



International Oil Pollution
Compensation Funds

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1992 Fund Executive Committee	92EC67	
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INTERIM PAYMENTS

Note by the Chairman of the Consultation Group on interim payments

Summary:

At its October 2015 session, the 1992 Fund Administrative Council decided to establish a Consultation Group to work with the Director and the International Group of P&I Associations (International Group) on the issue of interim payments. The Consultation Group has met four times with the representatives of the International Group.

The purpose of interim payments is to make compensation available to the victims of pollution damage as promptly as possible, whilst ensuring that the total amount paid is ultimately borne by the Club/shipowner and the IOPC Funds in the proportions envisaged by the 1992 Civil Liability Convention (1992 CLC), 1992 Fund Convention and the Supplementary Fund Protocol, if applicable.

This document summarises the work carried out by the Consultation Group and contains a proposed text of an Agreement between Clubs belonging to the International Group and the IOPC Funds on standard terms relating to interim payments. The draft text of an appendix to that Agreement is also set out, containing terms and conditions under which interim payments could be made in future incidents. The International Group endorses the Agreement and its appendix.

The text of the Agreement and appendix are attached to this document at Annexes I and II respectively.

Action to be taken: 1992 Fund Assembly and Supplementary Fund Assembly

- (a) Approve the Agreement on standard terms relating to interim payments and its appendix, attached at Annexes I and II, respectively; and
- (b) authorise the Director to sign the Agreement.

1 Introduction

1.1 At its October 2015 session, the 1992 Fund Administrative Council decided to establish a Consultation Group to work with the Director and the International Group of P&I Associations (International Group) on the issue of interim payments with the following mandate:

- (a) To examine the issues which need to be resolved in respect of interim payments;

- (b) to discuss the text of a new Memorandum of Understanding (MoU) between the International Group and the 1992 Fund and Supplementary Fund, which would contain the terms and conditions under which interim payments would be made in future; and
- (c) to make recommendations to the governing bodies at their October 2016 sessions.

1.2 The Administrative Council decided upon the following composition of the Consultation Group:

- Mr Volker Schöfisch (Germany) (Chairman)
- Minister Plenipotentiary Antonio Bandini (Italy)
- Lt. Commander Antonios Doumanis (Greece)
- Mr Jotaro Horiuchi (Japan)
- Captain Ibraheem Olugbade (Nigeria)

1.3 At its April 2016 session, the 1992 Fund Administrative Council noted that Captain Olugbade had to step down as a member of the Consultation Group as he had returned to Nigeria and would not be in a position to attend that meeting or future meetings of the Consultation Group. The Administrative Council commended Captain Olugbade for his contribution to the work of the Consultation Group and decided that the Consultation Group should continue its work with its remaining four members.

2 Work carried out by the Consultation Group

2.1 The Consultation Group has held four meetings. Mr Volker Schöfisch was elected Chairman of the Group. The Chairmen of the 1992 Fund and Supplementary Fund Assemblies, the Director of the Funds, its legal adviser Dr Rosalie Balkin, and a consultant engaged by the Funds, Mr Alfred Popp QC, were invited to join the meetings. The Consultation Group discussed with the International Group the main practice in making interim payments and, in particular, the two key areas relating to the Funds' immunity from jurisdiction and the definition of 'established claims'.

2.2 The Consultation Group recalled that interim payments are not prescribed in the text of the 1992 Civil Liability Convention (1992 CLC), the 1992 Fund Convention or in the 2006 Memorandum of Understanding (2006 MoU) between the International Group and the IOPC Funds on claims handling. Interim payments are based instead on practices and understandings developed over the years.

2.3 The Consultation Group noted that the purpose of interim payments is to enable payment of compensation as promptly as possible, whilst ensuring that the total amount paid is ultimately borne by the Club/shipowner and the IOPC Funds in the proportions envisaged by the 1992 Conventions.

2.4 After discussion with the International Group, the Consultation Group considered that it would be impossible to adopt an MoU on interim payments. First, the issue of waiver of immunity would have to be exercised on a case-by-case basis and would have to involve States. Secondly, there may be other circumstances particular to a specific spill which would require special terms. Accordingly, for these reasons, the Consultation Group concluded that it was preferable to adopt a template containing terms and conditions which could be modified on a case-by-case basis by the parties, including States, as they deem fit to address the concerns and requirements specific to a spill.

2.5 An agreement was then prepared on standard terms relating to interim payments with an appendix containing a template of terms and conditions which could apply to interim payments on a case-by-case basis.

2.6 The Consultation Group decided to recommend the approval of the Agreement and its appendix to the Assemblies of the 1992 Fund and Supplementary Fund. The Agreement and appendix are attached at Annexes I and II respectively.

3 The Agreement on standard terms relating to interim payments (2016) and its appendix

3.1 It is not proposed to give a detailed account of the draft agreement and standard terms and conditions contained in Annexes I and II of this document, since these documents speak for themselves. However, it may be useful to draw attention to certain crucial elements which will assist in the understanding of those documents.

3.2 Interim payments can only be made in respect of established claims. To enable prompt payment of compensation it is crucial therefore to clearly define what an established claim is. The Agreement sets out that a claim may be established by:

- agreement between the parties accepting that the claim is admissible for an approved amount; or
- a final judgment against the shipowner and/or Club and the 1992 Fund; or
- a final judgment against the shipowner and/or Club, provided that the 1992 Fund is either a party to the proceedings or has been notified of them and is bound by the facts and findings in the judgment (Article 7.6, 1992 Fund Convention).

3.3 In those cases where all the established claims are expected to exceed the total amount available for compensation under the 1992 Conventions, or where there is a risk that this could occur, the practice has been developed that the 1992 Fund Executive Committee agrees on a level of payments to limit the 1992 Fund's payments to a specific percentage of each claim. This has been done to ensure that all claimants are treated on an equal footing as required by the 1992 Fund Convention (Article 4.5).

3.4 The P&I Club normally agrees to pay claims at the same percentage as the one agreed by the Executive Committee and continues to make such payments until the shipowner's limitation amount under the 1992 CLC is reached. The 1992 Fund's payments commence only when the shipowner's payments have reached the limit under the 1992 CLC.

3.5 The Executive Committee normally increases the level of payments, sometimes in several stages, in the light of a more accurate assessment of the total amount of the damage caused by the spill. Whenever the level of payments is increased, the claimants who have received payments at the lower percentage will receive an additional payment corresponding to the difference between the lower and the higher percentage, without having to make a request for such payment.

3.6 A reconciliation between the 1992 Fund and the P&I Club takes place when all claims have been settled (by agreement or final judgment) and paid, and a 'balancing payment' is made by the 1992 Fund or the Club (as the case may be) to the other compensating party so that the total of the compensation payments by the Club equals the limitation amount under the 1992 CLC.

3.7 The Agreement sets out the terms and conditions under which the Club/shipowner will commence payment of compensation and when and under what conditions the IOPC Funds will take over payments. The 1992 Fund Executive Committee would have to approve the terms and conditions in every specific agreement.

3.8 Any dispute arising out of a specific agreement would be decided by the English High Court of Justice. This amounts to a waiver of immunity in respect of disputes and claims arising under the Agreement. The Agreement with the jurisdiction clause and the waiver of immunity would only be approved by the Executive Committee where it is appropriate to do so. Where the Executive

Committee is not prepared to agree to a waiver of immunity, the likely result would be that no agreement on interim payments would be made. Accordingly the Club/shipowner is more likely to establish a limitation fund with the result that compensation under the 1992 CLC would be paid in accordance with the procedures set out in that Convention, i.e. when the court administering the limitation fund decides to distribute that fund. This could take many years.

4 Consultation Group Chairman's considerations

- 4.1 I would like to thank the Consultation Group, the International Group, the Chairmen of the governing bodies, Dr Balkin and Mr Popp QC, who all contributed to the work of the Group over the year, for their assistance in developing an Agreement which is acceptable to all parties involved.
- 4.2 I am also pleased to note that the International Group endorses the Agreement and its appendix.
- 4.3 Interim payments are a legally complex and difficult issue which is not prescribed in the Conventions but which is essential to ensure that compensation to victims of oil pollution damage is promptly and effectively paid. The Agreement is therefore intended to provide clarity to all parties so that their respective rights and obligations are known when making interim payments.
- 4.4 The Consultation Group is of the view that it is important to maintain the current 2006 MoU, which provides that the P&I Clubs of the International Group and the IOPC Funds shall cooperate on claims handling with the aim of ensuring that compensation is paid as promptly as possible within the legal framework of the 1992 Conventions.
- 4.5 A template was prepared containing terms and conditions which the affected parties could use on a case-by-case basis. Member States could also participate in the Agreement if they so decide.
- 4.6 The 1992 Fund Executive Committee will decide, on a case-by-case basis, whether to approve case specific agreements on interim payments, including the waiver of the Funds' immunity, which is envisaged under the Headquarters Agreement with the United Kingdom Government.
- 4.7 The Consultation Group therefore recommends that the 1992 Fund Assembly and the Supplementary Fund Assembly approve the Agreement on standard terms relating to interim payments and its appendix.

5 Action to be taken

1992 Fund Assembly and Supplementary Fund Assembly

The 1992 Fund Assembly and Supplementary Fund Assembly are invited to:

- (a) take note of the information contained in this document;
- (b) approve the Agreement on standard terms relating to interim payments and its appendix attached at Annexes I and II respectively; and
- (c) authorise the Director to sign the Agreement.

ANNEX I

AGREEMENT ON STANDARD TERMS RELATING TO INTERIM PAYMENTS (2016)

(For use between International Group Clubs and the IOPC Funds)

The Members of the International Group of P&I Clubs (hereinafter referred to as “the Clubs”), whose names and addresses are scheduled hereto, on the one part, and the International Oil Pollution Compensation Fund 1992 (“1992 Fund”) and the International Oil Pollution Compensation Supplementary Fund 2003 (“Supplementary Fund”), hereinafter referred to collectively as “the Fund”, on the other part, agree as follows:

1. The terms and conditions set out in the appendix to this Agreement shall be known as the ‘Standard Terms relating to Interim Payments (2016)’, or by the abbreviated name the ‘Interim Payment Standard Terms’.
2. These terms are available for use in incidents which involve ships entered in the Clubs and which give rise to claims involving (or potentially involving) the 1992 Fund and, if applicable, the Supplementary Fund, and may be modified by agreement between the parties involved.
3. The Standard Terms shall apply in any particular incident only if expressly so agreed by the Club insuring the ship involved in the incident and by the 1992 Fund (together with the Supplementary Fund, if also potentially involved). In such a case the Standard Terms shall govern the rights and obligations of these parties with respect to interim payments, and they shall take effect subject to any modifications or additions which may be agreed with respect to the incident.

Dated

2016

For the International Group of P&I Clubs

For the International Oil Pollution
Compensation Fund 1992 and the
International Oil Pollution Compensation
Supplementary Fund 2003

Signed _____

Signed _____

Hugo Wynn-Williams
Chairman

José Maura
Director

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ANNEX II

APPENDIX

STANDARD TERMS RELATING TO INTERIM PAYMENTS (2016)

(For use between International Group Clubs and the IOPC Funds)

The objectives, concerns and safeguards summarised in Section I below are set out by way of explanatory background, and regard is to be had to them in interpreting and applying the terms and conditions in Section II.

Section I

The main objective of the terms and conditions set out in Section II is to promote the efficient working of the compensation system; to enable claims exceeding the 1992 Civil Liability Convention (1992 CLC) limit to be paid more speedily than if the 1992 CLC alone applied, and avoid the complexity and delay of a formal distribution of a limitation fund given the availability of supplemental compensation from the IOPC Funds.

The purpose of the arrangements that follow is to make compensation available to the victims of pollution as promptly as possible, whilst ensuring that the total amount paid is ultimately borne by the Club/shipowner and the IOPC Funds in the proportions envisaged by the 1992 CLC and the 1992 Fund Convention.

The main concerns stem from the fact that interim payments are not prescribed by the Conventions and therefore rest on agreement between the paying parties. Where established claims exceed the limit under the 1992 CLC, each claimant is entitled to receive part of their claim under the 1992 CLC and a further proportion from the 1992 Fund. However the practice has been that interim payments are not apportioned between the Club and the Fund but are made by one or the other. These exceed the amounts for which the paying party is liable to the parties paid.

The Club faces the risk of claims being established after it has completed making interim payments as the fact that the Club's payments have reached the 1992 CLC limitation amount does not absolve it of liability for claims established later. It may also have set up a fund in court from which these may be paid. This can result in an imbalance whereby the Club bears a greater proportion of the total claims than envisaged by the Conventions, and the Fund pays one which is correspondingly lower.

The safeguards set out in Section II support the efficient working of the compensation system. Any overpayment is to be rectified by a balancing payment in a reconciliation procedure between the Club and the Fund at the end of the case, ensuring that neither party pays compensation in excess of their limit of liability under the 1992 CLC and Fund Convention.

Section II

TERMS AND CONDITIONS

1. The following terms and conditions shall apply to any interim payments made in respect of claims for pollution damage in any incident to which the Standard Terms relating to Interim Payments (2016) are made applicable by agreement between the Club insuring the ship involved in the incident and the IOPC Funds. References herein to “the Fund” are references both to the 1992 Fund and, where it is (or might be) involved in an incident, the Supplementary Fund. For these purposes interim payments include any payment of compensation made directly to a claimant, by the Club/shipowner or the Fund, independently of a distribution of the available compensation by the competent court or other authority.
2. Any interim payments by the Club/shipowner in respect of such claims may either be:
 - (a) restricted to the Club/shipowner liability to any claimant under the 1992 CLC; or
 - (b) not so restricted, and set at a level which takes into account the claimant’s rights under the international regime as a whole.
3. If the Club/shipowner makes payments restricted in the manner described in paragraph 2(a) above they may do so on such terms as they see fit.
4. If the Club/shipowner makes payments as described in paragraph 2(b) above, and satisfy the conditions in paragraph 6 below, the Fund undertakes to bear responsibility in accordance with paragraph 7 below for payment of claims established thereafter.
5. A claim may be established:
 - (a) by agreement, as a result of the Club/shipowner and the Fund accepting that the claim is admissible for an approved amount; or
 - (b) by a final judgment of the competent court in proceedings against the shipowner and/or the Club and the Fund; or
 - (c) by a final judgment of the competent court in proceedings against the shipowner and/or the Club, provided the Fund is either a party to the proceedings or has been notified of them and is bound by the facts and findings in the judgment in accordance with Article 7.6 of the 1992 Fund Convention (and, if applicable, Article 7.1 of the Supplementary Fund Protocol).
6. The conditions referred to in paragraph 4 above are:
 - (a) Unless otherwise agreed, payments by the Club/shipowners are continued until their total amount, including any sums they may have paid in satisfaction of claim(s) established by final judgment, and/or any sums distributed in respect of such claim(s) from a limitation fund which they may have constituted, is equal to the 1992 CLC limit;
 - (b) save as provided in sub-paragraph (c) below, payments by the Club/shipowner are to be counted for the purposes of this paragraph only if and to the extent that they are made in respect of established claims;

- (c) any payment by the Club/shipowner in respect of a claim which is established under the 1992 CLC, but is not legally enforceable against the Fund, shall count for the purposes of this paragraph only up to the amount which the claimant would be entitled to receive from the distribution of a limitation fund under Article V(4) of the 1992 CLC;
 - (d) payments are made on terms approved by the Fund as to receipt and release;
 - (e) the Fund is consulted as to the level at which payments are made, it being accepted that payments will not count for the purposes of this paragraph to the extent that they exceed the level of payments finally approved by the Fund.
7. If and when the Club/shipowner has fulfilled the above conditions the Fund will bear responsibility thereafter to the Club/shipowner for payment of any established claims. This responsibility:
- (a) is subject to its liability limit, and to any restriction on the level of payments to avoid overpayment;
 - (b) applies to the full amounts for which any such claims are established (subject only to sub-paragraph (a) above);
 - (c) is not limited to the proportion of any such claim for which the Fund could be held (or has been held) legally liable under the 1992 Fund Convention and, if applicable, the Supplementary Fund Protocol;
 - (d) is unaffected by full or partial satisfaction of such a claim by payment from any limitation fund or other security which the Club/shipowner may have constituted, or by any other payment which they may be required to make, in which case the amount so paid shall be taken into account in the reconciliation procedure referred to in paragraph 10 below;
 - (e) is without prejudice to any time bar or other defence on which the Fund may be entitled to rely, including the defences mentioned in Article 8 of the 1992 Fund Convention, Article 8 of the Supplementary Fund Protocol and Article X(1)(a) and (b) of the 1992 CLC, but is unaffected by the mere absence of a monetary order requiring the Fund to pay any specified amount in respect of an established claim;
 - (f) is without prejudice to the Fund's right to dispute the shipowner's right of limitation under the 1992 CLC, and to claim from the shipowner by subrogation any amounts paid by the Fund if conduct barring limitation is established;
 - (g) is otherwise unaffected by any dispute as to the shipowner's right of limitation, save where the right is contested by the Fund before the competent court and its position is upheld by a final judgment.
8. It is recognised that the arrangements in paragraphs 4–7 above differ from those which apply if payments by the Club/shipowner and Fund are limited to the proportions of each individual claim for which they are respectively liable under the 1992 Conventions; that these arrangements do not absolve the Club/shipowner of liability to parties whose claims are established after payments have reached the 1992 CLC limit; and that, if such claims are enforced against the Club/shipowner, various factors may impair their ability to recover by subrogation the excess paid over the 1992 CLC limit.
9. In order to avoid any imbalance which may arise for these or other reasons in the apportionment of total compensation payments, a reconciliation procedure is to be carried out at the end of the case, and any balancing payment is to be made which may be necessary

to ensure that the amounts borne by the Club/shipowner are equal to the 1992 CLC limit (or are reimbursed in the circumstances referred to in paragraph 10 below).

10. For the purposes of these terms and conditions claims for pollution damage may be established, and may be the subject of interim payments, without prejudice to any defence of the Club/shipowner that no liability for the damage attaches to the shipowner by reason of Article III(2) of the 1992 CLC. If such a defence is established (either to the satisfaction of the Fund or by final judgment of the competent court in proceedings to which the Fund is a party), and no defence is available to the Fund under Article 4.2 of the 1992 Fund Convention, the reconciliation procedure referred to above shall be adjusted to reimburse the Club/shipowner any amounts they have paid.
11. Any claims or disputes arising in connection with these terms and conditions shall be governed by English law and be subject to the exclusive jurisdiction of the English High Court of Justice, to which the Club and the Fund submit for the purposes also of enforcement of any final judgment or order.
