



International Oil Pollution
Compensation Funds

Agenda Item 3	IOPC/NOV20/3/12	
Date	17 September 2020	
Original	English	
1992 Fund Assembly	92A25	
1992 Fund Executive Committee	92EC74	●
Supplementary Fund Assembly	SA17	

INCIDENTS INVOLVING THE IOPC FUNDS — 1992 FUND

BOW JUBAIL

Note by the Secretariat

Objective of document:

To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.

Summary:

On 23 June 2018, the oil and chemical tanker *Bow Jubail* (23 196 GT) collided with a jetty owned by LBC Tank Terminals in Rotterdam, the Kingdom of the Netherlands. As a consequence of the collision, a leak occurred in the area of the starboard bunker tank, resulting in a spill of fuel oil into the harbour. The ensuing pollution affected vessels in the vicinity, quays and other property, and wildlife.

At the time of the incident, the *Bow Jubail* was in ballast. The oil spilled was bunker oil. The shipowner applied before the Rotterdam District Court for leave to limit its liability in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as modified by the 1996 Protocol (LLMC 76/96). The shipowner argued that the incident was covered under Article 1.8 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention 2001).

In November 2018, the Rotterdam District Court decided that the shipowner had not proved that the tanker did not contain residues of persistent oil at the time of the incident. The Court assumed that the *Bow Jubail* qualified as a ship as defined under the 1992 Civil Liability Convention (CLC) and decided not to grant the leave to limit its liability under the Bunkers Convention 2001. The shipowner appealed to the Court of Appeal in The Hague.

The burden of proof on this point lies with the shipowner. If the shipowner cannot prove that the *Bow Jubail* had no residues of oil in bulk on board, the 1992 CLC would apply. The relevant test would be the one applied by local law, in this case, the law of the Netherlands.

The ship is insured with Gard P&I (Bermuda) Ltd, which is a member of the International Group of P&I Associations. The limitation amount applicable to the *Bow Jubail* if the 1992 CLC were to apply would be SDR 15 991 676, but the owner of the *Bow Jubail* is a party to the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006 (as amended 2017) whereby the shipowner would indemnify, on a voluntary basis, the 1992 Fund for the difference between the limitation amount applicable to the *Bow Jubail* under the 1992 CLC and the amount of compensation paid by the 1992 Fund, up to a limit of SDR 20 million.

It is likely that the total pollution damage will exceed the limit that would apply to the ship under the 1992 CLC and in that case, both the 1992 Fund Convention and the Supplementary Fund Protocol could apply to this incident.

However, if the shipowner is successful in proving that there were no such residues on board, the incident would fall under the Bunkers Convention 2001, and therefore, the limitation amount of the LLMC 76/96 would apply.

Recent developments:

After several postponements, the Court of Appeal in The Hague judgment is now expected on 27 October 2020.

Bearing in mind the consequences that the Court's decision might have on the compensation regime, the Director has considered the possibility for the 1992 Fund to intervene in the proceedings and has instructed lawyers in the Netherlands.

The 1992 Fund's lawyers in the Netherlands have advised that the 1992 Fund will have to wait for the Court of Appeal judgment and see whether the shipowner appeals and takes the case to the Supreme Court. It is only under those circumstances in which the 1992 Fund could join the legal proceedings (see section 4).

Relevant documents:

The online *Bow Jubail* incident report can be found via the Incidents section of the IOPC Funds' website.

Action to be taken:

1992 Fund Executive Committee

Information to be noted.

1 Summary of incident

Ship	<i>Bow Jubail</i>
Date of incident	23.06.2018
Place of incident	Rotterdam, the Netherlands
Cause of incident	Collision
Quantity of oil spilled	Approximately 217 tonnes of heavy fuel oil
Area affected	Rotterdam Port, the Netherlands
Flag State of ship	Norway
Gross tonnage	23 196 GT
P&I insurer	Gard P&I (Bermuda) Ltd
Bunkers Convention 2001	If the Bunkers Convention 2001 were to apply, the limit would be some SDR 14 million.
1992 CLC limit	If the 1992 CLC were to apply, the limit would be some SDR 16 million.
STOPIA/TOPIA applicable	If the 1992 CLC and Fund Conventions were to apply, STOPIA would also apply, with a limit of SDR 20 million.
1992 CLC + 1992 Fund + Supplementary Fund limit	The limit provided under the three Conventions would be SDR 750 million.
Legal proceedings	The Rotterdam District Court decided that the <i>Bow Jubail</i> could qualify as a ship as defined in the 1992 CLC so that the shipowner could not invoke the Bunkers Convention 2001 for its limitation of liability. The shipowner appealed arguing that the Bunkers Convention 2001 should apply to this case since the <i>Bow Jubail</i> was not a ship under the 1992 CLC.

2 Background information

- 2.1 On 23 June 2018, the oil and chemical tanker *Bow Jubail* (23 196 GT) collided with a jetty owned by LBC Tank Terminals in Rotterdam, the Kingdom of the Netherlands. As a consequence of the collision, a leak occurred in the area of the starboard bunker tank, resulting in a spill of fuel oil into the harbour. The ensuing pollution affected vessels in the vicinity, quays and other property, and wildlife.
- 2.2 At the time of the incident, the *Bow Jubail* was in ballast, however, on the voyage prior to the incident, from Houston to Rotterdam via Antwerp, the *Bow Jubail* carried 'oil' as referred to in the 1992 CLC.
- 2.3 The shipowner states that the tanks were clean of oil cargo residues at the time of the incident
- 2.4 There is some indication that the claimed amount may be over EUR 50 million.

3 Applicability of the Conventions

- 3.1 The Netherlands is Party to the 1992 Civil Liability and Fund Conventions and the Supplementary Fund Protocol.
- 3.2 Article I(1) of the 1992 Civil Liability Convention (CLC) defines 'ship' as: '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**'.
- 3.3 At the time of the incident, the *Bow Jubail* was in ballast. The oil spilled was bunker oil. The question is whether there were any residues of previous cargoes on board. The burden of proof that there were no residues on board lies with the shipowner. The relevant test will be the one applied by local law, in this case, the law of the Netherlands.
- 3.4 If the shipowner cannot prove that the *Bow Jubail* had no residues of oil in bulk on board, the 1992 CLC would apply. In that case, since the total pollution damage is likely to exceed the limit that would apply to the ship under the 1992 CLC, both the 1992 Fund Convention and the Supplementary Fund Protocol could apply to this incident.
- 3.5 The ship is insured with Gard P&I (Bermuda) Ltd, which is a member of the International Group of P&I Associations. The limitation amount applicable to the *Bow Jubail* if the 1992 CLC were to apply would be SDR 15 991 676, but the owner of the *Bow Jubail* is a party to the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006 (as amended 2017), whereby the shipowner would indemnify, on a voluntary basis, the 1992 Fund up to SDR 20 million.
- 3.6 However, if the shipowner is successful in proving that there were no such residues on board, the incident would fall under the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention 2001) and therefore, the limitation amount under the Convention on Limitation of Liability for Maritime Claims, 1976, as modified by the 1996 Protocol (LLMC 76/96) would apply. The liability limit applicable to the *Bow Jubail* under the Bunkers Convention 2001 would be SDR 14 312 384.

4 Limitation proceedings

- 4.1 The shipowner applied before the Rotterdam District Court for leave to limit its liability in accordance with the LLMC 76/96. The shipowner argued that the incident was covered under Article 1.8 of the Bunkers Convention 2001. Accordingly, the shipowner requested to establish a Limitation Fund in the form of a guarantee issued by the shipowner's insurer, Gard P&I (Bermuda) Ltd.

- 4.2 In response to a court request, the shipowner submitted a technical report concluding that no oil cargoes and/or their residues, persistent or non-persistent, remained on board the vessel prior to and at the time of the incident.
- 4.3 A hearing took place on 28 September 2018. At the hearing the shipowner argued that although it may be assumed that on the voyage prior to the incident, from Houston to Rotterdam via Antwerp, the *Bow Jubail* carried 'oil' as referred to in the 1992 CLC, the tanks were clean of oil cargo residues at the time of the incident and therefore, the Bunkers Convention 2001 applied to the incident.
- 4.4 The shipowner also argued that all tanks in which oil had been carried, had been subject to a MARPOL (International Convention for the Prevention of Pollution from Ships) prewash and an additional 'commercial wash'.
- 4.5 The majority of the claimants present at the hearing argued that the evidence that had been presented to the Court did not prove that the vessel was free of oil cargo residues and that as a result, not the Bunkers Convention 2001 but instead, the 1992 CLC with the additional 1992 Fund Convention and the Supplementary Fund Protocol should be governing the incident and the compensation.
- 4.6 The shipowner argued that the facts of the case should dictate which convention and which limits should apply, not simply the desire of the claimants to apply the convention which is more beneficial to the claimants.
- 4.7 The Court issued its decision in November 2018, holding that the shipowner had not sufficiently substantiated that the tanks of the *Bow Jubail* did not contain residues of persistent oil carried in bulk at the time of the incident, as provided for in Article I(1) of the 1992 CLC. The Court decided to leave the incompleteness of the documents and the lack of clarity with respect to the presence of residues in the sense of the 1992 CLC and decided not to grant the shipowner an opportunity to complete its standpoint that the tanks were clean of oil cargo residues. The Court assumed that the *Bow Jubail* qualified as a ship as defined in the 1992 CLC and decided not to grant the leave to limit its liability under the Bunkers Convention 2001.
- 4.8 The shipowner appealed to the Court of Appeal in The Hague. In its appeal, the shipowner mainly argued the following:
- a vessel can be a CLC vessel at one stage and a non-CLC vessel at another stage during its lifespan. Cleaning the vessel after the discharge of a cargo of persistent oil in bulk to 'oil free' means that the vessel no longer qualifies as a ship as defined in Article I(1) of the 1992 CLC;
 - the vessel's tanks were cleaned in order to be 'oil free' in accordance with the regulations of the MARPOL and thus, under these regulations, the vessel was no longer carrying oil or oil mixture on board. In addition, the vessel also had its tanks cleaned with a so-called 'commercial wash' in order to make the vessel fit to carry new cargo. This means that the vessel was no longer a ship in the sense of the 1992 CLC and therefore, the Bunkers Convention 2001 applied. Being 'oil free' according to MARPOL is also free of residues as defined in Article I(1) of the 1992 CLC.
- 4.9 After several postponements, the Court of Appeal judgment is now expected on 27 October 2020.

The 1992 Fund joining the proceedings — legal considerations

- 4.10 Given that the 1992 Fund has not been a party to the proceedings and bearing in mind the consequences that the Court's decision might have on the compensation regime, the Director has considered the possibility for the 1992 Fund to intervene in the proceedings and has instructed lawyers in the Netherlands.
- 4.11 The Fund's lawyers in the Netherlands advised that according to the Netherlands' 'Code of Civil Procedure', a party with an interest in legal proceedings pending between other parties may request to intervene or to

join in the proceedings. Given that the Court's decision might affect the 1992 Fund, the 1992 Fund would have sufficient interest in the legal proceedings. However, this would have to be decided by the Supreme Court.

- 4.12 The Fund's lawyers have also advised that it is too late at this time to submit a request to join or intervene in the proceedings before the Court of Appeal. If the judgment of the Court of Appeal is not in favour of the shipowner and the shipowner decides to appeal once more (filing for cassation), the case will be brought before the Supreme Court of the Netherlands. The Supreme Court will address only legal and procedural arguments instead of substantive arguments on the facts of the matter. Since the Supreme Court does not address substantive arguments, it is not possible to intervene in the proceedings, although it is possible to join them.
- 4.13 The difference between joining and intervention is that an intervening party may oppose both the plaintiff and the defendant, whereas, a joining party may only support the position of one of the parties. Since the 1992 Fund's case is to request a clarification from the Supreme Court on how the legal test applies as to whether there were residues or not on board the *Bow Jubail* according to the law of the Netherlands, the 1992 Fund could join the shipowner in the procedure before the Court by filing an incidental claim.
- 4.14 The 1992 Fund needs to wait for the Court of Appeal's judgment and thereafter, give serious consideration to the possibility of joining the shipowner in the procedure before the Supreme Court.

5 Director's considerations

- 5.1 This is an interesting case since there is doubt as to whether it is the Bunkers Convention 2001 or the 1992 CLC which applies. The case is based on the issue of the standard of proof of whether there were residues of previous cargoes of persistent oil in a ship in ballast.
- 5.2 The burden of proof that the *Bow Jubail* did not have, at the time of the incident, any residues of persistent oil from previous cargoes, lies with the shipowner. This burden of proof has not been satisfied according to the judgment by the Rotterdam District Court.
- 5.3 The shipowner appealed and a decision by the Court of Appeal is awaited. If a final judgment of a competent court were to decide that the 1992 Civil Liability and Fund Conventions apply, the 1992 Fund would pay compensation as required and would be indemnified by the shipowner in accordance with the provision under STOPIA 2006 (as amended 2017), up to a limit of SDR 20 million. However, if the shipowner were to be successful, the Bunkers Convention 2001 would apply, and the 1992 Fund would not be involved in this case.
- 5.4 According to the information provided by the shipowner's insurer, the Gard P&I (Bermuda) Ltd, claims have not yet been quantified but could exceed EUR 50 million according to estimations. The Court's decision could, therefore, have a financial impact on the 1992 Fund.
- 5.5 The 1992 Fund will now wait for the Court of Appeal's judgment and if the shipowner appeals to the Supreme Court, the Director considers that the 1992 Fund should join the proceedings. The Director has discussed this matter with the Gard P&I (Bermuda) Ltd, who agrees with this course of action.

6 Action to be taken

1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited to take note of the information contained in this document.
