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International Oil Pollution Compensation Funds

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INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

PRESTIGE – Judgment of Spanish Supreme Court

Submitted by the International Group of P&I Associations

Summary:	An appeal against the judgment of the Spanish Supreme Court has been filed by the master in the Constitutional Court. The implications of the judgment have been given further study and are the subject of further observations in this document, particularly with respect to the liability limit of insurers.
Action to be taken:	1992 Fund Executive Committee Information to be noted.

1 Introduction

1.1 It will be recalled that at its April 2016 session the 1992 Fund Executive Committee considered documents submitted by the Secretariat and by the International Group of P&I Associations (International Group) in which information was provided on the recent decision in this incident of the Spanish Supreme Court. Attention was drawn to various concerns arising from the judgment.

1.2 These concerns were supported in statements by three other industry observer delegations, as well as in the interventions of several Member States who shared the view that the judgment was apparently inconsistent with the provisions of the 1992 Civil Liability and Fund Conventions. As the International Group stated at the time, it was still evaluating the potential impact of the judgment and might wish to revert after giving further consideration to its implications.

1.3 It is naturally recognised that commentary on the judgments of competent courts in Contracting States calls for due respect for their decision-making authority. As the Group has stressed on previous occasions, it takes the view that the rule of law is of paramount importance, however unpalatable the decisions of competent courts may be. None of the comments which this delegation has made or now makes is intended to derogate from this in any way. They are intended simply to provide information as to the grounds for the judgment and contemplated grounds for appeal; and to make observations on potential implications which States may wish to consider.

1.4 Two aspects of the judgment on which further comment may assist are the liability of the insurer and the liability of the master.

2 Liability of the insurer

2.1 As previously noted, the Supreme Court held the London Club directly liable both under the 1992 Civil Liability Convention (1992 CLC) and under other laws. Its liability under the Convention up to the CLC limit was not in dispute, but it was also held to incur direct liability above that limit under Spanish domestic legislation. This latter liability was unaffected by the CLC limit and was subject to the terms of the policy, with the result that it was capped only by the limit of indemnity of US$1 billion.

2.2 It has not been thought necessary to comment on this aspect of the case in any great detail, as it has already been ruled upon by the English Court. Further clarification may nevertheless be helpful in the light of the statement by the Spanish delegation at the April 2016 meeting. It then stated that there had been an incorrect interpretation of the judgment of the Supreme Court on this aspect of the case. The Club, it said, had incurred direct liability without limitation under the 1992 CLC, as provider of the owners' financial security. Referring to Article V, paragraphs 8 and 11 of the Convention, it stated that the latter paragraph allows limitation of the insurer's liability, adding that "it is the insurer which can avail itself of this by means of defence." The Club, it added, had failed to do this as it had not taken part in the proceedings, and limitation under the Convention could not be allowed *ex officio* by the Court. This, it stated, is what the Supreme Court indicated in its judgment.

2.3 These remarks by the Spanish delegation give rise to the following observations:

2.3.1 In May 2003, the London Club made a cash deposit with the competent court in Spain of the limitation amount of some €22.8 million calculated in accordance with the 1992 CLC. On 28 May, lawyers representing the owners filed a document with the Court referring to this deposit, stating that it had been made to constitute a fund representing the liability limit of both the owner and insurer under Article V of the Convention, and requesting its acceptance. On 16 June 2003, the Court formally accepted the deposit.

2.3.2 The interpretation of the judgment presented by the Spanish delegation does not accord with that of the Club/owners and their legal advisers.

2.3.3 The Supreme Court distinguished between two bases of direct liability on the part of the insurer, namely liability under the 1992 CLC, and liability under other Spanish domestic laws (Article 117 of the Spanish Criminal Code and Article 76 of the Spanish Insurance Contract Law).

2.3.4 The insurer's liability under the 1992 CLC was described by the Supreme Court as existing "on a limited basis and without the possibility of extension". No reference was made by it to Article V paragraph 8 or 11 of the Convention. The Court made no suggestion that the Club had failed to avail itself of the right to limit its liability under the 1992 CLC – on the contrary, it made express reference to the Club's action in constituting the fund under the 1992 CLC. It also made no suggestion that the Club's right of limitation depended on it appearing in the proceedings "by way of defence". Indeed, the Convention contains nothing to support any such suggestion.

2.3.5 When it constituted the fund, the Club discharged its maximum liability under the 1992 CLC, and thereafter it had no further direct interest in proceedings under the Convention. It maintained an indirect interest as insurer of the owners, and in cooperation with the 1992 Fund in processing claims. However the appropriate distribution of the limitation fund was a matter for the Court.

2.3.6 The only reason for the Club to appear in proceedings in Spain would have been to contest the claim alleging direct liability under domestic laws. However the terms of the policy provided for arbitration in London. To resolve this issue the Club brought arbitration proceedings in London against the Spanish and French States, seeking declarations, *inter alia*, that any direct liability claim

(other than under the 1992 CLC) was to be brought in London arbitration and was subject to the terms of the policy, including the "pay to be paid" rule. London arbitration awards were made which granted these declarations, and the Club applied to the English High Court for them to be recognised as judgments of the Court. In 2013 the Court gave such judgments after a trial in which both States actively took part. The States appealed against the High Court's decision, and their appeals were dismissed in 2015 by the English Court of Appeal, which upheld the declarations and found that both States had submitted to the jurisdiction of the English courts. Neither State sought to challenge the Court of Appeal's decision.

2.3.7 The Spanish Supreme Court has since held, for reasons that do not seem entirely clear, that, notwithstanding the indemnity terms of the policy, the Club had no defence to a direct claim under the Spanish domestic laws mentioned above. It took the view furthermore that the Club, by constituting a fund under CLC, had waived any right to rely on the 'pay to be paid' rule. The basis for this view does not appear to be clear from the judgment. The cash deposit was expressly made in respect of the Club's liability under the CLC, to which the 'pay to be paid' rule in the policy terms could not provide any defence (Article VII(8)). It is therefore unclear why it was thought that the cash deposit waived any such defence.

2.3.8 In the statement by the Spanish delegation it is suggested that it was the procedural strategy of the P&I Club that caused it to incur liability in excess of the 1992 CLC limit. It appears to be accepted that any direct liability of the Club, however incurred, would have been limited under Spanish law to the 1992 CLC limitation amount, provided the Club availed itself of its right of limitation under the Convention. Given that the Club did in fact do so, as recognised by the Supreme Court, it would appear to follow that no liability should have been imposed on it in excess of that limit, whether under the Convention or otherwise. However it does not appear necessary to comment further on this issue, as it is now academic in the light of the outcome of the proceedings in the UK.

3 Liability of the master

3.1 Appeal proceedings on behalf of the master are currently pending before the Spanish Constitutional Court. Depending on the outcome, the case may later be brought before the European Court of Human Rights.

3.2 The master's case on appeal is, in essence, that the Supreme Court exceeded its powers by substituting its own view of the facts for the trial court's assessment of the evidence, and by reversing his acquittal without re-hearing his testimony.

3.3 As regards compatibility with the Conventions of the civil liability imposed on the master, the Spanish delegation stated in April 2016 that:

> "With respect to the master and shipowner, to the extent that the judgment finds the existence of recklessness in the master's conduct, there is strict compliance with the CLC."

3.4 This delegation respectfully differs from the view that a finding of recklessness is sufficient reason to deny immunity under the channelling provisions, in circumstances where it has been found that the master's actions did not cause the damage (and it is acknowledged that this finding was not altered on appeal), and where no finding has been made that he acted not only recklessly, but also "with knowledge that such damage would probably result", as Article III(4) of the 1992 CLC requires.

3.5 Similar concerns were expressed by several delegations as far back as the June 2005 session of the Executive Committee. The Spanish delegation then stated that it agreed that the Spanish courts should respect the 1992 Conventions, and that the Spanish Government intended to submit pleadings reminding them of their obligation to do so (92FUND/EXC.29/6, para. 3.2.32).

4 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.