

THE INTERNATIONAL LAW REGARDING SHIP-SOURCE POLLUTION

**LIABILITY AND COMPENSATION: EVOLUTION AND CURRENT
CHALLENGES**

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INTRODUCTION

The year 2017 marks a milestone in the history of the international law regarding ship-source pollution liability and compensation, established and strengthened over the last 50 years into what is today considered as a comprehensive and uniform regime. The principles that underpin this regime are the result of compromises between States and industry, lessons learned from past incidents and have been adhered to by the vast majority of countries in the world, denoting the success of the regime.

The premises of this comprehensive regime were developed in the context of major tanker spills and strengthened over time to adapt the regime to the constant evolution of shipping trends. The main legal instruments addressing spills of persistent oil from tankers include the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC), the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention) and the 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (2003 Supplementary Fund). Recognising the risks associated with bunker spills, the maritime industry enhanced the spectrum by adopting the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage governing oil pollution damage arising out of spills from the bunkers of ships (Bunker Convention), filling

a major gap in a comprehensive international liability and compensation regime for ship-source pollution.

Other legal instruments have more recently been developed with the aim of completing the international spectrum including the 2007 Nairobi International Convention on the Removal of Wrecks (Wreck Removal Convention) designed to ensure the prompt and effective removal of wrecks and the 2010 Protocol to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention), providing for a two-tier compensation system for pollution damage, loss of life or personal injury as well as loss of or damage to property in the event of maritime incidents involving HNS. The Wreck Removal Convention entered into force on 14th April 2015 following ratification by Denmark. Conversely, the HNS Convention has yet to come into effect with no signatory State to this date.

The two latter instruments, as falling outside the scope of this study (Wreck Removal Convention) or not into force in the case of the HNS Convention, will not be the subject of this paper. However, the existing international law governing ship-source oil pollution liability and compensation will be analysed in light of its evolution over time and its main features. The latter are nowadays considered as granted, but were far from typically encountered 50 years from now (I). Notwithstanding a well-established and tested international liability and compensation system, a number of challenges exist. However we will see that, despite these difficulties, the regime remains viable and the maritime community continues to work in a spirit of cooperation in order to achieve prompt compensation of victims of oil pollution incidents (II).

I. THE SUCCESSFUL ESTABLISHMENT OF A COMPREHENSIVE INTERNATIONAL LIABILITY AND COMPENSATION REGIME FOR SHIP-SOURCE POLLUTION

Over the last fifty years, the maritime community has made outstanding achievements in the development of a proven and tested international liability and compensation regime for ship-source pollution (A), the features of which are nowadays well established and recognised for the benefit of victims of oil pollution incidents (B).

A. Half-a-century of construction and strengthening of the regime

When the TORREY CANYON hit the Seven Stones Reef between Land's End and the Isles of Scilly in the United Kingdom in 1967, it became clear that the 117,000 tonnes of crude oil released from the vessel would cause unprecedented pollution. The TORREY CANYON incident is a landmark case in so far as it highlighted deficiencies in the response arrangements and capabilities but also revealed significant legal insufficiencies in the principles governing liability and compensation for oil pollution damage. At the time, the law governing liability and compensation for ship-source pollution did not follow a uniform pattern. No international convention addressing such matters was in place and, as was the case in many jurisdictions, proof of fault on the part of the shipowner had to be demonstrated by the claimant in order to establish liability, making it difficult for claimants to obtain compensation for the losses that they had suffered. This incident is a milestone in so far as it prompted the maritime industry to address these problems in a dedicated framework addressing spills of persistent oil from tankers. A novel approach was adopted by means of a dual convention system, the 1969 Civil Liability Convention for Oil Pollution Damage (1969 CLC) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention).

While these conventions were being considered in the international forum, the oil and shipping industries developed their own schemes, in the form of the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP), to be administered by ITOPF and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL). These were designed to provide voluntary payment to victims of oil pollution who could not obtain adequate legal remedies. It has been noted that strict liability for pollution is nowadays taken for granted but in 1969 its introduction by TOVALOP was an innovative vehicle for prompt compensation¹. The schemes ceased their existence in 1997 as adherence to the conventions became more widespread. Despite the termination of TOVALOP, technical advice on response techniques, damage assessment as well as reasonableness and merits of claims for compensation have remained an integral part of ITOPF's activities ever since.

A few years following the adoption of the 1969 CLC and 1971 Fund Convention, the AMOCO CADIZ and TANIO incidents occurred off the coast of Brittany, France in 1978 and 1980 respectively, causing significant pollution damage and claims for compensation. The occurrence of these incidents demonstrated the absence of adequate limits of liability and prompted the adoption of the 1984 protocols to amend the 1969 CLC and 1971 Fund Convention. The protocols were superseded by the 1992 protocols to the 1992 CLC and 1992 Fund Convention availing victims of oil pollution incidents of a more extensive scope of application, an expanded definition of pollution damage as well as increased amounts of compensation. The ERIKA incident off the coast of France in 1999 and PRESTIGE off the coast of Spain in 2002 prompted further changes to the conventions and overall review of the international compensation regime. In 2003, the 2003 Supplementary Fund was adopted

¹ De la Rue C., TOVALOP and CRISTAL – a purpose fulfilled, International Journal of Shipping Law.

providing additional compensation beyond the amount available under the 1992 Fund Convention.

In the context of the review of the international compensation regime, the International Group of P&I Clubs additionally established two voluntary schemes, STOPIA² and TOPIA³, whereby compensation was enhanced by increasing the shipowner's limit of liability provided for under the 1992 CLC for small vessels up to 29,548 GT (State Parties to 1992 Fund only) in the case of STOPIA and by co-funding 50% of the Supplementary Fund's liability in the case of TOPIA.

Since their establishment, the 1992 Fund and the preceding 1971 Fund have been involved in 150 tanker incidents of varying sizes around the world and have paid some £600 million in compensation⁴. Furthermore, in the great majority of cases, all claims have been settled out of court. It is also important to note that the shipowner alone meets the great majority of claims (some 95% historically) without any need for recourse to the IOPC Funds⁵.

Recognising that spills from vessels such as dry cargo ships, LNG or LPG carriers, passenger ships, or other vessels not engaged in the carriage of bulk persistent oil, whilst not normally involving the release of quantities of oil as great as those lost in major tanker incidents, account for the majority of oil pollution incidents, the IMO turned its attention to a specific regime dealing with such incidents. In March 2001 agreement was reached at an IMO Diplomatic Conference in London on the text of the Bunker Convention, filling an important gap in a comprehensive liability and compensation regime for ship-source pollution. The Bunker Convention and the growing awareness of oil pollution from ships

² Small Tanker Oil Pollution Indemnification Agreement 2006

³ Tanker Oil Pollution Indemnification Agreement 2006

⁴ International Oil Pollution Compensation Funds; 2016; Annual Review, p.5

⁵ International Chamber of Shipping and International Group of P&I Associations; 2017; Submission to the IOPC Funds April 2017 sessions, IOPC/APRIL17/4/6, p.2

other than tankers also coincides with the formal extension of ITOPF's key services to owners of all types of ships in 1999 and ITOPF's growing attendance to non-tanker spills around the world.

It should be noted that the USA took a different route by enacting the Oil Pollution Act 1990 (OPA 90) further to the EXXON VALDEZ (1989) dealing with oil pollution from all types of vessels. However it is beyond the scope of this paper to analyse in detail the provisions of OPA 90.

B. Key features of this comprehensive liability and compensation regime

A key feature of the international compensation regime is the principle of strict liability of the shipowner, i.e. that liability for oil pollution damage falls on the shipowner whose vessel has spilled the oil regardless of any element of fault on the vessel's part. The HEBEI SPIRIT incident which occurred in South Korea in 2007 is a good example in so far as the vessel was hit by a crane barge while at anchor. The incident resulted in the release of 10,900 tonnes of oil and 375 kilometres of shoreline were affected. Liability and compensation is channelled to the shipowner irrespective of the absence of fault on its part or which party is actually at fault. This feature of strict liability provides the benefit of reducing the scope for argument as to who is responsible for paying legitimate claims thereby ensuring prompt and efficient payment of admissible claims. The counterpart of this principle is the ability for the shipowner to limit its liability up to a financial limit calculated by reference to the tonnage of the ship, unless 'it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result'⁶.

⁶ Article V. 2 of the 1992 Civil Liability Convention

In the event that the level of claims exceed the shipowner's limit of liability, or if no liability arises under the 1992 CLC, or should the shipowner be incapable of meeting its obligations in full, the 1992 Fund Convention and 2003 Supplementary Fund (where applicable) are designed to provide compensation towards admissible claims, providing the benefit of the availability of high levels of compensation to victims of oil pollution affecting States Parties to these conventions.

Turning to bunker spills, the features of the Bunker Convention bear many similarities to 1992 CLC (e.g. strict liability, compulsory insurance, definition of pollution damage). However no stand-alone limits of liability are provided and instead the Bunker Convention refers to the applicable limitation regime in the jurisdiction concerned, much of the time by reference to the limits prescribed in the 1996 Limitation of Liability for Maritime Claims Convention (1996 LLMC) or relevant national law. Contrary to the 1992 CLC, the Bunker Convention – as a single tier of compensation – is not backed up by an additional layer of compensation above the shipowner's limit of liability. However, it is worth noting that further to extensive discussion at the IMO Legal Committee, the limits provided under the 1996 LLMC were increased with effect in 2015.

The international regime provides a certain degree of comfort for Member States in so far as there are usually sufficient funds available to meet admissible claims by means of the compulsory insurance provisions. Oil tankers carrying in excess of 2,000 tonnes of persistent oil under the terms of the 1992 CLC and any other vessels above 1,000 GT under the Bunker Convention are required to possess certificates attesting that adequate insurance is in place to meet the shipowner's liability in accordance with the terms of the convention concerned. These certificates are provided by the ship's registry on the back of a 'Blue Card' issued by the P&I insurer. Furthermore, claims for compensation may be brought directly against the insurer of the ship.

In terms of geographical scope of application, the 1992 CLC, 1992 Fund Convention, 2003 Supplementary Fund and Bunker Convention extend to the territories of Member States including Territorial Sea and Exclusive Economic Zone (EEZ) if one has been declared. However we will see in the second part of this paper that those States that are still party to 1969 CLC may only avail themselves of a much reduced scope of application and limits of liability.

Under the terms of the 1992 CLC and Bunker Convention, 'Pollution Damage' means the 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; and the costs of preventive measures and further loss or damage caused by preventive measures.

The international regime encompasses a comprehensive range of admissible claims for pollution damage or the threat of pollution damage, from reasonable costs of preventive measures, economic loss suffered by individuals and businesses, property damage, environmental monitoring and measures of reinstatement of the environment. With regards to the latter, it should however be noted that the proviso in the definition of Pollution Damage under the International Conventions restricts the scope of admissible environmental damage claims to reasonable measures of reinstatement actually undertaken or to be undertaken. In this regard, the IOPC Funds governing bodies have developed over the years an extensive set of guidance documents in order to assist claimants in a Member State following an oil spill incident. These define the practical parameters under which claimants may obtain compensation, ranging from the Claims Manual as well as various specific guidance documents regarding clean-up and preventive measures, tourism and fisheries claims. A

forthcoming guidance on environmental damage is currently under preparation. When providing technical advice on reasonable response measures and assessing the technical merits of claims for compensation, ITOPF commonly follows these international principles, as widely adhered to by the vast majority of countries around the world, ensuring that claimants are treated in a consistent and objective manner.

The international regime has been well-tested over the years and overall has proved its effectiveness in the prompt and fair treatment of victims of pollution incidents with the successful cooperation of all parties involved. However, the regime has been subject to operational and legal challenges in its application leading to questions of its future viability.

II. THE CHALLENGES FACED BY THE INTERNATIONAL LIABILITY AND COMPENSATION REGIME FOR SHIP-SOURCE POLLUTION, A POTENTIAL THREAT TO THE VIABILITY OF THE REGIME?

Whilst the international regime is considered as comprehensive and well-tested, a number of challenges exist whether they relate to the inconsistent interpretation and application of the conventions or the co-existence of different liability and compensation regimes in the case of transboundary pollution (A). We will see that despite these challenges and the difficulties encountered, a number of examples show the adaptability of the maritime community and the wish for all parties concerned to pursue their efforts in a spirit of cooperation (B).

A. The challenges faced by the regime

State Parties to the Conventions recognise the importance of uniform interpretation and application of the international compensation regime for its proper and equitable functioning and to ensure that claimants are treated in an equal manner. However, recent

court decisions in IOPC Funds Member States have been the subject of considerable discussion within the 1992 Fund governing bodies and the maritime industry at large⁷.

In a number of recent landmark cases such as PRESTIGE and ERIKA, the national courts applying domestic legislation have rendered judgements with potential detrimental implications for the international regime. In the case of PRESTIGE, the Spanish Supreme Court recently overturned the decision of the trial court and held that the master was guilty of the crime of reckless damage of the environment and on this basis imposed civil liability on the master, on the owners without the benefit of the limitation of liability provisions, and on their P&I Club up to the limit of the insurance policy of US\$ 1 billion, as well as on the 1992 IOPC Fund within the limits of the 1992 Fund Convention. This decision challenges some of the key principles underlying the international compensation regime as highlighted in part I of this paper, that were perceived as unbreakable by the maritime industry.

The ERIKA judgement rendered by the Cour de Cassation (French Supreme Court) on 25th September 2012 held that certain defendants had acted recklessly and with knowledge that the damage would probably occur and therefore could not avail themselves of the protection awarded by the 1992 CLC. In addition they were held criminally liable for causing pollution. Furthermore, the court awarded compensation for environmental damage, thus approving the principle, under French law of the right to compensation for pure environmental damage that is inconsistent with the criteria of admissibility under the international regime. In the record of decisions of the April 2013 sessions of the IOPC Funds governing bodies (IOPC/APR13/8/1) the Director of the IOPC Funds noted that ‘the most important difficulty was the quantification of environmental damage when there was no market value to ascertain any economic loss. It was noted that some jurisdictions tried to

⁷ International Chamber of Shipping and International Group of P&I Associations; 2017; Submission to the IOPC Funds April 2017 Sessions, IOPC/APR17/4/6; p.3

assess this damage by using abstract models to obtain a lump sum which were not admissible under the 1992 Civil Liability and Fund Conventions. [...] It was further noted that the damage awarded for this concept was not documented, that there was no proof of any damage additional to that already covered by other types of claims, such as clean up and that the damage awarded could not be quantified except using, as the Court did, a theoretical model.’ This is a prime example of a case where a court, applying national law, upholds claims that are unlikely to have been admissible under the international regime. Recent law on compensation for environmental damage has been adopted in France incorporating into French law the ERIKA jurisprudence. Uncertainties exist regarding the coexistence of such law with the existing International Conventions and possible application of unlimited liability for pure environmental damage in future oil pollution cases occurring in French waters.

This gives rise to numerous questions regarding the interaction between the international oil pollution liability conventions as incorporated into national law and other national legislation which could apply to the same oil pollution incident. Similarly, regional legislation or jurisprudence implemented into national law may differ in scope from the principles underpinning the international regime. The judgement of the European Court of Justice in the *Commune de Mesquer* case⁸ in the ERIKA proceedings is a good example where the court held that the oil released from the vessel mixed with water and sediment could be considered as waste under the EU Waste Framework Directive 75/442/EEC and that the seller of the hydrocarbons or charterer, in this case Total, may be considered as the producer of the waste and could therefore be held liable for the costs of disposing of the waste. Furthermore, the European Union Environmental Liability Directive 2004/35/EC (ELD)⁹ establishes a framework to prevent and remedy environmental damage, the definition

⁸ C-188/07 *Commune de Mesquer v. Total*

⁹ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage

of which is more extensive than the definition included in 1992 CLC and bears a few similarities with the USA Natural Resources Damage Assessment process. Nevertheless, the ELD does not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of the International Conventions listed above. However it remains to be seen whether, in the event of an oil pollution incident in an EU Member State, the approach might be taken that claims for pure environmental damage, as considered as falling outside the scope of these international conventions, could be brought on the basis of the ELD.

Notwithstanding the principle laid out in the IOPC Funds Claims Manual that claims based on abstract or theoretical models are not admissible, claims for environmental damage made on this basis have been and continue to be submitted by certain States. The *Volgoneft 139* incident provides a useful example where a claim for environmental damage was submitted in accordance with the 'Metodika' formula, as enshrined into Russian Law. However it was noted by the 1992 Fund that this type of claim was not admissible and in September 2010, the Arbitration Court in Saint Petersburg and Leningrad Region rendered a judgement rejecting this aspect of the claim. On the other hand, claims for environmental damage may be made independently of the international compensation regime. In this eventuality, 'liability for environmental damage may be incurred independently of the conventions if proceedings are brought to recover amounts in the nature of administrative penalties or criminal fines. Such amounts are regarded as falling outside the compensation system and to the extent that they fall outside the term 'pollution damage' they likewise fall outside the rule that CLC provides the sole remedy for such damage.'¹⁰ Recent case studies in Brazil have demonstrated this eventuality to a great extent.

¹⁰ De la Rue C., *Shipping and the Environment*

Another risk for the consistent and uniform application of the conventions lies with the possible coexistence of different national laws/compensation regimes in the case of transboundary pollution which raises questions as to the assessment, treatment and admissibility of claims. Potential scenarios include:

- An incident involving States Parties to different regimes such as the USA (OPA 90) and Canada (1992 CLC, 1992 Fund Convention and 2003 Supplementary Fund)
- An incident involving a State party to the 1992 CLC and/or the 1992 Fund Convention and/or 2003 Supplementary Fund and a State having its own Fund, such as Hong Kong (1992 CLC and 1992 Fund Convention) and China (1992 CLC and China Oil Pollution Compensation Fund)
- An incident where national law and international conventions coexist or where the International Conventions apply but with divergence as to the version applicable, i.e. 1969 CLC or 1992 CLC and/or only one State being signatory to the 1992 Fund Convention.

The lack of uniformity in the application and interpretation of the conventions as well as the coexistence of different regimes could give rise to uncertainties and challenges for the technical assessment of claims for compensation as well as the consistent and equal treatment of claimants.

B. A potential jeopardy to the viability of the system?

Despite these challenges, a number of examples show the adaptability of the maritime community and the wish for all parties concerned to pursue their efforts in a spirit of cooperation for the proper functioning of the international regime.

In practice, the International Oil Pollution Compensation Funds and the P&I Clubs have cooperated closely in the investigation of incidents and in the handling of claims since

the establishment of the Funds, contributing to the success of the regime. The Memorandum of Understanding (MoU) agreed between the International Group of P&I Clubs on the one part and the 1992 Fund and 2003 Supplementary Fund on the other part provides the basis for this cooperation in the event of an incident in areas such as claims handling and the joint sharing of experts. In this regard, the involvement and sharing of experts, such as ITOPF, to provide advice on effective response to marine oil spills, clean-up operations, investigation and assessment of the potential impact of pollution incidents to fisheries, mariculture and tourism activities as well as claims for compensation as a whole contribute to a great extent to the consistent application of the regime.

More recently, and after a number of years of intense discussions, the agreement reached between the IOPC Funds and the International Group of P&I Clubs on interim payments setting out the modalities and terms under which interim payments could be made in future cases, subject to the decision of the governing bodies, proves once again that all parties involved in the system are committed towards a similar goal: addressing the socio-economic and environmental effects of pollution incidents on individuals and businesses. At the same time, this spirit of cooperation contributes to the longevity of the regime.

This relationship has also been strengthened as a result of past incidents such as the HEBEI SPIRIT which demonstrates a good model of cooperation with the establishment of successful agreements with the Republic of Korea. This type of mechanism has been included in the IOPC Funds Guidance to Member States as a positive working arrangement for the prompt treatment of claims for compensation which could be followed by States and other national agencies/bodies in the event of future incidents.

With regard to transboundary pollution and the scenarios listed above, it is worth noting that the maritime industry has approached the Canadian Government and the USA in

order to establish a transboundary pollution exercise to facilitate preparedness and response in the event of an incident as well as treatment of claims for compensation.

The maritime community, including the IMO, IOPC Funds, International Group of P&I Clubs and ITOPF have been actively involved for a number of years in an extensive programme reaching out to States around the world in order to promote the effective application of the conventions, training regarding the provisions of the conventions and admissibility criteria for claims of compensation as well as sharing lessons learned from previous incidents.

Experience has shown that the maritime industry and States are capable of adapting themselves by reaching compromise decisions. To this extent, the outcome of the IMO Legal Committee that dealt with the revision of the limits of 1996 LLMC is meaningful. Further to lengthy discussions, the agreement was reached for an increase of 51% which came into effect in June 2015. This has direct importance for the Bunker Convention. However, in order to ensure the consistent and equal treatment of claimants in the event of a bunker spill, there could be merit for the maritime community to develop international guidelines or criteria addressing the admissibility of claims for pollution damage caused by bunker spills similar to those developed for spills of persistent oil from tankers. This would reflect existing practice followed by experts such as ITOPF regarding the assessment of the technical merits of claims for compensation and would bring certainty for the benefit of claimants.

Recognising the potential implications of recent court decisions on the viability of the international compensation regime and the importance for conventions to be applied in a uniform, consistent and equal manner in all Member States, the maritime community is currently making necessary steps for a better understanding of the regime to be developed as well as other possible options such as measures to increase the number of ratifications of the

2003 Supplementary Protocol. These include the development of a common understanding of the application of the Conventions and understanding whether and why any obstacles exist to the ratification of the existing International Conventions. These will be the subject of discussions to the forthcoming IOPC Funds April 2017 sessions.

Despite the challenges and difficulties encountered, the examples above show the constant adaptability of the regime to the needs of the international maritime community and the wish for all parties concerned to pursue their efforts in a spirit of cooperation for the consistent and fair treatment of victims of oil pollution incidents.

CONCLUSIONS

Over the last 50 years, the maritime community has proven great adaptability to the evolutions of shipping, addressing the issues brought to light following a number of landmark oil spills and integrating the lessons learned from these incidents. The law governing liability and compensation for oil pollution damage is undoubtedly one of the areas that has changed considerably over the past fifty years.

Throughout this paper, we have seen that the spectrum of international conventions addressing the socio-economic and environmental effects of pollution incidents on individuals and businesses has evolved, improving over time to cover a variety of scenarios. The international regime is adhered to by the vast majority of signatory countries and has been tested successfully on many occasions denoting the achievement of the regime.

Notwithstanding a well-established and tested international liability and compensation regime, a number of challenges exist whether they relate to the inconsistent interpretation and application of the conventions or the co-existence of different liability and compensation regimes in the case of transboundary pollution. Despite these challenges and the difficulties encountered, this paper provides a number of examples that positively demonstrate the

adaptability of the maritime community and the wish for all parties concerned to achieve prompt compensation for those affected by ship-source oil pollution in a spirit of cooperation.

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