14 The Changing Parameters of Compensation for Ship-Source Pollution Damage[1]

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The Established Regimes

The International Convention on Civil Liability for Oil Pollution Damage 1969 [CLC 1969], the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1971 [Fund Convention 1971], and their amending protocols of 1992,[2] have, for a number of years, provided a largely effective framework for compensation for ship-source oil pollution damage. CLC 1969/1992[3] imposes strict but limited liability on a ship owner for damage caused by a spill of persistent oil from a tanker carrying persistent oil as cargo. The definition of ship has been slightly widened in the 1992 Civil Liability Convention Protocol.[4] The shipowner's liability is subject to a number of exceptions including war and natural phenomenon of an exceptional, inevitable and irresistible nature.[5] The imposition of liability in CLC 1969 and 1992 is backed up by a system of compulsory insurance which also provides for a right of direct action against the person providing security.[6] The current general capping of shipowner's liability in CLC 1992 is set at 59.7 million units of account.[7] The shipowner's liability is complemented by liability imposed on the International Oil Pollution Compensation Funds [IOPC] [that is, 1971 and 1992] in terms of the Fund Convention 1971 and the Fund Convention 1992,[8] to which oil receivers in member States contribute. The current maximum liability of the IOPC Fund 1992 is 135 million units of account which can in certain instances rise to 200 million units of account;[9] the limits contained in CLC 1992 and the Fund Convention 1992 were raised in October 2000 by the tacit amendment procedure contained in the Conventions.[10] The Fund Convention 1971 will be cease to be in force on 24 May 2002;[11] as of 1 December 2001 the number of states parties to the 1992 Fund Convention was seventy-four.[12]

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2 Protocol of 1992 to Amend the International Convention on Civil liability for Oil Pollution Damage, 1969; Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

3 References to CLC 1992 constitute a reference to the consolidated text of the International Convention on Civil Liability for Oil Pollution Damage 1992, as amended by the 1992 Protocol.

4 CLC 1969 defined a ship as meaning 'any seagoing vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo' [Article I (1)]. This was widened in CLC 1992, and the same provision now states that 'ship' means 'any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.'

5 Loc. cit., Art. III (2).

6 Loc. cit., ArticleVII, paragraph 8.

7 Loc. cit., Article V. Article V, paragraph 9(a) states that this unit of account is the Special Drawing Right as defined by the International Monetary Fund.

8 References to the Fund Convention 1992 constitute a reference to the consolidated text of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, as amended by the 1992 Protocol.

9 Fund Convention 1992, Article 4, paragraph 4.

10 Resolutions adopting these amendments are reproduced at pages 47 *et seq.* of Texts of the 1992 *Conventions on Liability and Compensation for Oil Pollution Damage*, [2001 Edition]. Amendments will come into force on 1/11/2003, 'unless prior to 1 May 2002 not less than one quarter of the States which were contracting States to the respective Conventions on 18 October 2000 have communicated to the International maritime Organization that they do not accept these amendments". [IOPC Fund 1992, *Text of the 1992 Conventions on Liability and Oil Pollution Damage*, 2001 Edition, p.3]

11 IOPC Fund 1971 Documentation, 71FUND/A.24/4 [1 August 2001].

12 Source: www.iopcfund.org [10/12/2001]. Number of states parties to CLC 1992 was seventy-eight as of 1/12/2001 [ibid]. Malta acceded to CLC 1992 and the Fund Convention 1992 on 6 January 2000 and the said Conventions entered into force for Malta on 6 January 2001.

The liability of the Funds is strict and limited in all cases, and is also subject to a number of defences which are not as extensive as those in CLC 1969/1992. The *Erika* incident,[13] in particular, however has highlighted the possibility of damages from a spill which exceed the limit available under the 1992 Conventions. The European Commission proposed, in the wake of that incident, a regulation of the European Parliament and of the Council on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures.[14] Such a fund would lead to a regional solution; however the international maritime community deliberating within the framework of both the IOPC Fund and the International Maritime Organization [IMO] is actively considering the possibility of establishing a third tier of liability for oil pollution damage. In September 2001 the 1992 Fund Assembly considered a revised draft Protocol[15] establishing a Supplementary Compensation Fund. This supplementary fund would be very closely linked to the existing 1992 IOPC Fund. Indeed the draft protocol adopts the same definition of ship, person, owner, oil, pollution damage, preventive measures and incident.[16] The *raison d'être* of the Supplementary Fund is spelt out in Article 4:

> The Supplementary Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention, because the damage exceeds the applicable limit of compensation laid down in...in respect of any one incident.[17]

It has been suggested that the maximum available from the Supplementary Fund will be one billion US dollars;[18] it has, furthermore been suggested that a diplomatic conference will address the issue in 2003.[19]

The International Convention on Liability and Compensation for Damage in Connexion with the Carriage of Hazardous and Noxious Substances by Sea 1996. [HNS Convention].[20]

The CLC and the Fund Convention regimes do not provide compensation for damage caused by a ship-source spill of hazardous substances other than oil as defined in those Conventions.[21] The problem is addressed in the HNS Convention of 1996, which is still not in force. This Convention makes provision for a regime of compensation for damage caused by the carriage of hazardous substances on ships. Strict but limited liability, as in CLC 1969/1992, is channelled on to the owner, restrictively defined , and the Convention also provides for the setting up of an HNS Fund on lines similar to the IOPC Fund 1992. Despite the attractions of the implementation of this Convention,[22] only limited progress has been made in this direction, and this is probably due to the complexity of administering the Convention. In October 1999 the Legal Committee of the IMO decided to include the implementation of the HNS Convention as part of its programme, and a correspondence group was established to this effect. In October 2001 the 1992 Fund Assembly gave instructions to the IOPC Fund 1992 Director for the development of a system designed 'to assist States and potential contributors in the identification and reporting of contributing cargo under the HNS Convention'.[23] Furthermore the Assembly renewed instructions to the Fund Director 'to carry out the administrative tasks necessary for setting up the HNS Fund'.[24]

The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 [The Bunker Oil Pollution Damage Convention 2001].[25]

Another aspect of the established oil pollution regime which can be considered to be a drawback is that the definition of a 'ship' in both CLC 1969/1992 and the Fund Convention 1971/1992 largely restricts the application of the Convention to tankers. A number of States, including the

13 France, 12 December 1999.
14 Brussels, 6.12.2000, COM (2000) 802 final.
15 This draft protocol is entitled 'Draft Protocol of 200_ to Supplement the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992'.
16 IOPC Fund 1992 Documentation, 92FUND/A.6/28, Annex I, article 1, paragraph 6.
17 IOPC Fund 1992 Assembly Documentation, 92FUND/A.6/28 [19 October 2001], Annex I.
18 O'Mahony, *IMO plans $1bn 'third tier' for oil spill payouts*, 22 November 2001.
19 Ibid.
20 IMO documentation: LEG/CONF. 10/8/2, 9 May 1996.
21 CLC 1992, Article I, paragraph 5; Fund Convention 1992, Article 1(2).
22 The HNS Convention is not in force. It will enter into force 18 months after the date on which the following conditions are fulfilled:
a. at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it, and
b. the Secretary-General has received information in accordance with article 43 that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c) have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account... [Article 46].
23 IOPC Fund 1992 Assembly Documentation, 92FUND/A.6/28 [19 October 2001], §28.5.
24 IOPC Fund 1992 Assembly Documentation, 92FUND/A.6/28 [19 October 2001], §28.8 .
25 IMO documentation LEG/CONF. 12/19, 27 March 2001. See, further, Gauci, G. & Pace, J., 'Bunker Oil Pollution Damage Convention adopted at IMO', *Shipping and Transport Lawyer International*, Vol. 2, No. 4, 2001, p. 17.

United Kingdom, took unilateral action to impose strict liability in relation to bunker spills from non-CLC vessels.[26] On March 23, 2001, a Convention entitled the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 was adopted at IMO. According to article 14 of the said Convention, the Convention will go into force

> one year following the date on which eighteen States, including five States each with ships whose combined gross tonnage is not less than one million, have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.[27]

This Convention adopts the broad structure of the 1992 Civil Liability Convention in that it imposes a regime of strict but limited liability accompanied by compulsory insurance. As in CLC 1992, the ship owner is exempted from liability in a number of instances, including instances where the contamination damage is caused by war and hostilities, and a natural phenomenon of an exceptional, inevitable and irresistible character.[28] However, there is one major innovation in the Convention; this relates to the channelling of liability. Whereas CLC 1969/1992 applies a restrictive definition of shipowner,[29] the Bunker Oil Pollution Damage Convention 2001 defines a 'shipowner' as meaning 'the owner, including the registered owner, bareboat charterer, manager and operator of the ship'.[30] In turn 'registered owner' is defined as meaning 'the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship.'[31] The wide definition of 'ship owner' is a very interesting development; it bears similarities to the definition of 'responsible person' in the United States Oil Pollution Act of 1990.[32] It is most likely that the term susceptible to the widest interpretation is 'operator' which can include *inter alia* mortgagees in possession and salvors. The possibility that a salvor might be deemed to be an operator may support the view that the provisions of the Convention may constitute a disincentive to salvors; this problem is compounded by the fact that the Bunker Oil Pollution Damage Convention 2001 does not contain the equivalent of article III(4) of CLC 1992 which largely provides an immunity from liability for pollution damage in relation to salvors.[33] After a long debate on the issue prior to the adoption of the Convention at an IMO diplomatic conference in March 2001, the matter was resolved on the basis of the text of a resolution which recommends 'that persons taking reasonable measures to prevent or minimize the effects of oil pollution be exempt from liability unless the liability in question results from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result', and recommended further 'that States consider the provisions of Article 7, paragraphs 5(a), (b), (d), (e) and (f) of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 as a model for their legislation.'[34] It may be noted that the Bunker Oil Pollution Damage Convention 2001 imposes a duty to insure liability only on the registered owner of the vessel; operators and bareboat charterers have no such obligation.[35]

As in the case of the limitation regimes adopted in CLC 1992 and in the HNS Convention 1996, the regime of limitation of liability suggested by the Bunker Oil Pollution Damage Convention 2001 – the Convention on Limitation of Liability for Maritime Claims, 1976, as amended[36] – provides for a virtually unbreakable right of limitation of liability.

> Article 4 of that Convention provides that [a] person shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

Common Problems.

There are a number of common problems in the above mentioned three compensatory regimes. These include in particular the issue of compensability or otherwise of damage to the environment. All three systems provide that 'compensation for impairment of the environment other than loss of

[26] See section 154 of the Merchant Shipping Act 1995 [1995 c. 21].
[27] See, further, Article 14(2) of the same Convention.
[28] Loc. cit., Article 3, paragraph 3.
[29] Loc. cit., Article I.
[30] Loc. cit., Article 1, paragraph 3.
[31] Loc. cit., Article 1, paragraph 4.
[32] Public Law 101-380, August 18, 1990, §1001 (32).
[33] See also Article 7 (5) of the HNS Convention 1996.
[34] IMO documentation LEG/CONF. 12/DC/3 22 March 2001.
[35] Loc. cit., Article 7, paragraph 1.
[36] See Resolution on Limitation of Liability – IMO documentation LEG/CONF.12/DC/2 [22 March 2001].

profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken'.[37] Loss of profit gives rise to a particular problem in common law systems, and specifically the extent to which the rule – relating to non-recovery for pure economic loss (normally applied in the context of damages caused by a negligent act) – operates with reference to a national law implementing an international convention and imposing strict liability. The IOPC Funds, in their Claims Manuals, have delineated various criteria for compensability of economic loss.[38] Examples of instances where pure economic loss has been allowed by the IOPC Fund include: claims by self-employed fish-porters and net makers for loss of income indirectly caused by a spill;[39] claims of a car repair firm which lost business as a result of the closure of an area to ensure free movement in connection with preventive measures;[40] claims for loss by fish processing plants deprived of the supply of fish from an exclusion zone.[41] However a number of claims for pure economic loss arising from the *Braer* oil spill[42] have been recently addressed by the Scottish courts. In the case of *Landcatch Ltd v. IOPC Fund*,[43] the claim related to pure economic loss arising from the non-materialization of expected contracts, between Landcatch Ltd – producers of smolt – and salmon farmers, due to the declaration of emergency orders prohibiting the use, landing and supply of fish from the designated affected area. Recovery was not allowed on a number of grounds by both the court of first instance and the appellate court. In particular, Lord Cullen, at the appellate stage, stated that he arrived at his conclusion

> by applying considerations similar, though not identical, to those which have led to the development of a rule against such claims at common law.[44]

Similarly in *P & O Scottish Ferries Ltd v. Braer Corporation and Another*,[45] the claimants, providers of passenger and freight ferry services, provided the sole ferry passenger service between Shetland (where the spill occurred) and the mainland. It was stated in the judgement by Lord Gill, in the court of first instance, that the losses claimed in that case

> were no more than an indirect consequence of adverse publicity affecting the image of Shetland as a source of fish and fish products and as a holiday destination.[46]

The issue of compensability in relation to reinstatement measures and also post-spill environmental studies has been addressed by the Third Intersessional Working Group established by the IOPC Fund, which submitted a number of proposals to the sixth session of the Assembly of the 1992 IOPC Fund;[47] these matters will be further addressed at the next Assembly of the IOPC Fund 1992.[48]

Conclusion.

The Bunker Oil Pollution Damage Convention of 2001 fills one substantial lacuna in the international scheme for ship-source oil pollution damage. It is difficult to predict with any reasonable degree of accuracy when that Convention or the HNS Convention 1996 will come into force. Until that time serious lacunas will remain, and compensation for bunker spills and hazardous chemicals will have to be addressed by

37 See: CLC 1992, article I, paragraph 6; Fund Convention 1992, article 1, paragraph 2; HNS Convention, article 1, paragraph 6; Bunkers Convention Article 1, paragraph 9.

38 The current IOPC Fund 1992 Claims Manual [June 2000] provides that:

> Claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself.
>
> To qualify for compensation for pure economic loss, there must be a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. A claim is not admissible for the sole reason that the loss or damage would not have occurred had the oil spill not happened. When considering whether the criterion of reasonable proximity is fulfilled, the following elements are taken into account:
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> * the geographical proximity between the claimant's activity and the contamination
> * the degree to which a claimant was economically dependent on an affected resource
> * the extent to which a claimant had alternative sources of supply or business opportunities
> * the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.
>
> The 1992 Fund also takes into account the extent to which a claimant was able to mitigate his loss. [loc. cit., pp. 21-22].

39 IOPC Fund Executive Committee documentation, FUND/EXC.35.10, 8 June 1993. §3.3.18.

40 IOPC Fund Executive Committee documentation, FUND/EXC. 36.10, 5 October 1993, §3.3.8-9.

41 IOPC Fund Executive Committee documentation, FUND/EXC.34.9, 12 March 1993, §3.4.14-15.

42 United Kingdom, 5 January 1993.

43 Court of Session, Inner House (Second Division), 19 May 1999, [1999] 2 Lloyd's Rep. 316. See, further, Gauci, G., 'Ship-source Oil Pollution Damage and Recovery for Relational Economic Loss', *Journal of Business Law*, 2000, pp. 356-361.

44 [1999] 2 Lloyd's Rep. 316 at 329.

45 [1999] 2 Lloyd's Rep. 535, per Lord Gill. [Court of Session, Outer House, January 7, 1999].

46 [1999] 2 Lloyd's Rep. 535 at 540.

47 See IOPC Fund 1992 Assembly Documentation, 92FUND/A.6/28 [19 October 2001].

48 IOPC Fund 1992 Assembly Documentation, 92FUND/A.6/28 [19 October 2001], §6.43.

general basic domestic laws. Whereas it may be quite straightforward for some legal systems to impose strict and limited liability on a ship owner in relation to bunker spills or spills of hazardous chemicals, the benefits of an effective fund – such as the HNS Fund – remain inaccessible without international implementation.