

The “Erika” casualty. Legal Issues from the IMO View

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1 Introduction

Since the grounding of the Torrey Canyon in 1967, major oil tanker disasters have always had a traumatic repercussion in the work of IMO. The Organization is the only specialized agency of the United Nations entirely devoted to maritime affairs, in particular, the adoption of global preventative rules and standards to ensure safety of commercial navigation and prevention of marine pollution from vessel's source. It therefore inevitably that following a major casualty a general assessment is made to establish whether its cause was either lack of proper implementation of existing IMO provisions or the inability of existing IMO rules to effectively prevent the occurrence of the incident.

In the case of the Erika the available information seems to indicate that so far the blame, if any, should not be put to lack of appropriate IMO regulations. On the contrary proposals for action tend to accelerate and strengthen the application of existing rules both in terms of IMO existing treaty law provisions as well as soft law formulated mainly in the shape of recommendations by the IMO Assembly.

Take for instances the case of regulation 13G of Annex I in MARPOL 73/78. The adoption of the original regulation in the wake of the *Exxon Valdez* casualty was decided on grounds that new technical requirements, namely, double hulls or systems of equivalent efficacy should be incorporated into treaty law. The core of the proposals for amendment of this regulation made in the wake of the *Erika* is not to amend its technical features but rather to speed up its implementation by advancing the date for the phasing out of single hull oil tankers.

Available information also indicates that main questioning on the causes of the incident seem to focus not on the effectiveness of existing IMO regulations but rather on the way the classification society proceeded with its inspections, and the conduct of the shipowner and the Captain of the vessel. The withdrawal of the ISM certificate from the ship operator also indicates serious presumption of defective management based not on lack of adequate rules but on lack of compliance with existing ones.

Reference should be also made here to the decision taken by the Paris MOU Port State Control at its 33rd. meeting to undertake a concentrated inspection campaign on oil tankers over 15 years of

¹ The views of this paper are exclusively those of the author and do not necessarily represent the views and position of IMO.

age and over 3000 GT and to focus on both structural and operational aspects. This campaign also aims at ensuring that already existing and enforceable IMO rules and standards are properly implemented.

Action taken at IMO in the preventative field as a consequence of the *Erika* incident involves acceleration of initiatives which had been already in progress at the time of occurrence of the incident:

- A new and more stringent mandatory ship-reporting system in the English Channel has been approved by the IMO Sub-Committee on Safety of Navigation.
- The consideration of amendments to the IMO Enhanced programme of inspections during survey of bulk carriers and oil tankers has been speeded up in such a way that it will be ready for approval by the Maritime Safety Committee in November this year.

In the field of liability for oil pollution damage the *Erika* casualty has triggered off the process towards the achievement of what many consider an overdue task, namely the updating of the limits of compensation regulated in two IMO treaties, namely the International Convention on Civil Liability for Oil Pollution Damage, 1992 (the 1992 Civil Liability Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the 1992 Fund Convention).

This paper provides background information on the basic features of the liability and compensation regime established in the two treaties and addresses some of the most important legal issues involved in its operation. An explanation is also provided on the procedure for adoption of increased limits, expected to take place at the incoming session of the Legal Committee in October.

2 The IMO treaty law regime for liability and compensation for oil pollution damage

2.1 The 1969-1971 regime

It is important to remember that IMO's mandate to adopt liability and compensation rules in the field of maritime law came as a result of political decisions adopted as the *Torrey Canyon* incident in 1967. These decisions related to the consideration of how to develop international law in two main fields. Firstly, it was acknowledged that there was a need to adopt a treaty containing international public law rules to regulate the right of the coastal State to intervene in the high seas in cases of serious shipping accidents involving pollution damage caused by oil and other hazardous and noxious substances. It was also acknowledged that a private law treaty were also needed in order to regulate a global liability and compensation regime for victims of oil pollution damage.

The IMO conference where both the public and private law treaties were adopted met in 1969 under the denomination of *International Legal Conference on Marine Pollution Damage*. The public law treaty adopted by the Conference is the *International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties*. The private law convention adopted at the same Conference is the *International Convention on Civil Liability for Oil Pollution Damage, 1969* (the 1969 Civil Liability Convention).

Although there is no connection between the operation of both treaties, it should not be forgotten that during the Conference proposals were made to formally link them: it was proposed that the obligation of the coastal State to pay compensation to the shipowner for damage caused as a result of that State's intervention be made conditional on the shipowner's payment of compensation for oil pollution damage. The defeat of this proposal meant that a clear cut had been established forever between public and private law regimes related to compensation for damage occurred as a result of an oil pollution casualty.

The 1969 Liability Convention applies the liability for oil pollution damage on the owner of the ship from which the polluting oil escaped or was discharged. Subject to a number of specific exceptions, this liability is strict; it is the duty of the owner to prove in each case that any of the exceptions should in fact operate. However, except where the owner has been guilty of actual fault, he may limit his liability in respect of any one incident to 133 Special Drawing Rights (SDR) (about US\$179 at current exchange rates - *SDR exchange rates to the dollar and other currencies fluctuates daily*) for each ton of the ship's gross tonnage, with a maximum liability of 14 million SDR (about US\$18.9 million) for each incident.

In accordance with the Convention applies to all seagoing vessels actually carrying oil in bulk as cargo. Ships carrying more than 2,000 tons of oil are required to maintain insurance or other financial security to cover for his total liability in accordance with the Convention.

Damage covered consist of pollution resulting from spills of persistent oils suffered in the territory (including the territorial sea) of a State Party to the Convention. It is applicable to ships which actually carry oil in bulk as cargo, i.e. generally laden tankers. Spills from tankers in ballast or bunker spills from ships other than tankers are not covered, nor is it possible to recover costs when preventative measures are so successful that no actual spill occurs. The shipowner cannot limit liability if the incident occurred as a result of the owner's personal fault.

Although the 1969 Civil Liability Convention provided a useful mechanism for ensuring the payment of compensation for oil pollution damage, it did not deal satisfactorily with all the legal, financial and other questions raised during the Conference.

Some States objected to the regime established, since it was based on the strict liability of the shipowner for damage which he could not foresee and, therefore, represented a dramatic departure from traditional maritime law which based liability on fault. On the other hand, some States felt that the limitation figures adopted were likely to be inadequate in cases of oil pollution damage involving large tankers. They therefore wanted an unlimited level of compensation or a very high limitation figure.

In the light of these reservations, the 1969 Brussels Conference considered a compromise proposal to establish an international fund, to be subscribed to by the cargo interests, which would be available for the dual purpose of, on the one hand, relieving the shipowner of the burden imposed on him by the requirements of the new convention and, on the other hand, providing additional compensation to the victims of pollution damage in cases where compensation under the 1969 Civil Liability Convention was either inadequate or unobtainable.

Following the mandate conferred by the 1969 Conference the Legal Committee prepare a draft treaty considered at a Diplomatic Conference convened in Brussels in 1971. The Conference adopted the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the 1971 Fund Convention). It is a treaty supplementary to the 1969 Civil Liability Convention, which provides compensation for pollution damage to the extent that the protection afforded by the 1969 Civil Liability Convention is inadequate. It also regulates provision of relieve to shipowners in respect of the additional financial burden imposed on them by the 1969 Civil Liability Convention, such relief being subject to conditions designed to ensure compliance with safety at sea and other conventions.

The International Fund established by the treaty is under an obligation to pay compensation to States and persons who suffer pollution damage, if such persons are unable to obtain compensation from the owner of the ship from which the oil escaped or if the compensation due

from such owner is not sufficient to cover the damage suffered.

Under the 1971 Fund Convention, victims of oil pollution damage may be compensated beyond the level of the shipowner's liability. However, the Fund's obligations are limited so that the total payable to victims by the shipowner and the Fund shall not exceed 30 million SDR (about US\$40 million) for any one incident. In effect, therefore, the Fund's maximum liability for each incident is limited to 16 million SDR.

Where, however, there is no shipowner liable or the shipowner liable is unable to meet his liability, the Fund will be required to pay the whole amount of compensation due. Under certain circumstances, the Fund's maximum liability may increase to not more than 60 million SDR (about US\$81 million) for each incident.

With the exception of a few cases, the Fund will be obliged to pay compensation to the victims of oil pollution damage who are unable to obtain adequate or any compensation from the shipowner or his guarantor under the 1969 Convention.

The Fund's obligation to pay compensation is confined to pollution damage suffered in the territories including the territorial sea of Contracting States. The Fund is also obliged to pay compensation in respect of measures taken by a Contracting State outside its territory. The Fund can also provide assistance to Contracting States which are threatened or affected by pollution and wish to take measures against it. This may take the form of personnel, material, credit facilities or other aid.

The Fund is not obliged to indemnify the owner if damage is caused by his wilful misconduct or if the accident was caused, even partially, because the ship did not comply with certain conventions.

Contributions to the Fund should be made by all persons who receive oil by sea in Contracting States. The Fund's Organization consists of an Assembly of States, a Secretariat headed by a director appointed by the Assembly; and an Executive Committee.

After their entry into force in 1975 and 1981 respectively both the 1969 Civil Liability Convention and the 1971 Fund Convention were successfully implemented. By the mid-1980s however it was generally agreed that the limits of liability were too low to provide adequate compensation in the event of a major pollution incident.

Hence the adoption in 1984 of Protocols for both treaties setting increased limits of liability. By the beginning of the nineties it had become clear that these Protocols would never secure the acceptance required for entry into force. A major reason for this was the reluctance of the United States, a major oil importer, to accept the Protocols. The United States preferred a system of unlimited liability, introduced in its Oil Pollution Act of 1990. New versions of these protocols were accordingly drawn up in such a way that the ratification of the United States was not needed in order to secure entry into force conditions.

These drafts were adopted at an IMO diplomatic conference convened in 1992.

2.2 The 1992 regime

The Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage 1969 and the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 were

adopted on November 27th 1992. Conditions for their entry into force were met in record time for IMO standards and, as a result, the two treaties entered into force on 30 May 1996.

The 1992 Protocols should be read and interpreted together with the parent conventions under the name of International Convention on Civil Liability for Oil Pollution Damage, 1992 (the 1992 Civil Liability Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the 1992 Fund Convention).

The 1992 reproduce the increased limits originally regulated in the 1984 Protocols. Accordingly, the compensation limits to be paid under the 1992 Civil Liability Convention are:

- For a ship not exceeding 5,000 gross tonnage, liability is limited to 3 million SDR (about US\$4.1 million)
- For a ship 5,000 to 140,000 gross tonnage: liability is limited to 3 million SDR plus 420 SDR (about US\$567) for each additional unit of tonnage
- For a ship over 140,000 gross tonnage: liability is limited to 59.7 million SDR (about US\$80 million)

Under the 1992 Fund Convention, the maximum amount of compensation payable from the Fund for a single incident, including the limit established under the 1992 CLC Protocol, is 135 million SDR (about US\$182 million). However, if three States contributing to the Fund receive more than 600 million tonnes of oil per annum, the maximum amount is raised to 200 million SDR (about US\$267 million).

The 1992 amendments not only update limits of compensation. They also include other important changes to the regime established by the parent conventions:

The scope of application is widened to cover pollution damage caused in the exclusive economic zone (EEZ) or equivalent area of a State Party. Environmental damage compensation is limited to costs incurred for reasonable measures to reinstate the contaminated environment. Expenses incurred for preventative measures to be recovered even when no spill of oil occurs, provided there was grave and imminent threat of pollution damage.

Coverage extends to spills from sea-going vessels constructed or adapted to carry oil in bulk as cargo so that it applies to both laden and unladen tankers, including spills of bunker oil from such ships.

A shipowner cannot limit liability if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

States Party are allowed to issue CLC 92 certificates to ships registered in States which are not Party to the 1992 Protocol, so that a shipowner can obtain certificates to both the 1969 and 1992 CLC, even when the ship is registered in a country which has not yet ratified the 1992 Protocol. This is important because a ship which has only a 1969 CLC may find it difficult to trade to a country which has ratified the 1992 Protocol, since it establishes higher limits of liability.

The 1992 Fund Protocol establishes a International Oil Pollution Compensation Fund, known as the 1992 Fund, which is managed in London by a Secretariat, as with the 1971 Fund. In practice, the Director of the 1971 Fund is currently also the Director of the 1992 Fund.

2.3 Winding up of the 1969-71 regime

From 16 May 1998, Parties to the 1992 Protocols ceased to be Parties to the 69 Civil Liability Convention and the 1971 Fund Convention due to a mechanism for compulsory denunciation of the "old" regime established in the 1992 Protocols. However, for the time being, the two regimes are co-existing, since there are a number of States still Parties to the 1969 and 1971 Conventions which have not yet ratified the 1992 treaties.

By now, most of the States with major contributors have left the 1971 Fund to join the 1992 Fund. Thus, the former regime is fast losing its financial base and will soon cease to be financially viable. As a result, Member States who remain in the 1971 Fund are now facing serious financial disadvantages, since the financial burden is spread over increasingly fewer contributors. Should an incident occur involving the 1971 Fund, it is foreseeable that the 1971 Fund would not be able to pay compensation to victims, since there would be few or no contributors in the remaining Contracting States. Another consequence would be that remaining contributors would be called upon to provide a much greater proportion of the compensation than has been the case in the past. In order to avoid these damaging consequences, the IMO and the IOPC Fund Secretariat have been actively encouraging Governments who have not already done so to accede to the 1992 Protocols and to denounce the 1969 and 1971 regimes.

Parenthetically, an International Conference on the Revision of the 1971 Fund Convention is being convened at IMO Headquarters from 25 to 27 September this year. The Conference is requested to consider and adopt amendments to article 43 (1) of the Fund Convention in order to enable the Fund Assembly to wind-up the Fund on the date when the number of Contracting States falls below a number which should be significantly higher than the present one of three or twelve months following the date on which the Assembly notes that the total quantity of contributing oil received in the remaining contracting States falls below a quantity suggested as 100 million tonnes of contributing oil.

3 The *Erika* and the implementation of the compensation regime established by the 1992 treaties

Immediately after the occurrence of the incident the machinery leading to payment of compensation in accordance with the 1992 treaties was put into motion. The shipowner's P&I (Steamship Mutual Underwriting Association) and the 1992 IOPC Fund started monitoring the clean-up operations from day one through experts from the International Tanker Owners Pollution Federation Ltd (ITOPF) and established a Claim Handling Office in Lorient as early as a month after the incident. The usual steps to implement the 1992 treaties took place.

On 15 February, the Executive Committee of the 1992 IOPC Fund decided that the overall figure of 135 million SDR payable in accordance with both the 1992 Civil Liability and Funds Conventions should be converted into French Francs on the basis of the rates applicable that date. The amount of FFr. 211 966 881 was then fixed as a maximum compensation figure payable in accordance with both treaties.

In March the shipowner constituted a limitation fund by means of a letter of guarantee issued by the Steamship Mutual for up to the limits of compensation established by the 1992 Civil Liability Convention, namely FFr. 84 247 733 (£8.4 million). The difference between this figure and the overall figure of 211 966 881 would then be paid by the 1992 IOPC Fund.

Both the P&I and the 1992 IOPC Fund started dealing with the question of interim payments under difficult circumstances. Advance payments on account are made in cases where claims have been duly substantiated and the claimant is facing particular financial difficulties. Overpayment should be avoided on precautionary reasons: if the total damage quantified through claims processing exceeds the overall compensation figure, compensation for each individual claims must be reduced a *pro rata* so and all claimants will have to receive the same percentage of the approved amount of their respective claims.

This issue has proved to be a paramount consideration in the case of the *Erika*. The assessment of the total damage has proved to be extremely difficult and has still to be completed. In many important cases, such as damage to the tourist industry during the last summer season, substantiation of claims is still in progress. However it is by now clear that the duly substantiated claims will exceed the overall amount of compensation regulated in the 1992 treaties.

In order to reduce the negative impact of this situation, political decisions were taken to make more money available outside the 1992 regime. The French Government undertook not to pursue claims for compensation against the 1992 Fund or the limitation fund established by the shipowner and the P&I in accordance with the 1992 Civil liability Convention if and to the extent that the presentation of such claims would result in the maximum amount available under the 1992 Conventions being exceed. Similarly, Totalfina undertook not to pursue against the 1992 IOPC Fund or the shipowner's limitation fund the claims relating to the coast of any inspections and the operations in respect of the wreck such as inspections and operations to prevent further oil from escaping, including any oil removal operations.

In the field of treaty law, the main lesson to be learned from the incident is that the thesis that the limits of compensation regulated in the 1992 treaties are outdated has been now sufficiently substantiated by experience. Hence the political initiative now in full progress to increase these limits by amending the 1992 Civil Liability and Fund Conventions.

4 The process of updating of limits of compensation in the 1992 treaties

The sole fact that the limits of compensation established in 1992 were the same as those regulated in the Protocols of 1984, has been considered by many as a demonstration that the 1992 regime was already outdated at the time of its adoption. The need to increase these limits became obvious in the case of the *Nakhodka*, a Russian tanker which broke in two sections near Japan in January 1997. As a result of insufficient compensation available payment of claims have had to be made a *pro-rata*.

Bearing in mind this background it came as no surprise that the recurrence of a similar situation with the *Erika* less than three years later has triggered off the implementation of one of the novelties contained in these treaties, namely a simplified procedure for the adoption of amendments consisting on the increase of limits of compensation.

In line with precedents contained in other IMO treaties (SOLAS, MARPOL, STCW) the 1992 Civil Liability and Fund Conventions (articles 15 and 33 respectively) provide that at the request of one quarter of Contracting Parties, the Legal Committee may consider and adopt proposals for increase of limits of compensation.

All Contracting States (including those who may not be IMO members) can be invited to participate at the session of the Legal Committee where the amendments are to be considered and adopted.

The increased limits will come into force through a system of tacit acceptance of amendments. Amendments shall be deemed to have been accepted at the end of a period of eighteen months after the date of notification by the Organization, unless within that period not less than one-quarter of Contracting States that were Contracting States at the time of adoption have communicated to the Organization that they do not accept the amendment. In this case the amendment is considered as rejected and shall have no effect.

Amendments shall enter into force eighteen months as from the date of their deemed acceptance, namely thirty-six months after the date of their formal adoption by the Legal Committee.

In the case of the Civil Liability Convention increase of limits adopted through this simplified procedure cannot exceed 92 limits increased by 6 per cent per year on a compound basis as from 15 January 1993. No limit may be increased so as to exceed an amount which corresponds to the 92 limits multiplied by 3 in the case of the Civil Liability Convention. In the case of the 1992 Fund Convention, increase of limits should not exceed an amount which corresponds to the 92 Fund limits increased by six per cent per year calculated on a compound basis from 15 January 1993.

On 10 April 2000 the Secretary General of IMO circulated a proposal to increase the limits of compensation established in both treaties to the maximum level presented by Belgium, Canada, Cyprus, Denmark, Finland, France, Germany, Ireland, Liberia, Netherlands, Norway Sweden, Switzerland and the United Kingdom. Other countries have either joined or are in the process of joining this proposals as co-sponsors.

The Legal Committee will consider this proposal at its 82nd session, to be held from 16 to 20 October this year.