



International Oil Pollution
Compensation Funds

Agenda Item 5	IOPC/NOV20/5/5/1	
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RISK MANAGEMENT

UPDATE ON THE REVIEW OF INSURANCE PROBLEMS

Note by the Audit Body

Summary:	<p>This document reports the conclusions of the sixth joint Audit Body and the recommended measures and future tasks to be undertaken in respect of the risk relating to insurers who are not members of the International Group of P&I Associations (non-IG insurers).</p> <p>Given the variety and complexity of this risk, the Audit Body has divided it into five issues and has considered measures to deal with each one of them.</p>
Action to be taken:	<p><u>1992 Fund Assembly and Supplementary Fund Assembly</u></p> <p>(a) take note of the information contained in this document;</p> <p>(b) instruct the Director to present this report to the International Maritime Organization (IMO); and</p> <p>(c) take any other decision that the 1992 Fund Assembly and the Supplementary Fund Assembly may deem appropriate to implement the recommended measures.</p>

1 Introduction

- 1.1 While the number of incidents involving the 1992 Fund is decreasing, the number of incidents involving non-IG insurers (insurers who are not members of the International Group of P&I Clubs (IG Clubs)) is increasing. Even though the 1992 Fund and the 1971 Fund have not experienced many difficulties with non-IG insurers, based on the data submitted by the Secretariat, the 1992 Fund is likely to face problems which it has not experienced with ships insured by the IG Clubs. According to the Secretariat, the problems have resulted in a financial burden of £9.26 million^{<1>} or 1.24% of the total compensation paid by the 1992 Fund and the 1971 Fund which amounts to £742 million. This figure does not include the administrative costs (e.g. legal costs) incurred in solving these problems.
- 1.2 The issues arising from incidents involving the IOPC Funds and non-IG insurers were initially reviewed by the Audit Body as part of its work on risk management at its meeting on 13 April 2018. Subsequently, at the October 2018 sessions of the governing bodies, the Audit Body presented an interim report on this subject (document IOPC/OCT18/5/5/1) and further reported its considerations to the October 2019

^{<1>} This figure is the total amount of the compensation (CLC part, unrecovered) paid by the 1971 Fund and the 1992 Fund in relation to the incidents involving non-IG insurers.

sessions of the governing bodies (document IOPC/OCT19/5/5/1) and received many comments from the attending Member States. The Audit Body considered the comments received.

- 1.3 This document reports on the conclusions of the sixth Audit Body on this issue. It also includes recommendations by the Audit Body and suggests possible ways of putting them into practice in the future.

2 Importance of this problem

- 2.1 Among the various International Maritime Organization (IMO) Conventions on liability and compensation, the 1992 Civil Liability Convention (CLC), the 1992 Fund Convention and the Supplementary Fund Protocol create a three-tier compensation system. The 1992 CLC provides a first tier of compensation which is paid by the shipowner/insurer of a ship which causes pollution damage. The 1992 Fund Convention provides a second tier of compensation, and a third tier of compensation is available to Supplementary Fund Member States. The second and third tiers of compensation are financed by oil receivers in 1992 Fund Member States and the Supplementary Fund Member States, respectively.
- 2.2 If the actual compensation available from the shipowner/insurer falls short of the amount required under the 1992 CLC and this gap is filled by the 1992 Fund, this means that victims are compensated at an additional expense to contributors.
- 2.3 The international compensation system presupposes the existence of responsible shipowners, responsible governments, responsible insurers and responsible contributors. If the stakeholders do not fulfil their responsibilities and do not comply with the texts nor the spirit of the Conventions (e.g. by issuing CLC certificates which are in conflict with the underlying insurance cover or by refusing to pay compensation in accordance with the 1992 CLC), this results in an unfair burden on the IOPC Funds and a serious risk of undermining the compensation system established by these Conventions, which could lead to a lack of international support for the Conventions.

3 Measures recommended by the joint Audit Body

- 3.1 The problem arising from dealing with unreliable non-IG insurers is complex. The Audit Body has divided this problem into five issues and has proposed measures to deal with each one. The five issues are:
- How to prevent the occurrence of an 'insurance gap' (paragraph 3.2);
 - how to react when there is an 'insurance gap' (paragraph 3.3);
 - how to react when the insurer refuses to pay compensation for invalid reasons (paragraph 3.4),
 - how to facilitate cooperation between non-IG insurers and the IOPC Funds (paragraph 3.5); and
 - how to cope with the insolvency of non-IG insurers (paragraph 3.6).

The main organisations that have to deal with these issues are IMO and the IOPC Funds. Among the recommended measures listed in this document, it is suggested that some are to be taken by the IOPC Funds or IMO separately and others are to be taken by both organisations together. The Audit Body proposes which should be the leading organisation in the implementation of each recommended measure.

Since the recommended measures in this report are largely matters relating to the 1992 CLC, the Audit Body recommends that the Director presents this report to IMO. The Audit Body hopes that the proposed measures will be discussed further between the IOPC Funds and IMO and that they will be implemented in close cooperation by both organisations.

3.2 Measures to prevent the occurrence of an 'insurance gap'

- 3.2.1 An 'insurance gap' arises when there is a contradiction between the statement of the CLC certificate or blue card (a document issued by the insurer certifying the evidence of the insurance cover required by the 1992 CLC) and the statement of actual insurance coverage under the insurance policies. The insurance gap resulting from the insurer's insufficient coverage causes problems when handling claims. In order to prevent the occurrence of an insurance gap, the Audit Body recommends the following measures:

Use and disseminate a template document certifying the evidence of the 1992 CLC insurance (equivalent to the blue cards issued by the IG Clubs) (IMO, IOPC Funds)

- 3.2.2 Whereas the IG Clubs use a common text for their blue cards and many non-IG insurers seem to follow the same text, some non-IG insurers do not use the same text. Introducing a template document for those non-IG insurers similar to the blue cards issued for IG Clubs would act as a deterrent and would facilitate a more harmonised administration globally, thus assisting Member States. The Audit Body has considered two possible texts for the template document and hopes that these options will be discussed with IMO.

Dissemination of the template

- 3.2.3 After having held discussions with representatives of the insurance industry and, based on the comments received at the meeting of the governing bodies in October 2019, the Audit Body believes that Member States should disseminate the template document and request the mandatory use of such a template. Such an initiative should be based on the recommendation of IMO or the IOPC Funds. Some Member States have reported that they are already following such practice.

Request the Member States issuing the problematic CLC certificate to report to the Director (IMO, IOPC Funds)

- 3.2.4 To minimise the risk of a ship having insufficient insurance cover, the governing bodies should instruct the Director to request the Member States that issued the unsubstantiated CLC certificate to report on the following:

- How the CLC certificate in question was issued and what measures will be taken to address this issue; and
- what preventive measures will be taken to avoid a similar situation arising again in future.

- 3.2.5 After examining the report from the Member State, the Director should report it to the governing bodies. The governing bodies should instruct the Director to inform IMO if it finds any matter that should be discussed within the IMO.

Facilitate consultation in accordance with Article VII(7) of the 1992 CLC (IMO, IOPC Funds)

- 3.2.6 In general, Member States should be encouraged to share information on insurance companies which they have accepted or rejected as providers of financial security under the 1992 CLC.

- 3.2.7 In relation to the recognition of other Member States' certificates, Article VII(7) of the Convention stipulates that a 'Contracting State may at any time request consultation with the issuing or certifying State' if it believes that the insurer is not financially capable of meeting the obligations imposed by the 1992 CLC. The governing bodies should facilitate such a peer review process, especially between the pollution-affected Member State and the certificate-issuing Member State. Possible topics for the consultation would be:

- What kind of documents did the Member State request from the applicant before issuing the CLC certificate in question;

- whether other ships are insured by the same insurer; and
- what preventive measures can be taken in relation to the other ships insured by the same insurer to avoid this situation from occurring again.

3.2.8 IMO has focused on how to ensure the quality of insurance and has issued circular letters (Circular letter No. 3145 (6 January 2011), amended to include the CLC certificate by Circular No. 3464 (2 July 2014)). Although Member States have been implementing this Circular, such information is not being shared at present. The Audit Body believes that sharing that information could be facilitated by using the IMO Global Integrated Shipping Information System (GISIS) as the platform.

Request the Director to continue to report the details of any insurance gap issues that arise to the 1992 Fund Executive Committee (IOPC Funds)

3.2.9 This measure has already been taken by the Secretariat. The Secretariat's report should include the following information:

- Name of the insurer, shipowner, government that issued the CLC certificate; and
- amount of compensation and legal costs paid by the Fund as a result of the 'insurance gap'.

Encourage Member States to conduct Port State Control (PSC) on the CLC certificates (IMO, IOPC Funds)

3.2.10 Member States of the 1992 CLC have the obligation to ensure that insurance or other security is in force in respect of any ship calling at their port or off-shore terminal if the ship actually carries more than 2 000 tons of oil in bulk as cargo (Article VII(11), the 1992 CLC). Implementing this provision through their Port State Control (PSC) activities will be a deterrent against non-implementation of the Convention.

3.3 Measure to be taken when there is an 'insurance gap'

3.3.1 In spite of the above-mentioned preventive measures, insurance gaps may still occur. The Audit Body recommends the following measure for such unfortunate cases.

Clarifying the position of the IOPC Funds on the issue of insurance gap (IOPC Funds)

3.3.2 Article 4 of the 1992 Fund Convention, which stipulates the reasons why the 1992 Fund pays compensation, does not mention the occurrence of an insurance gap. The Audit Body considers that the insurance gap was not envisaged when the Convention was drafted.

3.3.3 It should be recalled that the IOPC Funds is not a charity organisation for victims of pollution damage, but an international organisation set up by a Convention with the purpose of compensating victims who cannot obtain full and adequate compensation from the shipowner/insurer under the 1992 CLC.

3.3.4 Taking into account the purpose of the Conventions as explained in paragraph 2.1 and the role of the 1992 Fund as explained above, the Audit Body recommends that the governing bodies should decide not to cover any insurance gap caused by the shipowner/insurer unless the national court in the Member State renders a judgment (which is no longer subject to ordinary forms of review) against the Funds.

3.4 Measures to cope with cases where the non-IG insurer refuses to pay compensation for invalid reasons

3.4.1 Under the 1992 CLC, shipowners have strict liability and claimants have a right to direct action against the insurers. Insurers may avail themselves of the defences which their shipowners would have been entitled to invoke and the defence that the pollution damage resulted from the wilful misconduct of the shipowners themselves only (Article VII(8) of the 1992 CLC). However, the IOPC Funds have been faced with non-IG

insurers who refused to pay (or tried to refuse to pay) compensation for other reasons. The Audit Body recommends the following measures to be applied in these cases.

Liaise with the insurer and seek support from the Member State where the insurer is based (IOPC Funds)

- 3.4.2 Though non-IG insurers provide insurance cover for shipowners, they may not be familiar with the requirements of the 1992 CLC. The IOPC Funds should liaise with the insurers and encourage them to comply with the Convention. Also, support should be sought from the government of the Member State where the insurer is based.

Outreach activities for insurers (IMO, IOPC Funds)

- 3.4.3 Facilitation of the insurers' understanding of the Conventions could help prevent incorrect implementation by the insurers. It may be worth considering developing a leaflet which explains the requirements of the 1992 CLC for insurers.

3.5 Measures to facilitate cooperative action from non-IG insurers

- 3.5.1 In order to facilitate the smooth operation of the Conventions, the IOPC Funds have concluded a cooperation arrangement with the IG Clubs and signed a Memorandum of Understanding (MoU). However, the IOPC Funds does not have an equivalent arrangement with non-IG insurers and has faced some difficulties in the past. The Audit Body recommends the following measures to address this issue.

Concluding an MoU with non-IG insurers equivalent to the MoU signed between the IOPC Funds and the IG Clubs (IOPC Funds)

- 3.5.2 The MoU concluded between the IOPC Funds and the IG Clubs covers, among others, cooperation in the use and cost-sharing of surveyors and other experts, and consultation on the interpretation of the term 'pollution damage'. Cooperation in these aspects is essential for the smooth operation of the Conventions. Therefore, the IOPC Funds should continue discussing with the International Union of Marine Insurance (IUMI) and non-IG insurers to advance the conclusion of a similar MoU.

Encouraging voluntary agreements equivalent to STOPIA and TOPIA (IOPC Funds)

- 3.5.3 The Small Tanker Oil Pollution Indemnification Agreement (STOPIA) and the Tanker Oil Pollution Indemnification Agreement (TOPIA) are agreements between the IG Clubs and their member shipowners with the purpose of striking a balance between the burden borne by the maritime industry and the oil industry. Though STOPIA and TOPIA are voluntary agreements, they are substantially essential elements of the CLC/Fund Convention regime. In this sense, non-IG insurers are benefiting at the expense not only of the 1992 Fund but also of the IG Clubs by avoiding the burden-sharing. If the percentage of non-IG incidents remains the same or increases, their non-contribution to the burden-sharing could become an issue in the future.

- 3.5.4 The Audit Body believes that financial exposure is an effective instrument to ensure responsible behaviour. As mentioned above, non-IG insurers are not organised in a way that would make it possible to have agreements similar to the STOPIA/TOPIA. However, this should not prevent the Secretariat from trying to persuade non-IG insurers to conclude similar agreements.

- 3.5.5 In relation to this point, there is an idea of raising the CLC limit, as an alternative to introducing STOPIA. This would also achieve equal footing between the IG Clubs and non-IG insurers. Bearing in mind that the insurance market outside the IG Clubs, which insures mainly smaller ships, is more diverse and consists of a number of different companies, the Audit Body has, on a preliminary basis, discussed whether a way forward could be to increase the liability limits without reopening the Conventions. If requested by the governing bodies of the Funds, the Audit Body could continue its discussions on this issue.

3.6 Measure to cope with the insolvency of the non-IG insurers (IOPC Funds)

The Audit Body recommends that the IOPC Funds should maximise cost recovery. It is necessary to participate in the liquidation process as early as possible. If a liquidation is perceived (e.g. if the Member State is aware that the insurer is unable to constitute its limitation fund) the Secretariat should monitor the situation with the cooperation of the Member State.

4 Action to be taken

1992 Fund Assembly and Supplementary Fund Assembly

The 1992 Fund Assembly and Supplementary Fund Assembly are invited to:

- (a) take note of the information contained in this document;
 - (b) instruct the Director to present this report to IMO; and
 - (c) take any other decision that the 1992 Fund Assembly and the Supplementary Fund Assembly may deem appropriate to implement the recommended measures.
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