

## MARINE POLLUTION 2014

# BUNKER POLLUTION, TOPICAL LEGAL ISSUES AND CURRENT CONCERNS

*Colin de la Rue*

## BUNKER POLLUTION AND LIMITATION OF LIABILITY

### Introduction

Sometimes it comes as a surprise to people to hear that pollution from ships' bunkers can be nearly as serious a problem as major cargo spills from tankers.

There are various reasons why this is so. For one thing, bunker spills can of course occur not only from tankers but from most of the world's fleet. Dry cargo ships and other non-tankers are much more numerous than tankers, and bunker spills are therefore a common source of oil pollution from ships.

Although only oil tankers can cause very large spills, many bulk carriers and container ships carry bunker fuel of 10,000 tonnes or more, and these are larger quantities than many of the world's tankers carry as cargo.

Most importantly, ships' bunkers normally consist of heavy fuel oils, which in general are highly viscous and persistent. A relatively small quantity of highly persistent bunker fuel can be disproportionately damaging and costly to remove in comparison, for example, with a substantial cargo of light crude oil.

Another point to bear in mind is that, if a ship is causing or threatening to cause oil pollution, there is a tendency for the public and media to fear the worst, whatever type of ship the vessel may be. This has a bearing on the scale of response measures which governmental agencies may consider appropriate.

That largely explains the fact that the costs incurred in dealing with a threat of bunker pollution from the woodchip carrier *New Carissa*, which ran aground off the US West Coast in 1999, were on a par with those to be expected in a major tanker incident. Likewise the cost of the *Cosco Busan* spill in San Francisco Harbour, in November 2007, went well beyond the OPA-90 liability limit, even though only about 200 tons of bunker fuel escaped.

This was therefore a subject to which the IMO turned its attention once it had devised compensation regimes dealing with pollution from cargoes of oil or other hazardous substances.

## **The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001**

In March 2001 agreement was reached at an IMO Diplomatic Conference in London on the text of the new International Convention on Civil Liability for Bunker Oil Pollution Damage.

Previously, the only international conventions in force which had any bearing on liability for bunker spills were the Civil Liability and Fund Conventions. These deal only with pollution from oil tankers, and would not therefore apply to bunker spills from vessels such as dry cargo ships, LNG or LPG carriers, passenger ships, or other vessels not engaged in the carriage of bulk oil. Spills from such vessels do not normally involve release of quantities as great as those lost in major tanker incidents, but they do account for the majority of significant oil pollution incidents. In such cases rights to compensation had previously depended on national laws. These did not follow a uniform pattern, and outside the USA it was not in practice possible to maintain a system of compulsory insurance in the absence of an international regime.

In order to fill this remaining gap in the international pollution regimes IMO decided in 1996 to prepare a draft Bunkers Convention to govern bunker spills from all vessels not covered already by CLC. This work culminated in the Diplomatic Conference held in London in March 2001, when the final text of the Convention was agreed.

The conditions for entry-into-force of the Convention called for a fairly high level of international support, largely because it provided for certification requirements which would involve a good deal of work, and which could not be justified unless the regime had a reasonably widespread effect. These conditions were met late in 2007, with the result that the Convention came into force one year later, in November 2008. There are now over 60 Contracting States in which the Bunkers Convention applies.

Three key features of the Convention are strict liability, compulsory insurance, and limitation of liability. These three corner stones follow a pattern which in many respects is similar to that of CLC, though there are some important differences. Most of these boil down to the fact that the Bunkers Convention is a single-tier compensation regime – i.e., there is no provision for supplemental compensation above the shipowner's liability limit from an additional source comparable to the IOPC Funds.

This means that if the claims in a bunker pollution incident exceed the shipowner's limit, the effect of limitation can be much more real and dramatic than is the case in most tanker incidents where the IOPC Funds are involved. In these cases the compensation available under CLC and the Fund Convention has normally been more than sufficient to cover the admissible claims in full. The shipowner's limit has then been of little consequence to the claimants, and its main significance has been to apportion the financial burden of compensation between shipowners and their liability insurers on the one hand, and, on the other, the IOPC Funds and their (mostly) oil industry contributors.

By contrast, if limitation is invoked in respect of a bunker spill from a non-tanker, the effect is to reduce the amount which claimants are able to recover. Unlike other cases in which limitation is commonly invoked – most of which involve claims by a small number of maritime commercial interests for property damage resulting from collisions and similar incidents – oil pollution cases typically involve multiple claims by small businesses and private individuals for economic loss, as well as claims by public bodies for clean-up expenses and other response costs. Reliance by the shipowner on limitation laws which leave pollution claimants less than fully compensated is relatively controversial and has been resisted on political as well as legal grounds.

The scope for legal argument lies mainly in the fact that the Bunkers Convention, unlike CLC, does not contain its own free-standing system of limitation. Instead it relies on linkage to the limitation regime in the 1976 London Limitation Convention, as amended (LLMC). This was not drawn up with pollution claims specifically in mind, and as a result, technical complications have sometimes thwarted attempts by shipowners to limit liability for bunker spills as they might have expected.

To appreciate these issues it is necessary to review some of the main features of LLMC.

### **The 1976 London Limitation Convention**

LLMC was adopted by the IMO in 1976 to meet the concern of many governments that the limits set by the existing regime, in the 1957 Brussels Limitation Convention, were out of date and too low. This was due chiefly to high levels of inflation over the intervening years.

LLMC introduced significant increases but also made the right to limit liability more secure. Under the 1957 Convention it had become increasingly difficult for shipowners to satisfy courts that damage had occurred without their “actual fault or privity”, as was necessary to establish the right of limitation. LLMC redressed the balance by (a) entitling shipowners to limit their liability unless the loss resulted from their personal act or omission, committed with the intent to cause the loss, or recklessly and with knowledge that such loss would probably result; and (b) reversing the onus of proof so as to place it on the party challenging the right to limit.

The Convention sets out a wide definition of parties qualifying as a “shipowner”, including not only registered owners but also charterers, managers and operators of a sea-going ship.<sup>1</sup>

### ***The financial limits***

LLMC provides for tonnage-related limits applying to most types of maritime claim, other than those covered by other regimes, such as claims for oil pollution damage from tankers under the Civil Liability Convention 1992. The limits are calculated in Special Drawing Rights (“SDRs”) and converted into national currency.

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<sup>1</sup> Art. 1.

The limits have been raised from time to time since 1976. A significant increase was the main amendment of the Convention introduced by the 1996 LLMC Protocol, albeit it applies only in Protocol States. The Protocol also provided for the limits to be updated in future by means of the tacit acceptance procedure which is now a feature of many IMO instruments. The latest increase was decided upon by the IMO in April 2012 and will take effect in accordance with this procedure from 19 April 2015.

These latest increases were first proposed as a result of the *Pacific Adventurer* incident off Queensland, Australia, in 2009. The case involved a container vessel which lost a number of boxes during a powerful cyclone, resulting in hull damage which allowed some 230 tons of bunker oil to escape into the sea. The cost of the clean-up was reported as some US\$27.5 million. Under the 1996 Protocol limits, the shipowners were entitled to limit their liability to about US\$15.5 million.

As a result of this incident, the Australian Government submitted a proposal to the IMO Legal Committee that the Protocol limits be increased. In response to a request from the Committee to provide relevant data, the International Group of P&I Clubs submitted information to the effect that only eight incidents since 2000 (or 1.34% of the total in that period involving ships entered in Group Clubs) had given rise to pollution claims above the 1996 Protocol limit applicable to the vessel concerned.

There was general agreement among States that some increase was needed, but there were widely differing views as to the percentage increase required, ranging from 147% (this being the maximum increase permitted under the formula prescribed by the LLMC Protocol) to 45%, based on changes in monetary values during the period since the limits were previously set. The latter view prevailed, supported by the argument that the limits should not be set at a level which was so high as to negate the concept of limitation of liability, since otherwise liability would be effectively unlimited. In the event, increases were agreed of 51% (which took account the further period before entry into force in April 2015).

As an indication of the current and future levels of the liability limits, a Panamax bulker of 35,000 gt would be subject to approximate limits of US\$8.8m under the 1976 Convention, US\$21m in Protocol States, and US\$32m in Protocol States from April 2015.

The corresponding figures for a Capesize vessel of 160,000 gt are approximately US\$ 27m, US\$65m and US\$98m.

### ***Limitation of liability for bunker spills***

As noted earlier, when limitation of liability results in pollution claims not being fully compensated this is relatively controversial and has been resisted on political as well as legal grounds.

The politics of the subject are illustrated by the very case which brought onto the IMO agenda the proposals for the latest increases in limits, the *Pacific Adventurer* incident in Australia.

In that case there was no dispute that the shipowners were entitled to limit liability to US\$15.5m compared with the US\$27.5m that the Queensland and national authorities were claiming as the cost of the clean-up. However the owners were part of an industrial group which had other business interests in Australia, and political pressure was exerted on them, by representatives of both the State and Federal Governments, to waive limitation rather than leave the excess to be borne by the taxpayer.

This pressure put the shipowners in an invidious position. For one thing, it failed to respect their legal rights, as well as treaty obligations to do so, and threatened to set an unfortunate precedent encouraging others to do likewise. There were also important principles of insurance at stake: P&I cover is designed to protect against legal liabilities only, and any amounts paid without liability would normally have to be funded from the shipowner's own pocket. Few would see this as a viable way of funding compensation for oil spills.

In the event, without waiving limitation, the shipowners agreed to pay an additional US\$6.5 million as a donation to a charitable environmental trust set up specifically for the purpose. The shortfall in recovery of clean-up costs was later reimbursed to the authorities from the Australian Protection of the Sea Levy, funded by the shipping industry through an Australian marine protection environment tax, which in turn was increased with the aim of recouping this amount over the following five years.

When the subject was tabled at the IMO, governments showed their usual diplomatic reluctance to criticise each other across the conference floor. Nonetheless, concerns were aired in the margins about the wider potential consequences which a case of this kind could have. Though it raised legitimate concerns about the level at which the limits were set, in some quarters it was seen as a setback for all who have campaigned in recent years for greater respect to be accorded to internationally recognized legal rights of shipowners and seafarers. It is believed that these concerns have been fully appreciated by all involved, and that the case is not considered a precedent to be followed in future.

Concerns do however remain over legal complications encountered in another significant bunker pollution incident which occurred later in the same year, on 31 July 2009, when the bulk carrier *Full City* dragged her anchors in a storm off Langesund, Norway, and ran aground spilling her bunker fuel. This incident, which was Norway's biggest ever oil spill, has highlighted the fact that rights of limitation for bunker pollution clean-up costs may be significantly affected by the manner in which the international bunkers and limitation regimes are enacted in domestic law.

Both the Bunkers Convention and the 1996 LLMC Protocol were in force in Norway, but the Norwegian Maritime Code provided that claims for bunker oil pollution clean-up costs were to be treated in the same way as wreck removal costs. The Code made these subject to a separate limit of Norway's own choosing, which is significantly higher than the limit under the Protocol. This presupposes that clean-up costs, unlike other bunker pollution claims, are not limitable under LLMC. Given that clean-up expenses are commonly the largest

element in the overall cost, this is a controversial proposition and one which can produce anomalous results.

The background to this situation goes back to the 1976 Conference, when LLMC was adopted. The Conference was of course concerned with limitation for maritime claims in general, and not specifically with pollution. Indeed, the view was evidently taken that the most significant problems of pollution had already been addressed in CLC, and these were specifically excluded from limitation under LLMC. The same thinking may explain the fact that the list of limitable claims in LLMC makes no express reference to the environment or to pollution, whether by bunkers or otherwise. The provision which came closest to making an express reference to bunker pollution was Article 2.1(d), which allows limitation of liability for

*"the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship".*

Although this provision was drawn up with wreck removal rather than bunker pollution in mind, few doubts have been expressed that it is wide enough to cover claims for bunker pollution clean-up costs. The problem with it is that contracting States may opt to exclude it from their national limitation laws.

The background to this is that a number of States insisted at the 1976 Conference on maintaining a policy of unlimited liability for wreck removal claims. A compromise was reached by including wreck removal as a limitable claim, in Article 2.1(d), whilst allowing States the right to opt out of it when implementing the Convention in their national laws.<sup>2</sup> A number of States have exercised this option, including Norway and the UK.

The possibility of this having unintended consequences in relation to bunker pollution appears to have been first noted in the early 1990s, when the UK Government proposed to introduce national legislation imposing strict liability for bunker spills. At the time it expressed the view that this new liability would be limitable under LLMC, but in some quarters it was questioned whether this right of limitation was as clear as intended.

In States which have opted out of Article 2.1(d) limitation for bunker pollution clean-up depends on whether it is accepted as falling within Article 2.1(a) in respect of property damage. The wording of this provision supports the inclusion of pollution, as it does not specify any particular mechanism by which the damage must occur, and it includes reference to 'waterways', something which can obviously be damaged by pollution. However, as Article 2.1 makes no express reference to pollution, the position was not entirely certain. In these circumstances an express stipulation was included in the UK Merchant Shipping Act that claims for bunker pollution were to be treated as claims for property damage limitable under LLMC Article 2.1(a).<sup>3</sup>

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<sup>2</sup> Art. 18.

<sup>3</sup> Merchant Shipping Act 1995 s. 168.

The same issue arose on an international level when the IMO undertook the preparatory work for the Bunkers Convention. At an early stage the issue had to be considered whether the new convention should establish a free-standing limit or rely instead upon linkage to LLMC. Both at the beginning and at the end of the process the CMI and other NGOs drew attention to the fact that the linkage solution gave rise to the interpretation issues outlined above, and urged that a clarifying provision be adopted similar to that in the UK. In the early stages this proposal was seen as a detail to be shelved until after wider issues of principle had been decided; then, in the final negotiations, under pressure of time, it was viewed as an unnecessary tinkering with the text: the Diplomatic Conference intended that all claims for bunker pollution were to be limitable under LLMC in contracting states, and none of the governmental delegations present saw any problem in this respect.

By this time there was a degree of judicial support for the view that Article 2.1(a) covered all pollution claims including clean-up costs.<sup>4</sup> A later Australian case is also relevant: though not concerned with pollution, the court emphasised that "damage to property" in Article 2.1(a) is to be construed on a broad rather than technical basis, taking into account the Convention's function as an international instrument to be applied in a uniform manner within a variety of national legal systems.<sup>5</sup>

There are accordingly ample grounds for concluding that the effect of LLMC, based both on judicial interpretation and on the common intention and practice of States, is that all claims for bunker pollution are limitable. The contrary proposition – that governments are free to stipulate that their claims for clean-up costs are subject to some higher limit of their choosing, or no limit at all, while the claims of private parties are capped in the normal way – is the opposite of the well-established practice of governments "standing last in the queue" until private claimants are paid.

## **Conclusions**

Over the years, increases in the limits of liability have gone hand in hand with measures to increase certainty as to how and when they apply. The latest increases were prompted by bunker pollution incidents which have highlighted not only the case for higher limits, but also a need for greater certainty that due effect will be given to them as intended.

As was pointed out in the recent IMO debates, the very concept of limitation envisages rare cases where claims will be capped. Pressurising shipowners to waive limits is not a viable way of funding supplemental compensation for oil spills, and governments need to consider other appropriate arrangements to apply if and when necessary.

Similarly, States in which national legislation negates the right to limit liability under LLMC for clean-up costs, or leaves it open to question, are open to the charge of failing to fulfil their treaty obligations. Those concerned to avoid this

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<sup>4</sup> See the remarks (albeit obiter) of Mr Justice Thomas in *The Aegean Sea* [1998] 2 Lloyd's Rep. 39.

<sup>5</sup> *The APL Sydney* [2009] FCA 1090.

can easily put the position beyond doubt, when implementing the latest increases, by adopting in national instruments a short additional provision following the model adopted in the UK Merchant Shipping Act 1995.