LIABILITY FOR POLLUTION FROM SHIPS' BUNKERS

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INTRODUCTION

The international regime of compensation for oil pollution from ships, as established by the Civil Liability and Fund Conventions, applies only to pollution from oil tankers. Bunker spills can of course occur not only from tankers but from a wide variety of other vessels. To deal with these incidents, the IMO adopted in 2001 the International Convention on Civil Liability for Bunker Oil Pollution Damage. In 2007 the necessary number of ratifications was reached for the Convention to enter into force one year later, on 21 November 2008.[1]

In this field of maritime law as in others, the most notable part of the world where the Convention is not in force is the United States, where the Oil Pollution Act 1990, as well other federal and state legislation, governs oil spills from all classes of vessel. Outside the US, the Bunkers Convention now applies in some 60 ratifying states, and the number can be expected to continue growing.

When work began on a draft convention in 1996, after the adoption that year of the HNS Convention, its proponents described it as filling a gap which remained in a portfolio of regimes to deal with marine pollution. Although it is a younger sibling, it is certainly no poor relation of international laws devised with spills of cargo in mind: bunker spills can occur from most of the world's fleet, and in practice they have been the most common source of oil pollution from ships.[2]

Although many of these spills have been minor incidents, even small bunker spills can cause considerable damage, as normally they involve fuel oil which is relatively viscous and persistent. A relatively small quantity of highly persistent bunker fuel may be disproportionately damaging and costly to remove in comparison, for example, with a substantial cargo of light crude oil.

Bunker pollution incidents in the US have been some of the most significant of all oil pollution cases to occur since OPA–90 was introduced. The grounding in February 1999 of the wood chip carrier *New Carissa*, outside Coos Bay, Oregon, was a high-profile bunker pollution incident in a sensitive area which led to substantial clean-up and wreck removal costs, as well as a review of US policies regarding dumping of wrecks and salvage; the bunker spill from the bulk carrier *Selendang Ayu*, which ran aground on Unalaska Island in the Bering Sea in November 2004, led to record costs and damages for a bunker pollution incident; and the spill of bunker fuel from the container ship *Cosco Busan*, which occurred when she struck the Oakland Bay Bridge in San Francisco Harbour in November 2007, may be expected to have significant political as well as financial consequences.

Outside the US, notable bunker spills since entry-into-force of the Bunkers Convention include the *Pacific Adventurer* incident in Australia in 2009, which has led to calls for liability limits to be increased; and the *Full City* incident later that year, the largest ever oil spill in Norway, which has highlighted important issues relating to the implementation of the Convention in national laws.

Before these topics are examined in further detail, an outline is first given of the main features of the Bunkers Convention.

THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE, 2001

Legal framework

The key features of the Bunkers Convention have much in common with the Civil Liability Convention (CLC), namely strict liability of the shipowner, limitation of liability, and a system of compulsory insurance.

By the time the Convention was adopted, strict liability had become commonplace in the domestic legislation of many states, and limitation of liability for bunker spills was generally available under the 1976 Limitation

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[1] The Convention required ratification by 18 states, at least five of which had to have at least 1m gross tons of ships on their registers: Art. 14.1.

[2] According to data submitted to the IMO by the International Group of P&I Clubs, there were 595 recorded cases of bunker pollution from ships entered in Group Clubs in the period between 2000 and August 2009: LEG 96/6/2.

Convention (LLMC). Many governments therefore viewed compulsory insurance as a lynch-pin of the Convention, to ensure that valid claims were duly satisfied by rights of direct action against approved insurers.

Despite the fact that several of its provisions are modelled on CLC, the Bunkers Convention differs from CLC in certain important respects.

Scope of liability

The Bunkers Convention provides that:

. . the shipowner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship . . . " [3]

The term "ship" is defined as "any seagoing vessel and seaborne craft, of any type whatsoever". This embraces a much wider class of vessels than those covered by the definition of "ship" in CLC (which essentially are limited to oil tankers). The Bunkers Convention is likely to be interpreted as applying to various types of offshore units as well as conventional ships of all kinds.[4]

The term "bunker oil" means "any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil".[5] For these purposes, unlike the position under CLC, it is not necessary for the oil to be persistent. The inclusion of residues results in liability attaching for any pollution damage resulting from discharge of effluents including oily wastes from bunker fuel, whether by accident or by operational discharge.

The term "incident" is the same as in CLC 92,[6] and the same applies to the term "pollution damage", with the sole change that the term "oil" in CLC is replaced by the term "bunker oil".[7]

The shipowner will be exonerated from any liability for pollution damage resulting from an incident if he can show that the damage resulted from war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional inevitable and irresistible character; or that it was wholly caused by an act or omission of a third party done with intent to cause damage, or was wholly caused by a negligent or wrongful act of any governmental authority responsible for the maintenance of lights or other navigational aids.[8]

The shipowner is also exonerated wholly or partially from liability to a claimant in respect of pollution damage which is shown to have resulted wholly or partially from an act or omission of the claimant done with intent to cause damage or from the claimant's negligence.[9]

These exonerations are couched in identical language to that used in CLC, and they may give rise to similar issues.

There are certain respects in which the liability provisions of the Bunkers Convention differ significantly from those of CLC. The differences owes their origin to the fact that the Convention establishes a single-tier liability regime, unlike the two-tier system in relation to tankers which is in force in IOPC Fund member states.[10] There is no international fund financed by cargo receivers from which supplemental compensation may be obtained for if bunker spills falling outside this system, if adequate recompense cannot be obtained from the shipowner.[11] In these circumstances scope is preserved in the Bunkers Convention for claimants to pursue remedies against a wider range of potential defendants than would be possible under CLC. This is reflected in a relatively wide definition of the parties liable under the Convention, and in the absence of "channelling" provisions excluding the liability of other parties independently of the Convention.

Parties liable under the Convention

The Bunkers Convention imposes liability on the "shipowner",[12] defined as "the owner, including the registered owner, bareboat charterer, manager and operator of the ship."[13] This means that there is a broader range of parties

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[3] Art. 3.1.
[4] Art. 1.1. The Bunkers Convention will apply to oil tankers in respect of any bunker oil pollution damage falling outside the definition of "pollution damage" in CLC 92, e.g. damage caused by non-persistent oil: see Art. 4.1.
[5] Art. 1.5.
[6] Art. 1.8.
[7] Art. 1.9
[8] Art. 3.3. The exoneration in respect of malicious acts would include terrorist risks, but only if it is shown that the damage was "wholly caused" by terrorism.
[9] Art. 3.4.
[10] There are indeed three tiers of compensation available in IOPC Fund member states where the Supplementary Fund Protocol also applies.
[11] In some jurisdictions a domestic fund of this kind has been established by national legislation (e.g. the Canadian Ship-source Oil Pollution Fund).
[12] Art. 3.1.
[13] Art. 1.3.

potentially liable under the Convention than under CLC, where liability is imposed on the "owner" of the ship, defined in the case of a registered ship as the registered owner.[14]

A further difference from other regimes lies in the fact that the Bunkers Convention does not contain any channelling provisions to exclude the liability of parties other than the owner. Far from excluding the liability of the bareboat charterer, manager or operator of the ship, as does CLC 92, it imposes liability upon them jointly and severally with the owner.[15] However, the Convention does provide, in common with CLC, that nothing in it shall prejudice any rights of recourse which the shipowner may have.[16]

In practice this may result in proceedings being brought against two or more "shipowner" defendants, but in general this should not affect the amount recoverable. Only the registered owner is required to maintain approved insurance against liabilities under the Convention, and nothing in the Convention affects the right of any "shipowner" defendant or of the ship's insurer to limit liability in accordance with the applicable limitation regime.[17]

In states where the 1976 London Limitation Convention (LLMC) is in force, either in its original form or as amended by the 1996 LLMC Protocol, the right of limitation is available to the charterer, manager and operator of the ship as well as the owner, and their aggregate liabilities are subject to a single liability limit.[18]

Assuming that insurance is in place as required by the Bunkers Convention, it is likely in practice that the liabilities of the registered owner will be satisfied by the insurer, thereby relieving other potential defendants of liability under the Convention, but subject to any rights of recourse which the registered owner may have against them.

The joint and several liability of different shipowners may nonetheless prove significant if, for example, the ship is one to which the compulsory insurance provisions do not apply, with the result that there are no rights of direct action against an insurer. If the liabilities of the registered owner are not satisfied, claimants may benefit from exercising rights of recovery against a bareboat charterer, manager or operator of the ship with assets against which a claim can be enforced.

Liability incurred independently of the Convention

In common with CLC the Bunkers Convention provides that no claim for pollution damage may be made against the shipowner otherwise than in accordance with the Convention;[19] and it does not impose liability on parties other than those within the definition of "shipowner", and the insurer of the registered owner. However it does not contain any provisions excluding liability independently of the Convention which other parties may incur.

This is in contrast with the position under CLC 92, which contains so-called "channelling" provisions stipulating that claims for pollution damage from tankers cannot be brought (under the Convention or otherwise) against various parties including the servants or agents of the owner; any charterer, manager or operator of the ship; or anyone performing salvage operations.[20] One of the reasons for these provisions is that the shipowner might well be bound to indemnify such parties for any liability they incur, and that this would in effect circumvent his liability limit for pollution.

The absence of channelling provisions in the Bunkers Convention therefore leaves open the possibility of claims being pursued independently of the Convention against parties other than the shipowner. In states where LLMC is in force their liability may be subject to limitation under that Convention,[21] and to aggregation with that of the shipowner for limitation purposes.[22] However, if rights of limitation are governed by a national regime other than LLMC, and no similar provisions apply, the overall exposure of the shipowner and other parties may be relatively onerous.

Another object of the channelling provisions in CLC 92 is to provide "responder immunity" to encourage salvors and other parties to take prompt measures to prevent or minimize pollution damage as a result of an incident. The question whether the Bunkers Convention should give responder immunity was keenly debated, but in view of the single-tier nature of the regime it was decided at the 2001 Diplomatic Conference that as many avenues for recovery as possible should be preserved. The Conference did however adopt a Resolution urging

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[14] CLC Art. I.3.
[15] Art. 3.2.
[16] See Art. 3.6, which refers to "any right of recourse of the shipowner which exists independently of this Convention", rather than to rights of recourse against third parties (as in CLC). This difference in text makes it clear that such rights may be exercised by one "shipowner" defendant against another after paying compensation (e.g. by the registered owner against the manager of the ship).
[17] Art. 6.
[18] See LLMC Art. 9.
[19] Art. 3.5.
[20] CLC 92 Art. III.4.
[21] The right to limit liability under LLMC is available not only to shipowners and salvors, as defined, but also to any person for whose act, neglect or default they are responsible: LLMC Art. 1.4.
[22] LLMC Art. 9.

contracting states to consider whether to provide for responder immunity in their domestic legislation when implementing the Convention.

Limitation of liability

Limitation of liability under the Bunkers Convention is addressed as follows in Article 6:-

"Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any application national or international regime, such as the Convention on Limitation of Liability for Maritime Claims 1976 as amended."

This is the only provision on the subject of limitation which the Convention contains. Any right of limitation depends on whatever laws apply, in the jurisdiction concerned, to liability generally for maritime claims. This means that limitation of liability for bunker spills differs in several important respects from the limitation regime in CLC.

First, the Bunkers Convention does not confer any right of limitation. It merely provides that it does not affect rights under any limitation laws which may apply. LLMC is widespread, but there is no requirement for states ratifying the Bunkers Convention to be parties to LLMC. The possibility therefore exists of liabilities under the Convention which are not subject to any right of limitation. This could be problematic not only in terms of the financial liability incurred, but also in releasing the ship or other assets of the shipowner arrested as security for pollution claims.

Second, assuming that LLMC or some similar regime is applicable, the liability limit is not dedicated to pollution claims. A limitation fund established by the shipowner will be available also for other types of claim which may arise from the same incident, such as collision damage claims, cargo claims, and other possible losses. Non-pollution claims will therefore affect the amount actually available for pollution claims, and the extent of any pro-rating which may be required.

Third, although it is widely assumed that bunker pollution claims are limitable under LLMC – and this is reflected in the linkage to LLMC in Article 6 of the Bunkers Convention – there is no express provision to confirm this in either Convention. In its list of limitable claims LLMC makes no reference to pollution damage. Some types of pollution claim fall reasonably clearly within this list, but others (notably for clean-up costs) have given rise to issues of interpretation, with adverse results for shipowners in at least one important case since the Bunkers Convention came into force. These issues are considered in more detail later.

Fourth, expenses incurred by shipowner in taking measures to avoid or minimize pollution damage will generally not rank as a claim against his limitation fund – there is no provision for this in either the Bunkers Convention or LLMC. This is in contrast to the position under CLC, where such costs are taken into account against the owner's liability limit. As a result, in some bunker pollution incidents it may be to the advantage of the shipowner and his insurers if preventive measures are taken by public authorities or other third parties, though this may mean they have less direct control over costs. However in some jurisdictions they may have little legal or practical choice.

Compulsory insurance and certification

One of the most significant changes made by the Convention is the introduction of a system of compulsory insurance and certification relating to liability for bunker oil pollution from all classes of ship.

Under the Bunkers Convention, the registered owner of any ship of more than 1,000 gross tonnes is required to maintain insurance or other financial security to cover his liability for pollution damage.[23]

A certificate attesting that such insurance or security is in force is to be issued to each ship by the appropriate authorities of a contracting state. The certificate is to be in the form of a model annexed to the Convention, must contain certain particulars, and must be carried on board the ship.[24] Claims for compensation for pollution damage may be brought directly against the insurer named in the certificate in respect of the liability of the registered owner.[25]

The detailed provisions of the Convention with respect to compulsory insurance, certification and direct rights against the insurer are in most respects identical to those of CLC. Certain differences from CLC reflect the fact that the limitation provisions of the Convention are not dedicated to claims for pollution but are linked to other

[23] Art. 7.1.
[24] Art. 7.2, 7.5. The Bunkers Convention allows contracting states to dispense with the requirement that a certificate be carried on board if records of certification are maintained in electronic format accessible to all contracting states: see Art. 7.13.
[25] Art. 7.10.

regimes, and that a much greater administrative burden is involved in certificating all ships covered by the Convention as distinct from the much more limited number of tankers to which CLC applies.

The direct liability of the insurer is in all cases limited to the amount for which insurance or other financial security must be maintained under the Convention.[26] This is stated as:

"an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended."[27]

In practice most ships are insured against pollution liability risks for amounts much greater than those required by the Convention.[28] The main significance of the compulsory insurance provisions is to allow claimants suffering pollution damage to recover compensation directly from the insurer, irrespective of any policy defences which could affect a claim under the insurance by the registered owner (other than wilful misconduct). As in the case of the limit of the owner's liability, the limit of the insurer's liability will depend on the applicable limitation regime, but in any event it is not to exceed the amount calculated for the ship by reference to LLMC as amended by the 1996 Protocol.

Although the Convention requires insurance to be maintained to up to this level to cover the liability of the registered owner "for pollution damage", it does not require the same amount to be available to satisfy claims for such damage in all cases. This follows from the fact that nothing in the Convention affects the right of the shipowner or insurer to limit liability in accordance with the applicable limitation regime,[29] and that LLMC provides for a single limitation fund to cover not only pollution claims but also various non-pollution claims which may arise from the same incident.

Given the very wide definition of "ship" contained in the Bunkers Convention, the compulsory insurance and certification requirements may apply to some types of vessels or craft which are excluded from the scope of the limitation regime established by LLMC.[30] Whilst this may result in unlimited liability for the registered owner, it cannot have the same result for the insurer, whose the liability limit is based on the tonnage limits prescribed by LLMC as amended, notwithstanding that the unit concerned is outside the scope of that Convention.

One of the main issues debated when the Convention was in preparation was a concern among flag states and insurers that the administrative burden involved in certificating all ships covered by the Convention would be very considerable. A need was recognized to place limits on this burden, and this was reflected in the relatively high number of ratifications required for entry into force of the Convention. It is also reflected in the fact that insurance is compulsory only for ships of more than 1,000 gross tonnes,[31] and that states may declare that the compulsory insurance provisions do not apply to ships operating exclusively in their territory or territorial waters.[32]

Where a ship is registered in a state which is not a party to the Convention, a certificate may be issued by the authorities of a contracting state.[33] However there is no obligation on a contracting state to certificate ships not flying its flag, and in the period leading up to entry into force of the Convention there were concerns as to whether any contracting states would be prepared to undertake the administrative burden involved in certificating ships flying other flags as well as their own. In the event, problems in implementing the Convention were avoided when three contracting states undertook to do so.

The period since entry into force of the Convention – issues encountered in practice

In the run-up to the entry into force of the Bunkers Convention, in November 2008, a number of certification issues had to be addressed, some of which still persist. There have also been some notable incidents since then which have highlighted liability and limitation issues of general importance. These topics are worth examining in further detail.

Certification issues

Mention has just been made of the considerable administrative burden involved, for insurers and flag state administrations, in certificating all ships which are subject to the compulsory insurance provisions. Whilst

[26] Art. 7.10.
[27] Art. 7.1.
[28] For ships entered in P&I Clubs in the International Group the limit of cover for oil pollution liability risks is US$1bn.
[29] Art. 6.
[30] Notably floating platforms, which are excluded by LLMC Art. 15.5.
[31] Art. 7.1.
[32] Art. 7.15.
[33] Art. 7.9.

governments charge a fee their role in the process, and insurers perform theirs as an additional service, directly or indirectly there is a high overall cost for industry to bear.

The workload and resulting cost have been increased significantly by a lack of uniform practice on key issues among contracting states.

One relates to the precise form of evidence which shipowners must produce to satisfy the flag state certificating authority that adequate insurance is in place. Ever since 1975, when the Civil Liability Convention 1969 came into force in relation to oil tankers, the normal practice has been for the owner's insurer, normally one of the P&I Clubs, to provide a so-called "Blue Card" – essentially a certificate of its own attesting that insurance is in place which complies with the Convention. In the last decade the normal form of Blue Cards has been brought into line with modern forms of electronic document exchange, and the vast majority of administrations now accept electronic Blue Cards as Portable Document Format (PDF) files. Nonetheless, a small but significant number of administrations have continued to require hard copy Blue Cards, with some even maintaining additional requirements, such as that Blue Cards be embossed with Club stamps, or printed on watermark paper.

To allay any lingering concerns, all International Group Clubs have established databases of vessels on their websites from which verification can easily be obtained that a specific ship is entered with the necessary cover and that a Blue Card has been issued.

The IMO has also endorsed a recommendation of a Correspondence Group of Member States, established to promote harmonized implementation of the Bunkers Convention, that all States Parties should follow the practice already adopted by the vast majority, and accept Blue Cards issued by International Group Clubs in electronic form.

A second area in which there has been a lack of consistency is that of approval of insurers. The IMO has recommended that International Group Clubs be universally accepted as approved insurers, but some States continue to insist on time-consuming approval procedures which would render the system unworkable if the same procedures were to be applied by other states.

It is to be hoped that experience gained in addressing these issues will improve certification procedures not only under the Bunkers Convention but also under other regimes expected to enter into force in the years ahead, such as the HNS Convention and the Nairobi Convention of the Removal of Wrecks.

Limitation of liability for bunker pollution clean-up costs

On 31st July 2009 the bulk carrier *Full City* dragged her anchors in a storm off Langesund, Norway, and ran aground spilling her bunker fuel. It was Norway's biggest oil spill. The incident has highlighted issues touched on earlier concerning limitation of liability under LLMC for bunker pollution clean-up costs.

This is an important subject, as clean-up is usually the largest component in the overall cost of a bunker spill. It is also a somewhat political area, in which there are different views as on the interpretation of the Limitation Convention and its proper implementation in contracting states.

As already noted, the list of claims subject to limitation, as set out in LLMC Article 2.1, makes no reference to pollution damage. Nor, indeed, does it mention "contamination" of the "environment". Nonetheless it appears broad enough to include pollution claims under more than one head.

Under Article 2.1(a) claims are limitable if they are in respect of –

"damage to property … (including damage to harbour works, basins and waterways …), occurring … in direct connection with the operation of the ship …, and consequential loss resulting therefrom."

This wording does not specify any particular mechanism by which the operation of the ship has to cause the damage – i.e., it could be caused by impact, fire, explosion, or other processes including contamination. The view that it covers pollution damage is supported by the reference to "waterways", as pollution must be an obvious way in which these can be damaged.

Other relevant provisions are Article 2.1(d) and (e). Paragraph (d) allows limitation of liability for claims in respect of –

"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."

Paragraph (e) applies to claims in respect of –

"the removal, destruction or the rendering harmless of the cargo of the ship."

Both of these provisions are apposite to cover the cost of removing or cleaning up contaminants, though only paragraph (d) could apply to bunkers.

Controversy has arisen from the fact that a number of states have traditionally maintained a policy of unlimited liability for wreck removal. LLMC permits contracting states to exclude Article 2.1(d) and (e) from their national laws,[34] and a number of them have exercised this right. A consequence of this, even if unintended, was to eliminate any right of limitation *under these paragraphs* not only in respect of claims for wreck removal but also in respect of those for the cost of avoiding or cleaning up pollution.

Norway is one of a number of LLMC states which have excluded Article 2.1(d) and (e) from their national law. In 2002 the Norwegian Maritime Code was amended to provide that claims for bunker oil pollution clean-up costs were to be treated in the same way as wreck removal costs. The Code does not provide for unlimited liability for such costs but applies a separate limit of Norway's own choosing, which is significantly higher than the limit under the 1996 LLMC Protocol, which applies in Norway.[35]

This raises the question whether Art. 2.1(d) is the only provision of LLMC under which claims for bunker pollution clean-up costs can be limited, or whether limitation can and should be allowed under Article 2.1(a) as claims for damage to property, or as consequential loss resulting therefrom. There are good reasons for taking the view that they are indeed covered by paragraph (a), both as a matter of interpretation and having regard to the practice of states.

Interpretation of Article 2.1(a)

A leading decision on the interpretation of Article 2.1(a) is the judgment in 2009 of the Federal Court of Australia in the case of the *APL Sydney*.[36] The case was not concerned with pollution but with damage to an underwater pipeline caused by a ship dragging her anchor. The issue was whether the shipowner could limit liability for economic losses suffered by various parties who were users of the pipeline.

These parties disputed that their claims were limitable under Article 2.1(a) on the grounds that they did not own the pipeline, and that their losses were not consequential on damage to their own proprietary rights. Rejecting this argument, the court held that the proper interpretation of LLMC had to take account of its status as an international instrument, designed to accommodate different systems of law. Whilst recovery of economic losses at common law has often depended on damage to the claimant's property, this has not generally been the case in civil law jurisdictions. The phrase in the Convention "damage to property" was not to be construed narrowly as concerned only with proprietary rights, but connoted "physical" damage in a broader sense, in contrast to "abstract" financial losses addressed in other paragraphs.

In a pollution context much the same conclusion was reached in the case of the *Aegean Sea*, where the view was taken by the English High Court that various types of pollution claim, including costs of clean-up and other preventive measures, are limitable under Art. 2.1(a).[37] These views were strictly speaking *obiter*, but in combination with the *APL Sydney* decision they point strongly to such costs being limitable under paragraph (a), regardless of what proprietary interests, if any, have been affected by the pollution.

Practice of states

Throughout the sessions of the IMO Legal Committee and Diplomatic Conference governments evinced a common assumption that bunker pollution liabilities would be limitable under LLMC. There was no suggestion at any stage of the debates that claims for clean-up costs were to be treated differently. Some observer delegations felt that it would nevertheless be desirable to make clear the intention that all forms of bunker pollution liability should be limitable. At the outset of the Committee's work, in 1996, a paper was submitted by the Comité Maritime International (CMI) outlining the potential interpretation issues in states where LLMC Art. 2.1(d) did not apply, and suggesting that a wording be adopted to make the position clear.[38] No one disagreed with the thinking behind this proposal, but the Committee shelved it while more fundamental questions were addressed, such as whether there was a real need for the Convention, and if so whether there should be linkage to LLMC or a free-standing limit.

Later, when these questions had been resolved and the Diplomatic Conference was approaching, the issue had still not been squarely addressed in the draft Convention, and a reminder of it was given in papers submitted by the CMI and International Group of P&I Clubs. They proposed that Article 6 be modified to put beyond doubt that liabilities under the new Convention were to be treated as limitable under LLMC, following the example of a

[34] Article 18.
[35] Whilst the Protocol limit for the *Full City* would be approx US$10 million, a separate fund required for pollution clean-up came to some US$35 million, giving a combined total some 4½ times the amount prescribed by the Protocol.
[36] [2009] FCA 1090.
[37] [1998] 2 Lloyd's Rep. 39, Thomas J.
[38] Document submitted by the CMI on 9 August 1996, LEG 74/4/2.

statutory provision to this effect in the UK.[39] However, time at the Conference was short, delegates didn't see any need for the suggested amendment, and the chairman described it as "tinkering". Under the circumstances the proposal was withdrawn and the text remained as it is.[40]

The fact that time was insufficient to put the point beyond doubt does not mean, of course, that Article 6 does not actually have the intended effect. It refers to "the right" of the shipowner "to limit liability" under the applicable regime, such as LLMC. It does not simply refer to some right to apply to the national court for a ruling whether bunker spill liabilities are limitable under LLMC. The clear implication is that the liabilities imposed by the Bunkers Convention are to be limitable under LLMC where that regime applies.

The Preamble to the Bunkers Convention refers to States "recognising the importance of establishing strict liability for all forms of oil pollution which is linked to an appropriate limitation of the level of that liability," and needless to say, liability under the Convention for "all forms of" bunker oil pollution is *not* limited if any category of potential claim is unlimited.

The same intention is clear from a Resolution on limitation of liability which the Conference adopted after agreeing on the Convention itself. This Resolution noted that Article 6 preserves "the right of the shipowner to limit his liability", reaffirmed that clear rights of limitation of liability are desirable to enable the shipowner to take out effective insurance cover at reasonable cost, and urged States to ratify the 1996 LLMC Protocol.

Conclusion

For the reasons outlined above, the Norwegian approach is based on an interpretation of LLMC which is at odds both with the case-law and with the practice and intention of states. The problems with it become even greater when some of its implications are considered.

A system which provides for two separate limitation funds in respect of different categories of pollution claim gives rise to various anomalies. For example, if a fishing net is so seriously contaminated that it is more economic for it to be discarded and replaced, this is evidently a claim for property damage limitable under the LLMC Protocol. If, on the other hand, the same fisherman has another net which is not so seriously contaminated, and can be reinstated by cleaning, that part of his claim apparently has to be satisfied from the separate fund established for clean-up costs. This means that practical decisions between repair and replacement take on new and unintended financial implications. And that is just one example. What if a pleasure craft stained by oil needs first to be cleaned and then re-painted? Does the contractor have to render two separate invoices, one to be claimed from one fund and the other from the other?

Indeed, the whole idea of a separate fund runs counter to the agreement reached in the IMO Legal Committee, and endorsed at the subsequent Diplomatic Conference, that limitation of liability for bunker spills would be achieved by linkage rather than by a free-standing fund.

The anomalies do not end there, for there are more to consider in states where Art. 2.1(d) is in force. If the Norwegian approach to LLMC is correct, and Art. 2.1(d) is the only basis for limiting liability for clean-up claims, it would follow that these are limitable only in cases where the ship is "sunk, wrecked, stranded or abandoned", and not in other types of incident which result in bunker oil pollution. Obvious examples include collisions between ships, or between a ship and a fixed object,[41] without the ship being "sunk, wrecked, stranded or abandoned" as a result. Is it really to be suggested that anyone intended clean-up costs to be limitable when a bunker spill results from a ship running aground on a rock, but not from it colliding with a ship or a bridge?

There can be no doubt that if any of these implications – unlimited liability, separate fund, and artificial distinctions between different categories of claim – had ever been put to the Legal Committee or Diplomatic Conference, they would have been dismissed by everyone present as being obviously contrary to what states intended.

It is therefore strongly arguable, as a matter of international law, that national legislation which does not permit claims for bunker pollution clean-up costs to be limited under LLMC, and which instead provides either for unlimited liability or for some unilateral domestic limit, is not in accordance with that state's treaty obligations under the Convention.

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[39] The UK Merchant Shipping Act 1995 s.168 provides for liability under the Act for oil pollution (other than from a tanker in accordance with CLC) to be deemed to be damage to property for the purposes of LLMC Art. 2.1(a).

[40] The UK Government was also approached as a sponsoring state by the British Maritime Law Association. It was in agreement as to what was intended, but it was not convinced of the need for an amendment, and it was not prepared to propose it unless other governments felt it was necessary. It then corresponded with other Protocol States and Australia, to inquire whether any problems were envisaged in limiting liability for bunker pollution under their national laws. Australia and Denmark responded that they saw no such problems, and there does not appear to be any record of any response from the other governments consulted (which included Norway) to suggest that such problems might exist under their national laws. Source: BMLA file.

[41] Such as occurred when the container ship *Cosco Busan* struck the Oakland Bay Bridge in San Francisco Harbour in November 2007.

Amount of liability limits – the Pacific Adventurer

In 2009 a bunker spill took place off Queensland, Australia, from the containership *Pacific Adventurer* when it got caught up in a tropical storm off Brisbane. This resulted in some of the containers carried on deck falling into the sea, where they punctured the ship's shell plating and caused bunker fuel to escape.

Australia was one of the leading states sponsoring the Bunkers Convention, and has given effect to it by the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008. The incident occurred before the Act came into force, and was governed by other domestic legislation imposing strict liability for bunker pollution.

The clean-up costs incurred by the Queensland State and Federal authorities amounted to approximately double the ship's liability limit under the 1996 LLMC Protocol, which is in force in Australia. There was no suggestion that the shipowners were not legally entitled to limit liability, and the case achieved international notoriety for the political duress exerted on them to pay substantially more than the liability limit to reflect their perceived social responsibility to make good the damage. The additional sums paid were donated to a charitable environmental trust set up specifically for the purpose, and the episode gave rise to concerns in the international maritime community about respect by governments for international law.

As a sequel to the incident, the Australian Government proposed to the IMO that the case demonstrated the need for the 1996 limits to be raised. In response to requests for relevant data to be provided to the IMO Legal Committee, the International Group of P&I Clubs has supplied information showing that only eight incidents since 2000 (or 1.34% of the total in that period involving ships entered in Group Clubs) have given rise to pollution claims above the 1996 limitation figure.[42]

It is expected that a decision on this issue will be taken at the spring session of the IMO Legal Committee in 2012, when it is likely that an increase will be agreed in accordance with the tacit amendment procedure set out in the 1996 Protocol.

Summary

In most contracting states the Bunkers Convention probably results in few legal changes apart from the introduction of compulsory insurance and certification of ships other than tankers. This involves insurers and flag state authorities in a good deal of work, and calls for maximum adherence to uniform streamlined procedures.

As a single-tier compensation regime the Bunkers Convention offers no top-up for claims which are not fully compensated by the shipowner because they exceed his liability limit. Domestic measures have in some cases rendered illusory the limitation rights which the shipowner would normally expect in international law. Two-tier regimes exist in some parts of the world, where a national fund is available to pay for clean-up not fully compensated by the shipowner, but generally these do not respond to incidents in co-operation with the owner and his insurer, as has been the case with the International Oil Pollution Compensation Funds. The creation of an IOPC Bunkers Fund would be a positive development that could avoid some of the problems which have arisen.

[42] See LEG 96/6/2.