

CHARTERERS AND TRADERS – IMPLICATIONS OF THE *ERIKA* AND *OCEAN VICTORY* INCIDENTS

Liability for oil pollution from ships is normally the concern first and foremost of shipowners, their insurers, and compensation bodies such as the IOPC Funds.

Usually there is no legal basis for any claim against the charterer of the ship or the owner of the cargo. CLC 92 expressly excludes any liability on the part of any charterer of the ship, under the Convention or otherwise. In principle the financial implications for cargo owners should be limited to any contribution they may have to make, along with other oil receivers in contracting States, to compensation paid by the IOPC Fund.

Whilst that is the theory, in practice charterers and cargo owners do face some degree of exposure, depending on the jurisdiction where an oil spill occurs and the circumstances of the incident. Often they are major oil companies, or other multinational trading groups, with deep pockets which make them potential targets for speculative litigation or political pressure.

When an incident occurs, entities of this kind are normally monitoring the situation very closely from behind the scenes, with their own crisis management plans at the ready, and are typically concerned to evaluate whether to maintain a low profile or to intervene in some way.

So far as concerns their legal exposure there are essentially three aspects to consider: first, any liability they may have to compensate parties with claims for pollution damage or costs of preventive measures; second, any liability they may have to reimburse the shipowner in a recourse claim to recover amounts paid to such parties; and third, the question whether they are entitled to limit any liability they incurs in either of these ways.

The *Erika* and *Ocean Victory* incidents have provided striking examples of both types of exposure – the *Erika* being an instance of liability for pollution being incurred by a major oil company which owned the cargo and chartered the ship, and the *Ocean Victory* being a notable recent example of a charterer incurring substantial liability to the owner for the consequences of nominating an unsafe port.

Liability for oil pollution claims

Position under international conventions

The two-tier system of compensation established by the Civil Liability and Fund Conventions in respect of oil pollution from ships imposes first-tier liability solely on the owner of the ship and his guarantor. No liability is imposed on a charterer (even a demise charterer) or on the owner of the cargo.

Although cargo interests contribute the funds required for second-tier compensation payable by the IOPC Funds under the Fund Conventions, this burden is borne by the numerous oil receiving contributors in member states. The Conventions do not impose liability on the owners of the particular cargo for the incident itself or for any damage it causes.

Liability for oil pollution under other laws

In most jurisdictions the owner is subject to strict liability coupled with compulsory insurance. This has normally meant that claims have been fully paid by the owner and his insurer, if necessary with supplemental compensation being paid by the IOPC Funds. This has nearly always made it unnecessary for claimants to trouble themselves with the possible difficulties involved in maintaining claims against charterers.

Nonetheless the possibility always exists of claimants failing for whatever reason to recover full compensation from the normal sources. The question may then arise whether there are any possible grounds on which a claim could be brought against the charterer. The two main types of potential liability are by statute and in tort.

Statutory liability

Liability by statute is at present still confined mainly to the United States. OPA-90 includes demise charterers as "responsible parties" who are strictly liable for oil pollution. It does not include time and voyage charterers, but it does include operators, and there are some who fear that a time charterer might be held to fall into this category. There are respectable arguments to the contrary, but the position under OPA is not completely clear. What is clear is that there are several State statutes which go further than OPA in their definition of responsible parties and which create a significant risk of liability extending to time charterers, or even to cargo owners.

Liability in tort

Liability in tort is a possibility in many jurisdictions, where again a distinction should be drawn between time and voyage charters on the one hand and demise or bareboat charters on the other. In most legal systems demise charterers may incur liability for any negligent acts or omissions of the master or crew whom they employ, or by virtue of being in possession and control of the ship. Other types of charterer, such as time or voyage charterers, do not have the same degree of control, and there have been few cases in which they have incurred liability directly to the victims of an incident, as distinct from contractual liability to indemnify the owner.

Nonetheless, certain aspects of their role in maritime commerce could, in some cases, involve them in liability as a result for example of negligence in their role as terminal operators, or in oil transfer operations, or of their responsibility for the hazardous nature of cargo or inadequate stowage. A particular concern in modern times among major oil companies is that their ship vetting procedures could expose them to responsibility for pollution from a chartered ship if this resulted from defects which were not revealed by their inspection of the ship – a risk highlighted by proceedings in France against the French oil company Total after the *Erika* incident (France, 1999).

Liability to remove waste or arising from disposal of waste

In some jurisdictions liability for clean-up costs after an oil spill may be incurred not only by the shipowner but also by other parties under legislation which treats the spilled oil as waste and imposes obligations on them to pay for the cost of its disposal.

For example, a Directive of the European Parliament and Council requires national laws in EU member States to impose the cost of disposing of waste on the "holder" and/or the previous holders of the waste, and/or on the "producer" of the waste or of the product from which it came.

In proceedings arising from the *Erika* incident, and concerning identical provisions in an earlier Directive, it has been held by the European Court of Justice that oil spilled in a maritime accident could constitute waste, and give rise to liability on the part of the charterer of the ship or the owner of the cargo to pay for its disposal, if they had contributed by their conduct to the risk of the pollution.

This interpretation of the Directive stops short of a strict liability approach, as liability depends on the defendant's conduct, but claims have been known to be asserted on a strict liability basis under similar legislation outside Europe.

Statutory immunity from liability

As mentioned earlier, the so-called "channelling provisions" of the Civil Liability Conventions exclude liability of various parties other than the owner of the ship. In other words, these parties are not only free from liability for oil pollution under the Conventions, but are indeed immune from any liability they might have incurred for it on some other basis, for example in tort.

There are differences in this respect between CLC 69 and CLC 92, and these are significant from a charterer's viewpoint.

CLC 69

The channelling provisions in CLC 69 are comparatively narrow. These exclude any liability on the part of the owner's servants or agents. Normally it will be difficult to envisage circumstances in which a charterer could be described as the owner's servant or agent. Accordingly, in cases governed by CLC 69, the possibility exists of a charterer incurring joint and several liability in tort, or perhaps under other domestic laws, alongside the owner's strict liability under the Convention.

As CLC 92 has become more widespread, there are now relatively few jurisdictions where the issue will be governed by CLC 69.

CLC 92

CLC 92 introduced wider channelling provisions which exclude claims against various parties including:

- (a)
- (b)
- (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;
- (d)
- (e)
- (f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e).

This immunity will not avail the charterer in every case. Clearly it will not do so where the incident occurs in the USA or in another non-contracting State. There is some doubt whether the exclusion can avail a charterer in a case where he is not sued in his capacity as charterer of the ship but rather in some other capacity, e.g. as owner or operator of a terminal at which the ship is loading or discharging when the incident takes place. The words "howsoever described" appear to refer to any description of charterer (to include, for example, time, voyage and space charterers), rather than to refer to other roles which the charterer may have.

Additionally, the channelling provisions make it clear that the exemption from liability will be lost if the damage resulted from the defendant's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. Cases of this kind should of course be rare. Nonetheless, the channelling provisions did not avail the major oil company Total SA in the *Erika* incident.

The incident occurred on 12 December 1999 when the Maltese 19,666 grt tanker *Erika* broke in two in the Bay of Biscay some 60 nautical miles off the coast of Brittany, France. The tanker was carrying a cargo of 30,000 tonnes of heavy fuel oil of which some 14,000 tonnes were spilled. An estimated quantity of about 10,000 tonnes of cargo remained in the bow section and a further 6,000 tonnes in the stern section. Soon it became clear that the casualty was an exceptionally serious oil pollution incident, which would ultimately affect some 400 km of coastline.

In April and May 2000 a number of public and private bodies brought actions in various courts in France, requesting the courts to impose joint and several liability on a range of defendants including TotalFinaElf SA (holding company), Total Raffinage Distribution SA (shipper), Total International Ltd (seller of cargo), and Total Transport Corporation (which had voyage chartered the ship in November 1999). It was argued against them that Total had chartered a vessel which was 25 years old, for which class certificates had expired, and which they had failed properly to inspect.

In January 2008, while the above civil claims were pending, the Paris High Court upheld criminal charges against four defendants of the offence under French legislation of imprudence contributing to the incident and resulting pollution.⁸ As a result of their criminal convictions, in French civil law these defendants were held jointly and severally liable for damage caused by the pollution, subject to defences on which they relied under the channelling provisions of CLC 92.

Those found liable included Total SA, which was held by the court to have acted imprudently in approving the ship for charter by its subsidiary, Total Transport Corporation (TTC). Its liability arose not from failure to note defects in its inspection of the ship but from the court's view that the risks inherent in maritime transport were unacceptably increased having regard to the age of the 25-year-old ship, lack of continuity in its technical management, and the fact that the product to be carried was heavy fuel oil.

The company was held not to be entitled to rely on the channelling provisions because it was neither the charterer of the tanker nor a servant or agent of the owner, but exercising a power of control over the ship accepted for charter. It was therefore held jointly and severally liable with other defendants to pay substantial damages.

The judgment raised a number of important questions. Among them was uncertainty as to why the court did not conclude that the vetting functions of Total SA had been exercised on behalf of the charterer as well as the cargo owner, and why it did not therefore allow the company the benefit of the exemption of liability in CLC 92 available to the agent of the charterer.

Appeals were brought by a number of parties including Total. In March 2010 the Court of Appeal in Paris confirmed the first instance decision holding Total and other parties criminally liable for imprudently causing pollution. However it also upheld Total's appeal against the finding of civil liability. It held that Total SA had been '*de facto*' charterer of the *Erika*, and that the company could benefit from the channelling provision in Art. III.4(c) of CLC 92: the imprudence committed in its vetting of the ship did not involve intent to cause pollution damage, or recklessness with knowledge that such damage would probably result.

There were then further appeals to the Court of Cassation, which gave judgment in September 2012. The court affirmed the defendants' criminal convictions and upheld the decision by the Court of Appeal that the channelling provisions applied to the civil claims against Total. However it held, overturning the decision on this issue of the Court of Appeal, that Total could not rely on the channelling provisions because the damage had resulted from its recklessness.

This was a remarkable conclusion when the right to rely on the channelling provisions should be barred only by personal misconduct, at an appropriately high level in the company, involving either intent or recklessness with knowledge that pollution damage would probably result.

⁸ Contrary to Art. 8 of Law No. 83-583 of 5 July 1983.

It is unclear on what basis the Court of Cassation reached made this finding of fact when it had not been found by either of the lower courts, and when it is quite unclear how it could be said that Total knew that their chartering of the ship, even if imprudent, would probably cause pollution.

Most informed comment on the judgment is agreed that this conclusion – which incidentally was reached also in relation to the classification society RINA – was in essence a political decision rather than the product of any orthodox legal analysis. The view was apparently taken that the exoneration of Total from civil responsibility for the incident was simply politically and publicly unacceptable.

It has long been a concern for major oil companies, and other 'deep pocket' traders, that high-profile incidents of this kind, though rare, involve political as well as legal risks; that these political risks can materialise in the form of court decisions which are questionable in point of law; and that these decisions can have extremely serious financial as well as reputational consequences.

The fact that such a decision has been made by the highest court in a Western European nation has naturally affected the perception of these risks. It is only to be expected that in other parts of the world it will be cited as a precedent legitimising similar approaches to international laws.

This has led to a significant increase in the interest shown among charterers and traders in formulating crisis management plans, and in insurance cover against liabilities for pollution.

Liability to the owner of the ship by way of recourse

There have been a number of cases in which shipowners have borne the cost of oil spills in the first instance under the strict liability regime in force where the pollution occurs, and in which they have subsequently brought substantial claims to recover the amounts concerned from the charterer. The conventions make it clear that the "channelling" provisions do not affect any rights of recourse which the owner may have against third parties. They therefore provide the charterer with no protection against a claim for damages or an indemnity under the charterparty. Such a claim is likewise possible where the incident has occurred in the United States, and in such cases there is a particular risk that the recourse claim may be a large one.

There have been quite a few cases – particularly those involving groundings – where a breach has been alleged of a safe port or berth warranty in the charterparty, and where the owner's claim has included an indemnity for compensation paid for pollution.

Probably there have been more such claims against charterers than is generally realised because they have normally been settled or arbitrated in private. Moreover they are by no means confined to incidents in jurisdictions where the international compensation regime is in force; they are likewise possible where the incident has occurred in the United States, and in such a case there is a particular risk that the recourse claim may be a large one.

Many standard forms of time and voyage charterparty provide that the ship shall proceed to a port or ports of loading or discharge which are described in the charterparty as "safe", or that she shall be ordered by the charterer to proceed only to ports which are safe. Both English and American courts have applied the following test of unsafety -

"...a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship."

There have been many reported cases which have applied various aspects of this test in practice, and it is beyond the scope of this paper to go into these. However it is to be emphasised that clauses of this kind have consistently been construed as a warranty by which the charterer assumes the risk of any unsafety at the port, even if the unsafety was unknown to him and he was free from blame.

Some printed forms expressly exclude any warranty on the charterer's part, or reduce it to a duty to exercise due diligence (e.g. Shelltime 4 Cl. 4). In this context due diligence has been held to mean reasonable care (see *The Saga Cob* [1992] 2 Lloyd's Rep. 545, 541; and *The Chemical Venture* [1993] 1 Lloyd's Rep 508, 519). The effect of such clauses may be in doubt if the loading and discharging ports or ranges are stipulated in a typed additional clause, and if this contains an unqualified warranty of safety: in case of conflict between the printed clauses and the typed rider provisions, the latter are likely to prevail.

A stark reminder of the effect of the safe port warranty in English law, and of the size of liabilities which might be incurred through its breach, has been provided by the decision of the London Commercial Court in the *Ocean Victory* case.⁹

The case did not involve oil pollution from a tanker but removal of the wreck of a bulk carrier. In principle however the legal issues are the same.

The *Ocean Victory* was a Capesize bulk carrier which grounded on 24 October 2006 while attempting to leave the Japanese port of Kashima in a severe gale and heavy swell. As result of the incident she broke up, causing losses to the owners of some US\$137.7 million, comprising loss of the ship (\$88.5m), wreck removal (\$34.5m), SCOPIIC costs under LOF 2000 (\$12m), and lost hire (\$2.7m).

At the time of the incident the vessel was operating under a chain of charterparties containing various similar provisions for the vessel to trade between safe ports. The claimants (who were hull underwriters suing as assignees of the owners), maintained that the port was unsafe by virtue of its vulnerability to two particular hazards, namely long swell and northerly gales. The charterers denied that the port was unsafe and argued that even if it were, the casualty was caused by negligence of the master.

⁹ *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2013] EWHC 2199 (Comm).

The court found that it was rare for both hazards to coincide, but that the conditions at the time of the incident could not be considered an “abnormal occurrence” (for which charterers would not be liable under English case-law) as such occurrences were limited to those unrelated to the prevailing characteristics of the port, and this was not the case in respect of either of the two hazards involved in this instance. It held that the dangers of the port, rather than negligence of the master, had been the cause of the incident, and that the claim for \$137.7 million succeeded.

The decision is under appeal, to be heard later this year, but whatever the outcome it is in principle a reminder of the sort of exposure which charterers can incur in a major casualty, including one which results in pollution.

Limitation of charterers’ liability

The next issue to consider is whether a charterer of a ship can limit liability for pollution – a question which can arise both when liability is incurred directly to those who suffer pollution damage, and when it arises by way of recourse to the owner or other parties who have paid for it in the first instance.

As the most common form of exposure has been a recourse action by the shipowner under a charterparty, and such claims have most frequently been governed by English law, it is pertinent to examine the issue here by reference to the 1976 London Convention on Limitation of Liability for Maritime Claims (LLMC), as enacted in the law of the UK. The 1976 Convention raises several difficult issues in relation to pollution, one of which concerns the circumstances in which a charterer may have any right to invoke limitation under the Convention.

The 1976 Convention provides that:

“Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.” (Art 1.1).

The term “shipowner” is defined as meaning:

“The owner, charterer, manager and operator of a sea-going ship.” (Art 1.2)

Claims which fall within Article 2 are subject to limitation “whatever the basis of liability may be”, and “even if brought by way of recourse or for indemnity under a contract or otherwise”.

For over 20 years after the adoption of LLMC there was no reported instance of any dispute concerning the right of a charterer to limit liability under the Convention. In practice there were probably few cases where claims were of sufficient size for the issue to arise. However, the right of limitation could well be important in the event of a significant oil pollution incident leading to a recourse action by the owner to recover the cost of substantial liabilities to claimants, quite apart from other losses which in a serious case could include the

total loss of the ship and loss of earnings. Such a situation arose after the *Aegean Sea* incident (Spain, 1992), and in proceedings before the English High Court it was held that the 1976 Convention gave no right to the charterers to limit liability in respect of an unsafe port claim brought against them by the owners under the charterparty. The basis for this decision was that, in the court's view, the Convention was intended to allow charterers to limit liability only for claims of a kind which could equally be brought against the owner, e.g. cargo claims. This did not apply to a claim by the owner for nomination of an unsafe port.

However the law on this subject has changed as a result of the Court of Appeal decision in the case of the *CMA Djakarta*. The case concerned a container vessel which was seriously damaged by an explosion attributable to two containers containing bleaching powder. It was held that the charterers were in breach of the charterparty terms regarding shipment of dangerous cargo, and that they were liable (subject to any right of limitation) for over US\$26 million.

At first instance the High Court applied the earlier ruling in the *Aegean Sea* and held that the charterer was not able to limit for such a claim against him by the owner. On appeal it was held that there is no such restriction. The only issue is whether the claim falls within the list of maritime claims, set out in Art. 2.1 of the 1976 Convention, which are subject to limitation. Here a difference emerges between claims by the owner which relate to damage to the ship, and claims for an indemnity for liabilities to third parties. All courts which have considered the issue so far have held that liability for damage to the ship is not subject to limitation; however indemnity claims may well be limitable. So far as pollution claims are concerned, there is an element of ambiguity since no reference is made in Art. 2.1 to pollution, but there is scope for most typical kinds of pollution claim to be squeezed within the Convention in one way or other.

Accordingly, if an oil pollution incident occurs as a result of the charterer nominating an unsafe port, it would seem likely that in English law as it currently stands the charterer would incur liability without limit for damage to the ship (including salvage and GA) but that he could limit liability to indemnify the owner for pollution claims.

In the *CMA Djakarta* leave was given to appeal to the House of Lords, but a compromise was reached and the law therefore rests for the time being with the decision of the Court of Appeal.

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June 2014**