

## Oil Spills and Compensation Systems

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### 1. INTRODUCTION

I am asked to speak on the subject of "Oil Spills and Compensation Systems". This subject, which at a first glance appears to be ordinary, discloses the very essence of the international oil spill compensation systems. Looking back to the history, one can see the creation and development of the Civil Liability Conventions and Fund Conventions were made and shaped by the landmark spills namely the Torrey Canyon, Amoco Cadiz, Exxon Valdez and perhaps today the Erika.

The Torrey Canyon incident in 1967 started everything. Although it was not the first pollution incident, it was the most significant oil spill at that time, in terms of size and effect. It made the public aware of the extent of pollution damage that could result from the carriage of oil by sea. This incident also made the legislators aware of the gaps and ambiguities in national laws, and the lack of legislation at international level, and ultimately, the potential polluters were made aware of the risks inherent in their industries.

Governments gathered together at IMO (formerly IMCO) and adopted two Conventions: the 1969 Civil Liability Convention and the 1971 Fund Convention. Industries concerned also took the initiative in setting up two voluntary schemes, TOVALOP and CRISTAL, which are basically similar to the Civil Liability Convention and the Fund Convention. US Congress adopted its first pollution law, the Water Quality Improvement Act in 1970 (later called Federal Water Pollution Control Act) while considering whether it would join the Civil Liability Convention. The Civil Liability Convention entered into force in 1975 whereas the Fund Convention entered into force in 1978.

Shortly after the entry into force of the Conventions, two incidents, Amoco Cadiz in 1978 and Tanio in 1980, called into question the fairness of the system and revealed that the limits of compensation provided by the two Conventions were not high enough

to satisfy damage claims in major spill cases and that the Convention regime failed to play its role even in countries which were parties to it.

Thus there arose the need to revise the initial Conventions, even though they had only been adopted for a short period of time. The attempts at revision of the initial Conventions began in 1979 and the work itself was completed in 1984, when two Protocols were signed during the IMO's Diplomatic Conference. However, the entry into force provisions of the 1984 Protocols were too optimistic, mistakenly assuming that the USA would ratify. Unfortunately, following the 1989 Exxon Valdez incident, US Congress promulgated the OPA 90, without ratifying the Protocols.

In 1992, the IMO convened another Diplomatic Conference to remedy the situation, during which the 1992 Protocols were signed. The '92 Protocols retained most of the provisions of the '84 Protocols, except those relating to their entry into force, and the capping system in order to avoid the unfairness to Japan having to contribute too much to the IOPC Fund.

The 1992 Conventions entered into force on 30th May, 1996. As at 31 December 1999, 54 countries were becoming parties to the new CLC (79.02% of the total world tonnage), among which 50 countries were also parties to the new FC. 69 countries still remained in the old CLC (world tonnage share of 38.65%) among which 45 are parties to the old FC.

## 2. The FIRST international oil spill compensation system - CLC 69 & FC 71

The Civil Liability Convention (CLC) establishes liability of shipowners for oil pollution, whereas the Fund Convention (FC) creates an oil spill compensation fund paid by oil companies in the member States to supplement compensation provided by the shipowners. Only a country which is a party to the CLC can become party to the Fund Convention. These two Conventions form an integral part of the international oil pollution compensation system.

### A. Civil Liability Convention 69

The 1969 Civil Liability Convention, shaped by the Torrey Canyon incident, is detailed

and precise in its scope. For it to apply, the pollution damage must be caused by a discharge of oil from a vessel actually carrying persistent oil in bulk as cargo. The pollution damage must be suffered in the territory or the territorial waters of a State party to the CLC. The flag state of the tanker is irrelevant in determining the scope of application. Furthermore it is the place where the damage occurred which is determining, the place where the incident happened may be of little importance. If the incident took place on the high seas, the Convention may well apply, if the pollution damage was sustained within the territorial sea of a Contracting State. The costs involved in preventive measures taken outside the territorial sea should also come within the scope of the Convention if the measures aim at preventing or minimising pollution damage within the territorial sea. However, the CLC only cover the costs of preventive measures taken after oil has actually spilled.

(a) liable party

In order for pollution victims to easily find the liable party, the CLC holds the shipowner liable. The identification of the shipowner is based on administrative evidence - person or persons registered as the owner of the ship or, in the absence of registration, person or persons owning the ship.

The shipowner is liable only under the CLC for pollution damage. However, no claim for pollution damage under the CLC or otherwise may be made against the servants or agents of the owner.

(b) no-fault liability

The shipowner's liability under the CLC is generally considered as "strict" in character or strict liability. He is liable irrespective of existence of any fault, in other words, he is liable simply because of the fact that his ship carrying persistent oil spilled oil and caused pollution damage. The victims bringing an action under the CLC need only prove that the damage sustained by them was caused by the pollution incident in question. For being discharged from the strict liability, the shipowner must prove that the pollution incident was due to one of the exonerating circumstances as specified by the Convention. These circumstances are: act of war, act of God, third party sabotage, negligence of a government.

### (c) limit of liability

In balance with the strict nature of liability, the Convention grants the shipowner the right of limitation in the absence of his actual fault or privity. If the pollution damage does not result from such a fault, the shipowner can limit his liability at 133 SDR per limitation ton with a maximum ceiling of 14 million SDR, whichever is lesser.

When the shipowner is entitled to limitation, he must constitute a limitation fund in the competent court of a State party to the CLC where the pollution occurred and where claims for pollution damage are submitted. The constitution of the limitation fund results in the protection of the shipowner's other assets and the release of any of his other ships that may have been arrested. However, this protection only takes effect in those States which are parties to the Convention. If a tanker causes pollution damage on the territory of a Contracting State and on that of a non-Contracting State, any of the shipowner's assets seized by the latter would not be protected by the constitution of a CLC limitation fund.

### (d) compulsory insurance and direct action against the insurer

The CLC requires ships carrying more than 2,000 tonnes of persistent oil in bulk as cargo to have a compulsory insurance to cover liability under the Convention. This insurance is traditionally provided by the P & I Clubs in the form of a so-called 'Blue Card'. By providing the evidence of insurance to the relevant authority of the vessel's State of registry, the shipowner obtains a CLC certificate from the latter. This document certifies that the insurance in place is valid and satisfies the requirements of the Convention. By issuing such an insurance, the P & I Clubs surrender themselves to direct action from claimants for pollution damage under the CLC.

### (e) Jurisdictional issues

Anyone can bring an action under the Convention.

The rights of compensation under the CLC are extinguished unless an action is brought within three years from the date when the damage occurred. However, no action can be brought six years after the date of the incident which caused the damage.

If a ship has caused pollution damage in several Contracting States, the courts of these States are all competent to decide on liability in accordance with the Convention. However, only the court of the State in which the limitation fund has been established is competent to determine the distribution of the fund.

## B. Fund Convention 71

Since the CLC chooses the shipowner as the liable party for pollution damage resulting from oil spills from ships, it was considered necessary to shift some of the burden of compensation onto the oil industry, the other main beneficiary of the carriage of oil by sea. This led to the idea of a second convention establishing a fund to which the oil industry would contribute. The CLC 1969 was complemented by the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

As the Fund Convention uses the same definitions of "ship", "oil", "pollution damage" etc, the scope of application of this Convention is identical to the CLC 69.

### (a) compensation for pollution damage

The first function of the IOPC Fund established by the 71 Fund Convention was to provide supplementary compensation to be paid in cases where the totality of claims exceed the shipowner's liability limit or where compensation is not obtainable from a shipowner who is exonerated from liability (ie. act of God, act of third party's sabotage, negligence of a government) or who is incapable of assuming their financial obligations. The amount of compensation available from the 71 IOPC Fund for an incident cannot exceed 60 million SDR. This amount includes, where applicable, compensation paid by the owner under the CLC 69.

### (b) indemnification to the shipowner

When the CLC 69 was adopted, it was believed that the shipowner's liability established under that Convention was too onerous comparing to the 1957 Limitation Convention. It was therefore believed necessary that the oil cargo fund indemnifies the shipowner for a portion of his liability under CLC, ie. between 100 SDR and 133 SDR for each ton of

the ship's tonnage, or between 8,333,000 SDR and 14 million SDR. That was the reason of the second function of the IOPC Fund. It should be noted that this function was abandoned in the 1992 Fund Convention.

The IOPC Fund can be relieved of its obligation of indemnifying the shipowner under two circumstances: a) In the case of the wilful misconduct of the owner; b) In the case of a ship's non-compliance with requirements laid down in certain international Conventions.

(c) contributions to the IOPC Fund

The IOPC Fund contributions are payable by any person who has received more than 150,000 tons of contributing oil in a Contracting State during the course of the calendar year.

(d) distribution of the shipowner's limitation fund and of the IOPC Fund

The IOPC Fund, together with the shipowner's limitation fund, is divided proportionally between the claimants. In theory, this means that the distribution of the funds will not take place until the total amount of admissible claims has been ascertained. If a claim for pollution damage compensation is to be paid after the distribution of the funds, the court sets aside a sufficient sum for the claimant.

If the total amount of the claims exceeds the total amount of compensation available under the CLC and FC, the compensation paid to each claimant will be reduced proportionately. When there is a risk that this situation will arise, only a fixed percentage of the approved claims can be paid to ensure that all claimants are given equal treatment.

Any person who has paid pollution damage compensation acquires by subrogation the rights which the person compensated would have enjoyed under the Conventions, provided that subrogation is permitted under the applicable national law. For example, if governments paid the clean-up contractors, they are entitled by subrogation to have access to the limitation fund and the IOPC Fund. However, their claims by subrogation are also subject to the test of "reasonableness" applied in the taking of preventive measures.

### 3. The revised oil pollution compensation system - CLC & FC 92

In this paragraph, we only need to address the new features of the 1992 Conventions in comparison to the initial Conventions. For the rest, the new Conventions copied the old ones.

The changes brought by the 92 CLC and FC relate to problems encountered by the initial Conventions shown through incidents such as Amoco Cadiz, Tanio, Olympic Bravery etc - namely a narrow and imprecise scope of application (Olympic Bravery); insufficient limits of liability and compensation (Amoco Cadiz, Tanio ); insufficient channelling of liability (Amoco Cadiz). I would like to explain them one by one.

#### (a) change relating to scope of application

(i) The new 1992 Conventions cover "threat removal measures" which are measures taken before a discharge occurs, whereas the initial 1969 and 1971 Conventions only cover the costs of preventive measures taken after oil has actually spilled. This new wording should encourage governments and shipowners to take positive action in a threatening situation in order to prevent or minimise pollution. Hence, costs incurred in a salvage operation which is taken before a discharge occurs, can be covered by the new Conventions, if they are aimed at preventing pollution damage.

(ii) The old Conventions only cover spills from laden tankers. This was the reason why they could not be used in Olympic Bravery, as she was not carrying cargo of persistent oil at the time the spill occurred. The new Conventions have changed this to cover pollution damage resulting from a spill of bunker oil from an unladen tanker.

Spills from a combination carrier are also covered when the ship is actually carrying oil or during the whole voyage following such carriage.

(iii) The definition of pollution damage is clarified in the new Conventions to restrict the recoverability of claims under the head of environmental damage to "costs of reinstating the damaged environment".

(iv) Finally, the geographic scope of the new Conventions has been extended

from the territorial sea to the exclusive economic zone.

(b) changes relating to shipowners' limit of liability and right to limitation

For the Civil Liability Convention, the limits of liability have increased, for ships of 5,000 ton or less, from 133 SDR per limitation ton to a fixed amount of 3 million SDR. And the ceiling amount under the new Civil Liability Convention has changed from 14 million SDR to 59.7 million SDR. As for the new Fund Convention, the maximum compensation has increased from 60 million SDR to 135 million SDR including the shipowner's payment under the new CLC.

In compensation for these considerably increased limits of liability, the test for breaking the shipowner's right of limitation has moved from "actual fault or privity of the shipowner" to the concept of "wilful misconduct of the shipowner" (or in the exact words of the convention "his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result"). This change, which brings the test into line with the test in the 1976 Limitation Convention, will make the shipowner's right to limit much stronger and thus reduce litigation.

(c) Changes relating to channelling of liability

The 1992 CLC has enlarged the list of persons protected from pollution liability under the Convention and outside the Convention, to include managers, operators, charterers, salvors, cleanup companies, and pilots, in addition to the shipowner's agents, unless such protected persons committed wilful misconduct which caused the damage. Pollution liability is therefore narrowly channelled to the shipowner alone. However, the shipowner can exercise his recourse action against any person at fault. This channelling mechanism aims at making the limits of liability and compensation for oil pollution valid and real, not only within the Conventions but also outside the Convention field.

The other reason for the improved channelling is that if charterers (who are often oil companies, and therefore contributors to the IOPC Fund) are not protected by the Conventions, they may have to pay twice for one pollution incident, first by contributing to the IOPC Fund and second by being held liable outside the CLC under a domestic law. The channelling clause should protect charterers from being held liable

for oil pollution under any system of law unless wilful misconduct is committed by them which caused the pollution damage. I will return to this point, in a moment, in connection with the "Erica" spill.

>From an insurance point of view, the more effective the channelling the better the use that can be made of a given market capacity, for it is necessary then only to reserve for one fund for shipowners' liability.

In conclusion, as the shipowner's level of liability has increased dramatically under the new Conventions, especially in case of small ships (e.g. for a ship of 1,000 ton, the limit increases from SDR 133,000 to SDR 3 million), it is expected that in small to medium spills, the IOPC Fund will not be called on, as the shipowner's limitation fund will be sufficient to meet claims in those cases. Based on previous experiences, it is expected that the maximum available under the 1992 CLC and FC, ie 135 million SDR, will be sufficient to cover the majority of major spills.

#### 4. Conclusions - looking to the future

##### TANKERS

Since 1996, the old regime and the new CLC regimes for tankers exist independently. Although application of the Conventions is more straightforward than during the transitional period, the potential burden of liability on shipowners and that of compensation on oil companies contributing either to the 1971 Fund or to the 1992 Fund, can be substantially heavier than before.

On the one hand, from the shipowner's point of view, if pollution affects two States, one being party to the old CLC, the other being party to the new CLC, the shipowner will be liable under the two CLCs and will have to establish two limitation funds. On the other hand, from the oil companies' point of view, the existence of two separate IOPC Funds will be burdensome to them. As the IOPC Fund is a mutual system, the bigger its membership is, the less the amount of each member's contributions will be. The existence of two separate funds amounts to a splitting of the membership and of contributions.

This shows that it is in the interests of shipowners and oil companies to have a single

regime. As far as claimants are concerned, the new Conventions which offer considerably higher amounts of compensation are also more beneficial to them. It is therefore to be hoped that the whole world (leaving aside the USA!) will enter into the revised system of compensation.

While indeed more and more countries are moving into the new regime in recognition of the progress made during the last 15 years, the very regrettable spills of the Nakhodka here in Japan, and the Erika last Christmas off the French coast, have raised questions about the adequacy of the liability system for oil pollution.

In the case of Nakhodka, the joint claims office has received more than 450 claims totalling more than US \$310 million (Japan Yen 35 billion). Claims include the cost of the clean up and preventative measures organised by the Japan Maritime Disaster Prevention Centre, local government agencies, and electricity companies whose plants were threatened by pollution. There have also been many tourism claims from businesses in coastal resorts for loss of income, as well as claims from fishery and mariculture interests. The claims are being assessed and the Director of the 1971 and 1992 Funds has so far made provisional payments in respect of 254 claims on a 60 per cent pro-rated basis totalling about \$86 million. (Yen 9.6 billion.) At current exchange rates, it seems likely that the value of approved claims following assessment will be about \$250 million. This is significantly in excess of the compensation available under the Conventions of US \$186 million (SDR 135 million).

In the case of the Erica, it is uncertain whether the damages are likely to exceed the 1992 Fund limit. The charterer, Total Fina, has made a public commitment to voluntarily contribute up to French Francs 700 million (about US\$108 million) to the oil removal and clean-up expenses, and both Total Fina and the French Government have indicated that they will refrain from claiming on the IOPC Fund to the extent that this would reduce the compensation available to other third parties. There is speculation that substantial tourism and fishery losses can be expected, but it remains too early to judge whether the total claims will exceed the compensation available under the '92 Funds, ie 135 million SDR.

Nevertheless, both of these accidents are examples of oil spills which have focussed the attention of governments on the adequacy of the limitation amounts in the compensation systems.

Although the new Conventions only entered into force in 1996, the large majority of their content was finalised more than 15 years ago, in 1984. Since that time, general monetary inflation, increased costs of clean-up, and an increased public awareness of pollution issues, have all contributed to raise the costs of a spill. Despite this, the system has worked very well and the maximum compensation has in fact proved to be sufficient in almost all spills. The Nakhodka and Erica cases are therefore very exceptional, but they draw attention to the need to keep the limitation amounts in the compensation system under review.

The 1992 Conventions provide that at the request of one quarter of the contracting states new limits can be proposed, and then introduced if approved by a two thirds majority of contracting states. A formula in the Convention restricts the amount of the increase to the equivalent of the 1992 limitation figures increased by 6% per year, calculated on a compound basis, from 15 January 1993, with an overall ceiling of 3 times the existing 1992 limits. An increase calculated by this formula up to the year 2000 would raise the overall limit from about \$186 million to about \$279 million.

The political aspects of the Erika spill have also raised other issues for the compensation system. As mentioned before, the financial burden from that accident will be alleviated to some extent by voluntary contributions to oil removal and clean-up costs from the charterer - the oil company Total Fina. Some European commentators have suggested that charterers should bear liability in any event and that the compensation system should therefore be amended to introduce an additional element of charterer's liability - in order to discourage oil companies from chartering ships of poor quality. However, the idea is controversial, first because major spills are by no means always the result of using poor quality tonnage (the Amoco Cadiz, for example, was a new ship), and second, because the oil companies are already major contributors to the costs of large spills through the IOPC Funds.

Conversely, some commentators have suggested that the oil companies should pay less than at present, and the shipowners more, on the basis that in cases like the Nakhodka and Erica the shipowner's contribution is only a small percentage (less than 10%) of the total compensation. However, as noted earlier in this paper, the dramatic increase in the shipowner's contribution under the 1992 Convention has the result that in most spills in 1992 CLC states, the shipowner will provide 100% of the compensation without

involving the Fund at all. When this is taken into account, it can be seen that the existing system does already contain a careful balance between contributions from those who own ships and contributions from those who charter them for carrying their oil.

## NONTANK SHIPS

As the title of this paper indicates, the systems of compensation for spills from tankers have been shaped by the experience of dealing with the spills themselves and providing some remedy for the damaged claimant. However, from the claimant's point of view, there is no great distinction between a beach, or nori-beds, contaminated by cargo from a tanker and a beach or nori-bed contaminated by bunkers from a stranded bulk carrier or a containership holed in collision. It is therefore not so surprising that, as the importance of environmental issues has grown, so has the interest in governments in having a liability and compensation system to deal with bunker spills, modelled on similar lines to that of the CLC.

The text of a convention for this purpose has already reached an advanced stage of drafting and, during this year 2000, the Legal Committee of IMO will be pressing ahead with the task of trying to finalise the wording.

The current version of the proposed Convention has the following main features.

It applies to sea-going vessels of "any type whatsoever". It applies in respect of pollution damage, the definition of which follows that of CLC 92, save that references to oil are references to oil used for the operation or propulsion of the ship. The "shipowner" is the chosen liable party, and claims are channelled to him as in CLC. However, the definition of "shipowner", unlike in CLC, includes the registered owner, bareboat or demise charterer, manager, and operator of the ship - so the channelling is not really effective. The persons falling within that definition are strictly liable, with the same limited defences as in CLC, and their liability is joint and several.

In the development of previous liability conventions, the introduction of strict liability has generally been balanced by a right of limitation, so that the extent to which liability can be imposed in the absence of any fault is not unlimited and has some bounds. The current draft Bunker Convention goes some way to achieving that kind of balance, by words which make clear that the Convention shall not affect the right of the shipowner

to limit liability under any national or international regime. However, this does not guarantee that the shipowner will enjoy any right of limitation in exchange for taking on strict liability, and there is nothing to actually prevent a state from being party to the Bunker Convention while having no limitation law at all. Finally, the draft Bunker Convention follows the model of CLC in proposing compulsory insurance for the registered shipowner (although not for other parties falling within the Convention definition of "shipowner") in an amount equivalent to the limitation under the 1996 Protocol to 1976 LLMC. Claimants are provided with a direct right of action against the insurer.

If the Bunker Convention succeeds, it will fill the last gap left in a well-established and comprehensive international regime of liability and compensation for oil pollution from ships. Changes brought about by that Convention will have a far-reaching impact if the current draft is followed, since tonnage of every kind will be affected and may for the first time be required to have compulsory insurance to cover the pollution liabilities created by the Convention.