INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

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1992 Fund Executive Committee	**92EC48**	
1992 Fund Working Group	**92WG6/1**	•

1992 FUND SIXTH INTERSESSIONAL WORKING GROUP:

FUNDING OF INTERIM PAYMENTS

Submitted by the International Group of P&I Clubs

Objective of document:	To invite the 1992 Fund sixth intersessional Working Group (Working Group) to consider the proposals raised in this document as a means of addressing the concerns on the current practice for funding interim payments, with a view to continuing to ensure the prompt and efficient use of available funds for the benefit of claimants.
Summary:	This document outlines certain proposals which may form the basis for the discussions that are directed at the possible participation of the 1992 Fund in the payment of claims before the 1992 Civil Liability Convention (1992 CLC) limit has been reached, and also the adoption of a model co-operation agreement along the lines of the second co-operation agreement agreed by the Korean Government, Skuld P&I Club and the owners of the *Hebei Spirit* in 2008.
Action to be taken:	1992 Fund sixth intersessional Working Group: Consider the proposals contained in this document.

1 Introduction

1.1 The 6th session of the 1992 Fund Administrative Council, acting on behalf of the 14th session of the 1992 Fund Assembly, considered the issues of possible overpayment faced by P&I Clubs as a consequence of making interim payments, particularly when there is a risk of admissible claims exceeding the maximum available compensation, and noted that, as interim payments were normally funded in the first instance by the Clubs, it had been the Clubs who had had the primary need to address these issues.

1.2 The International Group informed the 1992 Fund Administrative Council that overcoming the risk of overpayment can normally be met by simply following the procedures set down in the 1992 Civil Liability Convention (1992 CLC), and establishing a limitation fund for distribution as the court sees fit, as was the case in the *Prestige* incident. However, the International Group fully appreciates that this may result in the funds they provide being unavailable to claimants until a considerable time after the incident, and that the compensation regime operates more effectively if adequate safeguards can be found for the International Group Clubs to continue to make interim payments.

1.3 The term 'interim payments' can be used to describe various types of payments of less than the full amount, for example where:

- the claim has not been finally quantified;
- the claim has been quantified but only a proportion is payable as there is a risk that total claims will exceed available compensation (pro-rating); and

- payment is for a defined part of the overall claim (eg for one head of claim or for a period only).

1.4 The mandate of the 1992 Fund sixth intersessional Working Group (Working Group) agreed by the 1992 Fund Administrative Council provides that consideration should be given as to:

- whether model co-operation agreements, summaries of principles or similar documents could be developed which could assist Member States in quickly making adequate arrangements in response to incidents within their jurisdiction; and

- whether alternative solutions could overcome the identified risk, including what role, if any, the 1992 Fund could have in relation to such alternative solutions regarding interim payments and whether the Memorandum of Understanding between the 1992 Fund, the Supplementary Fund and the International Group of P&I Clubs should be amended to include provisions designed to overcome the risk of overpayment by the shipowner.

2 Involvement of the 1992 Fund in payments before the 1992 CLC limit has been reached

2.1 The 1992 Fund's policy has always been to commence compensation payments only after the shipowner or the shipowner's insurer has paid up to the limitation amount applicable to the ship concerned.

2.2 In discussions that took place within the 1992 Fund Executive Committee in 1999, the International Group submitted a proposal that when there was a risk that the total amount of the established claims would exceed the maximum amount of compensation available under the 1992 Fund and the payments were therefore pro-rated, the 1992 Fund should participate with the Club in the payments to each claimant, in proportion to their estimated respective ultimate liabilities.

2.3 The decision reached by the 1992 Fund Executive Committee at the time was to make no change. Several delegations at that session considered, amongst other issues, that it was premature to consider new procedures at that time since the system of the 1992 CLC and Fund Conventions had not been in existence for very long. This situation has now changed. The 1992 CLC and Fund Conventions had only been in force for three years at the time of the second session of the 1999 Executive Committee meeting, whereas the 1992 CLC and Fund Conventions have now been in force for 14 years, with 103 States Party to both the 1992 CLC and the 1992 Fund Convention. The risk of overpayment is much greater therefore than was the case in 1999, owing to the greater number of States that are now Party to the Conventions. In addition, the exposure is much greater, given the significantly higher limits that are in force today as a result of the increase in the limits of liability that took effect in 2003.

2.4 In support of the proposed approach tabled at the 1992 Fund Executive Committee meeting in 1999, the International Group believes that the following points remain of relevance today in the discussions due to take place shortly within the Working Group, namely that:

- in cases where the approved claims reach or exceed the 1992 Fund limit, each claimant will, in the majority of cases, receive a greater part of his compensation from the 1992 Fund than from the Club;

- whilst the legal liability on the part of the 1992 Fund to pay claims arises where 'the damage exceeds the owner's liability under the 1992 Civil Liability Convention…..', this pre-condition relates to the insufficiency of the compensation available under the 1992 CLC and <u>not prior payment</u> by the Club;

- it is in accordance with the principles of the 1992 CLC and Fund Conventions that the claimant receives part payment from the Club, and part payment from the 1992 Fund, where the 1992 CLC limit is exceeded;

- whilst this approach would not in itself eliminate the risk of over-payment, it would reduce the risk in monetary terms as a result of being shared between the Club and the 1992 Fund in proportion to their respective limits. Without this participation from the 1992 Fund, the Clubs would face a degree of risk that would be out of proportion to their liability limit.

2.5 One analysis of the current practice in support of this proposed approach is that, when a Club bears sole responsibility, as is currently the case, to make interim payments based on the estimated entitlement to claimants under the 1992 CLC and Fund Conventions, and continues to do so until the 1992 CLC limit is reached, it does so on its own behalf to the extent of the proportion for which it is responsible and on behalf of the 1992 Fund for the remainder. Equally, the 1992 Fund's payments once the CLC limit has been reached are made partly on its own behalf, and partly on behalf of the Club. In other words, the current arrangement that exists between the Club and the 1992 Fund is that each will make payments partly on its own behalf and partly on behalf of the other. Consequently, in any distribution of a limitation fund by the competent court, account should be taken not only of the interim payments paid by the Club but of all interim payments under the compensation regime including those paid by the 1992 Fund as explained above. However, the sixth session of the 1992 Fund Administrative Council noted in October 2009 that this is not reflected in the 1992 CLC and Fund Conventions and that uncertainties remain as to the manner in which interim payments are treated.

2.6 In most incidents, it is very difficult to say with certainty in the first few weeks following the incident, whether the overall compensation available under the 1992 CLC and 1992 Fund Convention would be exceeded. Nevertheless, if the 1992 Fund decided to contribute to the compensation payments and the initial estimated amount of established claims was later revised, appropriate re-adjustments could always be made in the apportionment of later payments.

2.7 An illustrative example of how this procedure could work in practice is contained in the Annex to this document.

2.8 Whilst such an approach would not overcome claimants' concerns with regard to the agreed pro-rata percentage payment of claims in the event that the total estimated aggregate of claims exceeded the 1992 Fund limit (since such concerns would only be alleviated by implementation and ratification of the 2003 Supplementary Fund Protocol or, for example, by the government agreeing to 'stand last in the queue'), or necessarily speed up the assessment of claims (since claims would still be jointly assessed by both Club and 1992 Fund as per the current procedure), it may alleviate concerns that are often directed at both the 1992 Fund and the State in which such large scale and high profile incidents occur with regard to the delay of compensation payments by the 1992 Fund itself.

2.9 At the same time, consideration would need to be given to ensure that any such new procedure does not disadvantage claimants or delay the payment of claims compared with the current procedure for the payment of claims, as well as avoiding the need for claimants to receive two separate payments from both Club and 1992 Fund, which would be unnecessarily cumbersome, by the joint funding of single payments.

2.10 The International Group also recognises that the 1992 Fund would still need to obtain the authorisation of the 1992 Fund Executive Committee to approve claims and to make payments, as well as to decide on the level of payments. The International Group is not proposing that this procedure needs to, or should, change. If this proposed approach were adopted, the International Group Clubs would continue to follow current practice in relation to interim payments prior to a decision being taken by the 1992 Fund Executive Committee at its first meeting following the incident concerned if it became clear that advance payments to claimants that were most in need would alleviate such hardship. If this were the case, then appropriate re-adjustments could always be made in the apportionment of later payments. Such a re-adjustment may also be necessary in cases where the estimated total cost of claims is within the 1992 Fund limit but subsequent claims result in the estimated total exceeding the 1992 Fund limit, thereby resulting in a change in the apportionment of the payment of claims between the Club and the 1992 Fund.

2.11 Any risk that a decision taken at the first 1992 Fund Executive Committee meeting that the level of payments could result in the overpayment of claims by the 1992 Fund should be allayed given that the 1992 Fund normally takes a very cautious approach when fixing the percentage to be paid in the early stages of an incident.

2.12 This proposed approach is not set out in detail, since a general consideration of the principles of the proposal would be desirable before any further consideration of the details of such a change, either in procedure, or of how such a procedure could be adopted, whether through an amendment to the Funds policy, a 1992 Fund Assembly Resolution, or an amendment to the Funds/International Group Memorandum of Understanding.

2.13 As has been mentioned, such a new procedure for paying claims would not on its own entirely overcome the International Group's concerns, although it would go some way towards minimising the risk through a sharing of the burden of payments. If such a procedure were followed, the shipowner might in some cases still be obliged to establish a limitation fund in the competent court, either in order to release his ship or other property from arrest, or as a condition of availing himself of the right of limitation. Where an interim payment has been made but the obligation then arises to establish a limitation fund, the Club may be exposed to the risk of 'double payment' if the competent court does not recognise that the interim payments can be offset against the limitation fund.

2.14 Given the precedent already established in the *Hebei Spirit* case, and in accordance with the Working Group's mandate, the International Group has also set out below the key provisions of the Second *Hebei Spirit* Co-operation Agreement to allow the Working Group to consider the development of a model co-operation agreement as an additional means of overcoming the risk of overpayment by means of a 'double payment' that could be considered both by States in whose waters an incident occurs, and the relevant parties, on a case-by-case basis.

3 Co-operation agreements

3.1 On 1 July 2008, the Korean Ministry of Land, Transport and Maritime Affairs (MLTM), the owners of the *Hebei Spirit*, and the Skuld P&I Club (as the owner's Club) signed the Second Co-operation Agreement ('the Agreement') which provided the necessary safeguards that allowed the Club to continue to provide the funds required for prompt payment of compensation in respect of claims which it and the 1992 Fund approved as admissible on the basis that:

1. the Korean Government undertook to provide the funds required for payment into court if it became necessary (to establish a limitation fund), since the owner and the Club had been advised that even if they made interim payments up to the full limitation amount (89.77 million SDR) this would not protect them from the prospective liability to deposit the same amount in court at a future date in order to avail themselves of limitation; and

2. all claimants received 100% of their assessed claims.

3.2 This enabled the Club to make interim payments for the full amount of assessed and approved claims, and to agree to continue making such payments until they reached the 1992 CLC limit in accordance with the current procedure on the payment of claims in 1992 CLC/Fund cases. Although the 1992 Fund was consulted during the discussions which led to the Agreement, it was not a party to the Agreement.

3.3 Several Clubs had received advice in previous incidents in various jurisdictions that even if they made interim payments up to the full limitation amount, this would not protect them from the prospective liability to deposit the same amount in court at a future date in order to avail themselves of limitation. The *Hebei Spirit* is the first pollution case where such a co-operation agreement has been agreed to overcome the very real concerns faced by Clubs in regard to interim payments and it should be emphasised that without this Agreement, it was most unlikely that interim payments would have been made by the Club.

3.4 The International Group believes that the Agreement has established a valuable precedent that provides the basis of a model agreement that could assist member governments in response to other incidents where the total cost of admissible claims was estimated to exceed the overall limit of compensation under both 1992 CLC and the 1992 Fund, whilst recognising at the same time that similar arrangements may not be appropriate in each and every such case.

3.5 The Working Group is invited to consider whether the principles contained in the above-mentioned Agreement provide the basis for a model agreement that could assist States in ensuring the prompt payment of claims by both the Clubs and 1992 Fund (in the event that the Funds engaged in the funding of interim payments) by providing the necessary safeguards to allow claims to be paid following review and assessment in accordance with the Funds' criteria for the admissibility of claims. With this in mind, the key principles that are contained in the Agreement are listed as follows to facilitate the Working Group's consideration of a possible framework model agreement:

- the Club and 1992 Fund continue to review and assess claims in accordance with the Funds' criteria on admissibility of claims;
- the Club provides the funds required for payment of compensation, which shall be for the full amount for which the claim has been assessed and approved;
- any such payment is conditional on the provision by the claimant of documentation containing the amount assessed and approved by the Club and the 1992 Fund as well as a receipt, release and transfer to the owner, Club and 1992 Fund, of the benefits of the claimant's rights to compensation under the Conventions up to the amount of the payment;
- the aggregate amount paid by the Club shall not exceed the 1992 CLC limit;
- in the event that the Club is required to deposit with the competent court a cash amount representing the limitation fund, the Government shall pay into court the balance between the payments already made by the Club and its limit under the 1992 CLC. If this is not accepted by the court, then the payment shall instead be made to the Club.

3.6 Clearly if the 1992 Fund does engage in the payment of claims, then its participation in any such future agreement should be considered and factored in to any principles that may be agreed to form the basis of a model agreement to be used in future cases.

4 Conclusion

The International Group invites the Working Group to consider the proposals contained in this document as the basis for discussions, and hopes that this will be a positive contribution to a wide-ranging discussion of the concerns about the current practice of funding interim payments, with a view to continuing to ensure the prompt and efficient use of available funds for the benefit of claimants. In summary, our proposals are:

1. the involvement of the 1992 Fund in the payment of claims before the 1992 CLC limit has been reached when there is a risk that the total amount of the established claims will exceed the maximum amount of compensation available under the 1992 Fund and the payments are therefore pro-rated;

2. the development of a model agreement to assist States in ensuring the prompt payment of interim claims by providing the necessary safeguards; and

3. any other possible measures to establish a common understanding of the purpose and effect of interim payments with a view to alleviating the risks raised in this document to facilitate the prompt payment of compensation to claimants.

5 Action to be taken

1992 Fund sixth intersessional Working Group:

The 1992 Fund sixth intersessional Working Group is invited to consider the proposals contained in this document.

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Annex

The proposal for a new payment procedure can be illustrated by the following example for the 1992 Fund:

Total amount of compensation available	203 million SDR (100%)
Total compensation payable by the 1992 Fund	113.23 million SDR (55.78%)
Total compensation payable by the shipowner/Club	89.77 million SDR (44.22%)
Decision taken to pro-rate all claims at 20% of approved amounts	
Payments made so far have not reached the shipowner's limit	
Claim Y has been approved for 500 000 SDR	
Amount payable to Claimant Y = 20% of 500 000 SDR = 100 000 SDR	
Claimant Y would be paid as follows:	

Present procedure	SDR	Proposed procedure	SDR
Club: 100% of payable amount =	100 000	Fund: 55.78% of payable amount =	55 780
Fund: 0% of payable amount =	0	Club: 44.22% of payable amount =	44 220
Total	**100 000**	**Total**	**100 000**

If, in the above example, the payment of established claims were to be increased from 20% to 80%, resulting in an additional payment of 300 000 SDR, the consequences would be as follows. Under the present procedure, the Club would pay the total additional amount of 300 000 SDR and make any further payments until the shipowner's limitation of 89.77 million SDR is reached. Under the proposed procedure, the 1992 Fund would pay 167 340 SDR (55.78 % of 300 000 SDR) and the Club 132 660 SDR (44.22 % of 300 000 SDR).