The Recent Developments of the International Liability and Compensation Regime

The Supplementary Fund and the Possible Review of the 92 Conventions

Masamichi Hasebe
Legal Counsel
International Oil Pollution Compensation Funds 1971 and 1992

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INTRODUCTION

The international regime for the compensation of pollution damage caused by oil spills from tankers is based on two sets of treaties adopted under the auspices of the International Maritime Organization (IMO). The framework of the regime was originally the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention). These Conventions entered into force in 1975 and 1978 respectively.

This 'old' regime was amended in 1992 by two Protocols, and the amended Conventions are known as the 1992 Civil Liability Convention and the 1992 Fund Convention. The 1992 Conventions provide higher limits of compensation and an enhanced scope of application. The 1992 Conventions entered into force on 30 May 1996.

The Civil Liability Conventions govern the liability of shipowners for oil pollution damage. The Conventions lay down the principle of strict liability for shipowners and create a system of compulsory liability insurance. The shipowner is normally entitled to limit his liability to an amount which is linked to the tonnage of his ship.

The Fund Conventions, which are supplementary to the respective Civil Liability Convention, provide additional compensation to victims when the compensation under the applicable Civil Liability Convention is inadequate. Each of the Fund Conventions established an intergovernmental organisation to administer the compensation regime, the International Oil Pollution Compensation Funds 1971 and 1992 (IOPC Funds 1971 and 1992) respectively. By becoming Party to one of the Fund Conventions, a State becomes a member of that corresponding Fund. The Organisations have their headquarters in London.

The 1971 Fund Convention ceased to be in force on 24 May 2002. This paper deals therefore primarily with the 'new' regime, i.e. the 1992 Civil Liability Convention and the 1992 Fund Convention.

On 15 December 2003, 94 States were Parties to the 1992 Civil Liability Convention, and 86 States were Parties to the 1992 Fund Convention[<1>].

The States which are Parties to the 1992 Conventions and the 1969 Civil Liability Convention are listed in the Annex.

Information on the international compensation regime and the IOPC Funds is available on the Funds' web site at: **http://www.iopcfund.org**

MAIN FEATURES OF THE 1992 CONVENTIONS

The 1992 Conventions apply to pollution damage (i.e. damage caused by contamination) suffered in the territory (including the territorial sea) and the exclusive economic zone (EEZ) or equivalent area of a State Party to the respective Conventions.

'Pollution damage' is defined in the 1992 Conventions as damage caused by contamination and includes the cost of 'preventive measures', i.e. measures to prevent or minimise pollution damage.

The 1992 Conventions apply to ships which actually carry oil in bulk as cargo, i.e. generally laden tankers, as well as to spills of bunker oil from unladen tankers in certain circumstances. The Conventions do not apply to spills of bunker oil from ships other than tankers.

[<1>] 43 States are still Parties to the 1969 Civil Liability Convention.

The owner of a tanker has strict liability (ie he is liable also in the absence of fault) for pollution damage caused by oil spilled from the tanker as a result of an incident. He is exempt from liability under the Civil Liability Conventions only if he proves that:

(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a grave natural disaster, or

(b) the damage was wholly caused by sabotage by a third party, or

(c) the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.

Under certain conditions the shipowner is entitled to limit his liability to an amount which is linked to the tonnage of the vessel.

The limits of the shipowner's liability under the 1992 Civil Liability Convention are:

(a) for a ship not exceeding 5 000 units of gross tonnage, 4 510 000 Special Drawing Rights[<2>] (SDR) (US$6.6 million);

(b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 4 510 000 SDR (US$6.6 million) plus 631 SDR (US$923) for each additional unit of tonnage; and

(c) for a ship of 140 000 units of tonnage or over, 89 770 000 SDR (US$131 million).

Under the 1992 Civil Liability Convention, the shipowner is deprived of the right to limit his liability if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Claims for pollution damage under the 1992 Civil Liability Convention can be made only against the registered owner of the ship concerned. This does not preclude victims from claiming compensation outside the Convention from persons other than the owner. However, the 1992 Civil Liability Convention prohibits claims against the servants or agents of the owner, the pilot, the charterer (including a bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures.

The compensation payable by the 1992 Fund in respect of an incident is limited to an aggregate amount of 203 million SDR (US$297 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention.

The 1992 Fund has an Assembly, which is composed of representatives of all member States. The Assembly is the supreme organ governing the 1992 Fund, and it holds regular sessions once a year. The Assembly elects an Executive Committee (composed of 15 Member States) whose main function is to approve settlements of claims[<3>].

The 1992 Fund and the 1971 Fund are operated by a joint Secretariat located in London (United Kingdom) with 26 staff members.

[<2>] The unit of account in the Conventions is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this paper, the SDR has been converted into US dollars at the rate of exchange applicable on 15 December 2003, ie 1 SDR = US$1.46262.

[<3>] During the winding-up period, the 1971 Fund is governed by an Administrative Council composed of all former Member States.

FINANCING OF THE 1992 FUND

The 1992 Fund is financed by contributions levied on any person who has received in one calendar year more than 150 000 tonnes of crude oil and heavy fuel oil (contributing oil) in a State Party to the 1992 Fund Convention after sea transport.

Annual contributions are levied by the 1992 Fund to meet the anticipated payments of compensation and administrative expenses during the coming year. Each contributor pays a specified amount per tonne of contributing oil received. The amount levied is decided each year by the Assembly.

The contributions are payable by the individual contributors directly to the 1992 Fund. A Member State is not responsible for the contributions levied on contributors in that State, unless it has voluntarily accepted such responsibility.

The Japanese oil industry is the major contributor to the 1992 Fund, paying 20% of the total contributions. The Italian oil industry is the second largest contributor paying 11%, followed by the oil industries in the Republic of Korea, the Netherlands, France, United Kingdom, Singapore, Spain, Canada, Germany, Australia and Norway.

TERMINATION OF THE 1971 FUND CONVENTION

After the entry into force of the 1992 Conventions in 1996, the 1969 Civil Liability Convention and the 1971 Fund Convention were denounced by a number of Member States. As more States joined the 1992 Fund and ceased to be members of the 1971 Fund, the 'old' regime lost its importance.

Under Article 43.1 in its original version, the 1971 Fund Convention would have ceased to be in force when the number of Member States fell below three. Although many States had denounced the 1971 Fund Convention, it was unlikely that the number of Member States would fall below three in the foreseeable future. For this reason a Diplomatic Conference, held in September 2000, adopted a Protocol under which the 1971 Fund Convention would cease to be in force on the date on which the number of Member States fell below 25, or 12 months following the date on which the Assembly (or any other body acting on its behalf) noted that the total quantity of contributing oil received in the remaining Member States had fallen below 100 million tonnes.

Due to a number of denunciations of the 1971 Fund Convention, the Convention ceased to be in force on 24 May 2002 when the number of States Parties fell below 25. The Convention does not apply to incidents occurring after that date. However, the 1971 Fund will continue to pay compensation for claims arising from incidents which occurred when the 1971 Fund Convention was in force. Once all such claims have been paid, the 1971 Fund will be wound up. It is expected that the winding-up procedure will take several years.

CLAIMS SETTLEMENT

Claims experience

Since the establishment of the regime in 1978, the IOPC Funds have been involved in some 130 incidents. The IOPC Funds have paid some US$800 million in compensation.

In the great majority of these incidents, all claims have been settled out of court. So far, court actions against the Funds have been taken in respect of only a handful of incidents.

The largest payments have been made in respect of the following incidents: *Aegean Sea* (Spain) US$49 million, *Braer* (United Kingdom) US$73 million, *Sea Empress* (United Kingdom) US$49 million, *Nadhodka* (Japan) US$179 million, *Erika* (France) US$68 million and *Prestige* (Spain) US$71 million.

Admissibility of claims for compensation

The 1992 Fund can pay compensation to a claimant only to the extent that his claim is justified and meets the criteria laid down in the 1992 Fund Convention. To this end, a claimant is required to prove his claim by producing explanatory notes, invoices, receipts and other documents to support the claim. In most cases, the Fund provides the claimant with a Claims Form which sets out the information required to enable the Fund to determine whether the claim is admissible and, if so, the quantum of the damage. The 1992 Fund has published a Claims Manual which contains general information on how claims should be presented and sets out the general criteria for the admissibility of various types of claims.

For a claim to be accepted by the 1992 Fund, it has to be proved that the claim is based on a real expense actually incurred, that there was a link between the expense and the incident and that the expense was made for reasonable purposes.

The IOPC Funds have acquired considerable experience with regard to the admissibility of claims. In connection with the settlement of claims they have developed certain principles as regards the meaning of the definition of 'pollution damage', which is specified as 'damage caused by contamination'. In 1994 a Working Group of the 1971 Fund examined in depth the criteria for the admissibility of claims for compensation within the scope of the 1969 Civil Liability Convention, the 1971 Fund Convention and the 1992 Protocols. The Report of the Working Group was endorsed by the Assembly of the 1971 Fund. The Assembly of the 1992 Fund has adopted a Resolution to the effect that this Report shall form the basis of its policy on the criteria for the admissibility of claims.

The 1971 and 1992 Fund Assemblies have expressed the opinion that a uniform interpretation of the definition of 'pollution damage' is essential for the functioning of the regime of compensation established by the Conventions. The IOPC Funds' position in this regard applies not only to questions of principle relating to the admissibility of claims but also to the assessment of the actual loss or damage where the claims do not give rise to any question of principle.

The importance of uniformity of application is obvious, since the oil industry in one Member State pays for the cost of clean-up operations incurred and economic losses suffered in other Member States. Unless a reasonably high degree of uniformity and consistency is achieved, there is a risk of great tensions arising between Member States and of the international compensation system no longer being able to function properly.

The 1992 Fund considers each claim on the basis of its own merits, in the light of the particular circumstances of the case. Whilst criteria for the admissibility of claims have been adopted, a certain flexibility is nevertheless allowed, enabling the Fund to take into account new situations and new types of claims. Generally, the Fund follows a pragmatic approach, so as to facilitate out-of-court settlements.

Decisions on the admissibility of claims which are of general interest are reported in the IOPC Funds' Annual Report.

REVIEW OF THE ADEQUACY OF THE INTERNATIONAL COMPENSATION REGIME

Increase in the maximum amount of compensation available under the 1992 conventions

In October 2000, the Legal Committee of IMO adopted under a special procedure two resolutions increasing the limits contained in 1992 Civil Liability Convention and the 1992 Fund Convention by some 50.37%. The amendments entered into force on 1 November 2003.

The increased limits of the shipowner's liability are those set out on page 2 above.

The amendment to the 1992 Fund Convention brought the total amount available under the 1992 Conventions to 203 million SDR (US$297 million).

1992 Fund Working Group

In April 2000, the 1992 Fund Assembly established a Working Group to examine the adequacy of the international compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention. The point was made that although the system had worked well on many occasions, there were inadequacies in the system.

Maximum level of compensation

During the discussions in the Working Group a number of Member States maintained that in order for the international compensation system to retain credibility, the maximum compensation levels should be sufficiently high to ensure full compensation to victims even in the most serious oil spill incidents. Other Member States, however, did not see the need to increase the maximum level of compensation over and above the increases adopted within the IMO in October 2000 referred to above which brought the total amount available from 1 November 2003 to 203 million SDR (US$297 million).

In light of this difference in views, the Working Group considered a proposal to establish an optional third tier of compensation by means of a Protocol creating a Supplementary Compensation Fund, which would provide additional compensation over and above the compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention.

The delegations representing shipping, insurance and oil interests supported the Supplementary Fund scheme in principle. It was emphasised, however, that it was important to preserve the sharing of the burden of compensating oil spills between shipping and oil interests.

The International Group of P & I Clubs informed the 1992 Fund that the P & I Clubs, with the support of shipowners, were developing a proposal for a voluntary increase in the limit of liability for small ships under the 1992 Civil Liability Convention which would apply only in the States which ratified the proposed Supplementary Fund Protocol. Although the precise level of the increase has not yet been decided, it is expected that the limit for small ships will be increased from 4.5 million SDR (US$6.6 million) to about of 20 million SDR (US$29 million).

A Diplomatic Conference was held under the auspices of IMO in London from 12 to 16 May 2003 to consider the creation of a Supplementary Compensation Fund. After difficult negotiations, a Protocol was adopted creating such a Supplementary Fund. The main elements of the Protocol are as follows:

- The total amount of compensation available for pollution damage in the States that become Parties to the Protocol will be 750 million SDR (US$1 097 million), including the 203 million SDR (US$297 million) which will be available from 1 November 2003 under the 1992 Conventions.
- The Supplementary Fund will be financed by contributions payable by oil receivers in the States which ratify the Protocol.
- The Protocol contains a provision for so-called “capping”of contributions, ie that the aggregate amount of contributions payable in respect of contributing oil received in a particular State during a calendar year should not exceed 20% of the amount of contributions levied. The capping provision applies until the total amount of contributing oil received in the States Members of the Supplementary Fund has reached 1 000 million tonnes or for a period of 10 years from the date of the entry into force of the Protocol, whichever is the earlier.
- For the purposes of contributions, it will be considered that there is a minimum aggregate quantity of 1 million tonnes of contributing oil received in each Member State of the Supplementary Fund.
- The Protocol will enter into force three months after it has been ratified by at least eight States which have received a combined total of 450 million tonnes of contributing oil in a calendar year.
- The Protocol only applies to incidents which occur after its entry into force.

The ratification process is under way in a number of States. The European Union Council of Transport Ministers has decided that the European Union Member States should, if possibke, ratify the Supplementary Fund Protocol by 30 June 2004. Norway is also preparing the legislation necessary for

ratification. It is possible that the Protocol will enter force during the second half of 2004

Environmental damage and environmental studies

Under the 1992 Conventions, compensation for impairment of the environment (other than loss of profit from such impairment) is limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

In 2001 the Working Group set up by the Assembly considered a proposal to introduce the concept of compensation for environmental damage as a violation of collective property whereby compensation would be available to the State on the basis of international rights under other Conventions to which it was a Party, the amount of compensation to be based on the conclusions of environmental impact studies conducted in accordance with procedures adopted by the 1992 Fund. The Working Group also examined a proposal to change the 1992 Fund's policy as regards environmental damage to the effect that compensation would no longer be limited to cases where the claimant had suffered economic loss and to allow compensation to be calculated through theoretical models.

These proposals were not accepted since it was considered that they went beyond the present definition of 'pollution damage' in the 1992 Conventions. It was agreed that an examination should be made of what could be achieved within the present definition of 'pollution damage' as regards the admissibility of claims for reinstatement of the environment and for cost of environmental impact studies. There was also support for considering the issue of environmental damage in depth in the longer term.

The Funds had in 1994 determined the criteria for the admissibility of claims for costs of post-spill environmental studies and for costs of measures to reinstate the polluted environment.

In April/May 2002 the Working Group re-considered the criteria to be applied as regards the admissibility of such claims. The Working Group prepared a revised text of the relevant section of the Claims Manual. The revised text was approved by the Assembly at its October 2002 session. The purpose of the revised text is to clarify the criteria to be applied in respect of such claims, within the legal framework of the definition of "pollution damage" in the 1992 Conventions.

Shipowners' liability and related issues

When the Working Group discussed whether amendments should be made to the provisions in the 1992 Civil Liability Convention regarding shipowners' liability and related issues, it became clear that there was a great divergence of opinion.

Representatives of shipowners and their insurers took the view that that the issues relating to shipowners' liability should not be reopened since to do so would be detrimental to the position of victims of oil pollution. It was suggested that the 1992 Conventions were intended to create an efficient compensation regime and had not been intended to ensure the quality of shipping or to punish the guilty party. It was further suggested that any amendments to the provisions relating to shipowners' liability would give rise to serious treaty law problems. It was emphasised that it was of paramount importance to maintain the equitable balance between the burdens imposed on the two industries involved, ie those of the shipping and cargo interests. An analysis of oil spills which had occurred in the period 1990-1999 showed that the present regime had resulted in an equitable sharing of burden between these two interests. They maintained that the proposal by the shipping industry to increase, on a voluntary basis, the limitation amount applicable to small ships to around 20 million SDR (US$29 million) would preserve this balance and that the matter should be re-examined in the light of experience three to five years after the entry into force of the proposed Protocol establishing a Supplementary Fund.

Representatives of the oil industry maintained that the international compensation regime should ensure that persons suffering oil pollution damage were compensated promptly but also be consistent with the general objective to improve maritime safety and reduce the number of oil spills. It was emphasised that it was the sole responsibility of the shipowner to maintain a safe and seaworthy ship. It was suggested that the latter objective might be compromised by the establishment of the Supplementary Fund, in so far as it was funded only by oil receivers. In addition, the point was made that a Supplementary Fund

financed permanently by oil receivers would only distort the balance between the shipowners' and oil receivers' contributions to the regime. It was the oil industry's view that such a Supplementary Fund would also shield low quality shipowners from the consequences of their actions and would therefore not provide any incentive to improve the quality of their ships or the standards of their operations. In order to preserve the balance, it was suggested that this could be achieved either by an increase in the shipowner's limitation amount or by shipowners' participation in the third tier compensation provided by the Supplementary Fund.

A number of Fund Member States, whilst recognising the short-term benefits of the Protocol establishing a Supplementary Fund and the proposed voluntary increase of the limitation amount for small ships, considered that it was still necessary to take a long and hard look at the current regime and to increase the shipowners' involvement on a firm legal basis.

Several Member States expressed the view that increasing the financial burden on shipowners beyond those already envisaged by the 50% increase that would come into effect in November 2003 and the proposed voluntary increase for small ships was not justified. Those States also stated that tonnage-related financial limits were well established in maritime law and stressed the importance of the Civil Liability Convention remaining consistent with other international maritime compensation Conventions.

In February 2003 the Working Group decided that, in view of the apparent disagreement between the shipping industry and the oil industry on the extent to which the financial burden of oil spills had been shared in the past and would be shared in the future, the Director should undertake an independent study of the costs of past spills in relation to the current and future limitation amounts of the 1992 Conventions. The Working Group considered that it was important that the study reflected the costs of past spills and the apportionment of those costs between the shipping and oil industries on the basis of values in 2003 and the likely values in the future, taking into account inflation indices for individual States. This study is being carried out.

The Working Group considered a proposal to develop new criteria governing the shipowner's right to limitation of liability so as to make it easier to break that right. The view was expressed that the virtually unbreakable right of limitation of shipowners had hampered the 1992 Fund from Member States expressed the view that it was inappropriate to lower the threshold for breaking the shipowner's right to limit liability as means of trying to improve the overall quality of shipping, and that in those States' view this was best dealt with through other international Conventions, which attached punitive sanctions to non compliance.

Furthermore, the Working Group considered a proposal that the present provisions on channelling of liability, which precluded claims for compensation being pursued against a number of parties (eg the charterer) should be amended so as to revert to the channelling provisions in the 1969 Civil Liability Convention, which barred only claims against the servants or agents of the shipowner. A number of delegations considered that the benefit to victims afforded by the current channelling provisions was of paramount importance, but supported exploring further a proposal put forward at a previous meeting of the Working Group to include charterers' (usually cargo owners) liability in the compensation regime.

The issues relating to shipowners' liability will be considered further by the Working Group

Other issues

The Working Group has also considered other issues such as the refinement of the contribution system, problems caused by States not submitting oil reports, the definition of 'ship', uniform application of the 1992 Conventions, alternative dispute settlement procedures (ADR) and admissibility of claims for fixed costs. The discussions on these issues will continue.

CONCLUDING REMARKS

The international compensation regimes relating to oil pollution damage established under the Civil Liability and Fund Conventions are one of the most successful compensation schemes in existence over the years. Most compensation claims have been settled amicably as a result of negotiations.

Although the Conventions were revised in 1992, the main features of the regime were decided in the late sixties and early seventies. It is not surprising therefore that the Contracting States have found that the regime needs to be revisited for modifications in the light of experience, so as to enable the regime to adapt to the changing needs of society and to ensure the regime's survival by remaining attractive to States. The first steps to that effect have been taken by the increases in the limits of liability and compensation which entered into force on 1 November 2003 and by the adoption in May 2003 of the Protocol establishing a Supplementary Fund and by the amendments to the Claims Manual in respect of the cost of post-spill studies and the costs of reinstatement of the polluted environment. The review of the 1992 Conventions continues.

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ANNEX I

States Parties to both the
1992 Protocol to the Civil Liability Convention and the
1992 Protocol to the Fund Convention

as at 20 December 2003

84 States for which Fund Protocol is in force
(and therefore Members of the 1992 Fund)

Algeria	Georgia	Panama
Angola	Germany	Papua New Guinea
Antigua and Barbuda	Greece	Philippines
Argentina	Grenada	Poland
Australia	Guinea	Portugal
Bahamas	Iceland	Qatar
Bahrain	India	Republic of Korea
Barbados	Ireland	Russian Federation
Belgium	Italy	Saint Vincent and the Grenadines
Belize	Jamaica	Samoa
Brunei Darussalam	Japan	Seychelles
Cambodia	Kenya	Sierra Leone
Cameroon	Latvia	Singapore
Canada	Liberia	Slovenia
China (Hong Kong Special Administrative Region)	Lithuania	Spain
Colombia	Madagascar	Sri Lanka
Comoros	Malta	Sweden
Congo	Marshall Islands	Tanzania
Croatia	Mauritius	Tonga
Cyprus	Mexico	Trinidad and Tobago
Denmark	Monaco	Tunisia
Djibouti	Morocco	Turkey
Dominica	Mozambique	United Arab Emirates
Dominican Republic	Namibia	United Kingdom
Fiji	Netherlands	Uruguay
Finland	New Zealand	Vanuatu
France	Nigeria	Venezuela
Gabon	Norway	
	Oman	

2 States which have deposited instruments of accession, but for which the Fund Protocol does not enter into force until date indicated

Ghana	3 February 2004
Cape Verde	4 July 2004

States Parties to the

1992 Protocol to the Civil Liability Convention
but not to the 1992 Protocol to the Fund Convention

as at 20 December 2003

(and therefore not Members of the 1992 Fund)

7 States for which Protocol to Civil Liability Convention is in force			
Chile	Egypt	Indonesia	Switzerland
China	El Salvador	Romania	
1 State which has deposited an instruments of accession, but for which the Protocol to the Civil Liability Convention does not enter into force until date indicated			
Vietnam			17 June 2004

States Parties to the 1969 Civil Liability Convention

as at 20 December 2003

43 States Parties to the 1969 Civil Liability Convention		
Albania	Georgia	Nicaragua
Benin	Ghana	Peru
Brazil	Guatemala	Portugal
Cambodia	Guyana	Saint Kitts and Nevis
Chile	Honduras	Sao Tomé and Principe
Colombia	Indonesia	Saudi Arabia
Costa Rica	Kazakhstan	Senegal
Côte d'Ivoire	Kuwait	Serbia and Montenegro
Dominican Republic	Latvia	South Africa
Ecuador	Lebanon	Syrian Arab Republic
Egypt	Luxembourg	Tuvalu
El Salvador	Malaysia	United Arab Emirates
Equatorial Guinea	Maldives	Yemen
Estonia	Mauritania	
Gambia	Mongolia	
1 State which has deposited an instruments of accession, but for which the Protocol to the Civil Liability Convention does not enter into force until date indicated		
Jordan		12 January 2004

Note: the 1971 Fund Convention ceased to be in force on 24 May 2002