

Compensation For Pollution Damage In A Transnational Oil Spill

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Introduction

The "Evoikos" accident raises interesting issues of application of the CLC and Fund Conventions because it was a transnational oil spill - an incident occurring in the territory of country A, but which caused or threatened pollution damage not only in country A, but also in neighboring countries B and C.

In such a situation, different legal systems are involved. If, as a result of a single incident, pollution damage occurs in country A which is party to CLC 69, in country B which is party to CLC 69 and FC 71, and country C which is not party to either of these Conventions, different legal systems apply for compensating damage claims. The situation can give rise to different complications, if four Conventions, not just two, are involved, ie the initial CLC/FC and the revised CLC/FC. Because of the relationships between the Conventions (as laid down in the Conventions themselves), the way claims will be dealt with is not at all straightforward. It is the application of the Conventions in these complex situations which is the subject of my presentation today.

For addressing this issue, we need first of all to examine certain keywords such as 'pollution damage' and 'preventive measures', since the Conventions *"apply exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage."* It is important to note that the definitions of these keywords are intentionally made the same in CLC and FC, for the sake of their consistent application:

Under the initial CLC and FC 'pollution damage' is defined as *"loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ships **wherever such escape or discharge may occur**, and includes the costs of preventive measures and further loss or damage caused by preventive measures."* 'Preventive measures' is defined as *"any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage"*. 'Incident' is defined as *"any occurrence, or series of occurrences having the same origin, which causes pollution damage."*

Under the revised CLC and FC, 'pollution damage' is redefined as: "(a) *loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, **wherever such escape or discharge may occur**, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; (b) the costs of preventive measures and further loss or damage caused by preventive measures.* " The definition of 'preventive measures' remains the same as in the initial CLC/FC, ie "*any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.* " However, the definition of 'incident' is revised to the effect of including in 'preventive measures' any measures taken to prevent or minimise a grave and imminent threat of causing pollution damage.

According to these definitions, the application of the Conventions does not depend on the place where the spill occurs, or where preventive measures are taken; the Conventions clearly state "*wherever such escape or discharge may occur* " and the FC 71, in its Preamble, further clarifies and emphasises admissibility of preventive measures "*wherever taken*".

What matters is the place where pollution damage is suffered. This differentiation of escape and pollution damage makes the compensation for pollution damage claims somewhat tricky in certain cases.

If a spill occurs on the high sea, but pollution damage occurs within territorial waters of a contracting state, the claim for such damage is acceptable under the Conventions. If, again, a spill occurs in the territory of a non-contracting state, but pollution damage occurs in the contracting state, claims for such are also covered under the Conventions.

We can indeed imagine numerous scenarios of a transnational oil spill (CLC 69-CLO/FO 92; CLC 92-non CLC; CLC 69-FC71-CLC92 etc etc) where treatment of claims has to vary. However time is too limited to fulfil such an exercise. Instead, I will choose the "Evoikos" scenario which represents a typical example of a transnational oil spill to discuss how the Conventions work to compensate claims,

In the case of "Evoikos", the incident occurred in Singapore waters, but pollution damage was suffered not only by Singapore claimants, but also Malaysian claimants.

The different legal status of Singapore and Malaysia at the time of the incident of "Evoikos" exposes claimants of the two nations to disparate treatment of their claims. This will be discussed in Section (A) below. (Please note that I am using "Evoikos" as an example, and this paper does not seek to comment on any specific actual claim raised in the "Evoikos" case.)

Furthermore, the CLC 92 recently became effective in Singapore, but the CLC 69 still remains applicable until 31/12/98. During a period of a little more than three months, CLO 92 may apply in Singapore, as well as the CLO 69, but the FC 92 is not yet effective. Liability and compensation for pollution damage arising during this period, based on a similar scenario as "Evoikos", will be analysed in Section (B) below.

Finally, after this intermediary period CLC 69 will no longer be applicable, OLC/FC 92 both will apply in Singapore, and Section (0) below will reflect that situation.

(A) "Evoikos" scenario at the time of the incident-Analysis of past legal situation. before
18/9/98

At the time "Evoikos" happened, Singapore was party to CLC 69, whereas Malaysia was party to CLC 69 and FC 71. As indicated earlier, these Conventions apply to "*pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage*". Which pollution damage and preventive measures are recoverable under CLC and which under FC7 Let's look at the principle first and then the procedure of compensation.

1. Principle

As far as pollution damage is concerned, Singaporean claimants receive compensation provided by the CLC 69, whereas Malaysian claimants can recover under both CLC 69 and FC7 1,

However, the above simple answer only relates to pollution damage strictly speaking, that is damage suffered by claimants as a result of the pollution, such as contamination of a fishing boat, loss of income by fishermen. loss of profit by certain businessmen located - in the polluted area etc. The preventive measures, costs of which are also included in the definition of "pollution damage", are however treated differently in the

Conventions. In the aim of encouraging prompt measures for preventing or minimizing pollution damage, the Conventions resolve to pay costs of preventive measures **wherever they are taken.**

Hence, if a spill occurs on the high sea, measures taken on the high sea with the aim of preventing or minimizing pollution damage in the territorial waters of a contracting state are covered under the Conventions. If a spill occurs in a non contracting state, which causes or presents threat to cause pollution damage in its neighboring state which is a party to CLO or CLC/FC, preventive measures taken in the non-contracting state should also be recoverable under the Conventions if only they had a clear purpose of preventing pollution in a contracting state. In such a situation, if due to the measures successfully taken, no actual pollution damage occurred in the contracting state, claimants for costs of preventive measures can still bring an action for compensation in the court of the contracting state, as the CLO provides in art. IX that *"Where ...preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea. actions for compensation may only be brought in the Courts of any such Contracting State or States."*

Now if we have an incident where preventive measures were taken in Singapore, but with the aim of preventing or minimizing pollution damage not only in Singapore but also in Malaysia, these preventive measures should be recoverable not only under CLO to which Singapore is a party, but also under FC which applies in Malaysia. This is because the FC uses the same definition of 'preventive measures', ie measures wherever taken to prevent or minimize pollution damage in a FC country. This is the way the Conventions should work.

2. Procedure (steps of compensation)

One of the most characteristic provisions of the Conventions is the one which establishes a pro-rating mechanism. Both CLO 69, FC 71 provide that in case admissible claims exceed the available fund, the fund shall be distributed among claimants in proportion to the amounts of their established claims¹. This pro-rata mechanism, peculiar to the Conventions, serves to ensure that claimants are treated equitably. More importantly, it has a practical effect of strengthening shipowners' right

¹ CLC 69, art. V(4) and FC 71, art. 4(5)

limitation.

By applying the provision of pro-rating, and taking into consideration the interaction between CLO and FC, the following diagram explains how the Conventions work to compensate admissible damage claims.

For the purpose of simplifying our explanation, we have assumed the following conditions:

- indemnification by the IOPC Fund to the shipowner does not apply;
- the size of the ship is big enough to reach the maximum amount of limitation, ie SDR14 million;
- the shipowner is entitled to his right of limitation;
- damages are arbitrarily divided into three categories: (i) preventive measures in Singapore; (ii) other damages in Singapore including property damage, consequential economic loss, pure economic loss, as well as costs for restoring the environment; and (iii) all types of damage in Malaysia. For the purpose of the example, each of the three categories represents an equal amount of SDR 20 million as admissible claims. [See Table 1. Singapore (CLC 69); Malaysia (CLC 69, PC 71)¹

First, the CLC limitation fund of SDR 14 million will be apportioned among admissible claims for preventive measures and pollution damage suffered by Singaporean and Malaysian claimants. If this fund is not sufficient to pay for all the claims, the latter will be reduced proportionately. As claims for pollution damage in Singapore, preventive measures in Singapore, and all types of damage in Malaysia, are each assumed to be SDR 20 million, each will only receive SDR 4.662 million from the shipowner's limitation fund, and in each case SDR 15,338 million remains unpaid under CLC 69.

It can be seen that, in this situation, it is important that the Singaporean court and the Malaysian court apply the same criteria of admissible claims, otherwise, claims would be treated inequitably even within the CLC limitation fund.

Second, there is payment by the IOPO Fund. As Singapore is only party to CLC 69, not to FC 71, claims in Singapore for pollution damage receive no further compensation¹ However Singaporean claimants for preventive measures may submit claims for any unpaid amount to the IOPC Fund. Even supposing there were no actual pollution damage in Malaysia, preventive measures in Singapore are recoverable under the FC, if they were intended to prevent pollution damage in Malaysia.

As for claims incurred in Malaysia, all admissible claims for pollution damage and preventive measures, which remain unpaid by the shipowner's limitation fund, should be paid by the IOPC Fund subject to its maximum amount of compensation.

Here we need to spare some time to explain the amount of the IOPC Fund's maximum compensation. Art. 4.4(a) of the PC 71 provides that *"the aggregate amount of compensation payable by the Fund under this Article shall in respect of any one incident be limited, so that the total sum of that amount and the amount of compensation actually paid under the Liability Convention **for pollution damage caused in the territory of the Contracting States** ..shall not exceed SDR 60 million."*

The amount actually paid by the limitation fund under CLC for damage occurring in Malaysia is SDR 4.662 million, therefore the maximum compensation payable by the IOPC Fund in this case is SDR 60 million minus 4.662 million, ie 55.338 million. It may be argued that payment made by the owner's limitation fund to Singaporean claimants for preventive measures should also be taken into account when calculating the IOPC Fund's maximum compensation. However, I prefer to think that the Fund might want to be flexible on this point in view of the difficulty of judging which part of preventive measures were taken for preventing pollution damage in Singapore and which part were taken for damage in Malaysia. Alternatively, it is possible that this argument might be entirely abandoned in consideration of the FC's main purpose, expressed in its Preamble, which is to ensure full compensation to victims with admissible claims.

In case claims for Singaporean preventive measures plus Malaysian damage of all types together exceed the maximum compensation payable by the IOPC Fund, again, they will be reduced proportionately in accordance with the amount of their established claims.

In conclusion,, based on the legal status of Singapore and Malaysia at the time when "Evokos" happened, private claimants for pollution damage in Malaysia may receive a much higher level of compensation than most Singaporean claimants. However, Singapore claimants in respect of preventive measures may be entitled to payment by the IOPC Fund, if their actions had the purpose of preventing or minimizing pollution damage in a PC country.

(B) "Evoikos" scenario during the period from 18/9/98 to 31/12/98-Analysis of present legal situation

Let's analyze Singapore's legal status first. Singapore acceded to the CLC 92 on 18/9/97 and FC 92 on 31/12/1997. These two Conventions take effect one year after their respective dates of accession. However, the CLC 69 was only denounced at the time when Singapore acceded to the FC 92 and its denunciation will only take effect on 31/12/98, the same date as that when the FC 92 enters into force. Therefore between 18/9/98 and 31/12/98, both CLCs are in effect in Singapore, but not the FC 92.

If a tanker spill occurs during this period, which CLC shall apply in Singapore? Both CLC 69 and CLC 92 provide that *"This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which the Convention is opened for signature, but only to the extent that such Conventions would be in conflict with it, however, nothing in this Article shall affect the obligations of Contracting States to non-Contracting States arising under such International Conventions"*. In accordance with this treaty provision, three situations exist for Singapore depending on the legal status of the polluting ship's flag country:

1. If the polluting tanker flies the flag of a country which is not party to either of the CLCs, Singapore has no treaty obligations vis-a-vis that country, therefore would apply CLC 92, as the effect of the first part of the above-quoted provision which exists in both CLCs makes the new CLC to supersede the old CLC.
2. If the polluting tanker flies flag of a country which is party to CLC 69, CLC 69 would apply. According to the second part of the provision, CLC 92 would not apply because Singapore has to fulfill its treaty obligation arising from CLC 69 to apply this Convention to a ship flying flag of a CLC 69 country.
3. If the polluting tanker flies the flag of a country which is party to CLC 92, then CLC 92 will apply - CLC 69 has to disappear from the picture in order for Singapore to fulfill its treaty obligation under CLC 92 vis-a-vis a ship flying flag of a CLC 92 country.

In the case CLC 69 applies, the steps for compensation for pollution damage in Singapore and Malaysia & the same as described in Section A above.

In the case CLC 92 applies (i.e. the ship flies the flag of a country not party to CLC 69), the situation of compensation needs some explanation. For the purpose of simplifying our example, we have assumed the following conditions:

- the size of the ship is big enough to reach the maximum amount of limitation, i.e. SDR 14 million in the case of CLC 69 and SDR 57 million in the case of CLC 92;

- the shipowner is entitled to his right of Limitation:

- damages are arbitrarily divided into three categories; (i) preventive measures in

Singapore; (ii) other damages in Singapore including property damage, consequential economic loss, pure economic loss, as well as costs for restoring the damaged environment;

and (iii) all types of damage in Malaysia. For the purpose of the example, each of the three categories represents an equal amount of SDR 40 million as admissible claims.

Though Singapore has to apply CLC 92 to a CLC 92 flag ship, Malaysia does not have treaty obligation towards such a ship, therefore it will apply CLC 69 as well as PC 71 to which it is a party. [Table 2 shows how compensation of claims is processed in accordance with the three Conventions.]

In this situation, Singaporean claimants for pollution damage and costs of preventive measures are compensated in accordance with CLC 92, whereas Malaysian claimants for all types of pollution damage are compensated under CLC 69 and PC 71. As for preventive measures taken in Singapore, if these are not fully compensated under CLC 92, then they are eligible for compensation under CLC 69 and PC 71, provided they were taken for preventing or minimizing pollution damage in Malaysia.

The same mechanism of pro-rating exists in the new regime of CLC/IFC, if the available funds are not sufficient to satisfy all the admissible claims.

From this example, it can be seen that the burden on the shipowner and his Club can be enormous, as he may be liable under two CLCs for one incident and has to set up two limitation funds. If a third country which is not party to either CLCs is involved, the shipowner may be liable three times, under two CLCs and the third country's domestic law. This double or triple exposure of the shipowner demonstrates a certain advantage of the now no longer existent CRISTAL, as far as the shipowner is concerned. If CRISTAL were still available, its mechanism of reimbursement to the shipowner would

mostly have the effect of assuring that the shipowner's maximum liability in one incident would not exceed the maximum limit laid down in TOVALOP Supplement, ie SDR 59.7 million - for CRISTAL would reimburse the shipowner for any amount he paid in excess of SDR 59.7 million up to SDR 120 million.

(C) "Evoikos" scenario after 31/12/98 - Analysis of future legal situation..

From 31 December of this year, CLC/FC 92 will both be in effect in Singapore and on the same dates CLC 69 will be denounced to its effect, In a spill such as "Evoikos" which caused pollution damage both in Singapore and Malaysia, how do the four Conventions work to compensate pollution damage? [See Table 3]

Here, the legal situation should be easier, as the two regimes exist separately. Pollution damage and preventive measures in Singapore are compensated under the 92 regime, and pollution damage including preventive measures in Malaysia are compensated in accordance with the old CLC/FC regime. As for preventive measures taken in Singapore, if not fully compensated under CLC/FC 92, they are eligible for compensation under CLC 69 and FC 71, However, it might be found unpopular that Singaporean claimants for preventive measures, especially if they are governmental bodies, after being paid high compensation of their claims by the 92 scheme. come to compete with Malaysian private victims suffering pollution damage for the relatively low fund offered by the old CLC/FC regime.

It is noted that preventive measures under CLC 92 are wider than in CLC 69: in order to encourage immediate action in the event of a tanker incident to "prevent" pollution, CLC/FC 92 accept threat removal measures which are measures taken to remove a grave and imminent threat of causing pollution damage.

As was noted above, the separate existence of the old and the new regimes creates a heavy burden on the shipowner who may be liable two times for the same incident and has to set up two limitation funds. As far as oil companies are concerned, the bigger the Fund's membership is, the smaller the burden of contribution. The existence of two IOPC Funds means there is splitting of each Fund's membership and this results in heavier contributions. CLC/FC 92, with their increased level of compensation, have been shown to be a fairer solution to the problem of oil pollution from ships. They offer more adequate compensation to pollution claimants. It is therefore in the interests of

potential claimants to see countries moving into the revised CLC/FC. As far as shipowners and oil companies are concerned, it is also in their better interests to see the world adopting a unified system.

CONCLUSION

If, in the "Evoikos" scenario, both Singapore and Malaysia had been parties to CLC/FC 92, claimants of the two nations would have received the same treatment in terms of compensation of their pollution damage claims, and the legal complexity that we have described would be non-existent. Nevertheless, however more reasonable and fair the revised CLC/FC are proving to be compared to the initial Conventions, it is unrealistic to assume that the whole world will, in a foreseeable future, move into a single and unified system. It follows that some inequity and complexity of the type examined in this paper will remain, and a spirit of understanding and flexibility will continue to be crucial to the successful implementation of the Conventions.

Table 1. Singapore (CLC 69); Malaysia (CLC 69, FC 71)

	preventive measures in Singapore SDR 20m	pollution damage in Singapore (excluding preventive measures) SDR 20m	all type of pollution damage in Malaysia SDR 20m
owner's CLC 69 limitation fund: SDR 14m	14m x 0.333 = 4.662m 20m - 4.662m = 15.338m 15.338m: unpaid	14m x 0.333 = 4.662m 20m - 4.662 = 15.338m 15.338m: unpaid	14m x 0.333 = 4.662m 20m - 4.662 = 15.338m 15.338m: unpaid
IOPCF 71: SDR 55.338m = (60 - 4.662)	15.338m: recoverable*	no further compensation	15.338: recoverable*

* if these two items had exceeded SDR 55.338m, compensation amount would have been reduced proportionately.

Table 2. Singapore (CLC 92); Malaysia (CLC 69, FC 71)

	preventive measures in Singapore SDR 40m	pollution damage in Singapore (excluding preventive measures) SDR 40m	<i>all types of pollution damage in Malaysia</i> SDR 40m
owner's CLC 92 limitation fund: SDR 59.7m	$59.7m \times 0.5 = 29.85m$ $40m - 29.85m = 10.15m$ 10.15m: unpaid	$59.7m \times 0.5 = 29.85m$ $40m - 29.85m = 10.15m$ 10.15m: unpaid	
owner's CLC 69 limitation fund: SDR 14m	$14m \times 0.203 = 3m$ $10.15m - 3m = 7.15m$: unpaid		$14m \times 0.797 = 11m$ $40m - 11m = 33m$: unpaid
IOPCF 71: SDR 46m = (60-14)	7.15m: recoverable*	no further compensation	33m: recoverable*

* if these two items had exceeded SDR 46 million, compensation amount would have been reduced proportionately.

Table 3. Singapore (CLC/FC 92); Malaysia (CLC 69, FC 71)

	preventive measures in Singapore	pollution damage in Singapore (excluding preventive measures)	<i>all types of pollution damage in Malaysia</i>
owner's CLC 92 limitation fund: SDR 59.7m	yes	yes	
owner's CLC 69 limitation fund: SDR 14m	yes, <i>theoretically</i>		yes
IOPCF 92: SDR 75.3 m	yes	yes	
IOPCF 71: SDR 46m = (60-14)	yes, <i>theoretically</i>		yes