

(ii) Advice and guidance on issues brought to the Legal Committee in connection with implementation of IMO instruments; advice on the implementation of the International Convention on Civil Liability for Oil Pollution Damage, 1992

13.9 The International Oil Pollution Compensation Funds (IOPC Funds) introduced document LEG 100/13/1 inviting the Committee to consider a request for advice on the possible consequences of the discrepancies between insurance policies, blue cards and certificates issued under the International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC 92).

13.10 In particular, the Committee considered:

- whether the State issuing the CLC certificate has an obligation to investigate the terms, conditions and cover provided in certificates (blue cards) presented by insurers; and
- whether, as a consequence, the State would have a potential liability to the IOPC Fund, should the Fund suffer a loss as a result of the insurance cover being insufficient.

13.11 It was noted that the Committee was not requested to provide advice on a specific case, but instead was invited to express its views on the two questions listed above on the basis of CLC 92.

13.12 It was noted further that these questions go beyond the narrow limits of claims against the IOPC Fund under the 1992 Civil Liability and Fund Conventions but have much broader characteristics and implications that potentially touch upon a number of international conventions such as the 2001 Bunkers Convention and the 2002 Protocol to the Athens Convention, as well as other instruments providing for State certificates.

13.13 In analysing article VII of CLC 92, the following views were expressed:

(i) On the question of the obligation on the State to investigate the terms, conditions and cover provided in certificates (blue cards) presented by insurers:

- the obligation contained in article VII, paragraph 2 requires the State to "determine" whether the requirements of article VII, paragraph 1 have been complied with. Accordingly, the State issuing the certificate has an obligation to investigate the blue card;
- article VII, paragraph 2 does not state the manner in which contracting States should fulfil their obligation to investigate – accordingly, contracting States should normally be able to trust the blue card providing by the insurance company unless there is some indication that there is a need for further investigation;

- national administrations are responsible for investigating the blue card to the best of their ability. This is a relatively straightforward process where the insurer is a P&I Club and a member of the International Group or even another major insurer outside the Group; with foreign insurers the task may be more difficult, but not impossible;
- it is the general practice of national administrations to determine whether the requirements of the Convention have been complied with solely on the basis of blue cards. In so doing, the State acts in good faith. However, in case of any doubt as to the reliability of a blue card, the State should also examine the insurance policy and the condition of the insurer;
- article VII, paragraph 6 requires the State of registry to determine the conditions of issue and validity of the certificate and if a State is in doubt the need arises to investigate further;
- in case of any doubt, the State may consult another State on the reliability of the insurer;
- as a general rule, administrations issue the certificates on the basis of blue cards issued by the International Group of P&I Associations (P&I Clubs);
- administrations may also request proof of solvency of the company in line with the Assembly resolution on insurance certificates under the Bunkers Convention; and
- in case of any discrepancy between the blue card and the insurance policy, it will be up to national law to determine the legal consequences in such a case.

(ii) On the question of the liability of a State issuing a certificate:

- this was a more complex and difficult issue to address;
- CLC 92 does not clearly provide for the liability of the State if it issues a certificate on insufficient or invalid insurance. By contrast, the 1992 Fund Convention does place a liability on States who misreport oil receipts;
- since the aim of the blue card is to certify that a ship is covered in a manner consistent with CLC 92, liability should not arise on the part of the State issuing the certificate;
- the Convention imposes no strict liability on States;
- the contracting State is not automatically liable to pay damages if an incorrect certificate has been issued;
- in some jurisdictions State liability depends upon whether a duty of care applies and in such cases States may be liable in negligence in the same way as private individuals, if the convention regime or domestic law allows this interpretation;
- in theory, States may be liable at international law for improper implementation of their convention obligations;

- the conventions that regulate an obligation to issue a certificate do not provide for the channelling of liability to a State. Liability under these conventions is channeled either to economic actors operating for profit (namely the shipowner or insurer) or Funds, such as the IOPC Funds, which receive contributions specifically for the purpose of providing compensation;
- any interpretation to the effect of potentially channelling liability to the issuing State will result in transforming the State as a quasi-additional level of liability, thus upsetting the delicate balance of the liability and compensation regime established by the conventions; accordingly, any question of channeling liability should be approached in a manner fully consistent with the actual provisions and wording of the relevant conventions;
- the purpose of the CLC regime may not be suited to apportioning State liability and therefore whether liability would be attributed to the State is an open question;
- despite the potential lack of insurance, there is still the liability of the shipowner; and
- the 130 States Parties to CLC 92 must ensure the exercise of due diligence to ensure the long-term viability of the international regime.

13.14 Two delegations informed the Committee of their intention to submit a proposal at LEG 101 to extend the guidelines for accepting documentation from insurance companies, financial security providers and P&I Clubs, adopted in respect of the Bunkers Convention (Circular letter No.3145), to CLC and HNS Certificates.

13.15 The Director of the IOPC Funds thanked the Committee for its advice which would be duly reported to the Funds Governing Bodies.

LEGAL COMMITTEE
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Agenda item 13(ii)

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ANY OTHER BUSINESS

(ii) Advice and guidance on issues brought to the Legal Committee in connection with the implementation of IMO instruments; advice on the implementation of the International Convention on Civil Liability for Oil Pollution Damage, 1992

Submitted by the International Oil Pollution Compensation Funds (IOPC Funds)

SUMMARY

Executive summary: The Legal Committee is invited to consider a request for advice by the IOPC Fund 1992 about possible consequences of the discrepancies between insurance policies, blue cards and certificates issued under the International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC 92)

Strategic direction: 2

High-level action: 2.0.1

Planned output: 2.0.1.16

Action to be taken: Paragraph 7

Related documents: IOPC/OCT/12/3/14 and IOPC/OCT/12/11/1¹

1 During discussion of some oil spill incidents involving the 1992 Fund at the October 2012 sessions of the of IOPC Funds' governing bodies, a number of issues in respect of the insurance requirements under CLC 92 were raised. The problems have arisen in several oil spill incidents and, by way of example, it would be beneficial to highlight the issues in respect of one specific case, namely the **Alfa 1** incident which took place in Elefsis Bay, near Piraeus, Greece, in March 2012.

2 On 5 March 2012, the tanker **Alfa 1** hit a submerged object, most likely the marked wreck of the vessel **City of Myconos**, while crossing Elefsis Bay, near Piraeus, Greece. The impact punctured the bottom hull plating of the **Alfa 1** over a length of some 30 metres. Shortly thereafter, the vessel listed over onto her starboard side and sank. She came to rest in 18 to 20 metres of water with her stern in contact with the seabed but the bow still visible above water. The incident also resulted in the tragic loss of the master's life. After sinking,

¹ The documents are available at www.iopcfunds.org

an unknown quantity of oil was released from the tanker through the manholes, vent pipes and sounding pipes on her deck. The oil impacted some 13 kilometres along the shoreline of Elefsis Bay, contaminating a number of local beaches in Loutopyrgos, Neraki and Nea Peramos, and also the Salamina Island (Faneromenis and Batsi). In addition, it is reported that some oil impacted less accessible areas of rocky shore and at a naval base.

3 Claims for compensation by the clean-up contractors have been submitted to the shipowner, totalling some €14.4 million. The shipowner's insurer, Aigaion Insurance Company (Aigaion), a fixed premium insurance provider, has forwarded the claims to the IOPC Funds for comment.

4 The **Alfa 1** had P&I cover including pollution risks with Aigaion. The terms of that policy provided for trading in Greek waters only, and limited the insurance cover as follows:

"Euro 2 000 000 combined single limit each vessel for all claims any one accident or occurrence"

It also included the following express warranty:

"Warranted non-persistent cargoes only"

Aigaion issued a certificate (blue card) to the Central Port Authority of Piraeus (the Greek authorities as the flag State) in respect of liability under the Bunkers Convention and liability under the 1992 CLC. The blue card provided:

"Certificate furnished as evidence of insurance pursuant to article VII of the International Convention on Civil Liability for Oil Pollution Damage, 1969 and article VII of the International Convention for Oil Pollution Damage, 1992.

THIS IS TO CERTIFY that there is in force in respect of the above named ship while in the above ownership a policy of insurance satisfying the requirements of (A) article VII of the International Convention on Civil Liability for Oil Pollution Damage, 1969 and (B) article VII of the International Convention on Civil Liability for Oil Pollution Damage, 1992 where and when applicable."

5 On the basis of the blue card, the Central Port Authority Piraeus issued a certificate of insurance in the form of the annex to CLC 92 specifying, inter alia, Aigaion as the insurers. Since the **Alfa 1** (1,648 GT) was below 5,000 units of tonnage, the limitation amount applicable under CLC 92 is 4.51 million SDR (€5.53 million). The total amount available for compensation under CLC 92 and the 1992 Fund Convention is 203 million SDR (€248.9 million). Consequently, if the total amount of damages caused by the spill were to exceed the limitation amount applicable under CLC 92, the 1992 Fund would be liable to pay compensation to the victims of the spill. Alternatively, the 1992 Fund would be liable to pay compensation if the shipowner was financially incapable of meeting his obligations in full, and any insurance provided did not cover or was insufficient to satisfy the claims for compensation, after the claimants had taken all reasonable steps to pursue the legal remedies available to him (article 4(1)(b) of the 1992 Fund Convention).

6 It is noted that there is a contradiction in the terms of the insurance policy and the certificate (blue card) issued to the Greek State by the shipowner's insurer because the insurance policy is limited to some €2 million, with an express warranty permitting the carriage of non-persistent mineral oils only. However, the certificate (blue card) provided to the Central Port Authority of Piraeus states that an insurance policy was in place which complied with article VII of the 1992 CLC "where and when applicable".

It will be for the IOPC Funds' governing bodies to determine whether the Fund should attempt to recover any compensation paid from the insurer who issued the certificate of insurance (blue card).

Action requested of the Legal Committee

7 The Legal Committee is requested to consider the information provided and comment or advise on whether the State issuing the CLC certificate has an obligation to investigate the terms, conditions and cover provided in certificates (blue cards) presented by insurers and whether, as a consequence, it would have a potential liability to the IOPC Fund, should the Fund suffer a loss as a result of the insurance cover being insufficient.
