

THE BUNKER CONVENTION

International Convention on Civil Liability
for Bunker Oil Pollution Damage



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1 Introduction

1.1 The subject and the objective of the paper

This thesis will primarily examine the International Convention on Civil Liability for Bunker Oil Damage – the Bunker Convention – that implements a liability and compensation regime for pollution damage caused by spills of oil carried as fuel in the ship's bunkers. Since the scope of this paper does not allow for an exhaustive presentation of the Convention, the following discussion will be limited to a three-fold objective.

Firstly, a presentation of the situation in place before the Bunker Convention comes into play is a necessary starting point to the understanding of the Convention itself. It will be thus important to recall the relevant legal instruments in place dealing with ship-source marine pollution, and to present the way national legislations have been dealing with bunker oil spills up until the entry into force of the Convention.

Secondly, the key characteristics of the Bunker Convention will be discussed and its practical consequences critically analysed.

Thirdly, the author will seek to determine whether the States Parties can, in the implementation legislation, provide for additional measures other than those set out in the Convention itself. In other words, this paper intends to ascertain whether the Bunker Convention brings about minimum or maximum standards to be followed, allowing or not, depending on the case, the States Parties to create tougher rules at national level.

The Bunker Convention will enter into force on 21 November 2008, more than six years after its adoption by the International Maritime Organization (IMO) in 23 March 2001.

To date, twenty two¹ countries have ratified the Convention, but it was Sierra Leone's accession on 21 November 2007 that guaranteed the meeting of the entry-into-force criteria,² at which point the combined gross tonnage of the ratifying states amounted 114,484,743 (15.86 % of the world's merchant shipping tonnage).³

1.2 Legal Sources

1.2.1 Conventions

The obvious primary source of law used for the preparation of this paper is the Bunker Convention as adopted by IMO in 2001.

Furthermore, because the Bunker Convention was modelled both on the Civil Liability Convention 1969/1992 (CLC Convention) and on the Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by sea of 1996 (HNS Convention), these will also be important sources of law as their similarities and differences will be identified and analysed below.

Regarding the question of limitation of liability, the author will make use of the International Convention on Limitation of Liability for Maritime Claims, 1976, and the Protocol of 1996 amending such convention.

¹ As of 31 July 2008, Bahamas, Bulgaria, Croatia, Cyprus, Estonia, Germany, Greece, Hungary, Jamaica, Latvia, Lithuania, Luxemburg, Marshall Islands, Norway, Poland, Samoa, Sierra Leone, Singapore, Slovenia, Spain, Tonga, United Kingdom.

The information is available at: <http://www.imo.org/includes/blastDataOnly.asp/data_id%3D22499/status-x.xls> (visited 11 August 2008).

² Bunker Convention, Article 14(1). See also Griggs, Patrick, "*Obstacles to Uniformity of Maritime Law*" (2002), at 172, for the reason why the Bunker Convention's threshold was set so high.

³ As of 30 June 2008, the combined gross tonnage of the 22 Contracting States corresponds to 28.83% of the world'sw tonnage. The information is available at: <<http://www.imo.org/>> (visited 11 August 2008).

1.2.2 National legislation

In Norway, domestic implementation of international conventions related to maritime law and shipping are included in the Norwegian Maritime Code. For that reason, this is an important source of law not only when it comes to understanding the national rules in place preceding the entry into force of the Bunker Convention, but also when it comes to ascertaining the national implementation of the Convention itself.

English law will be analysed in three situations. First, the rules applicable to bunker oil pollution from non-tankers preceding the entry into force of the Bunker Convention, which can be found in the Merchant Shipping Act of 1995, will be presented. Second, the rules on direct action will be discussed on the basis of the provisions of the Third Party (Rights against Insurers) Act of 1930. Third, the English implementation of the Bunker Convention will be ascertained on the basis of the Merchant Shipping (Oil Pollution) (Bunker Convention) Regulations 2006.

Regarding the U.S. legislation, the focus will be on the Oil Pollution Act of 1990 (OPA '90), in that a comparative analysis will be drawn between the provisions of this act and the provisions of the international liability and compensation conventions. Besides that, the OPA '90 regulates pollution damage caused by bunker oil spill in the U.S. territory, reason for which it is indispensable for the elaboration of this paper.

1.2.3 Preparatory works

The Bunker Convention was adopted by the International Maritime Organization (IMO). It is thus not only appropriate but also necessary to consult and analyse the discussions undertaken at the IMO's headquarters in London leading to the passing of the Convention. This will be ascertained through the reading of the reports of the 77th, 78th, 79th, 80th, 81st, 82nd, and 83rd sessions of the IMO's Legal Committee.

The Norwegian implementation of the Bunker Convention will be ascertained through a look at the preparatory works (Ot.prp nr. 77 (2006-2007)), which explain the background and propose changes to domestic law, in order to comply with the obligations undertaken with the ratification of the Convention.

1.2.4 Literature

The author availed herself of a number of books for the preparation of this paper, among which two deserve special mention: (a) “Compulsory Insurance and Compensation for Bunker Oil Pollution Damage” by Ling Zhu, dealing specifically with the Bunker Convention; and (b) “Shipping and the Environment” by Colin De la Rue and Charles Anderson, dealing with the various aspects of oil pollution as such.

Among the legal articles used, three have particularly been important sources of information since they specifically deal with the Bunker Convention: (a) “Liability and Compensation for Bunker Pollution” by Chao Wu; (b) “International Convention on Civil Liability for Bunker Oil Pollution Damage” by Patrick Griggs; and (c) “The Bunker Pollution Convention 2001: completing and harmonizing the liability regime for oil pollution from ships?” by Michael Tsimplis.

1.2.5 Courts decisions

Since the Bunker Convention has not yet come into force, it is obvious that no specific court decision on the subject can be found. However, since the Bunker Convention was modelled on the CLC Convention – and because court decisions help with the understanding of how the provisions of the Convention have been interpreted by national courts – the author will discuss one court decision related to tanker oil pollution: the Swedish Supreme Court’s ND 1983.1 SSC TSEISIS.

In addition, two English cases will be discussed: the “*Aegean Sea case*” regarding the admissibility of limitation of liability for oil pollution claims under the International Convention on Limitation of Liability for Maritime Claims (LLMC 1976); and the “*Fanti case*” regarding the validity of the “pay-to-be-paid” clause in the light of The Third-Party (Rights against Insurers) Act of 1930.

1.3 The structure of the paper

In order to achieve the three-fold objective of this paper, it is worthy to commence by providing an overview of the legal framework in place developed as a response to oil pollution incidents that have taken place over the years (Chapter 2). Additionally, the situation in place before the entry into force of the Bunker Convention will be discussed and three practical examples will be given (Chapter 3). Following, the key features of the Bunker Convention will be critically analysed, what will also involve a comparison to the current liability regime applicable to oil pollution from tankers (Chapter 4). Further, closer attention will be drawn to possible additional measures to be taken by the ratifying States Parties when implementing the legislation at national level, namely: (a) whether or not the concept of strict liability can be extended to a wider range of persons than those charged with liability under the Convention (item 5.1); (b) whether or not compulsory insurance can be required of persons not originally required to take out insurance under the Convention (item 5.2); and (c) whether or not direct action can be permitted for any insurance that exists beyond the LLMC 1976 limits (item 5.3). Finally, the author will try to balance the advantages and disadvantages of the Bunker Convention in order to ascertain whether such piece of legislation is destined for success or failure (Chapter 6).

2 Ship-Source Marine Pollution: Liability and Compensation Systems

2.1 Introduction

Preceding the explanation of the different national regimes dealing with bunker oil pollution prior to the adoption of the Bunker Convention, it appears to be useful to recall how the development of responses undertaken in order to prevent, minimise, or compensate for damage caused by oil pollution has progressed in the international scenario. This discussion is helpful for a better understanding of the context in which the Bunker Convention was conceived.

The development of responses undertaken in order to tackle the effects of ship-source marine pollution has invariably followed the occurrence of major marine disasters involving the spill of large quantities of oil in the marine environment – most of the times associated with tankers carrying oil as cargo - what explains why the Bunker Convention discussions were put aside until 1996.

It is noted that two different liability and compensation regimes for oil pollution damage were triggered following the occurrence of two marine disasters involving the spill of crude oil from tankers: the *United States v. the Rest*.⁴

In March 1967, the *Torrey Canyon*⁵ ran aground off England spilling 120,000 tons of crude oil into the sea, what turned out to be the major oil spill in history up to that time. This incident culminated in the adoption of the CLC Convention in 1969 and the Fund

⁴ Gold, Edgar, *Liability and Compensation for Ship-Source Marine Pollution: The International System* (1999/2000), at 32.

⁵ Liberian registered tanker owned by a subsidiary of Union Oil Company, built in the U.S. in 1959 with a cargo capacity for 60,000 tons but later enlarged to 120,000 tons capacity.

Convention in 1971 by the International Maritime Organization (IMO). In March 1989, a new oil pollution disaster took place when the oil tanker *Exxon Valdez*⁶ ran aground in Alaska (U.S.) spilling approximately 40,000 tons of crude oil into the sea, causing serious environmental damage. The U.S.' response to the *Exxon Valdez* incident was the establishment of the Oil Pollution Act of 1990 (OPA '90).

Accordingly, in the present Chapter, the author will display the liability and compensation systems conceived in order to cope with damages occurred in connection with the carriage of pollutant cargo substances. First, a short presentation of the IMO's fundamental role in addressing marine pollution problems will be given. In this context, of all the instruments put in place by the IMO, three deserve special attention: the already mentioned CLC Convention, which leads us to a discussion on the Fund Convention, and the HNS Convention. This presentation is a necessary starting point to the discussion that will be carried out under Chapter 4, not only because the Bunker Convention was modelled⁷ on the CLC and the HNS Conventions, but also because all of them together complete the IMO's legal framework addressing ship-source marine pollution. And, second, the U.S.' Oil Pollution Act of 1990 and its main features will be analysed.

2.2 The International Maritime Organization and its Conventions

The International Maritime Organization (IMO), formerly known as Inter-Governmental Maritime Consultative Organization (IMCO), was established by the Convention on the Intergovernmental Maritime Consultative Organization adopted in 1948 and entered into force in 1958. The IMO is one of United Nations' specialized agencies, being responsible for improving maritime safety and preventing pollution from ships.

⁶ American registered tanker owned by the Exxon Corporation, built in the U.S. and delivered in 1986, with a cargo capacity for 150,000 tons.

⁷ Two alternatives for an instrument on liability for damage caused by bunker oil spills were contemplated during the discussions leading to the adoption of the Bunker Convention: one alternative involved a free-standing convention and the second alternative involved a protocol to the CLC Convention. See IMO LEG 77/6/2, for advantages and disadvantages of each one of these alternatives.

The *Torrey Canyon* incident in 1967 delineated once and for all the IMO's role as an active participant in the prevention, control and reduction of marine pollution. After an extraordinary session of the IMCO Council, requested by the Government of the United Kingdom, a plan was developed to tackle the disastrous consequences of the *Torrey Canyon* incident.⁸ Among other measures, in 1969, the IMO adopted two conventions as an immediate response to the accident: the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (delimiting the coastal states' entitlement to take measures of intervention in cases of maritime accidents) and the International Convention on Civil Liability for Oil Pollution Damage (governing the strict liability of shipowners for oil pollution damage). Two years later, the Fund Convention was adopted, creating a second tier of compensation to the CLC Convention.

Gradually, the IMO developed a comprehensive set of measures, set out not only in the form of conventions, but also comprising resolutions, recommendations, guidelines, non-binding codes, all of which create the framework enabling oil pollution issues to be promptly addressed.

The nature of the measures designed by the IMO in order to address marine pollution issues is threefold: first, preventive measures (rules designed to avoid accidents causing pollution); second, measures to control or minimise the effects of oil pollution; and, third, measures dealing with liability and compensation for damage as a result of pollution.⁹

⁸ Mensah, Thomas, *Prevention of Marine Pollution: The Contribution of IMO* (2007), at 44.

⁹ See Falkanger, T., Bull, H.J. & Brautaset, L., *Scandinavian maritime law: the Norwegian perspective* (2004), at 195, referring to rules both at national and international level, thus also applicable to the IMO's rules.

2.2.1 *The International Convention on Civil Liability for Oil Pollution Damage (CLC Convention)*

As already mentioned, the CLC Convention was designed as an immediate response to the *Torrey Canyon* disaster, and for that reason it deals with pollution caused by a certain type of oil carried on a certain type of vessel, as will be explained below. Up until then, liability schemes were, when in existence, regulated at national level. It became evident then that the national regulations available were not sufficient to warrant adequate compensation to parties suffering damage caused by oil pollution. That, associated with the urge to adopt uniform regulations and procedures defining new standards of responsibility, led to the adoption of the CLC Convention in 1969 (which entered into force in June 1975).

The occurrence of a new disaster in March 1978¹⁰ caused the CLC Convention to be revised and modified through a Protocol of 1984. The limits of liability set out in the CLC Convention 1969 proved to be too low to warrant adequate compensation for victims of major oil spills. For that reason, the 1984 Protocol established higher limitation amounts. Moreover, the adoption of the 1984 Protocol was an attempt to get the U.S. to ratify the Convention. The U.S. never ratified the 1984 Protocol, that being the main reason why its entry-into-force criteria could not be met.

In 1992, a new Protocol was adopted, this time not only changing the entry-into force criteria,¹¹ but also widening both the functional and the geographical scope of application of the Convention. The 1992 Protocol came into force in May 1996.

¹⁰ The Liberian-registered tanker *Amoco Cadiz* ran aground off the coast of Brittany (France) releasing its entire cargo of 223,000 tons of crude oil and 4,000 tons of bunker fuel, and resulting in one of the largest oil spills ever recorded.

¹¹ The entry-into-force requirement was changed by reducing from six to four the number of large tanker-owning countries needed for the Protocol to come into force.

Later, in October 2000, the limitation amounts were again increased by a decision of the IMO Legal Committee which came into force on 1 November 2003.

The CLC Convention has its functional scope of application restricted to damage caused by a certain type of oil carried by a certain type of vessel. The type of oil is defined to be any persistent hydrocarbon mineral oil, what includes crude oil, fuel oil, heavy diesel oil, lubricating oil,¹² whereas the type of ship is defined to be any vessel constructed or adapted to carry oil in bulk as cargo, provided that it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.¹³ That basically means that the CLC Convention is directed to pollution from tankers, irrespective of whether the oil spilled was being carried in bulk as cargo or in the bunkers as fuel.

Concerning the geographical scope of application,¹⁴ the CLC Convention shall be applied to pollution damage caused on the territory of a State Party, including its territorial sea and its exclusive economic zone, and to preventive measures¹⁵ taken in order to prevent or minimise such damage. In other words, the CLC Convention will be applicable in so far as pollution damage has been suffered within these jurisdiction zones.

The key characteristics of the CLC Convention are: strict liability imposed on the registered owner of the ship coupled with limitation of liability, channelling of liability, compulsory insurance, and direct action against the insurer. Further details on these features will be elaborated below when a comparison will be drawn with the provisions of the Bunker Convention.

¹² CLC 1992, Article I (5).

¹³ CLC 1992, Article I (1).

¹⁴ CLC 1992, Article II.

¹⁵ CLC 1992, Article I (7)

2.2.2 The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention)

It is not possible to discuss the CLC Convention without referring to its supplementary Convention adopted in 1971 – the Fund Convention – which entered into force in 1978. The Fund Convention created a compensation, rather than a liability, regime, and represented a second tier of compensation.

The Fund was established based on two main reasons. First, it was a common understanding that liability should not be borne exclusively by the shipowners alone but it should be spread to the cargo interest i.e. oil companies. In fact, payments of compensation under the Fund Convention are financed by contributions levied from entities in the Member States which receive more than 150,000 tons of crude or heavy fuel oil in a year after sea transport.¹⁶ Second, it was necessary to secure compensation to those suffering from damage from oil pollution in cases where the CLC coverage was insufficient or even unobtainable.¹⁷

Following the CLC Convention revisions, the Fund Convention 1971 was also revised through protocols in 1984 (which never entered into force), and in 1992 (which entered into force in 1996). Additionally, as already mentioned above in relation to the CLC Convention, in October 2000 a decision by the IMO Legal Committee increased even more the limitation amounts in comparison to the amounts available under the 1992 Protocol.

The third tier of compensation was established in May 2003 (entered into force in March 2005) by the Supplementary Fund Protocol 2003, which increased significantly the amounts of compensation in the States who opt to ratify it.

¹⁶ The International Oil Pollution Compensation Fund (IOPC) was established in 1978 to manage the compensation regime under the Fund Convention.

¹⁷ Fund Convention 1971, Article 4.

2.2.3 *The International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention)*

The discussions pointing to the need for an international liability regime regulating damage resulting from carriage by sea of hazardous substances emerged parallelly to the discussions leading to the CLC and Fund Conventions, but were not carried on at that instance. A first draft Convention returned to the IMO's agenda only in 1984, but it again did not succeed.¹⁸ It was only on 3 May 1996 that the HNS Convention, one of IMO's liability and compensation conventions, was adopted with the intent to secure compensation to victims of incidents occurred in connection with the carriage by sea of hazardous and noxious substances. After twelve years from its adoption,¹⁹ the entry-into-force criteria²⁰ has not yet been met, since only 11 states²¹ representing 3.76% of the world's tonnage have ratified it.

It is important to mention that the HNS Convention, like the Bunker Convention, was modelled on the CLC Convention. However, as opposed to the Bunker Convention, the HNS Convention does count on a second tier compensation system, that being the reason why it was also modelled on the Fund Convention. This second tier of compensation is financed by contributions from the cargo interest, i.e. receivers of hazardous and noxious in

¹⁸ Göransson, Magnus, *The HNS Convention* (1997), pp. 1-2.

¹⁹ It is outside the scope of this paper to discuss the reasons why, even after twelve years from its adoption, the HNS Convention has still not come into force. The subject was brought back into IMO's Legal Committee work programme, at its 80th session, when it was agreed that a Corresponding Group would prepare the ground for discussions regarding monitoring the implementation of the HNS Convention. See IMO LEG 80/10/2 and LEG 80/10/3.

²⁰ HNS Convention, Article 46.

²¹ Angola, Cyprus, Lithuania, Morocco, Russia, Saint Kitts and Nevis, Samoa, Sierra Leone, Slovenia, Syrian Arab Republic, and Tonga. The information is available at:

<http://www.imo.org/includes/blastDataOnly.asp/data_id%3D22499/status-x.xls> (visited 11 August 2008).

the States Parties. The Fund will be liable when the compensation provided under the first tier is inadequate or unobtainable.²²

The key characteristics of the HNS Convention follow the main features of the CLC Convention. The author will revert to these elements below, to the extent necessary, when drawing a comparison among the Bunker Convention, the CLC Convention and the HNS Convention.

2.3 The United States' regime: the Oil Pollution Act of 1990

Despite the efforts of the marine community to have the U.S.' adherence to the international liability and compensation regime created by the IMO, especially with the passing of the 1984 Protocols, the U.S. opted to take a unilateral approach by enacting the Oil Pollution Act on 18 August 1990 (OPA '90).²³

Before the enactment of the OPA '90, the U.S., like some other countries, relied on its national legislation to regulate oil spill liability and compensation.²⁴ Limitation of liability related to oil pollution damage was also regulated by national law.²⁵ However, the regime in place was far from being adequate. For example, although the liability regime in place before the OPA '90 was to a great extent equivalent to the CLC requirements, it was only applicable to damages caused to the U.S. Government, but did not cover liability to others damaged by pollution.²⁶ Ordinary claimants would still be required to prove the existence

²² HNS Convention, Article 14(1).

²³ See Kim, Inho, *A comparison between the international and US regimes regulating oil pollution liability and compensation* (2003), at 269-271, for the reasons behind the U.S.' decision to choose a different approach.

²⁴ Consisted of 4 federal statutes: the Federal Water Pollution Act, the Outer Continental Shelf Lands Act, the Deepwater Port Act, and the Trans-Alaska Pipeline Authorization Act.

²⁵ The Limitation of Shipowners' Liability Act of 1851.

²⁶ Gold, Edgar, *supra*, note 4, at 34.

of fault on the part of the owner of the ship. Such regime called for modifications which only came about following the *Exxon Valdez* incident.

The main differences between the international regime and the OPA '90 can be found on the two following subjects: first, the scope of the definition of pollution damage; and, second, the liability limits.²⁷ A further distinction is found on the subjects on whom liability is imposed.

First, the scope of recoverable damages under the OPA '90 includes damage to natural resources and damage to real or personal property. It also includes economic losses associated with loss of natural resources, real property, or personal property, loss of subsistence use, loss of revenues which are recoverable by the federal or state governments, and damages for net costs of providing increased and additional public services connected to the spill.²⁸ It is necessary to bear in mind, however, that although the scope of recoverable damages under OPA '90 may be more far-reaching than the one provided by the CLC Convention, this does not mean that the final outcome will be necessarily different. As the definition of "pollution damage" provided by the CLC Convention gives only limited guidance on the types of claims that are recoverable,²⁹ the interpretation will be to a great extent left to the national courts applying the Convention, which will invariably lead to the same results intended to be achieved by the OPA '90.³⁰

²⁷ Kim, Inho, *supra*, note 23, at 266.

²⁸ U.S. OPA '90, Section 1002(b).

²⁹ De la Rue, Colin & Anderson, Charles, *Shipping and the Environment* (1998), at 84.

³⁰ For example, the IOPC Fund policy admits claims for pure economic loss: loss of earnings caused by oil pollution suffered by persons whose property has not been polluted, even though this has not been expressly mentioned in the definition of damage. This information is available at:

<<http://www.iopcfund.org/npdf/claimsman-en.pdf>> (visited 25 August 2008).

Second, the OPA '90 establishes considerably higher liability limits for the responsible parties, when compared to the limits provided by the CLC and Fund Conventions. In addition, these limits are relatively easily breakable.³¹ In this context, it should be noted that the OPA '90 does not preempt state legislation, allowing thus the individual states to implement their own liability laws,³² which can provide for higher limitation amounts, or even provide for unlimited liability.

Third, another characteristic of the OPA '90 is that it imposes strict liability not only on the shipowner but also on the operator and the demise charterer of the ship.³³ This characteristic is particularly interesting because, as we will see below, the Bunker Convention, following the U.S. example, also provides for strict liability for other parties than the registered owner of the ship.

Last but not least, it is necessary to point out that the liability and compensation regime established by the OPA '90 regulates not only damage caused by oil pollution from tankers, as it is the case of the CLC Convention, but also covers damage caused by bunker oil pollution from any kind of sea going vessel.³⁴

³¹ U.S. OPA '90, Section 1004(c): liability is unlimited, for example, when the spill occurs due to gross negligence, wilful misconduct, or violation of any federal safety, construction, or operating or safety regulation.

³² Zimmermann, Jaelyn, *Inadequacies of the Oil Pollution Act of 1990: Why the United States should adopt the Convention on Civil Liability* (1999), at 1521.

³³ U.S. OPA '90, Section 1001(26).

³⁴ See OPA '90, Section 1001: "Definitions. [...] (23) "oil" means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section; 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act; [...] and; (37) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel."

3 The national systems dealing with bunker oil pollution

Prior to the discussion on the key characteristics of the Bunker Convention, which will be carried out under Chapter 4 below, one important question arises: how has liability and compensation for pollution caused by bunker oil spills been regulated before the adoption and entry into force of the Bunker Convention? The answer to that question is: such liability and compensation has been regulated, when regulated at all, on a non-uniform basis by different regimes in existence in national legislation of different countries.

These regimes can be categorised in three different types: (a) the traditional jurisprudence; (b) the legislation extending some aspects of the CLC Convention to bunker spills; and (c) the legislation actually differing from the CLC Convention liability system.³⁵

In the first situation, where traditional jurisprudence regulates liability and compensation in the event of damage caused by fuel oil spill in the absence of a legal provision doing so, liability is normally established on the basis of negligence. Liability can be established based on a blameful conduct of the shipowner, who may also be vicariously liable for the torts of his or her servants. Liability can also be established based on the fault of any other person whose acts or omissions caused the bunker oil spill.

Such solution is obviously not satisfactory since it would not be reasonable to expect that victims with limited resources would have to prove that the spill of fuel oil resulted from someone's faulty conduct. Besides that, questions like limitation of liability and jurisdiction are not properly regulated leading to uncertainty as to the application of the law.

³⁵ De la Rue, Colin & Anderson, Charles, *supra*, note 29, pp. 267-268.

A sub-division of this first approach would include countries which have in fact enacted relevant legislation to regulate liability for bunker oil pollution damage but such liability is dependent on the existence of a negligent conduct by the shipowner. That is the situation in place in Australia: no compensation is to be paid if the shipowner is not at fault. Additionally, Australia has ratified the International Convention on Limitation of Liability for Maritime Claims 1976 (LLMC) and the 1996 Protocol,³⁶ and, in the event of fault, the shipowner will be able to limit his or her liability to the amounts prescribed in that convention. It is noteworthy that although Australia took a proactive position during the discussions leading to the adoption of the Bunker Convention, it has not to date ratified it. Nevertheless works are in progress in order to establish the necessary regime to implement the Convention.³⁷

Some countries decided to address bunker oil pollution matters by making use of the second approach mentioned above, i.e. extending the liability regime applicable to oil pollution from tankers in accordance with the CLC Convention to bunker oil pollution with the necessary adjustments. Such solution was adopted by the Nordic countries, and it seems appropriate to analyse how this system works in practice. Norway is taken as the example.

Liability for damage from oil pollution is regulated under Chapter 10 of the Norwegian Maritime Code of 1994 (NMC) which implements at national level the CLC and Fund Conventions rules, including provisions for i.a. strict liability of the registered owner of the ship and exemptions from liability,³⁸ limitation of liability,³⁹ insurance obligation,⁴⁰ and direct action against the insurer.⁴¹ Such rules are initially intended to address liability for

³⁶ Australia's Limitation of Liability Act of 1989.

³⁷ See <<http://www.aph.gov.au/library/Pubs/bd/2007-08/08bd100.htm#Passage>> (visited on 14 July 2008) concerning the status of the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008.

³⁸ NMC, Section 191 and 192.

³⁹ NMC, Section 193.

⁴⁰ NMC, Section 197.

⁴¹ NMC, Section 200.

damage from oil pollution from tankers. However, tucked away in the second last section of Chapter 10 is a provision (Section 208) addressing pollution caused by oil escaping or being discharged from other ships than the ones mentioned in Section 191,⁴² in that it extends the imposition of strict liability to damage caused by oil used or intended to be used for the operation or propulsion of the ship. It is important to point out though that the convention-based rules (channelling of liability, compulsory insurance and direct action) are not applicable to bunker oil pollution from non-tankers. In addition, the limits of liability are the ones provided in Chapter 9 of the NMC, commonly known as “global limitation”, calculated in accordance to the LLMC 1976, as amended. The Norwegian implementation of the Bunker Convention will be carried out through an amendment to the Norwegian Maritime Code with the introduction of Sections 183 to 190.⁴³

The solution is similar in the U.K. where the Merchant Shipping Act of 1995 imposes on the shipowner strict liability for damages caused by oil pollution from ships other than tankers,⁴⁴ what corresponds to the situations involving bunker oil pollution. Whereas the channelling provisions applicable to oil pollution from tankers is also extended to oil pollution from other vessels,⁴⁵ the limitation amounts,⁴⁶ the requirement for insurance,⁴⁷ and the right of direct action⁴⁸ are not. The English implementation⁴⁹ of the Bunker Convention will be carried out through an amendment to the Merchant Shipping Act 1995

⁴² NMC, Section 191, third paragraph: “A ship which can carry oil and other cargo shall nevertheless in this context be regarded as a ship when it is in fact carrying oil as cargo in bulk, and during subsequent voyages unless it is shown that no residues of such oil remain on board”.

⁴³ See Ot.prp. nr. 77 (2006-2007)

⁴⁴ U.K.’s M.S.A. 1995, Section 154.

⁴⁵ U.K.’s M.S.A. 1995, Section 156.

⁴⁶ U.K.’s M.S.A. 1995, Section 157.

⁴⁷ U.K.’s M.S.A. 1995, Section 163.

⁴⁸ U.K.’s M.S.A. 1995, Section 165.

⁴⁹ Following the European Union Council Decision 2002/726/EC which authorised the member States to sign, ratify or accede to the Bunker Convention.

by the Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006 with the introduction of Section 153A.⁵⁰

Finally, following the third category mentioned above, some countries opted to tackle bunker oil pollution issues by deviating from the rules adopted in the CLC Convention, creating a tougher liability and compensation regime than the one introduced by the international regime. The classic example of a country falling under this category is the United States which enacted the OPA '90, as discussed at length above.

⁵⁰ See Tsimplis, Michael, *Marine pollution from shipping activities* (2008), at 123.

4 The Bunker Convention: Main elements

4.1 Legislative background

The CLC and the Fund Conventions have, for the past 30 years, been the core of the international system of liability and compensation for oil pollution from ships. However, their scope of application is restricted, not covering all types of pollution arising out of ships, such as spills of hazardous and noxious substances and bunker oil spills from vessels other than tankers. International regulation for pollution damage caused by incidents connected with the carriage of hazardous and noxious substances came about in 1996 with the adoption of the HNS Convention, although it has not yet come into force, as discussed above. In relation to pollution damage caused by fuel spill from ships other than tankers, the last gap is now being filled with the adoption and entry into force of the Bunker Convention.

The understanding that there was a need for a liability regime for bunker oil pollution dates back to 1969 at the time when the CLC Convention itself was being discussed.⁵¹ During the discussions on the 1992 Protocol to the CLC Convention 1969 the idea was again debated. However, in order not to delay the good course of the liability regime necessary to address the *Torrent Canyon* incident, bunker oil spills were intentionally left outside the scope of the CLC Convention.⁵²

⁵¹ See Griggs, Patrick, *International Convention on Civil Liability for Bunker Oil Pollution Damage; 2001* (2001), at 1. See also Wu, Chao, *Liability and Compensation for Bunker Pollution* (2002), at 554, making reference to the IMO LEG/CONF/C.2/WP7.

⁵² This information is available at: < http://www.imo.org/Newsroom/contents.asp?topic_id=67&doc_id=457> (visited 10 August 2008).

In contrast to what most might think, and although oil spills originating from tankers invariably catches media attention, it is a common misconception that most oil spills actually originate from tankers. Statistics and studies, in fact, indicate otherwise.⁵³ Besides that, many non-tankers have bunkers capacity in excess of some tankers, and bunker fuels are deemed to be more costly to deal with than many crude oil cargo.⁵⁴

For example, in November 1997, the wood chip carrier *M/V Kure* had its fuel oil tank ruptured after colliding with a loading dock in Humboldt Bay, California, spilling several thousand gallons of bunker fuel. At the time, it was recorded as the most expensive oil spill in terms of dollars per barrel.⁵⁵

The issue was thus brought back to the table by Australia in 1994 at the 38th session of the IMO's Marine Environment Protection Committee, which referred the question to the IMO Legal Committee. Following, both during the 73rd and 74th sessions of the Legal Committee, the need for a system regulating compensation to those suffering damage from a pollution incident involving oil from the ship's bunkers was not only confirmed, but also given high priority. It was only on 23 March 2001 that the final text of the Bunker Convention was agreed, adopted and opened for signature.

4.2 Scope of application

Oil pollution is defined in the Bunker Convention as “loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship” and “the costs of preventive measures and further loss or damage caused by preventive measures”.⁵⁶

⁵³ UK P&I Club Analysis of Major Claims, 1993, at 33: “It is also significant, however, that half the total number of pollution claims arose from incidents involving ships not carrying oil cargo.”

⁵⁴ See IMO LEG 78/5/1.

⁵⁵ De la Rue, Colin & Anderson, Charles, *supra*, note 29, pp. 263-264.

⁵⁶ Bunker Convention, Article 1(9).

Following this definition, it is in relation to their functional scope of application that the Bunker Convention and the CLC Convention notably differs. The Bunker Convention is designed to provide compensation for damage caused by incidents in connection with escape or discharge of bunker⁵⁷ oil from ships. As ship is defined⁵⁸ to be any seagoing vessel and seaborne craft, of any type whatsoever, it is the Bunker Convention itself that provides for the exclusions⁵⁹ to the definition, among which it is extracted that the Bunker Convention shall not apply to pollution damage as defined in the CLC Convention. In other words, these two conventions are mutually exclusive. Other exclusions relate to warships, naval auxiliary or other ships owned or operated by the State, provided they are being used on non-commercial service.

The geographical scope of application⁶⁰ of the Bunker Convention covers pollution damage caused in the territory (including territorial sea) of a State Party, the exclusive economic zone of a State Party, and includes preventive measures, wherever taken, to prevent or minimise such damage. It follows from a comparison with the correspondent provision of the CLC Convention that their geographical scope of application is identical, although it should be noted that the introduction of the exclusive economic zone in the scope of application of the CLC Convention was only achieved by the 1992 Protocol.⁶¹

⁵⁷ Bunker Convention, Article 1(5).

⁵⁸ Bunker Convention, Article 1(1).

⁵⁹ Bunker Convention, Article 4.

⁶⁰ Bunker Convention, Article 2.

⁶¹ See also HNS Convention, Article 3(c): The geographical scope of application of the HNS Convention differs from the one provided by the CLC Convention and the Bunker Convention in that it also includes damage caused outside the territory of any State, including its territorial sea, whenever such damage has been caused by a substance carried on board a ship registered in a State Party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party.

A closer look at the functional and geographical scopes of application of the Bunker Convention in combination with the functional and geographical scopes of application of the CLC Convention leads us to the following conclusion: if bunker oil is spilled either from a laden tanker in a State that is not a party to any of the CLC Conventions or from an unladen tanker in a State that is party only to the CLC 1969 (and not to the 1992 Protocol), neither the CLC Convention nor the Bunker Convention will apply.

In relation to the first situation, where a laden tanker spills bunker oil in a State that has not ratified any of the CLC Conventions, but has ratified the Bunker Convention, none of the conventions will be applicable for two reasons. Obviously, the CLC Convention is not applicable because such State is not a Party to it. However, the Bunker Convention is not applicable, even though such State is a party to it, because the Bunker Convention itself excludes pollution damage as defined in the CLC Convention, whether or not compensation is payable under the CLC Convention.

In relation to the second situation, where an unladen tanker spills bunker oil in a State that has only ratified the CLC Convention 1969 (but not the 1992 Protocol), and has also ratified the Bunker Convention, none of the conventions will be applicable for the following reasons. The Bunker Convention is not applicable for the same reason explained in the previous paragraph. The CLC Convention 1969 is not applicable because the definition of ship thereof only comprises vessels actually carrying oil in bulk as cargo, which is the opposite situation of an unladen tanker.

Consequently, there is a gap that could have been left deliberately in order to encourage the States Parties to the CLC 1969 to become parties to the CLC 1992.⁶²

⁶² Wu, Chao, *Liability and Compensation for Bunker Pollution* (2002), at 557.

But does that mean that the Bunker Convention will never apply to tankers, defined in the CLC Convention as a ship that is “constructed or adapted for the carriage of oil in bulk as cargo”? As seen above, the definition of ship was widened by the 1992 Protocol in order to include spills from tankers during “any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard”, i.e. tankers in ballast. This definition could be better illustrated with the following example: an oil-tanker departs from Norway to the U.S. carrying oil in bulk, it discharges the oil in the U.S., and returns to Norway in ballast. Up to that moment, if oil had been spilled on the voyage back to Norway, the CLC Convention 1992 would apply, unless it could be proved that there was no oil residue from the previous transport. But one could envisage a situation where this same tanker, after returning to Norway, is laid-up for a period of six months. After these six months, it starts on a new voyage to a port in order to load crude oil again, but before reaching that port, it runs aground, and bunker oil is spilled in the ocean. In this case, it appears that the CLC Convention will not be applicable because this new voyage cannot be considered a subsequent voyage following the carriage of oil from a previous transport. Consequently, the Bunker Convention can come into play, regulating thus liability and compensation for bunker oil spilled from a tanker.

Finally, it is important to draw attention to oil spills taking place during bunkering operations when there are two vessels involved: one supplying the bunkers and one receiving them. It is necessary thus to investigate from which vessel the spill originated. The vessel supplying the bunkers is usually a vessel falling under the definition provided by the CLC Convention (1969 or 1992). Consequently, if the spill originates from this type of vessel, and the damage was caused in a CLC state, then the CLC and the Fund Conventions will be applicable. On the other hand, if the spill originates from the vessel receiving the bunkers, which can be a cargo vessel or a fishing vessel for example, and the damage was caused in a State Party to the Bunker Convention, this Convention will apply. Lastly, it should be pointed out that irrespective of which of the parties will be subject to

strict liability, depending on the two situations above, his or her right of recourse will not be prejudiced in relation to the other party whose blameful act resulted in the spill.⁶³

One could envisage, for example, a hypothetical situation where the spill does not originate from any of these two vessels, but resulted from a rupture of the hose used for the bunker transfer. Which party should then be subject to strict liability? As pollution damage is defined as the loss or damage resulting from the escape or discharge *from the ship*,⁶⁴ one would have to investigate whether such hose would fall into the definition of ship provided by the Conventions. The definitions of ship under both Conventions have been provided above, and, strictly speaking, they do not seem to encompass such structures designed to convey liquid, in this case fuel oil. Obviously, such solution is far from satisfactory, and it seems that the hose conveying bunker oil from one ship to another should be considered an inextricable part of the ship: one of the ship's equipments. As discussed above, strict liability will be imposed on the owner of the vessel from which the spill originated. Following this same line of thinking, and because the hose should be considered one of the ship's equipments, strict liability should be imposed on the owner of the hose. This will then determine which one of the Conventions will be applicable.

4.3 Key features

4.3.1 *Strict liability*

The general rule under tort law is that liability is based on the presence of fault. The main purpose of tort law is to provide compensation for harm, and such compensation can be obtained as long as a blameworthy conduct can be attributed to the tortfeasor, whose act or omission violates a duty of care, inflicting harm on the injured party. Strict liability is, as a starting point, an exception to the rule. The development of the strict liability concept is usually associated with the understanding that those engaged in dangerous activities should

⁶³ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage* (2007), at 23.

⁶⁴ CLC Convention 1992, Article I (6), and Bunker Convention, Article 1(9).

bear the risks arising out of such activities, simply because these are the persons economically benefiting from them.

In this context, strict liability was one of the novelties introduced to the shipping industry in 1969 with the advent of a new international liability and compensation regime, the CLC and Fund Conventions. It became obvious then that a liability and compensation system relying on the presence of fault was far from satisfactory to guarantee prompt and effective compensation to oil pollution victims. Strict liability has, since then, become the rule, and not an exception to the rule, when it comes to oil pollution liability, and was, not differently, maintained by the drafters of the Bunker Convention.⁶⁵

Hence, following the corresponding concept in the CLC Convention, the Bunker Convention also provides that the shipowner is strictly liable for pollution damage caused by bunker oil spill from his or her ship. Here again, the shipowner will be liable regardless of fault, except when the incident is connected to certain exonerating circumstances:⁶⁶ (a) damage resulted from an act of war, hostilities, civil war, insurrection or natural phenomenon of an exceptional, inevitable and irresistible character; or (b) damage wholly caused by an act or omission done with the intent to cause damage by a third party; or (c) damage wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.⁶⁷

⁶⁵ Gauci, Gotthard, *Protection of the Marine Environment through the International Ship-Source Oil Pollution Compensation Regimes* (1999), at 30.

⁶⁶ Bunker Convention, Article 3(3).

⁶⁷ The HNS Convention, Article 7(2), provides the shipowner with an additional defence in case of failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped.

Although these exonerating circumstances were also modelled on the CLC Convention, one practical difference exists between the two systems. Under the international liability and compensation regime, the International Compensation Fund (IOPCF) will provide compensation when the injured party was not able to obtain it “because no liability for damages arises under the 1992 Liability Convention”.⁶⁸ This applies to all the defences mentioned above, with the exception of pollution damage resulted from an act of war, hostilities, civil war or insurrection.⁶⁹ In contrast, since the Bunker Convention does not count on a second tier of compensation, the injured parties will have to seek compensation from other liable parties than the shipowner.

It is also important to draw attention to the fact that the second and the third exceptions to liability are accompanied by the word “wholly”, while the first exception is not. This seems to indicate that the scope of applicability of the war exception is broader, it being enough that this is the dominant or closest cause of the damage.⁷⁰

Moreover, it has been suggested that the war exception is rather undesirable, in that requiring the shipowner to subscribe for the relevant insurance cover would be more adequate than requiring the injured party to recover damages from an entity engaged in belligerent actions.⁷¹

One contemporary question is whether “acts of terrorism” could be deemed as an exonerating circumstance falling under one of the exceptions above. First of all, it should be investigated whether it could fall under the war exception. Because such exception is

⁶⁸ Fund Convention 1992, Article 4(1)(a).

⁶⁹ Fund Convention 1992, Article 4(2)(a).

⁷⁰ See Hoftvedt, Jannecke, *Bunkersoljekonvensjonen: En sammenligning med sjøloven § 208* (2002), pp. 30-31, for the possible interpretations of the expression “wholly caused”.

⁷¹ Gauci, Gotthard, *supra*, note 65, at 32.

consistent with the exclusion clause from insurance covers against marine risks,⁷² assistance can be sought in the relevant Marine Insurance legal theory, so an interpretation by analogy can be achieved. Accordingly, taking the Norwegian legislation as an example, it is noted that even before the expression “acts of terrorism” was included in the Norwegian Marine Insurance Plan (NMIP),⁷³ it has been considered either as part of the expression “war or war-like conditions”, or as part of the term “sabotage”, or as part of the expression “and the like”.⁷⁴ Following that, and strictly speaking, it appears that the expression “act of war” provided by the Bunker Convention is not as far-reaching as the related expressions provided by the NMIP. However, the second exonerating circumstance (b) mentioned above seems to encompass damages resulted from terrorism, in that under an “act of terrorism” the damage can be deemed to have been caused by an act of a third party done with the intent to cause damage.⁷⁵

Determining whether damage caused by terrorism would fall under the first or the second exonerating circumstance is only useful within the scope of the CLC Convention to the extent that the IOPF will provide compensation for claims connected to the second defence, but not to claims connected to the first. In the Bunker Convention, the discussion is merely academic.

The practical application of such exceptions can be better understood through a look at court decisions borrowed from tanker oil pollution cases within the scope of application of the CLC Convention, among which one specific decision of the Swedish Supreme Court can be mentioned. In ND 1983.1 SSC TSEISIS, the Russian tanker *Tsesis* struck a rock

⁷² De la Rue, Colin & Anderson, Charles, *supra*, note 29, at 88, referring to the same exception but in relation to the CLC Convention.

⁷³ NMIP, Sections 2-8 and 2-9.

⁷⁴ Wilhelmsen, Trine-Lise & Bull, Hans Jacob, *Handbook in Hull Insurance* (2007), pp. 96- 97.

⁷⁵ See Tsimplis, Michael, *The Bunker Pollution Convention 2001: completing and harmonizing the liability regime for oil pollution from ships?* (2005), at 89, in relation to sabotage, which can be by analogy applied to terrorism.

which was incorrectly marked on the chart. In fact, the dangerous area had been discovered years before but the chart was never amended accordingly. The Swedish Supreme Court held that the chart as a “navigational aid” and such “navigational aid” was defective, allowing the owner to rely on the third exception to liability in any claim for the cleanup costs of the spillage and any pollution claims.

4.3.2 *Who is liable?*

While the CLC Convention and the HNS Convention define shipowner as the “persons registered as the owner of the ship” solely, the definition of shipowner under the Bunker Convention⁷⁶ is broader, also including the bareboat charterer, the manager and the operator of the ship.⁷⁷ Their liability is joint and several.⁷⁸

A preliminary description of roles played by these liability subjects is advisable in order to introduce the discussion that will be carried out under 5.1 below.

The meaning of registered owner needs no further explanation since it is expressly given by the Bunker Convention.⁷⁹ The bareboat charterer is the person or persons hiring the vessel under a bareboat charter party, who takes possession of the vessel through the master and crew, taking over the functions of the shipowner in that he assumes not only the commercial but also the nautical management of the ship.⁸⁰

⁷⁶ Bunker Convention, Article 1(3).

⁷⁷ See IMO LEG 79/6/1: One of the reasons that such definition was favoured during the discussions leading to the adoption of the Bunker Convention is that it rests on a stronger precedent, in that it is based on Article 1(2) of the LLMC 1976. As we will see below, the LLMC is the recommended limitation regime to be followed by the States Parties to the Bunker Convention.

⁷⁸ Bunker Convention, Article 3(2).

⁷⁹ Bunker Convention, Article 1(4).

⁸⁰ See Falkanger, T., Bull, H.J. & Brautaset, L., *supra*, note 9, at 246.

The definitions of operator and manager are not provided in the Bunker Convention and are somewhat imprecise. It has been pointed out that reference to “manager or operator” already appeared in the U.K. legislation⁸¹ qualified by the expression “any person interested or in possession of a ship”, although the 1976 Convention may not have intended to restrict the concept of “manager or operator” only to those who are either interested in or in possession of the ship.⁸² One author⁸³ points out that the definition of operator has to be found in the discussions leading to the CLC Convention 1969. As a result, the operator, who is presumably but not necessarily the shipowner, is the person who uses the ship in his own name and mans, equips and supplies it.

The imposition of liability on as many as four different parties may also lead to practical problems, such as: whether or not liability has to be shared by all the parties included in the definition of shipowner; in which way liability among the parties and their insurers is to be apportioned; and in which way the limits of liability and the test for the right of limitation are to be applied.⁸⁴

There is no clear and definitive answer to any of these questions. It appears though that the question of apportionment of liability will only come into play on eventual recourse claims among the parties, since their liabilities are joint and several, which means that the claimants will be able to choose which one of the parties to sue.

⁸¹ The U.K. 's Merchant Shipping (Liability of Ship Owners and Others) of 1958.

⁸² Gaskell, Nicholas, *Limitation of Shipowners' Liability: The New Law* (1986), at 29: “One can perhaps envisage a case where there are a group of companies one of which is the operator of the ship but does not charter her or own her, but otherwise arranges all matters connected with the management and operation of the ship.”

⁸³ Zhu, Ling, *supra*, note 63, at 139.

⁸⁴ Wu, Chao, *supra* note 62, at 559.

One scholar⁸⁵ has drawn attention to another inconvenience related to the high number of persons that may be liable, and refers to an example: in situations where the damage is done partly by bunker oil and partly by hazardous and noxious (hns) substances, the other parties falling into the definition of shipowner, other than the registered owner of the ship, run the risk of paying compensation for damages caused by the hns substances.

4.3.3 Channelling of liability

The other novelty introduced by the CLC Conventions 69/92 – together with the imposition of strict liability on the registered owner of the ship – lies in the channelling of liability provision, according to which claims for compensation founded upon convention-based liability for oil pollution can only be made against pre-determined person, the registered owner of the ship. Since then, such provision has been customarily found in oil pollution liability conventions, like the HNS Convention.

As a result, both the CLC Convention 1992 and the HNS Convention regulate that no claim for compensation for pollution damage may be made against certain persons⁸⁶ unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

⁸⁵ Tsimplis, Michael, *supra*, note 75, at 89.

⁸⁶ CLC 1992, Article 4 (4): “(a) the servants or agents of the owner or the members of the crew, (b) the pilot or any other person who, without being a member of the crew, performs services for the ship; (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship; (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority; (e) any person taking preventive measures; (f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e)”.

The fact is that since the *Erika* incident⁸⁷ the channelling provisions have been “under attack”.⁸⁸ The result is that the channelling of liability was not regulated under the Bunker Convention.⁸⁹

The reason why the channelling mechanism was left outside the scope of the Bunker Convention lies in the fact that the Bunker Convention does not count on a second-tier compensation system.⁹⁰ The Bunker Convention, as opposed to the CLC and to the HNS Conventions, is not supplemented by any international fund, meaning that compensation can only be obtained either from the liability subjects or from their insurers. The intention was thus to increase the claimants’ possibilities of recovery.

But is it really so that imposing liability on as many as four parties, and at the same time not protecting certain persons from potential claims, will improve the situation of the claimants? The answer appears to be negative for two reasons. The first reason relates to the requirement for insurance from the registered owner of the ship coupled with the right of direct action against the insurer, which will be further developed below. Although it will be up to the claimant to decide against which of the liability subjects the claim is going to be directed to, it appears to be correct to foresee that most of the claims will be directed against the registered owner’s insurer. The second reason relates to the limitation of liability regime applicable. Briefly, and provided that the LLMC 1976/1996 is the legal instrument in place regulating limitation of liability, it appears that the claimants will not be

⁸⁷ Maltese registered oil tanker that sank off the coast of France on 8th December 1999, after breaking in two in a heavy storm when entering the Bay of Biscay, causing 22,000 tons of oil to leak from its cargo tanks.

⁸⁸ See Chao, Wu, *Liability and Compensation for Oil Pollution Damage: Some Current Threats to the International Convention System* (2003), at 105.

⁸⁹ See IMO LEG 77/4/3. It comprises a submission by the U.S. to the IMO’s Legal Committee and describes the U.S.’ experience with channelling pollution liability to a small group, rather than channeling to a single party. The terminology adopted when referring to the imposition of strict liability to a small group of persons as a “channelling” provision does not seem helpful.

⁹⁰ Zhu, Ling, *supra*, note 63, at 29.

able to recover up to the prescribed limits from each one of the liability subjects. This will also be further explained below.

4.3.4 Limitation of liability

The right of the shipowner to limit his or her liability is a traditional principle of maritime law. Such right was recognised long before the advent of the CLC Convention in 1969. Hence, the CLC Convention essentially confirmed the right of the shipowner to limit his or her liability to a pre-determined amount,⁹¹ except when the incident resulted from his or her personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result.⁹² The novelty introduced by the CLC Convention was that pollution damage was no longer part of the ordinary system of limitation, but of a new one which provided for higher amounts.

Not surprisingly, following the CLC and the HNS Conventions, the commonly recognised principle was also embraced under the Bunker Convention, in that the shipowner (including the registered owner, the bareboat charterer, the manager and the operator) and his or her insurers are entitled to limit their liabilities.⁹³ However, while the CLC and the HNS Conventions introduce their own compensation limitation amounts,⁹⁴ the Bunker Convention makes express reference to existing law on limitation of liability, applicable either under national or international regimes.

During the discussions leading to the adoption of the Bunker Convention, the provision regulating limitation of liability gave rise to extensive debate over the alternatives available.⁹⁵ Some delegations were of the opinion that the Convention should contain its

⁹¹ CLC 1992, Article V (1).

⁹² CLC 1992, Article V (2).

⁹³ Bunker Convention, Article 6.

⁹⁴ CLC 1992, Article V, and HNS Convention, Article 9.

⁹⁵ See IMO LEG 77/6/1 and LEG 78/11.

own limitations figures instead of referring to other instruments. Another option then contemplated would be to tie the limitation amounts to the CLC 1992, by reproducing its limitation of liability provision. However, the majority preferred linking the limitation amount to an instrument already in existence. At last, a consensus was achieved in that the shipowner would be entitled to limit his or her liability under any applicable regime, and this might involve referring to international conventions already regulating the limitation subject, among which the LLMC 1976, and its 1996 Protocol, are examples.⁹⁶

The result is that the limitation of liability was regulated in a fairly imprecise manner, leaving significant discretion to the States Parties as regards the amounts to be applicable to bunker oil pollution related claims. In any event, as an attempt to harmonise the application of the limitation amounts, the Bunker Convention was accompanied by a resolution which urges the States who have not yet ratified or acceded to the Protocol of 1996 to the International Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC), to do so. The Protocol of 1996 increases the limits of liability in relation to the LLMC 1976.⁹⁷

Another problem arising out of the imprecise limitation of liability provision is that claims in connection to damage from bunker oil pollution are not specifically listed in the LLMC 1976 as one of the claims subject to limitation. This means that they will have to fall within one of the listed categories thereof. However, one could think of cases of bunker oil pollution falling outside the scope of the LLMC 1976, creating the very unsatisfactory consequence that the shipowner is left without the protection of the limitation of liability.

⁹⁶ Other international conventions regulating limitation of liability are the 1924 Limitation Convention and the 1957 International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships.

⁹⁷ As of 31 July 2008, 15 of the 22 States Parties to the Bunker Convention have already ratified or acceded to the Protocol of 1996 and they are: Bulgaria, Croatia, Cyprus, Germany, Jamaica, Latvia, Lithuania, Luxemburg, Marshall Islands, Norway, Samoa, Sierra Leone, Spain, Tonga and United Kingdom. Five of them (Bahamas, Estonia, Greece, Poland and Singapore) are parties to the LLMC 1976. Two of them (Iceland and Slovenia) have neither ratified the LLMC 1976 nor the 1996 Protocol.

The information is available at: <http://www.imo.org/includes/blastDataOnly.asp/data_id%3D22499/status-x.xls> (visited 11 August 2008).

Before carrying on with a more detailed analysis of each one of the categories listed in the LLMC 1976,⁹⁸ it is important to make reference to the *Aegean Sea* case⁹⁹ on which the question as to what extent liabilities resulting from an oil spill would fall under the categories listed in the LLMC 1976 was considered by the English High Court. In this case, the court decided that the three types of claims arising from the oil spill incident would fall into the first category, since they were either in respect of “damage to property” or “consequential losses” resulting from the loss of the cargo.¹⁰⁰ However, the court made no specific distinction within other claims that could unfold from those three types of claims initially considered, and for that reason a closer look at the relevant provision of the LLMC 1976 is needed.

According to one author,¹⁰¹ the claims usually arising in connection with a bunker oil spill incident are: clean up costs and other removal measures; property damage and consequential loss; pure economic loss; and restoration of damaged environment. Having that in mind, special attention should particularly be paid to the first, the fourth and the fifth categories explained below.

The first category of claims that are subject to limitation of liability includes “(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential losses resulting therefrom”. Considering that loss of life and personal injury are not relevant for claims connected to bunker oil spills, this category (a) covers all the claims in connection with property damage and financial loss as a consequence of damage

⁹⁸ LLMC 1976, Article 2(1).

⁹⁹ *Aegean Sea Traders Corporation v. Respsol Petroleo S.A. and Another (The “Aegean Sea”)* [1998] 2 Lloyd’s Rep. 39.

¹⁰⁰ De la Rue, Colin & Anderson, Charles, *supra*, note 29, at 271.

¹⁰¹ Wu, Chao, *supra*, note 62, at 563.

to the property. It is noteworthy that pure economic loss¹⁰² does not fall under this category and would have to be tested under the third category (c) explained below.

The second category of claims includes “(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage”. Considering that the definition of pollution damage under the Bunker Convention is restricted to loss (or damage) caused outside the ship by contamination, it appears that this category relating to loss from delay will not have significant impact on claims for bunker oil spills.

The third category of claims includes “(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations”. As mentioned above, claims for pure economic loss could fall under this category since there is no requirement for the loss to be connected with damage to the property of the claimant. However, since the interpretation of the meaning of the expression “infringement of rights other than contractual rights” is somewhat vague - and the answer will have to be found in national legislation¹⁰³ - it may be the case that such claims are not subject to limitation under the LLMC 1976.¹⁰⁴

The fourth category of claims includes “(d) 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”. This category of claims cover clean-up costs and removal measures, as long as pollution arises out of a ship that is sunk, wrecked, stranded, or abandoned. Attention should be drawn to the fact that

¹⁰² For example, earnings lost by operators of hotels and restaurants when tourists avoid the polluted beaches.

¹⁰³ Zhu, Ling, *supra*, note 63, at 156.

¹⁰⁴ See De la Rue, Colin, & Anderson, Charles, *supra*, note 29, at 272: “Some countries with a civil law tradition allow recovery of pure economic loss only where the basis of liability is that the claimant’s rights have been infringed. In these jurisdictions the effect of Art. 2.1(c) may be reasonably clear, but in common law jurisdictions a different approach to pure economic loss has been taken and the concept of “rights” being “infringed” is relatively unusual.”

the States Parties to the LLMC 1976 were conferred the right to make a reservation in order to exclude, at national level, such claims from the limitation amounts set out in the Convention.¹⁰⁵

The fifth category of claims includes “(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship”. First, it is not certain whether bunker oil under these circumstances could be defined as “cargo of the ship”. The fact is that the Bunker Convention covers oil used, or intended to be used, for the operation and propulsion of the ship as fuel or lubrication. It has been pointed out that the distinction between cargo and bunkers lies in the demonstration of intention of use.¹⁰⁶ Following that, it appears to be correct to conclude that bunker fuel does not fall within the definition of “cargo of the ship”. According to this understanding, claims relating to the removal of bunker oil from a vessel would not fall under this category (e). Second, even if one considers that bunker oil would fall within the definition of “cargo of the ship”, another question arises. There may be an overlap between the expressions “cargo of the ship” and “anything that is or has been on board such ship” found in the previous category.¹⁰⁷ Considering that the same right of reservation mentioned in the previous paragraph was conferred to the States Parties in relation to claims falling under this category (e), a conflict may be created¹⁰⁸ in those States that incorporated one category, and excluded the other.¹⁰⁹

¹⁰⁵ LLMC 1976, Article 18.

¹⁰⁶ Tsimplis, Michael, *supra*, note 75, at 86.

¹⁰⁷ Griggs, P.J.S., Williams, R., & Farr, J., *Limitation of Liability for Maritime Claims* (2005), at 24.

¹⁰⁸ See Chen, Xia, *Limitation of Liability for Maritime Claims* (1998), at 47.

¹⁰⁹ Griggs, P.J.S., Williams, R., & Farr, J., *supra*, note 107: “But limitation is not available under (2)(1)(d) in the United Kingdom. It may therefore be that in the United Kingdom, claims in respect of cargo removal, qualify for limitation before the ship is sunk, wrecked, stranded or abandoned but not after that event has occurred.”

The last category of claims listed in the LLMC 1976 that are subject to the limitation amounts includes “(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.”. Similarly to the claims falling under the fourth category (d) above, clean-up costs and removal measures can also fall under this last category (f), provided that the measures were taken to avert or minimise losses for which the liable person may limit his liability, in accordance with the categories a, b and c. But because the claimants, in this situation, can only be “a person other than the person liable”, the result is that the shipowner will not be able to submit his response costs for payment from the limitation fund. Clearly, this reduces the incentive to the shipowner to take prompt action as a response to an oil pollution incident.¹¹⁰

It is worthy to draw attention to the fact that claims falling under the three last categories mentioned above (d, e and f) are not subject to limitation when they relate to remuneration under a contract with the person liable.¹¹¹

Furthermore, the Bunker Convention does not regulate in which way the limits of liability are to be applied, i.e. if the rights of the registered owner of the ship, the bareboat charterer, the manager and the operator are independent or joint. As briefly mentioned above, to the extent that the LLMC 1976/1996 is applicable, even if the claimants decided to sue all the parties, they would only be able to recover from all of them up to the prescribed limits. The explanation for that can be found in the LLMC 1976/1996 itself,¹¹² when it establishes that a fund constituted by one person shall be deemed constituted by all persons.¹¹³

¹¹⁰ Wu, Chao, *supra*, note 62, at 563: “Both the CLCs and the HNS Convention encourage the shipowner to take prompt action following a spill, by making clear that the costs and sacrifices incurred by the shipowner in preventing or minimising damage can be ranked as other admissible claims against the shipowner’s own limitation fund.”

¹¹¹ LLMC 1976, Article 2(2).

¹¹² LLMC 1976/1996, Article 11(3).

¹¹³ Tsimplis, Michael, *supra*, note 75, at 93.

It should be also pointed out that the lack of a dedicated limitation regime equals the lack of a dedicated fund to exclusively cover bunker oil pollution claims. From the point of view of the victims, the absence of a dedicated fund is unsatisfactory since oil pollution claimants will have to compete with other claimants to see their demand satisfied. From the point view of the shipowners, such system is positive since they will not have to establish two different funds in the occurrence of an accident.

Finally, for the sake of exemplification, if the limits provided by the 1996 Protocol are to be applied, the ceiling amount for claims other than loss of life or personal injury for ships with a tonnage not exceeding 2,000 tons is 1 million SDR.¹¹⁴ For ships with a tonnage in excess of 2,000 tons, the following amounts are added: (a) 400 SDR, for each ton from 2,001 to 30,000; (b) 300 SDR, for each ton from 30,001 to 70,000; (c) 200 SDR, for each ton in excess of 70,000 tons.¹¹⁵

4.3.5 Compulsory insurance cover

The requirement for compulsory insurance was first introduced in the context of international conventions by the CLC Convention. Back in 1969, the CLC Convention imposed on the owner of a ship carrying more than 2,000 tons of oil in bulk as cargo an obligation of obtaining insurance or other financial security to cover his or her liability for pollution damage under the Convention.¹¹⁶ Years later, in 1996, the same concept was also adopted in the HNS Convention and has been a matter of great importance in the development of liability conventions in the IMO.¹¹⁷ The Bunker Convention, following its model Convention, establishes the same requirement for the owner of a ship with a gross tonnage of more than 1,000 tons.

¹¹⁴ Special Drawing Rights. Further information is available at:
<<http://www.imf.org/external/np/exr/facts/sdr.htm>> (visited 11 August 2008).

¹¹⁵ 1996 Protocol, Article 3(b).

¹¹⁶ CLC 1969, Article VII (1).

¹¹⁷ Røsæg, Erik, *Compulsory Maritime Insurance* (2000), at 1.

First, it is important to point out that the need for insurance goes hand-in-hand with the imposition of strict liability, since strict liability would not serve its purpose if the shipowner was not financially able to satisfy the amounts of compensation resulting from damage caused by oil pollution.

Second, despite the fact that other persons than the registered owner are subject to strict liability, namely the bareboat charterer, the manager and operator of the ship, the requirement for subscribing for compulsory insurance is imposed on the registered owner of the ship only.

Third, attention should be drawn to the threshold figure of 1,000 gross tons, below which no obligation for compulsory insurance or financial security is imposed. In spite of efforts from countries like the U.K., Australia and Canada to see vessels of 300 gross tons and above included in the compulsory insurance requirement, a compromise had to be made to guarantee the passing of the convention, leading thus to a relatively high threshold.¹¹⁸

Four, the insurance or financial security required to cover the owner's liability shall be subscribed to an amount equal to the limits of liability under the applicable limitation regime of the flag state or international regime, but not exceeding the limits provided by the LLMC, 1976, as amended.¹¹⁹ The conclusion is that even if national legislation establishes higher amounts for limitation of liability than the ones provided by the 1996 Protocol, the owner will only have to subscribe for insurance up to the amounts calculated in accordance with the 1996 Protocol.

¹¹⁸ Fowler, Rodriguez, Kingmill, Flint, Gray, & Chalos, L.L.P., *The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001* (2005), at 5.

¹¹⁹ Bunker Convention, Article 7(1).

Fifth, it should be noted that although the compulsory insurance is taken out for the benefit of bunker oil pollution claimants, the fact is that it will serve to protect other claimants as well, considering such insurance cover will be arranged, in most of the cases, by the Protection and Indemnity insurers (P&I Clubs) which, in short, provide the shipowners with marine insurance against third party liability. The P&I Clubs' Rules will establish not only the scope of coverage for claims for oil pollution,¹²⁰ but also the limitation amounts applicable to such claims.¹²¹

Finally, the requirement for compulsory insurance leads to the requirement that a certificate attesting that insurance or financial security is in force is issued by the competent authority¹²² and always carried on board.¹²³ The result is the creation of administrative burdens on the States Parties to the Convention, both as flag states and port states, related to the issuing and monitoring of such certificates.¹²⁴

4.3.6 Direct action

In direct connection with the requirement for compulsory insurance is the right of the claimants to address any claim for compensation for pollution damage directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage.¹²⁵ The right for direct action was inspired in the corresponding provision of the CLC Convention,¹²⁶ and it also includes the right of the defendant (insurer) to invoke

¹²⁰ See e.g. Gard's Rules and Statutes, Rules for ships, Part II, Rule 38.

¹²¹ See e.g. Gard's Rules and Statutes, Rules for ships, Part II, Rule 53, and Appendix III.

¹²² Bunker Convention, Article 7(2).

¹²³ Bunker Convention, Article 7(5).

¹²⁴ See Gard Circular No. 4/2008: Ships registered on a State Party need to obtain a certificate from that State only, and such certificate will be regarded as evidence of insurance when calling ports in the other States Parties. Ships registered in a State that is not party to the Bunker Convention must obtain a State issued certificate from a State Party to the Convention in order to be able to call any of its ports or terminals.

¹²⁵ Bunker Convention, Article 7(10).

¹²⁶ CLC 1969, Article VII (8).

the defences which the shipowner would be entitled to invoke (other than bankruptcy and winding up), including availing of the same limits of liability. Furthermore, the defendant will be able to avoid liability when pollution damage resulted from the wilful misconduct of the shipowner.¹²⁷

It is important to stress that even if the shipowner is not entitled to limit his or her liability, the insurer will be entitled to limit his liability to an amount equal to the amount of the insurance or other financial security required to be maintained. In practice, this means that direct action claims will be dependent on the amounts given in national legislation, but never higher than the amounts provided by the LLMC 1976, as amended by the 1996 Protocol.

As seen above, before the adoption and entry into force of the Bunker Convention, liability and compensation for bunker oil spills were regulated under national law. Similarly, the right of direct action against the insurer for such claims would also be dependent on the regulation by domestic legislation. For the sake of illustration, two examples will be provided below.

In Norway, the right of direct action is regulated under the Norwegian Insurance Contract Act (ICA) 1989. The starting point is that third parties have the right to seek compensation directly from the insurer, and this rule applies to both voluntary and mandatory insurances.¹²⁸ However, in certain situations,¹²⁹ among which marine insurance is included, the injured party is entitled to take direct action against the insurer only if the carrier is insolvent, and also provided jurisdiction is established before a Norwegian court.¹³⁰ The

¹²⁷ See Ot.prp. nr. 77 (2006-2007): The Norwegian *Justisdepartementet* understands that although the Bunker Convention refers to the term shipowner, such exception is only applicable when related to the registered owner's willful misconduct.

¹²⁸ ICA 1989, Sections 7-6 and 7-7.

¹²⁹ ICA 1989, Section 1-3.

¹³⁰ ICA 1989, Section 7-8.

relevant provisions are mandatory, i.e. cannot be derogated by the parties, meaning that the “pay-to-be-paid” clause,¹³¹ in such circumstances, would not be upheld under Norwegian Law.¹³²

Under English common law, the right of direct action is not well developed and is limited to the privity rule, according to which no person may enforce a contract to which he or she is not a party.¹³³ The Third-Party (Rights against Insurers) Act of 1930 addresses such question and provides for the transfer of the insured’s rights against the insurer to third-parties in the event of the insured becoming insolvent or in the event of winding up of the insured¹³⁴. Third parties are thus conferred a “statutory subrogation”.¹³⁵ However, in *the Fanti case*¹³⁶ the House of the Lords confirmed the understanding that the “pay to be paid” clause is not contrary to the 1930 Act and it must be obeyed to the letter. The result is that the 1930 Act cannot apply to P&I Clubs, which are not liable until the assured has made payment.

Hence, the provision of the Bunker Convention establishing the right of direct action against the shipowner’s liability insurer is broadening the scope of admissibility of bunker oil pollution claims in comparison to national regulations in place before the adoption of the Convention.

¹³¹ Commonly found in the P&I Clubs’ insurance contracts (See Gard Rules, 87), the “pay to be paid” clause establishes that in order for the insurer to be liable under the insurance contract, the insured has to first discharge his liability to the third parties.

¹³² Falkanger, T., Bull, H.J. & Brautaset, L., *supra*, note 9, at 537.

¹³³ Merkin, Robert & Hjalmarsson, Johanna, *Compendium of Insurance Law* (2007), Chapter 5.

¹³⁴ The 1930 Act, Article 1(1).

¹³⁵ Zhu, Ling, *supra*, note 63, at 175.

¹³⁶ *Firma C-Trade v. Newcastle Protection and Indemnity Association* [1990] 2 Lloyd’ Rep 191, per Lord Goff of Chieveley.

Lastly, it has been discussed above that although the compulsory insurance is taken out for the benefit of bunker oil pollution claimants, it will also serve to protect other claimants. It has also been mentioned that the lack of a dedicated fund to cover bunker oil pollution claims means that bunker oil pollution claimants and non-pollution claimants suffering damage from the same incident will have to compete in order to see their claims satisfied. A number of questions arise in this regard in connection with the right of direct action. Will non-pollution claimants have the right of direct action against the insurer? How are the different claims and the right of the insurer to limit his liability organised in practice?

Regarding the right of non-pollution claimants to address their claims directly against the insurer, the answer will have to be found under the relevant national legislation applicable. In the two examples above, under Norwegian and English laws, non-pollution claimants would not, as a starting point, benefit from the same right conferred to bunker pollution claimants. A conflict is thus created, in that some of the claimants will be able to obtain compensation directly from the insurer, whereas others will have to seek compensation first from the shipowner, in accordance with the “pay-to-be-paid” clause. Considering that in many instances it may not be possible to determine in advance whether the limitation fund will be exceeded by claims, another question arises: will the bunker pollution claimants have to wait until all the other claims are settled? The answer to this question can only be negative, and following the CLC and Fund Conventions examples, it would be reasonable to expect that the insurer would authorise limited payments on a provisional basis.¹³⁷

4.3.7 Responder immunity

It is worth to finalise this chapter by mentioning one provision that what was actually not included in the Bunker Convention: the legal protection for persons taking measures to prevent or minimise pollution, such as salvors and clean up contractors, the so-called responder immunity. Such protection would serve to encourage prompt and effective

¹³⁷ See Gaskell, Nicholas, *Pollution, Limitation and Carriage in The Aegean Sea* (2000): In the Aegean Sea case, admissible claims have been paid on a 40% basis, in case the overall claims exceeded the Fund's limits.

response to oil pollution incidents but was never agreed upon until the adoption of the Convention.

Despite that, the Bunker Convention was accompanied by a Resolution which urges the States to consider introducing, in their implementing legislation, a provision providing for the exemption of liability for those persons responding to a casualty and taking reasonable measures to prevent or minimize the effects of the oil pollution, except when this resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result. To the States that have already adapted their legislation providing for such protection in the cases of oil pollution from tankers under the CLC Convention, it will be a just a matter of extending such protection to the cases of pollution falling under the scope of application of the Bunker Convention. That was exactly what was done by Norway and the U.K., as we will see under 5.1. below.

It has been suggested that such compromise is rather unsatisfactory since the States Parties will in fact be fulfilling their commitments under the Bunker Convention even if they do not comply with the Resolution.¹³⁸

¹³⁸ Tsimplis, Michael, *supra*, note 75, at 90.

5 Additional measures that could be added in the implementing legislation

The focus of the discussion below will be on the national implementation of the Bunker Convention, on the basis that the author will try to ascertain whether additional measures can be added when national law is adopted or modified by the States Parties in order ensure the compliance of the obligations undertaken with the ratification of the Convention.

5.1 Strict liability for a wider range of persons

The first question that arises is whether or not the Bunker Convention restricts the freedom of the States Parties to implement domestic rules extending the imposition of strict liability to others than the registered owner, the bareboat charterer, the manager and the operator.

Two main arguments are available in order to provide an answer to the proposed question.

On one hand, the Bunker Convention, in comparison with the CLC and HNS Conventions, took a step further, in that it adopted the same approach embodied under the OPA '90, imposing strict liability not only on the registered owner of the vessel, but also on the bareboat charterer, the manager and the operator of the ship. As a brief explanation about the roles of these persons was already provided under 4.3.2 supra, it is now time to point out that the common denominator among these four subjects is the fact that their activities are closely connected with the operation of the ship, in the same way as bunker pollution is directly linked to the operation of the ship.¹³⁹ In fact, during the discussions leading to the adoption of the Bunker Convention, it has been pointed out that “both options in respect of the definition of “shipowner” have been drafted so that the person *having effective control of the vessel* will be responsible for ensuring that the appropriate obligations of the

¹³⁹ See IMO LEG 77/6/1.

Convention are met” (emphasis added).¹⁴⁰ It goes without saying that those are the individuals in the best position to guard against bunker oil spills.

On the other hand, the Bunker Convention, as opposed to the CLC and HNS Conventions, does not bring a provision preventing claims for bunker oil pollution to be brought against certain persons. In other words, compensation can be obtained from other potentially liable parties, which means that third parties are in principle not exempted from liability in case their actions or activities have led to bunker oil spill.

The answer to the proposed question may not seem clear. However, taking these two arguments into consideration, it appears that the States Parties are free to extend strict liability to other persons than the ones mentioned in Article 1(3) of the Bunker Convention, and here is why. Although the drafters of the Bunker Convention might have intended to impose strict liability only on those parties who are really able to control and prevent bunker oil spills, the lack of a provision protecting other parties from liability should be understood as a silence, and as such it does not prevent national legislators neither from excluding liability of some parties nor from deciding that others can be made liable.

A question of a different nature relates to whether it is fair and reasonable to legislate differently, and, in this context, it appears to be correct to state that the imposition of strict liability on parties that are not closely involved in the operation of the ship cannot be considered reasonable. As an example, we can mention the particular condition of the cargo owners, who, although not made strictly liable under the CLC Convention, bear part of the costs related to compensation for oil pollution to the extent that they contribute to the formation of the international compensation funds. The CLC and the Fund Convention relates, as seen, to oil pollution caused by ships carrying oil in bulk, meaning that, under these conventions, the nature of the cargo justifies that the cargo owners bear part of the burdens caused by oil pollution. In addition, such cargo owners also benefit from the

¹⁴⁰ *Ibid.*

“dangerous” activity carried out by the shipowner. The same reasoning is not valid for cargo owners when it comes to fuel oil pollution under the Bunker Convention.

The Norwegian implementation of the Bunker Convention seems to be in consonance with the conclusion above. First, it includes in the already known definition of shipowner as provided by the Bunker Convention *all other parties engaged on key activities connected to the operation of the ship*.¹⁴¹ Additionally, it extends the channelling of liability provision contained in Section 193 of the Norwegian Maritime Code to the situations involving bunker oil pollution, so to avoid that claims be brought against the persons named under that section, with the exception of the bareboat charterer, the manager and the operator of the ship.¹⁴²

Apparently, Norway has gone further than it was allowed to under the Bunker Convention, as it exempted from liability exposure other parties than the so-called “responders”, as recommended in the Resolution on protection for persons taking measures to prevent or minimise the effect of oil pollution. Hence, the channelling of liability not originally provided for under the Bunker Convention will be operative in Norway, and claims for bunker oil pollution shall not be directed against the parties listed in NMC §193, with the exception of the bareboat charterer, the manager and the operator of the ship.¹⁴³

¹⁴¹ See Ot.prp. nr. 77 (2006-2007) which refers to a submission from *Den Norske Advokatforening*, pointing out that the definition of manager is somewhat unclear under Norwegian law, even though such term is referred to in Section 171 of the NMC, which is based on the relevant provision of the LLMC 76/96. Accordingly, more important than the literal interpretation of the definitions of the persons who fall under the definition of shipowner, is the fact that their activities are closely connected with the operation of the ship.

¹⁴² See Ot.prp. nr. 77 (2006-2007), NMC, new Section 185.

¹⁴³ See Tsimplis, Michael, *supra*, note 50, at 125: The U.K. implementation of the Bunker Convention also excludes from liability a number of parties (see new Section 156(2B) introduced by the Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006), and according to Tsimplis: “This is arguably and improvement on the 2001 BOPC and, strictly speaking, is not against the implementation on the 2001 BOPC as the Convention is silent on the liability of these parties”.

5.2 Compulsory liability insurance for persons not required to take out insurance

The second question that arises is whether or not the Bunker Convention restricts the freedom of the States Parties to implement domestic rules extending the insurance requirement to other persons than the registered owner of the ship, taking into consideration that the relevant provision of the Convention does not extend such requirement to anyone else, not even to those who have been charged with strict liability, namely the bareboat charterer, the manager and the operator.

Introductorily, an understanding of the rationale for compulsory insurance is advisable. First, the requirement for insurance intends to guarantee that victims of oil pollution will be able to obtain compensation even if the shipowner becomes insolvent. Second, the right for direct action, associated with the requirement for compulsory insurance, facilitates the accessibility problem, in that claimants will not have to seek compensation in remote jurisdictions, running the subsequent risk of not finding there assets to cover the claim. Third, the requirement for insurance is believed to improve the insurance industry's regulation with respect to safety standards on board, as a way of minimising risks. Finally, competition aspects will be regulated to the extent that irresponsible shipowners will not be able to escape the costs for subscribing for insurance.¹⁴⁴

During the discussions leading to the adoption of the Bunker Convention, the Japanese delegation proposed an alternative text to the relevant draft provision regulating compulsory insurance, according to which the insurance requirement would be extended to the other parties falling into the definition of shipowner. In response, some delegations argued that the situation of the claimants would not be improved by requiring separate insurance cover for other parties, while other delegations expressed their concern about the practical difficulties¹⁴⁵ that would arise out of such proposal. The proposal was thus

¹⁴⁴ Røsæg, Erik, *supra*, note 117, pp. 3-4.

¹⁴⁵ See Zhu, Ling, *supra*, note 63, at 139, *in fine*: One of the practical difficulties related to broadening the insurance requirement seems to be the fact that imposing compulsory insurance on a plurality of parties

rejected and the original draft provision which required insurance only for the registered owner was maintained.¹⁴⁶

It seems that the Bunker Convention had the categorical intention to make a distinction between the term “shipowner” applied in the rule providing for strict liability, and the term “registered owner of the ship” applied in the rule providing for compulsory insurance.¹⁴⁷

Following that, it appears to be correct to conclude that the Bunker Convention did not intend to leave the question of compulsory insurance to the discretion of the States Parties. Hence, the answer to the proposed question is that the States Parties are not free to legislate differently, and extend the insurance requirement to other parties than the shipowner.

A question of another nature (rather than whether it is allowed or not) is whether requiring separate insurance cover from other parties than the registered owner would be advisable, or even necessary, from a practical point of view.

First of all, as one author well emphasized: “The reason why still only one person has to maintain insurance is simply that nothing is added if the same liability is insured several times”.¹⁴⁸ Second, it has been already signalled by the insurance market (P&I Clubs) the difficulties of extending the same coverage for parties which are not members of the Clubs.¹⁴⁹ That is due to the key characteristic of P&I Clubs, the mutuality, which can be defined as the sharing of liability between the members of the Club on a non-profit basis,

would increase even more the administrative burdens associated with the issuing and monitoring of certificates placed on the State Parties.

¹⁴⁶ See IMO LEG 81/4.

¹⁴⁷ See IMO LEG 81/4: “It was suggested that the provisions in these articles might be viewed as a package which could provide a practical and workable way forward, given that the Committee had accepted the present definition of “shipowner” contained in article 1(3)”.

¹⁴⁸ Røsæg, Erik, *supra*, note 117, at 12.

¹⁴⁹ *Ibid.*

meaning that they all share the interests and risks with one another in the Club.¹⁵⁰ Lastly, another inconvenience that could stem from the requirement for insurance for a plurality of parties would be the practical difficulty to apportionate liability between the parties' insurers, what would possibly lead not only to delays in taking response measures, but also to delays in the final settlement of claims.¹⁵¹

In any event, the fact that the bareboat charterer, the manager and the operator are not obliged to take up insurance does not necessarily mean that they are not going to do so, especially considering that they can be held jointly and severally liable together with the registered owner. If they do it, it will be on a voluntarily basis. In this context, mention should be made of the relevant provision of the Bunker Convention relating to the right of recourse of the shipowner against other liable parties.¹⁵² The mentioned provision regulating the right of recourse and the provision regulating the parties' several and joint liability are inextricably linked.¹⁵³ Accordingly, the right to seek recovery among the parties listed in the definition of "shipowner" is maintained independently of the Bunker Convention.

Both the Norwegian and the English implementation of the Bunker Convention falls into line with the conclusion reached above, in that the requirement of compulsory insurance was only imposed on the registered owner of the ship.¹⁵⁴

¹⁵⁰ Zhu, Ling, *supra*, note 63, at 128.

¹⁵¹ See IMO LEG 81/4/2.

¹⁵² Bunker Convention, Article 3(6).

¹⁵³ See IMO LEG 81/11.

¹⁵⁴ See Norwegian Ot.prp. nr. 77(2006-2007), Norwegian Maritime Code, new Section 186. See also English Statutory Instrument 2006 no. 1244, The Merchant Shipping (Oil Pollution) (Bunker Convention) Regulations 2006, Regulation 17 which inserts new Section 163A to the Merchant Shipping Act 1995.

5.3 Direct action for insurance beyond the LLMC 1976 limits

The third question that arises is whether or not the Bunker Convention restricts the freedom of the States Parties to implement domestic rules extending the right of direct action for claims connected to insurance that exists beyond the LLMC 1996 limits.

The proposed question could be illustrated by way of the following example: Country A ratifies the Bunker Convention but is neither a party to the LLMC 1976 nor to the 1996 Protocol, applying thus to claims for bunker oil pollution the limits of liability set out in its own national legislation, which comprises higher amounts than the ones established in the mentioned international instruments. Could country A then implement the Bunker Convention modifying its original text, and conferring the right of direct action also for insurances existing beyond the LLMC 1976 (as amended) limits?

The starting point to the discussion should be the interpretation of the Bunker Convention's provisions *per se*, i.e. as to whether the text of the Convention leaves some discretionary power to the States Parties in respect of providing for such "extra" direct action. Or, in contrast, as to whether it restricts the freedom of national law to provide for it, by establishing a maximum limit for the admissibility of direct action claims, upon which the States Parties are not free to regulate.

It follows from the Bunker Convention that the right for direct action is available whenever the shipowner has taken out liability insurance, whether it is compulsory or not. And although the limits of the compulsory insurance shall not exceed the amounts calculated in accordance with the 1996 Protocol, the shipowner can in theory still be found liable for larger amounts, for example in countries with unlimited liability or in countries which national law regulating limitation of liability sets out higher limits than the 1996 Protocol. The result in these cases is that the insurer, in its internal relationship with the shipowner, will not be relieved from its obligation to indemnify the shipowner who has paid out compensation for larger amounts. However, with respect to the insurer's relationship with

third parties suffering damage from bunker oil pollution, the situation appears to be different.

It seems clear that the Bunker Convention categorically intended to limit the right of direct action to the amounts of the compulsory insurance. “The insurer has the unequivocal right to cap the exposure in relation to direct action claims to the applicable LLMC limits...”¹⁵⁵ However, in two instances, the insurer’s exposure to direct action may be subject to higher limitation amounts.

Because the ceiling for both the right of direct action and for the requirement for compulsory insurance is found in the provisions of the LLMC 1976/1996, a closer look at this convention is advisable. It follows from article 6 of the 1996 Protocol that the States Parties can reserve the right to exclude the application of the limits of liability set out in article 6 of the LLMC 1976 (as amended by article 3 of the 1996 Protocol) in three different cases, among which are: “claims in respect of the raising, removal, destruction or the rendering harmless of a ship which sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ships”¹⁵⁶ and “claims in respect of removal, destruction or rendering harmless of the cargo of the ship”.¹⁵⁷ These two situations can well be applicable to bunker-fuel pollution, for example, removal of bunker-fuel from a grounded vessel and the cleaning-up of oil spills on beaches after a ship has sunk.

On the basis of a combined analysis of the above provisions of the LLMC 1976/1996 with the provisions of the Bunker Convention relating to direct action and to compulsory insurance, the following conclusion appears to be valid: a State Party to the Bunker Convention is free to implement domestic legislation extending the right of direct action for insurances existing beyond the LLMC 1976/1996 limits, but only in relation to those

¹⁵⁵ Røsæg, Erik & Ringbom, Henrik, *Liability and compensation with regard to places of refuge* (2004), at 22.

¹⁵⁶ LLMC 1976, Article 1(d).

¹⁵⁷ LLMC 1976, Article 1(e).

claims for which the LLMC 1976/1996 itself establishes the right of the States Parties to exclude limitation of liability, and only if such right of reservation has been exercised.

As an example, Norway, as a State Party to the 1996 Protocol, has taken such reservation and has established, for such claims, higher limitations amounts.¹⁵⁸ According with the reasoning above, Norway would thus be free to extend direct action for these types of claim to amounts beyond the LLMC 1976/1996 limits and that was actually done in the implementation of the Bunker Convention under the Norwegian Maritime Code.¹⁵⁹

¹⁵⁸ Norwegian Maritime Code, Sections 172 and 175a.

¹⁵⁹ Ot.prp. nr. 77 (2006-2007): Norwegian Maritime Code, new Section 188, 3rd paragraph.

6 Conclusion

The adoption of the Bunker Convention under the auspices of the IMO represents the last gap-filling international measure addressing ship-source marine pollution. The Convention's entry into force in November 2008 undoubtedly indicates that a continuously increased environment-conscious world is taking the necessary steps towards the protection of the marine environment. Despite such efforts, it cannot be taken for granted the fact that some aspects of the Convention fail to address relevant issues (or rather address them in a non-comprehensive way), raising a number of questions regarding its practical interpretation and application.

First, although the imposition of strict liability on as many as four parties (combined with the lack of a corresponding channelling provision exempting other potentially liable parties from liability) questionably increases the possibilities of recovery of compensation for victims, it may also lead to practical problems relating to the sharing and apportionment of liability among the parties and their insurers.

Second, the imprecision of the provision establishing the applicable limitation of liability regime to bunker oil pollution claims will inevitably cause uncertainty as to which limitation amounts are actually going to be followed, to the extent that the States Parties are somehow free to set out its own national legislation regulating the subject. In addition, even if we assume that the States Parties will follow the recommendation to accede to the 1996 Protocol, it is uncertain whether all types of claims for bunker oil pollution will be subject to the limits set out thereof.

Moreover, still with regard to the provision regulating limitation of liability, it is noted that the lack of a dedicated fund will mean that bunker pollution claims will compete with other claims subject to limitation of liability under the relevant limitation regime. As a result,

there is a greater chance that the limits provided in the relevant legislation are not sufficient to meet the totality of all claims.

Four, the conclusions drawn in Chapter 5 of this thesis, in that additional measures can be included in the national law implementing the Bunker Convention, confronts with the ideal to reach uniformity of the international private maritime law.

Shipping is an international industry, most of its quests assume rapidly a global dimension, and for that reason it should ideally be regulated not only on an international but mainly on a uniform basis. Uniformity is desirable in order to promote certainty regarding the application of law in the multiple States that interact in the maritime law environment. Uniformity is achieved not only by ensuring that the conventions are implemented at national level without any changes to the text, but also by seeing to it that their interpretation will not vary from country to country.

Hence, it is arguable whether the compromises undertaken in order to achieve a consensus during the drafting and adoption of the Bunker Convention will put in jeopardy the Convention's stated desire to "adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation"¹⁶⁰ for damage caused by pollution resulting from the escape or discharge of bunker oil from ships.

Lastly, despite the fact that the author opted to highlight the downsides of the Bunker Convention in the present conclusion, it is important to set the records straight: it is better to have a rather incomplete system regulating liability and compensation for bunker oil spills based on strict liability coupled with compulsory insurance and direct action than not counting on any at all. It remains to be seen how the individual states – and their Courts – will fill the blanks left by the Bunker Convention. And these blanks will certainly have to be filled on the basis to enable the Bunker Convention to achieve its main purpose which is

¹⁶⁰ Bunker Convention, Preamble.

to “ensure the payment of adequate, prompt and effective compensation for damage caused by pollution resulting from the escape or discharge of bunker oil from ships”.¹⁶¹

¹⁶¹ Bunker Convention, Preamble.

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