



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1992

THIRD INTERSESSIONAL  
WORKING GROUP  
Agenda item 2

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## REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

### UNIFORM APPLICATION OF THE CONVENTIONS

#### Note by the Director

<b>Summary:</b>	The document deals with certain provisions in the Conventions in respect of which the Director feels that in the past the Conventions have not been applied in a uniform manner or difficulties have arisen as a result of the relationship between the Conventions and national law, namely channelling of liability, time bar, enforcement of judgements and jurisdiction.
<b>Action to be taken:</b>	Information to be noted.

## 1 Introduction

- 1.1 At its 1st and 2nd meetings, the Working Group discussed the issue of the uniform application of the 1992 Civil Liability Convention and 1992 Fund Convention. It was generally considered that the uniform application of the Conventions was of prime importance. It was recognised however that it would be difficult to achieve this end fully. The Working Group agreed to consider this issue further at its next meeting.
- 1.2 In this note the Director draws attention to some provisions of the Conventions in respect of which he feels that in the past the Conventions have not been applied in a uniform manner or difficulties have arisen as a result of the relationship between the Conventions and national law.

## 2 Channelling of liability

- 2.1 The issue of channelling of liability is governed by Article III.4 of the 1969 Civil Liability Convention and the 1992 Civil Liability Convention, respectively. These provisions read:

Article III.4 of the 1969 Civil Liability Convention

No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.

Article III.4 of the 1992 Civil Liability Convention

No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against:

- (a) the servants or agents of the owner or the members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any person taking preventive measures;
- (f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

- 2.2 In spite of these provisions in the 1969 Civil Liability Convention (Article III.4) prohibiting claims against the servants or agents of the shipowner, national courts have held the master personally liable for pollution damage. The courts arrived at this result because claims for compensation based on the Conventions were filed in criminal proceedings and since a person held criminally liable for a given event is automatically civilly liable for the same event. It should also be noted that in one of these cases, the master, the shipowner's insurer and the 1971 Fund were held primarily liable whereas the registered owner was held subsidiarily liable, although it is clear from Article III.1 of the 1969 Civil Liability Convention that the shipowner is the person primarily liable.

**3 Time bar**

- 3.1 The relevant provisions in the Conventions on time bar read:

Article VIII of the 1969 Civil Liability Convention and the 1992 Civil Liability Convention

Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this

incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

Article 6 of the 1971 Fund Convention and the 1992 Fund Convention

1. Rights to compensation under Article 4 *or indemnification under Article 5* <sup><1></sup> shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.

2. Notwithstanding paragraph 1, the right of the owner or his guarantor to seek indemnification from the Fund pursuant to Article 5, paragraph 1, shall in no case be extinguished before the expiry of a period of six months as from the date on which the owner or his guarantor acquired knowledge of the bringing of an action against him under the Liability Convention <sup><2></sup>.

- 3.2 Some Fund Member States have not implemented in their national law the exact texts of the time bar provisions in the Conventions but have reworded the provisions in their national statutes, thereby changing their substantive contents. In addition, the courts in some States tend to interpret the time bar provisions in conjunction with provisions and principles on time bar in their national law. This problem is of particular importance in States where claims for compensation may be brought in both civil and criminal actions. In one Member State once a criminal action has been brought in respect of a particular event, the running of time bar periods is suspended until the criminal action has been brought to an end by a final judgement.
- 3.3 The main question is whether (as the 1971 Fund has maintained) the three-year time period from the date of the damage is absolute, or whether, as has been suggested in some Member States, the period can be extended or suspended through the application of general domestic law relating to time bar or prescription. There have also been different views expressed as to whether the three-year period can be interrupted by legal steps other than the bringing of an action for compensation. In addition, there has been a dispute as to the interpretation of Article 7.6 of the 1971 Fund Convention. Under this Article, the claimant can prevent a claim from becoming time-barred against the 1971 Fund by notifying the Fund, in accordance with the formalities required by the law of the court seized, of an action for compensation brought against the shipowner or his insurer.

**4 Enforcement of judgements against the 1992 Fund**

- 4.1 The enforcement of judgements rendered by national courts against the 1992 Fund is governed by Article 8 of the 1971 and 1992 Fund Conventions respectively. Articles 4.5 and 18.7 are also relevant in this regard. These provisions read:

Article 4

5. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and

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<1> The words in italics do not appear in the 1992 Fund Convention.

<2> This subparagraph does not appear in the 1992 Fund Convention.

the amount of compensation actually recovered by the claimant under *the Liability Convention and* <sup><3></sup> this Convention shall be the same for all claimants.

### Article 8

Subject to any decision concerning the distribution referred to in Article 4, paragraph 5, any judgement given against the Fund by a court having jurisdiction in accordance with Article 7, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the 1992 <sup><4></sup>Liability Convention.

### Article 18

The functions of the Assembly shall, *subject to the provisions of Article 26* <sup><5></sup>, be:

7. to approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with Article 4, paragraph 5, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of pollution damage are compensated as promptly as possible;

- 4.2 In a recent case it has become apparent that the national system for the enforcement of judgements had not been adapted so as to take into account the provisions of the 1971 and 1992 Fund Conventions referred to above. The national law does not contain any specific provision to the effect that the courts shall take into account decisions by the competent Fund body that payments of established claims should be pro rated. It has been argued that the decisions by the national courts in respect of individual claims shall always be enforceable in full against the Fund, notwithstanding decisions by the Fund body that payments should be pro rated. This problem may arise also in other States, in particular in States where claims for compensation arising out of the same incident may be pursued in several courts, for example in both civil and criminal courts.

## **5 Jurisdiction**

An additional problem encountered by the IOPC Funds is that of jurisdiction. The Conventions only govern the distribution of jurisdiction between various States but do not deal with the competence of courts within the State where the pollution damage occurred. In some countries this may result in several courts being competent to hear claims relating to the same incident. In one case litigation was pursued in five courts at various levels.

## **6 Action requested**

The Working Group is invited:

- a) to take note of the information contained in this document; and
- b) to give due consideration to the issues raised in the document in its recommendations to the Assembly.

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<3> The words in italics do not appear in the 1992 Fund Convention.

<4> The 1971 Fund Convention does not contain the expression '1992'.

<5> The words in italics do not appear in the 1992 Fund Conventions.