the risk that the ship might constitute.

In order to take this aspect into account in a fair manner, several amendments could be examined.

First, the determination of a significant minimum amount (for example one third of the total amount available under the cover offered by the CLC/IOPC Fund system); secondly, the taking into account of a risk rating. The parameters needed to work out such a rating must remain simple and could be based on the IMO's current studies and on statistical surveys conducted by specialised bodies (ITOPF, Intertanko, etc). Possible examples could be the age of the ship and/or the existence of a double hull.

6. Position and role of cargo receivers

It may be noted that, in the present system, the actual liability of cargo receivers is limited to the payment of contributions in the event of an incident. This system does not, however, reflect the true role of cargo receivers in the maritime transport of oil. Either they are directly concerned and involved in this transport (such is the case of the big oil companies), or their activities largely depend on the deliveries of oil products. In both cases, there is no denying that cargo receivers must participate more in mechanisms designed to improve transport safety.

The huge variety of different participants in the transport of oil makes it impossible *a priori* to identify one person who could be held solely accountable for the quality of the ship used to transport the oil to its receiver.

In view of the number of persons involved, the taking into account of a criterion relating to the quality of the ship can rest only on the recording of the condition of the ship when the cargo is received.

6.1. Since the aim is to ensure that oil is transported in ships in a good condition, the fact that the receiver is not the charterer and that the cargo has formed the subject of several commercial transactions before it arrives at its receiver's premises should not have any influence.

Given that receivers of oil cargoes are professionals who depend on the arrival of these products for their business (oil middlemen or power stations), it would not be illogical to include them in this quality drive by imposing a financial constraint on them reflecting the condition of the ships which have just supplied them.

This step is already partly that of the oil companies who specify criteria of acceptability for the transport of cargo to their terminals or for transport on their behalf (with a transfer of ownership at the point of destination). The proposal that contributions should be calculated by weighting the quantities of hydrocarbons received by taking into account the condition of the ship would be merely an additional incentive.

It would not be unusual for the industry to accompany such a modification by a revision of the contractual clauses connecting it with various middlemen such as chartering brokers, so that they also participate in this quality drive and, if need be, bear the consequences of the choice of ship they propose to their customers.

6.2. The receipt of some categories of petroleum products creates a specific risk

The experience of the *Tanio*, *Nakhodka* and *Erika* incidents, to quote only these three cases, shows that some particularly persistent products are transported by ships offering fewer safeguards than those assigned to the transport of other petroleum products. Several factors explain the use of these ships, principally the level of the freight for black products compared with that for other petroleum products and the cost of cleaning tanks after such cargoes. But the constraints of transporting these products, especially the fact that they must be heated, increase the risk, for they promote corrosion, which spreads all the more rapidly if the ship is already old.

It might therefore be possible to contemplate either an increase in the contribution borne by the receivers of such cargoes, or the provision of specific cover for incidents caused by such products (for example an additional charge like that which is to be found in conventions for natural phenomena of an exceptional character). This higher charge could also have a bearing on the first level, in other words it could be included in the calculation of the owner's liability limitation fund.

7. Inclusion of interest in the Fund Convention

Interest on the sums due from the shipowner and interest on those due from cargo receivers are treated differently at present.

While it has been decided that liability limitation funds should bear interest and that this interest should be to the benefit of the victims, the Fund Convention offers a different solution in respect of the payment of interest, because it fixes a maximum obligation of 135 million SDR.

Any interest earned on contributions levied is in fact deducted from the sums which cargo receivers will have to pay.

It would seem fairer for this interest to be used for the benefit of the victims.
