INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

Agenda item: 8	IOPC/MAR11/**8/9**	
Original: ENGLISH	11 March 2011	
1992 Fund Assembly	**92AES15**	
1992 Fund Executive Committee	**92EC51**	
Supplementary Fund Assembly	**SAES4**	
1971 Fund Administrative Council	**71AC26**	
1992 Fund Working Group	**92WG6/2**	●

FUNDING OF INTERIM PAYMENTS

Submitted by the International Group of P&I Clubs

Summary:	To provide an update to the 1992 Fund sixth Intersessional Working Group on the discussions that have taken place between the International Group of P&I Clubs and the 1992 Fund Secretariat on the funding of interim payments since the previous meeting of the Working Group.
Action to be taken:	Information to be noted and consideration to be given to draft Memorandum of Understanding between the International Group of P&I Clubs and the 1992 Fund contained in the Annex.

1 Introduction/Background information

1.1 The first meeting of the 1992 Fund sixth intersessional Working Group considered the concerns expressed by the International Group of P&I Clubs (International Group) with regard to the funding of interim payments of claims when there is a risk that the total amount of established claims will exceed the maximum amount of compensation available, and the payments are therefore pro-rated. Those discussions also included the possible development of a model agreement to assist States in ensuring the prompt payment of interim claims by providing the necessary safeguards.

1.2 The International Group and the 1992 Fund Secretariat have engaged in discussions in the intersessional period since the first Working Group meeting to consider proposals that seek to address these issues and to facilitate interim payments. The International Group and the 1992 Fund Secretariat have, in particular, considered in detail the text of the draft Memorandum of Understanding (MoU) that is contained in the Annex to this document which was prepared by the International Group as a means of addressing the International Group's concerns in respect of the risk of the overpayment of claims.

1.3 Unfortunately, no agreement on the text of such a draft MoU has yet been reached between the two parties and some underlying issues of principle have emerged which need further discussion.

2 Draft MoU on the Funding of Interim Payments under the 1992 Civil Liability and Fund Conventions

2.1 The text of the draft MoU contained in the Annex has been drafted by the International Group with the intention of setting out both the practice which has normally been followed in making interim payments under the international regime of compensation for claims for oil pollution damage, and also the intent in making such payments. The draft also proposes that the Fund would:

- accept the possibility that it would engage in the funding of interim payments when it is known that the amount of admissible claims would exceed the 1992 Fund Convention limit, as the ratios in which each payment is to be apportioned between the two contributing parties (Club and Fund);

- recognise the principle that payments funded by one compensation body are made on behalf of them both;

- satisfy any liabilities which are established under the 1992 CLC after payments equivalent to the shipowner's CLC limit have been made; and

- reimburse the Club/shipowner where such a liability is enforced by claimants.

2.2 Paragraphs 1 – 8 of the draft MoU attempt to record in a public document the practice to date where interim payments have been made (by the Club). Paragraphs 9 – 14 attempt to build upon existing practice and cover any future involvement of the Fund in the funding of interim payments.

2.3 It is hoped that progress can be made in reaching an agreement between the two parties (International Group and Fund) that adequately addresses the International Group's concerns on the risk of overpayment of claims in the circumstances already considered by the first meeting of the 1992 Fund Working Group and previously by the 1992 Fund Administrative Council in October 2009 (and indeed the 1992 Fund Executive Committee when this issue was first raised by the International Group in 1999 (see document 92FUND/EXC.2/6)).

2.4 In October 2009 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 the International Group Clubs and noted that interim payments were normally funded in the first instance by the International Group Clubs. For example, although the Skuld Club has funded substantial payments to claimants in respect of the *Hebei Spirit* incident, no payments have been made to date by the 1992 Fund even though the 1992 Fund Executive Committee continues to set a pro rata percentage payment to claimants in the event that payments are to be made by the Fund in this particular case.

2.5 Clearly, it is in the interests of all interested parties (claimants, States, the 1992 Fund, International Group Clubs) that a joint agreement is reached between the International Group and the 1992 Fund on the matter. However, in the event that such an agreement is not reached, then the risk of over-payment on the part of the International Group Clubs will remain when there is a risk of admissible claims exceeding the maximum available compensation under the 1992 CLC and 1992 Fund Convention - if the International Group Clubs continued to fund interim payments.

2.6 The IG has previously informed the 1992 Fund that overcoming the risk of overpayment can normally be met by simply following the procedures set down in the 1992 CLC, and establishing a limitation fund for distribution as the court sees fit, as happened in the Prestige case. Whilst the IG Clubs fully appreciate that this approach may result in the funds they provide being unavailable to claimants until a considerable time after the incident, if adequate safeguards cannot be found for the IG Clubs to continue to make interim payments then there is undoubtedly a greater risk that this approach will be followed by the IG Clubs in future cases.

3 Action to be taken by the1992 Fund Working Group

The Working Group is invited to

(a) take note of the information contained in this document; and

(b) consider the draft Memorandum of Understanding contained in the Annex and comment as appropriate.

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INTERIM PAYMENTS OF COMPENSATION UNDER THE 1992 CIVIL LIABILITY AND FUND CONVENTIONS

Draft Memorandum of Understanding between the International Oil Pollution Compensation Fund, 1992 and the International Group of P&I Clubs

1. This Memorandum sets out the practice which the International Oil Pollution Compensation Fund, 1992 (1992 Fund) and Clubs in the International Group (the Clubs) will normally follow in making interim payments under the international regime of compensation for claims for oil pollution damage established by the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention (Fund Convention). Where appropriate, the 1992 Fund and the Clubs are referred to herein as "the compensation bodies".

2. The compensation bodies recognise that although there is no legal requirement under the Conventions for interim payments to be made, such payments are normally desirable to avoid or alleviate financial hardship to those suffering pollution damage. They are also conscious that where such payments are made, clarity is desirable as to their intended purpose and effect. This Memorandum accordingly sets out the intent of the compensation bodies in making such payments.

3. The compensation bodies are aware that where the total of established claims exceeds the shipowner's liability limit under the 1992 CLC, that Convention entitles all claimants to receive from the Club/shipowner the same pro-rata proportion of their respective established claims (1992 CLC, Article V(4)). In incidents where the Fund Convention also applies, the portion of their claims which is irrecoverable from the Club/shipowner by reason of pro-rating gives rise to a claim against the Fund, and similar pro-rating of such claims is required when their total admissible amounts exceed the maximum compensation available under the Fund Convention (Fund Convention, Article 4(5)) and where additional compensation is not available under the International Oil Pollution Supplementary Compensation Fund (Supplementary Fund).

4. Where pro-rating is required, the precise amounts which each claimant is entitled to receive from the Club/shipowner under the 1992 CLC and, where applicable, from the Fund under the Fund Convention, can be ascertained only when all claims have been finally determined. In a major incident the time required for all claims to be presented, substantiated and assessed, and for more contentious claims to be finally resolved, may typically run to a period of some years. The Fund and the Clubs are convinced that the international compensation regime would fail to meet the needs of society if compensation payments were postponed for such a time.

5. The compensation bodies therefore intend, where possible, to maintain a practice of making interim payments to claimants as soon as possible after their admissible claims have been established. In this Memorandum the phrase 'interim payment' refers to any payment of compensation, whether in full or partial settlement of the recipient's admissible claim, when payment is made prior to the distribution of any fund established under the 1992 CLC with the competent court, or to the formal distribution of the compensation available under the Fund Convention.

6. If it is clear that the aggregate of established claims will not exceed the maximum available compensation, interim payments may be made for the full amount of individual claims, as and when their admissible amounts are established. If, however, there is a risk of the maximum amount being exceeded, interim payments will normally be restricted to a conservative estimate of the proportion of the admissible amounts which claimants will ultimately be entitled to receive.

7. In cases where the 1992 CLC applies but not the Fund Convention, interim payments will normally be based on an estimate of the claimants' entitlement under the 1992 CLC alone.

8. Where the Fund Convention also applies, interim payments can normally be based on an estimate of the claimants' entitlement under both Conventions. The compensation bodies may decide that interim payments are to be funded by separate contributions from both of them (based on their estimated liabilities respectively under 1992 CLC and under the Fund Convention), or they may decide that they are to be funded entirely by one of them in the first instance and thereafter by the other. Normally this involves payments by the Club until an amount equivalent to the CLC limit has been paid, and subsequent payments being made by the Fund (though adjustments may be made to include apportionment of joint costs between the compensation bodies). Whichever procedure is adopted, interim payments are made in full or partial satisfaction of the claimants' rights under both Conventions.

9. Funding of interim payments by separate contributions may be preferred in cases where it is clear that the admissible claims will exceed the maximum compensation available under the Fund Convention (as the ratio between such contributions is then known). Funding by the Club in the first instance may be preferred in cases where this ratio remains uncertain, or where it is uncertain that the admissible claims will exceed the CLC limit, or where this procedure is considered administratively more efficient. (In either case the source of the funds will not necessarily be clear to claimants, notably when they are paid through a joint claims office.)

10. Where interim payments are funded by the Club in the first instance, the funds it provides are paid with priority to claimants whose claims are established first, whilst compensation available from the Fund is reserved for parties whose claims are established later. This procedure is not intended as any departure from the principle that all claimants are entitled to receive the same proportions of their claims under the 1992 CLC from the Club/shipowner, and under the Fund Convention from the Fund. In particular it does not signify any intention on the part of either compensation body to pay greater amounts to any claimants than the amounts of their respective liabilities under the 1992 CLC and the Fund Convention. What it signifies is that each such interim payment, however funded, is made on behalf of both of them, in full or partial settlement of each of their respective liabilities, in ratios to be finally determined at a later date.

11. Where the Club/shipowner has made interim payments up to an amount equivalent to the CLC limit, the amounts paid on behalf of the Fund are notionally reimbursed as a result of the payments made to other claimants by the Fund at later stages of the claim-settling process. The intent of these arrangements is that no further payment to claimants should be required in these circumstances from the Club/shipowner. It is recognised that the Club is not released from potential legal liability to claimants other than those whom it has paid, but in the event of such other claimants establishing liability to them on the part of the Club/shipowner, such liability is to be discharged by the Fund. Alternatively, if it is enforced against the Club/shipowner, or satisfied by distribution from any fund which they have established in court, the Club/shipowner is to be reimbursed by the Fund.

12. It is likewise not intended that the Club/shipowner should bear the cost both of interim payments and, in addition, of making a cash deposit of a CLC limitation fund in court. If the Club/shipowner considers that there is a risk of a cash deposit being required – for example, as a condition of maintaining limitation proceedings, or pursuant to a guarantee provided to the court at an earlier stage – it may decide that it is unable to fund interim payments in the absence of satisfactory arrangements to protect it from the need to make payments exceeding in aggregate the CLC limit.

13. Such protection may be provided by agreement between the compensation bodies that in the event of a CLC fund being established by cash deposit after the Club/shipowner has made interim payments, (i) the CLC fund is to be allocated wholly to payment of claims under the 1992 CLC; (ii) interim payments funded by the Club/shipowner are to be treated as made wholly on behalf of the Fund; (iii) the amount of such payments is to be reimbursed to the Club/shipowner by the Fund when the CLC fund is established; and (iv) the Club/shipowner will not pursue any subrogation claim against the CLC fund under 1992 CLC, Article V.5 or otherwise.

14. Such protection may alternatively be provided by equivalent arrangements between the Club/shipowner and other parties, such as the competent authorities in the State where the incident has

occurred, to hold the Club/shipowner harmless against the risk of payments exceeding in aggregate the CLC limit. Similar arrangements between the Fund and, for example, the competent authorities may also be sought by the Fund in order to afford the Fund protection in circumstances where it makes interim payments.

15. This Memorandum is without prejudice to the right of any party including the Fund to contend that the shipowner is not entitled to avail himself of limitation on the facts of a particular incident. However, even where it wishes to reserve this right, the Fund will normally participate in funding interim payments in accordance with this Memorandum, and, if so advised, will pursue a subsequent subrogation claim against the shipowner.