

## **THE *PRESTIGE* INCIDENT – IMPLICATIONS OF THE JUDGMENT OF THE SPANISH CRIMINAL COURT**

On 13 November 2002 the Bahamas registered 42,820 gt tanker *Prestige*, carrying 76,972 tonnes of heavy fuel oil, began listing and leaking oil while some 30 km off Cabo Finisterre, Galicia, Spain.

All the crew escaped without injury or loss of life. The master of the ship, Captain Mangouras, chose to stay on board, corrected the list and stabilised the vessel. After numerous attempts to make fast a tow (which parted several times in the heavy seas) a tow line was successfully connected on 14 November 2002. Both the Master and salvors requested the Spanish authorities to grant the vessel refuge in sheltered waters. Both these requests were refused, and the authorities instead ordered the *Prestige* to proceed into the Atlantic in winter gale force weather.

On 19 November, whilst under tow away from the coast, the ship broke in two and sank to a depth of over 3,000 metres, some 3,600 km west of Vigo. The break-up and sinking released an estimated 25,000 tonnes of cargo, and over the following weeks oil continued to leak until the amount remaining in the wreck was estimated at about 13,800 tonnes.

Due to the highly persistent nature of the cargo, released oil drifted for long periods and over great distances, contaminating the west coast of Galicia and eventually long stretches of coastline in Northern Spain and France. In both countries the incident gave rise to many hundreds of claims, some on behalf of fishery associations representing many thousands of fishermen and shellfish harvesters. The incident also affected Portugal, where a claim was made by the government for costs in respect of clean-up and preventive measures. It was soon clear that the aggregate of admissible claims would considerably exceed the maximum amount of compensation available under the international regime.

Several aspects of the incident gave rise to controversy, concern and legal changes. Concerns were expressed that less than three years after the *Erika* incident another single hull tanker, carrying heavy fuel oil, had spilt most of her cargo in an incident involving structural failure. This led among other things to MARPOL amendments to accelerate the phase-out of single-hull tankers.

Criticism was levelled against the Spanish maritime authorities for refusing to allow access to sheltered waters.<sup>6</sup> There had been a long history – going back at least to the 1970s – of Spain pursuing this policy against the recommendations of salvage experts, and the subject was already being comprehensively examined by the IMO in the aftermath of the *Castor* incident in 2001. The *Prestige* incident intensified these concerns and led to the IMO Guidelines on Places of Refuge for Ships in Need of Assistance, adopted in December 2003.

Another development hard on the heels of this incident was the adoption in 2003 of the Supplementary Fund Protocol, to ensure that compensation for oil pollution from tankers in Protocol States would be available up to SDR 750

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<sup>6</sup> In February 2003 hundreds of thousands of protesters were reported to have taken part in a demonstration in Madrid against the Spanish Government's handling of the incident: see for example "Huge Protests over 'Prestige' Oil Pollution", *The Independent*, 24 February 2003.

million. The Protocol is now in force in all European States as well as in a number of others.

One of the most controversial aspects of the incident concerned the treatment of the master by the Spanish authorities, and the criminal proceedings brought against him. On his arrival ashore he was arrested, detained and charged with criminal offences relating to pollution and disobedience of the Spanish administrative authorities. Many observers found it hard to understand the basis of these charges. Under international law monetary penalties only could be imposed for any pollution offence unless he were found guilty of a 'wilful and serious act of pollution'.<sup>7</sup> However, he was transferred to jail where he remained for 83 days and was released only on payment of bail of €3m. He was then obliged to remain in Spain, reporting daily to a local police station, and was not able to return permanently to Greece until March 2005. His treatment in this manner attracted much criticism and led to the adoption later that year of the IMO Guidelines on Fair Treatment of Seafarers.

### **Criminal proceedings in Spain**

Shortly after the incident, the Criminal Court in Corcubi3n started an investigation into the cause of the incident.

As in other countries with a legal system which follows civil law principles rather than common law traditions, the criminal court had power to determine not only criminal liabilities but also any civil liability for claims arising from criminal acts. Indeed, once a criminal action has been brought, civil actions based on substantially the same facts, whether against the same defendants or other parties, cannot be pursued until final judgment has been given in the criminal proceedings. Civil claims were therefore filed in the criminal proceedings, and the London Club deposited in the same court the CLC limitation amount of some €22.8 million.

A total of 2,531 claims were filed in the criminal proceedings, including an action brought by the Spanish Government on behalf not only of itself but also of local and regional authorities, and a number of other claimants. The total amount claimed in the Spanish proceedings is €2,317 million, approximately half of which is for pure environmental damage or "moral" damage.

In July 2010 the Corcubi3n court decided that four persons should stand trial for criminal and civil liability, namely the master, the chief officer and the chief engineer of the ship, and the official who had refused access into a place of refuge in Spain. The court decided that various other parties, including the London Club, the 1992 Fund, the shipowner, the ship managers and the Spanish Government would be vicariously liable for any civil liability found on the part of the four defendants. The proceedings were transferred to another court, the Audiencia Provincial in La Coru3na, where the hearing of the criminal trial took place between 16 October 2012 and July 2013.

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<sup>7</sup> UNCLOS Art 230.

## **Direct actions – proceedings in the UK**

While the Spanish proceedings were in progress the Club took steps in the UK to obtain declarations that claims against it by Spain and France, and pursued by way of direct action independently of CLC, could be brought only on the terms of the Club rules. That would mean, among other things, that such claims would be subject to arbitration in London and to the terms of cover, including “paid to be paid” condition precedent to the Club’s liability.

Separate arbitrations were brought against Spain and France, in which neither State participated. Each of these arbitrations resulted in an award substantially in the Club’s favour.

Subsequently the Club applied to the High Court for judgments in the terms of the awards, to facilitate recognition and enforcement of the decisions reached. France and Spain resisted these applications, alleging lack of jurisdiction on the grounds of state immunity, and also on the merits. In court they challenged the jurisdiction of the arbitration tribunal, contending that they were not bound by the arbitration agreement in the Club rules, as their direct action rights were, in their submission, independent rights under Spanish law rather than contractual rights subject to arbitration.

After hearing expert evidence on the relevant Spanish legislation the Court (Mr Justice Hamblen) held that although Spain’s rights of direct action arose by virtue of that legislation, they did not exist independently of the contract of insurance and were subject to its terms. The Court also dismissed Spain’s arguments of sovereign immunity and non-arbitrability of the issues in dispute. In conclusion it granted the Club’s applications for judgments to be entered in the terms of the arbitration awards.

Judgment was given on 22 October 2013, less than a month before judgment of the Criminal Court in La Coruña.

## **Judgment of the Criminal Court in La Coruña**

The court in La Coruña gave judgment on 13 November 2013, eleven years to the day after the original casualty.

The court held that none of the defendants was criminally liable for damage to the environment. The master was convicted of an offence of disobeying an order from the authorities to co-operate in the towage of the vessel out to sea. He was sentenced to nine months in prison, but he will not have to serve this sentence in view of the time for which he was detained after the incident.

The court’s conclusions were based on the following findings:

- (i) The vessel suffered a structural failure due to defective maintenance.
- (ii) The structural defects were not visible, and the master and crew were unaware of them.

- (iii) All the vessel's documents were in order. There was no evidence that the master or crew could have known that the vessel's structural condition was defective, or that they undertook an imprudent or risky voyage.
- (iv) It could not be established precisely what might have been the cause of what happened, or what would have been the appropriate response to the incident.
- (v) It was apparently clear that inspections by the vessel's classification society, ABS, were defective. (However, ABS was not a defendant in the criminal proceedings, as Spanish law did not provide at the time of the incident for corporate criminal liability.)
- (vi) The decision of the Director General of Merchant Marine to order the towage of the ship offshore was of debatable merit, but the court considered that it was a technically informed professional decision, was partially effective, and was logical and cautious.
- (vii) The court was not satisfied that it would have been viable to provide a place of refuge, or that this would have been a less harmful course than towing the vessel offshore.
- (viii) The fact that the decision taken might not have been successful did not mean that it was unlawful or had any criminal implications.
- (ix) The master did not comply with an order from the authorities to take a towing line. This could not be justified, especially in an emergency, and was to be considered a criminal offence.

These conclusions of the criminal court have had serious implications for claimants seeking compensation. The court held that it could find civil liability only for the consequences of a criminal act. The only criminal offence it found was disobedience on the part of the master, but this was not the cause of the damage. The court was therefore unable to determine any civil claims arising from the incident, and could not award compensation.

The court decided that the limitation fund deposited by the London Club was at the Club's disposal, subject to any appeal to the Supreme Court (Court of Cassation). The period allowed for filing appeals has only recently started running, as it began only after the judgment had been translated into Greek and been served on the master. A number of parties have indicated that they intend to appeal.

If the Supreme Court upholds the judgment, claimants whose claims have not been settled out of court, and who wish to pursue legal action, will have to commence fresh proceedings in the civil courts.

## **Implications of the judgment**

News items following the judgment reported hostile reactions, especially from environmental groups.

Greenpeace reportedly described the decision as providing "a carte blanche to the oil industry to threaten the environment and citizens". The Spanish group Equo complained that more senior officials had not be put on trial for the decision to refuse the ship refuge, and found it scandalous that no one had been held responsible for the country's worst ever environmental disaster.

Responses of this kind reflect the sentiments which serious oil spills have often engendered. Unfortunately these sentiments, and the demand for heads to roll in criminal proceedings, contribute to the dissatisfaction of which environmental campaigners complain.

The fact is that few major transport accidents have resulted from a single cause. The main hazards have long been identified and guarded against by safety standards, the reach of which is now so wide that rarely if ever will a single dominant cause find its way round them. A more common scenario is an accident resulting from a fateful concatenation of contributory factors, each initially unrelated, individually unable to spell misfortune, and more able, for that reason, to slip through the protective mesh.

Further advances in safety require these complex situations to be expertly analysed and objectively understood. Criminal proceedings are not a process well adapted to achieving that end. When it is found that various straws have combined to break the back of a camel, it should be no surprise if there are difficulties in deciding which of them, if any, should be singled out for criminal liability.

The nearest the court came to assigning a primary cause was in its finding of a clear defect in ABS's inspections. Recourse actions against ABS have been brought both by Spain in the courts of New York and by France in the Court of First Instance in Bordeaux.

The proceedings in New York were dismissed by the Court of Appeals in August 2012 for lack of proof of recklessness. Spain has not appealed against this ruling, which is therefore final. It has left open the question whether a duty even exists to coastal states to avoid reckless behaviour.

The proceedings in Bordeaux were dismissed at first instance in March 2014 on grounds on sovereign immunity. The basis of the court's decision was its finding that a close relationship existed between the classification services provided by ABS on a commercial basis to the owners of the ship and the flag state control function which it undertook on behalf of the Bahamas Maritime Authority.

The obstacles which have confronted these recourse actions against ABS have highlighted questions about the role of classification societies in ship safety. If the shipping industry relies on their inspections and maintenance recommendations, and coastal states have a public interest in their work being conducted with appropriate care, there may be some concerns that there are doubts whether they owe a duty even to avoid recklessness, let alone to

exercise due care, and that sovereign immunity may prevent them being held to account.

Of course, classification societies have their own view of the proper extent of their responsibilities – this is a subject in its own right, and beyond the scope of this paper. What can be said at this point, so far as the *Prestige* is concerned, is that the relevant inspections took place well over a decade ago, and that much has happened since then to prevent recurrences of structural failure at sea. Incidents of this kind are fortunately now far rarer than was the case in the 1970s, or even the 1990s. This has been achieved not by assigning blame, but by improved understanding of the causes of accidents, and corresponding development of safety standards.

Similar comments apply to the proper functioning of compensation arrangements. The *Prestige* case has highlighted the fact that criminal proceedings are not well adapted to claims for compensation.

As noted earlier, restrictions apply in Spain (and indeed in other jurisdictions with a similar legal system) to civil actions based on substantially the same facts as criminal proceedings which are still in progress. This is understandable as there is a risk, otherwise, of criminal proceedings being prejudiced by civil actions, especially as these are normally subject to different rules of procedure and evidence.

However it may be suggested that prejudice of this kind is really only a risk if civil actions are brought in which claimants make allegations of fault. From the outset, the Civil Liability and Fund Conventions were designed as strict liability regimes in which rights to compensation do not depend on fault. Indeed, apart from exceptional cases such as war, these rights do not depend on the cause of the incident at all. The only facts which claimants need to show are that they have suffered pollution damage as a result of the escape or discharge of persistent oil from a tanker. These facts can be established without going into the question of how the incident was caused, or who, if anyone, was at fault.

It would appear that problems arise only if claimants make allegations of fault with the object of “breaking” the owner’s right to limit liability and/or of depriving other defendants of the benefit of the channelling provisions: these provisions may exclude their liability, under CLC or other laws, but do not apply if the incident was caused by conduct on their part similar to that which will deprive the owner of limitation. Under CLC 92 this requires the claimant to prove personal misconduct involving intent, or recklessness with knowledge that the damage was likely to result. In principle such cases should be rare in the extreme.

Claimants who make these allegations not only undertake a heavy burden of proof but need to consider what benefit they gain even if they succeed. If the compensation available from the IOPC Funds is sufficient to pay established claims in full, the claimants derive no financial benefit. On the contrary, by breaking the owner’s right of limitation they merely complicate their own right of recovery from the Funds, which will then be liable only after the claimants have taken all reasonable steps to obtain satisfaction of their rights under CLC.

Claimants therefore benefit from these allegations only if (a) the established claims exceed the available compensation, and (b) it is possible actually to recover from the owner an amount exceeding the IOPC Fund's liability limit, and/or to make a recovery from another defendant.

In the *Prestige* incident the established claims clearly will considerably exceed the liability limit of the 1992 Fund at the time of the incident. However the findings of the criminal court come nowhere near providing any grounds for questioning the owner's right of limitation, or indeed for depriving any other party of the benefit of the channelling provisions.

Furthermore, even if the owner's right of limitation were capable of being broken, there remains the question of how a recovery above the CLC limit could be enforced. Unless the owner is a large corporation with a fleet of sister-ships in common ownership, recovery will normally depend on whether it can be made from the ship's insurers. Rights of direct action against insurers under CLC are restricted to the CLC limit, irrespective of whether the owner's right of limitation has been lost. Claims against P&I Clubs based on English direct action legislation will be subject to the Club rules, including arbitration and 'pay to be paid' provisions. Where they rely on foreign legislation, the English courts will likewise regard them as subject to the Club rules if they interpret the legislation along the lines adopted by the High Court in the *Prestige* case.

Given the decisions of the Spanish criminal court, no conflict has so far arisen between judgments of the courts in the two countries. It remains to be seen whether any conflict arises at a later date – either as a result of an appeal in the criminal proceedings or of civil actions. Even if the Spanish courts were ever to give judgment requiring the London Club to pay more than the CLC limit, it must be questionable whether this would be enforced in England against the background of the decision which the High Court has already made.

These considerations all lead to the conclusion that the prospects of claimants' compensation recoveries being improved by allegations of fault are usually extremely small. This makes it questionable whether these allegations are really necessary or appropriate if, as a consequence, determination of their compensation claims by the courts has to await the conclusion of criminal proceedings.

The long delay which this can cause is problematic not only for the claimants who wish to refer their claims to the courts. It is also problematic for parties whose claims can be settled out of court. That is because the amount actually paid to them will be normally be no more than a percentage of the agreed amount, so long as there is a risk of the established claims exceeding the available compensation. When claims are referred to the courts this is normally because they have been disputed by the IOPC Funds on the grounds that they do not satisfy their admissibility criteria. So long as they remain pending before the courts there is uncertainty as to the total amount for which claims will be established, and interim payments to other parties are likely to be set at a cautious level.

These are problems for which two remedies may be suggested. One would be for States to consider amending their domestic legislation to make it possible for compensation claims under the international regime – against the owner, insurer

and IOPC Funds – to be determined by civil courts while criminal proceedings are in progress. It might need to be specified that the scope of such proceedings is limited to the question whether a claim has been established for pollution damage, and that they are without prejudice to any questions of fault or other issues which may be raised at a later date in connection with the owner's right of limitation.

A second remedy is to ensure that the available compensation is sufficient for established claims to be paid in full. This should normally remove any financial incentive for claimants to go into these issues. States which have not already done so have good reason for considering whether to ratify the Supplementary Fund Protocol of 2003. There is also good reason for keeping under review the adequacy of the Protocol limit of SDR 750 million. This will no doubt be considered once the total amount of claims established in the *Prestige* incident is known.