

Civil Liability for Oil Pollution Damage

Florentina Marilena TOMA
Ecological University, Bucharest, ROMANIA

Key words: *civil liability, environment, oil pollution*

Abstract: Shipping is a significant contributor to marine pollution. The lessons learned from maritime disasters and the conclusions resulting from the investigations carried out have had a major impact on the improvement of maritime safety over the years. The international rules on civil liability for oil pollution make it possible to establish the fundamental principles governing the investigation of accidents in the maritime transport sector. The civil liability conventions were adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships.

Marine transportation of oil represents a great risk of spills. Any major oil spill can have a serious impact on people's livelihoods and on the environment. Lighter oils are more likely to cause severe toxic effects. Heavy oils are generally less toxic but can contaminate surfaces over wide areas due to their greater persistence. The main industries affected by oil spills are the fishing, aquaculture and tourism industries. Increased levels of compensation must be available for victims of oil pollution from oil tanker accidents. It is necessary to establish if all forms of environmental damage caused by oil pollution can be remedied by means of the liability mechanism.

The International Maritime Organization (IMO), a specialized agency of the United Nations, is the international statutory body responsible for measures to improve the safety and security of international shipping and to prevent marine pollution from ships through International Conventions.

The international regime for the compensation of pollution damage caused by oil spills from tankers is based on treaties adopted under the auspices of IMO such as the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention), and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention). These Conventions replace two corresponding Conventions adopted in 1969 and 1971 respectively.

International Convention on Civil Liability for Oil Pollution Damage (CLC 1969) was adopted in the wake of the Torrey Canyon oil spill to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties

involving oil-carrying ships. The purpose of the 1969 CLC is to provide uniform international rules and procedures for determining questions of liability.

Pollution damage includes damage to the environment (covering primarily the clean up costs) and also loss of profit.

The 1969 CLC entered into force in 1975 and lays down the principle of strict liability (liability even in the absence of fault) for tanker owners and creates a system of compulsory liability insurance. Claims for compensation for oil pollution damage (including clean-up costs) may be brought against the owner of the tanker which caused the damage or directly against the owner's insurer.

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

The tanker owner is normally entitled to limit his liability to an amount which is linked to the tonnage of the tanker causing the pollution. No liability for pollution damage can be attached to the owner if he proves that the damages resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character. Also the shipowner can limit liability if the damage was caused by an act or omission done with intent by a third party or if it was 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.

When oil has escaped or has been discharged from two or more ships, and pollution damage results therefrom, the owners of all the ships concerned are jointly and severally liable for all such damage which is not reasonably separable.

Tanker owner's liability limit under the CLC depends on the size of the tanker. The owners of tankers carrying more than 2,000 tonnes of persistent oil as cargo are required to maintain insurance to cover their liabilities.

The 1969 Civil Liability Convention used the "Poincaré franc", based on the official value of gold, as the applicable unit of account. But the conversion of this gold-franc into national currencies was becoming increasingly difficult. The 1976 Protocol provided for a new unit of account, based on the Special Drawing Rights (SDR) as used by the International Monetary Fund.

The Civil Liability Convention is implemented in Romanian domestic legislation by the Law no. 158/2000.

The compensation available from the tanker owner were insufficient to pay the full compensation costs. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC Fund Convention 1971) signed at Bruxelles in 1971 entered into force on 16 October 1978.

The 1969 CLC and the 1971 IOPC Fund ensure that compensation is available for victims of oil pollution from ships. The CLC places liability on the shipowner up to a set limit and requires the shipowner to take out insurance against such claims. If an accident at sea results in pollution damage which exceeds the compensation available under the CLC, additional compensation is available through the IOPC Fund, which is financed by contributions by oil receivers. The compensation regime as a whole thereby ensures that the burden of compensation is spread between shipowner and cargo interests.

The 1971 Fund Convention provided for the payment of supplementary compensation to those who could not obtain full compensation for oil pollution damage under the 1969 CLC. The International Oil Pollution Compensation Fund (1971 IOPC Fund) was set up for the purpose of administering the regime of compensation created by the Fund Convention when it entered into force in 1978. By becoming party to the 1971 Fund Convention, a country became a Member of the 1971 IOPC Fund. Payments of compensation and the administrative expenses of the 1971 IOPC Fund were financed by

contributions levied on companies in Fund Convention countries that received crude oil and heavy fuel oil after sea transport.

The compensation limits of the 1971 Fund had become too low to cover the cost of oil spills. The 1969 CLC and the 1971 IOPC Fund were amended in 1992 by two protocols, which increased the compensation limits and broadened the scope of the original conventions. These 1992 Conventions, which provide higher limits of compensation and a wider scope of application than the original conventions, entered into force on 30th May 1996.

As in the case of the original conventions, the tanker owner and the insurer are liable for the payment of compensation under the 1992 CLC, and oil receivers in countries that are party to the 1992 Fund Convention are liable for the payment of supplementary compensation through the 1992 IOPC Fund.

The 1992 Fund is an intergovernmental organization governed by two bodies: the Assembly (representatives of the governments of all Member States) and the Executive Committee (a subsidiary body elected by the Assembly). The Executive Committee gives the Fund's Director the authority to approve and pay claims.

The 1992 Fund pays for what is defined as "pollution damage": loss or damage caused outside the ship by contamination resulting from the escape or the discharge of oil from the ship, where ever such discharge or escape may occur. Pollution damage includes preventive measures, defined as any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

This covers the cost of clean-up operations and property damage, as well as claims for consequential loss and "pure economic loss". For example, the fishermen or the hotel owners at seaside resorts are entitled to compensation.

Claimants can be private individuals, partnerships, companies, private organizations or public bodies, including States or local authorities, actually anyone who has suffered pollution damage in a State that is party to the 1992 Conventions.

Compensation is payable for the cost of reasonable clean-up measures, repairing or replacing property that has been contaminated by oil and for the costs of reasonable reinstatement measures aimed at accelerating natural recovery of environmental damage.

In the wake of the Nakhodka oil tanker incident in 1997 off Japan and the Erika oil tanker incident off the coast of France of December 1999, the IMO Legal Committee in October 2000 adopted an agreement which raise by 50 percent the limits of compensation payable to victims of pollution by oil from oil tankers with effect from 1st November 2003.

The total combined amount of compensation payable for one incident under the CLC and the Fund Convention is 203 million SDR (US\$311 million), up from 135 million SDR.

In 2003 a Protocol establishing an International Oil Pollution Compensation Supplementary Fund (the Supplementary Fund) was adopted by a diplomatic conference held in London. The aim of the established Fund is to supplement the compensation available under the 1992 CLC and Fund Conventions with an additional, thereby creating a third tier of compensation for pollution damage caused by oil spills at sea.

Participation in the Protocol is voluntary and, while it is open to all States Parties to the 1992 Fund Convention, claimants in those States which decide not to join it will continue to have their claims met, as they have been up to now, under the terms of the 1992 Civil Liability/Fund regime, which remains unaltered.

The new fund is a separate legal entity with its own Director and its own Assembly, but it is operating very closely with the existing IOPC Fund system. The information on oil receipts made to the Director of the 1992 IOPC Fund shall be deemed to be made also under the Protocol. Similarly, claims made against the 1992 Fund will be regarded as claims made against the supplementary Fund.

The new fund came into existence on 3 March 2005, three months after it had been ratified by eight states with a combined total of more than 450 million tons of contributing oil in a calendar year. The third tier applies where the total amount of compensation available from the ship's insurer and the 1992 Fund is insufficient to cover the total compensation costs.

The criteria under which compensations claims qualify for compensation from the Supplementary Fund are identical to those of the 1992 Fund.

The Supplementary Fund is financed in a similar way as the 1992 Fund, that is, by contributions levied on any entity or person who has received in a calendar year more than 150,000 tonnes of crude oil or heavy fuel oil after sea transport in a country that is Party to the Supplementary Fund Protocol. However, for the purposes of the Protocol, there is a minimum aggregate receipt of 1,000,000 tons of contributing oil in each contracting state.

The total amount of compensation payable for any one incident are limited to a combined total of 750 million SDR (US\$1 148 million) whatever the size of the ship, including the amount of compensation paid under the existing CLC/Fund Convention. The supplementary fund is applying to damage in the territory, including the territorial sea, of a contracting state and in the exclusive economic zone of a Contracting State.

There are 102 states parties to both the 1992 Civil Liability Convention and the 1992 Fund Convention, 38 states parties to the 1969 Civil Liability Convention and 21 Fund Member States which are Party to the 1992 Supplementary Fund Protocol.

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention, 1996) establishes a system for compensation and liability covering in principle of all kinds of hazardous and noxious substances. It introduces strict liability for the ship owner, with higher upper limits than are available under existing general limitation regimes.

This Convention also introduces a system of compulsory insurance and insurance certificates. The ship owner's liability is supplemented by an HNS Fund, which is financed by cargo interests. Contributions to the HNS Fund will be levied on persons within the territory of contracting Parties who receive a certain minimum quantity of HNS cargo during a calendar year. The HNS Convention goes further in its scope than the oil pollution compensation regime in that it covers not only pollution damage but also the risks of fire and explosion.

The international liability and compensation regime covered only oil pollution damage caused by oil tankers. There was thus a need to bring the law on marine oil pollution responsive to oil pollution damage caused by non-tankers. In March 2001, the International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunkers Convention) was adopted following a diplomatic conference at the International Maritime Organization.

Pollution damage means:

(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

(b) the costs of preventive measures and further loss or damage caused by preventive measures.

The aim of the Bunkers Convention is to ensure the availability of adequate, prompt and effective compensation to persons who suffer pollution damage caused by oil spills when the oil is carried as fuel in ships' bunkers.

The shipowner is liable for pollution damage caused by any bunker oil on board or originating from the ship, provided that, if an incident consists of a series of occurrences

having the same origin, the liability shall attach to the shipowner at the time of the first of such occurrences. Where more than one person is liable, their liability is joint and several.

The shipowner may be exonerated wholly or partially from liability if he proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person.

If there are incidents involving two or more ships, the shipowners of all the ships concerned shall be jointly and severally liable for all such damage which is not reasonably separable.

Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage.

Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluters.

Liability is not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with acts or failure to act of certain individual actors.

It is necessary to establish a common framework for the prevention and remedying of environmental damage at a reasonable cost to society. Also it is important that the international oil pollution compensation regime to respond and adapt to changing circumstances and the new political and social expectations. The policy on safety at sea must be a high priority on the political agenda.

Preventing pollution is the best way to protect the marine environment. Because pollution will never be totally eliminated, compensation for pollution damage is an important form of protection. Compensation is necessary for environmental restoration, but it also has a preventive effect.

Bibliography

- ASSEMBONI-OGUNJIMI, Alida. 2004. *Le contentieux de l'environnement marin devant le tribunal international du droit de la mer*. În: *Revue européenne de droit de l'environnement*, nr. 3, p. 255-165
- DUȚU, Mircea. 2004. *Dreptul internațional al mediului*. București: Ed. Economică
- DUȚU, Mircea. 2005. *Principii și institutii fundamentale de drept comunitar al mediului*. București: Ed. Economică
- DUȚU, Mircea. 2007. *Dreptul mediului*. București: Editura C.H. Beck
- DUȚU, Mircea. 2007. *Tratat de dreptul mediului*. București: Ed. C.H. Beck
- FĂINIȘI, Florin. 2005. *Dreptul mediului*. București: Editura Pinguin Book
- MARINESCU, Daniela. 2007 *Tratat de dreptul mediului*. București: Editura Universul Juridic
- MAZILU, Dumitru. 2007. *Dreptul comunitar al mediului*. București: Editura Lumina Lex
- STEFANIUK, Dominika. *La prevention des marées et leur indemnization. Aspect du droit international et européen*. În: "Journal du droit international", nr. 4/2003, Paris, Juris Classeur, p. 1013-1057
- TARCĂ, Ștefan. 2005. *Dreptul mediului*. București: Editura Lumina Lex
- www.europarl.europa.eu
- www.imo.org
- www.iopcfund.org
- www.mmediu.ro