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The Bunkers Convention –
Selected aspects of the liability
and compensation regime for
bunkers pollution damage

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Contents

SUMMARY	1
ABBREVIATIONS	2
1 INTRODUCTION	4
1.1 Background	4
1.2 Purpose	4
1.3 Method and material	5
1.4 Disposition and delimitation	6
1.5 Terminology	6
2 THE BUNKERS CONVENTION – LAST LINK IN THE INTERNATIONAL LIABILITY REGIME FOR SHIP-SOURCE POLLUTION	8
2.1 Overview of the international liability and compensation regime for marine pollution	8
2.2 Legislative background of the Bunkers Convention	12
2.2.1 <i>Preparatory work on the Bunkers Convention</i>	12
2.2.2 <i>Factors calling for reform</i>	14
2.2.2.1 The statistics	14
2.2.2.2 Technical factors	15
2.2.2.3 No uniform liability regime	16
2.2.3 <i>Adoption of the Bunkers Convention</i>	17
3 MAIN FEATURES OF THE BUNKERS CONVENTION	19
3.1 The purpose of the Convention	19
3.2 Definitions	19
3.2.1 <i>Ship</i>	19
3.2.2 <i>Shipowner</i>	20
3.2.3 <i>Bunker oil</i>	21
3.2.4 <i>Pollution damage</i>	21
3.3 The scope of application	22
3.4 Scope of liability	23
3.4.1 <i>Wide range of liable persons</i>	23
3.4.2 <i>Strict liability</i>	26
3.4.3 <i>Exclusions from liability</i>	26
3.4.4 <i>Limitation of liability</i>	27

3.5	Compulsory insurance	28
3.5.1	<i>Compulsory insurance requirement</i>	28
3.5.2	<i>Insurance certificates</i>	30
3.6	Direct action against the insurer	31
3.6.1	<i>Claimants' right of direct action</i>	31
3.6.2	<i>Defences available to the insurer</i>	32
3.6.3	<i>Insurer's right of recourse</i>	33
4	SELECTED ISSUES UNDER THE BUNKERS CONVENTION	35
4.1	Compatibility of the Bunkers Convention with other international regimes	35
4.1.1	<i>Compatibility with the CLCs</i>	35
4.1.2	<i>Compatibility with Limitation Regimes, LLMCs particularly</i>	36
4.1.2.1	Inconsistency regarding "pollution damage"	37
4.1.2.2	Inconsistency regarding "ship"	42
4.2	Does the Bunkers Convention ensure the adequate compensation for pollution damage?	43
4.2.1	<i>No supplementary layer of compensation</i>	43
4.2.2	<i>Does the strict liability imposed on several defendants increase the prospects of compensation?</i>	44
4.2.3	<i>Funds available in case of bunkers pollution incident</i>	46
4.2.4	<i>Bunkers pollution claims data</i>	48
4.3	Adequacy of the Convention	50
4.3.1	<i>No uniform limitation regime</i>	50
4.3.2	<i>No priority for responder immunity</i>	52
4.3.3	<i>The certification system – how advantageous it is?</i>	54
4.3.3.1	Administrative burden corollary to the requirement of insurance certificates	55
4.3.3.2	Issuing certificates – a bureaucratic problem?	56
4.3.3.3	Certificates for ships registered in States non-parties	56
4.3.3.4	Offshore units – additional burden	57
4.3.3.5	Achievement of certification regime	58
5	CONCLUSIONS	61
	BIBLIOGRAPHY	67
	TABLE OF CASES	72
	APPENDIX: TEXT OF THE BUNKERS CONVENTION	73

Summary

The adoption of the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 plugs a gap in the otherwise comprehensive international liability and compensation regime for ship-source pollution. Although liability for bunkers pollution from tankers was partially regulated by other civil liability regimes, bunker spills pollution from other types of vessels was left uncovered by any international compensation system and thus, had to be dealt with under national laws of the States. Therefore, the pursuit of uniformity, in the light of significantly increased bunkers capacity in many modern vessels, prompted the International Maritime Organization to render the issue of adoption of an international instrument devoted to bunkers pollution a high priority. As a result, the Bunkers Convention was adopted in March 2001 and subsequently entered into force in November 2008.

The provisions of the Bunkers Convention are largely modelled on their counterparts in the International Convention on Civil Liability for Oil Pollution Damage 1992, though on several issues the Bunkers Convention follows its own path. The Bunkers Convention establishes strict liability for several persons, who in one way or another are responsible for the operation of the vessel. The strict liability is coupled with right to limitation, though no separate limitation regime is provided by the Convention. Consequently, on the issue of liability limits, the Bunkers Convention is dependent on other national and international limitation regimes, which would be applicable in each incident. The compulsory insurance and certification requirements are other distinguishing features of the Bunkers Convention, which are designated to guarantee that sufficient amount of compensation is available once the bunkers pollution incident occurs.

As in case of any other international regime, the Bunkers Convention is a result of a compromise reached between the drafters of the Convention. Several of the Convention's prominent provisions that were agreed upon under enormous time pressure during the final Conference, have been criticised for being ineffective in relation to the aim pursued by the Convention. Although uniformity of liability and compensation for bunkers pollution damage was highly preferable, the adoption of the Bunkers Convention raised certain doubts as regards the successfulness of the Convention to provide adequate compensation to the victims of bunker spills. Notwithstanding that certain provisions have received predominantly positive reaction, still some of the central elements of the Convention are claimed to raise as many problems as they solve.

Abbreviations

1969 CLC	International Convention on Civil Liability for Oil Pollution Damage, 1969
1976 LLMC	Convention on Limitation of Liability for Maritime Claims, 1976
1992 CLC	International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969
1996 LLMC	Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976
Bunkers Convention	International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001
CMI	Comité Maritime International
CMLA	Canadian Maritime Law Association
CRISTAL	Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution
FPSO	Floating Production, Storage and Offloading Unit
Fund 1971	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971
Fund 1992	International Maritime Organization Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1971
GT	Gross Tonnage
HNS Convention	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996
IMCO	Inter-Governmental Maritime Consultative Organisation
IMO	International Maritime Organization
Intervention Convention	International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969
IOPC Funds	International Oil Pollution Compensation Funds
ITOPF	International Tanker Owners Pollution Federation
MARPOL 73/78	International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto

MEPC	IMO's Marine Environment Protection Committee
MOU	Mobile Offshore Unit
NGO	Non-Governmental Organization
OPA 1990	U.S. Oil Pollution Act 1990
P&I Club	Protection and Indemnity Club
SDR	Special Drawing Rights
STOPIA	Small Tanker Oil Pollution Indemnification Agreement
Supplementary Fund	International Supplementary Fund for Compensation for Oil Pollution Damage, 2003
TOPIA	Tanker Oil Pollution Indemnification Agreement
TOVALOP	Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution
UK	United Kingdom
USD	United States Dollars

1 Introduction

1.1 Background

Blame for oil pollution from ships has always been attributable to oil tankers. Experience has, however, shown that oil tankers are far from the only source of marine pollution as bunker oil spills from non-tankers can be equally expensive and devastating. Still, the issue of bunkers pollution remained on the work programme of the International Maritime Organization (the IMO) for more than thirty years before in March 2001 a new Convention titled “International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001” (the Bunkers Convention) was finally adopted. The Bunkers Convention is said to be the last missing link in an otherwise comprehensive liability and compensation system of liability for pollution from ships established by the IMO. The Bunkers Convention has come into force on 21 November 2008 after its ratification by eighteen States and at the present time there are 51 States parties to the Convention holding more than 84 % of the world’s tonnage.

1.2 Purpose

Undoubtedly, uniformity in the liability standards for bunkers pollution that has been achieved by the adoption of the Bunkers Convention is highly advantageous. Moreover, the broad recognition of the Bunkers Convention notwithstanding the short period it is being in force indicates the absence of major disadvantages or apparent imbalance between different interests, which are affected by the Convention. At the same time, worldwide adherence to the Bunkers Convention does not automatically signify absence of any legal gaps or practical difficulties that may be encountered once the Convention is applicable.

Thus, notwithstanding certain apparent advantages of the uniform liability system for bunkers pollution, this thesis is primarily aimed at critical examination of the Bunkers Convention. The purpose of the thesis is to provide an overview of the most distinguishing provisions of the Bunkers Convention as well as scrutinise the Convention from several different perspectives. During the preparatory work on the Bunkers Convention the avoidance of overlapping application with other international regimes was considered to be of a significant importance. Therefore, one of the issues aimed to be evaluated in this thesis is compatibility of the Bunkers Convention with other international instruments, which may be applicable in case of bunkers pollution damage. Since the goal of the Bunkers Convention, according to its preamble, is to provide an adequate compensation to the victims of bunkers pollution, the attempt will be made to investigate the efficacy of the Convention in the quest for adequate

compensation. In addition, this thesis is intended to provide an analysis of the adequacy of the Bunkers Convention in relation to the aim it strives to achieve.

1.3 Method and material

The thesis is constructed as a combined descriptive and analytical study of the Bunkers Convention. In certain parts of the thesis, the comparative method has been used as well. The second chapter of the thesis is built upon facts without any intention to conduct a legal analysis of either of its subchapters. Thus, in the entire background section, which is purely informational, the descriptive method is predominantly used.

Descriptive method has been used in chapter three as well, though in combination with the analysis of most prominent provisions. As several articles of the Bunkers Conventions are modelled on corresponding provisions of the 1992 CLC¹, the comparison of adequacy and impact of chosen construction in both cases are presented where deemed necessary and relevant. Therefore, in this chapter a combination of descriptive, comparison and analysis methods is used. As fourth chapter is dedicated to discussion of selected issues under the Bunkers Convention, the analysis method dominates throughout the chapter. Some comparison with the 1992 CLC is present in this chapter as well. Apart from the continuous remarks throughout the thesis, the concluding chapter reiterates the most essential points of this thesis combined with the conclusions derived from the entire presentation. Footnotes are used for presentation of the sources of references, but as well for the purpose of distinguishing the views of the author from the views of the scholars whose works have been used during the writing process.

The availability of the materials on the Bunkers Convention is quite limited. The scarcity of doctrine may be partly attributable to the fact that the Convention has been in force comparatively short period and yet there has not been an opportunity to analyse its efficacy in practice. The lack of the materials on the subject may also be explained by referring to the statement of the International Group of P&I Clubs according to which the bunkers pollution has so far been successfully dealt on the national level² and, therefore, the issue has not involved so much public attention.

The websites of international organisations and P&I Clubs have provided much of the information as regards bunkers pollution issue generally as well as the Bunkers Convention itself. The preparatory works on the Bunkers Convention, which are comprised mainly of the IMO documents, have served as a vital source of information as they reveal the rationale behind some less balanced provisions of the Convention. Apart from some well-

¹ International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969.

² LEG/CONF.12/9.

known cases of oil pollution mentioned in chapter two, there are no bunkers pollution incidents that have been exposed to public attention to the same extent. Thus, due to the lack of case-law on the subject-matter, the evaluation of the issues attributable to the Bunkers Convention is made purely on a theoretical basis relying on the abovementioned sources.

1.4 Disposition and delimitation

Apart from the introductory and conclusive chapters, the thesis is comprised of three substantive parts, each divided into several subchapters for the purpose of convenience. Prior to the analysis of the Bunkers Convention, an overview of the existing liability and compensation system for marine pollution created by the IMO is presented in chapter two. The remaining part of the chapter provides a brief description of the legislative background of the Bunkers Convention. Apart from the protracted process emanating at last to final draft, several reasons that have triggered the adoption of the Convention are presented as well. The third chapter is dedicated to presentation of some distinguishing features of the Bunkers Convention. Where deemed as suitable, articles of the Bunkers Convention are compared with the corresponding provisions of the 1992 CLC. It is necessary to indicate that the analysis mainly focuses on certain provisions that are of paramount importance for the discussion that follows in chapter four. The other issues or articles, that may likewise be regarded as essential under the Bunkers Convention but which are not directly related to the discussions carried on in the thesis, either are mentioned in a brief manner or are not considered in this thesis at all. Chapter four is devoted to discussion of the Bunkers Convention from three different perspectives, namely, compatibility, efficacy and adequacy. Several distinguishing elements of the Convention will thus be scrutinised in the light of mentioned issues. Finally, the conclusive chapter will summarise central issues of the thesis as well as present some closing comments on the entire thesis.

1.5 Terminology

For the purpose of preventing any terminological misunderstanding, some terms and abbreviations, which are frequently used in the thesis, are explained below.

In accordance with the Bunkers Convention, the term “shipowner” includes, apart from the registered owner, bareboat charterer, manager and operator of the ship. Therefore, when a shipowner is mentioned in the context of the Bunkers Convention, the reference is actually made to all the persons embraced by its definition; otherwise, a clear reference is made to the

registered owner. Under the LLMCs³ the same range of persons are encompassed by the definition of a shipowner and, therefore, the clarification above applies even in the context of the LLMCs. As regards the CLCs, the terminology is quite clear, as under these Conventions only a registered shipowner is recognised as the owner of a ship.

As the 1996 LLMC does not alter in any way the nature of the provisions of the 1976 LLMC, which are discussed in this thesis, both Conventions are jointly referred to as the LLMCs. More specific reference will be made to either of the Conventions when such distinction is required by the context. Unless the context requires a clear distinction between the 1992 CLC and the 1969 CLC, the abbreviation CLCs is used for referring to both Conventions jointly.

³ The Convention on Limitation of Liability for Maritime Claims, 1976 and Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976.

2 The Bunkers Convention – last link in the international liability regime for ship-source pollution

2.1 Overview of the international liability and compensation regime for marine pollution

Although nowadays oil pollution is of paramount importance in the maritime world, oil pollution as a problem was not seriously discussed on the international level until the conference in 1954 where preventive measures as regards oil pollution of the sea were considered. However, a sense of urgency for international action has not emerged until the *Torrey Canyon*⁴ disaster in 1967, which took the world by surprise illuminating the immense range of damage that oil spill from one ship is able to cause.⁵ This catastrophe can be seen as the starting point of the current international liability and compensation system for marine oil pollution as it highlighted the need for a new international mechanism with a focus on two major areas, namely, the need of coastal states to be protected from oil pollution damage and the absence of uniform civil liability rules for such damage.⁶ Thus, the devastating impact of the incident provided a considerable stimulus to the development of two International Conventions by the Inter-Governmental Maritime Consultative Organisation (IMCO, now IMO),⁷ namely, the public law Intervention Convention⁸ and its private law counterpart the Civil Liability Convention⁹.

The aim of the 1969 CLC was to standardise the international law and procedures on oil pollution liability and compensation as well as to ensure that such compensation was available for oil pollution victims. The 1969

⁴ The *Torrey Canyon*, a Liberian-registered tanker, ran aground on the Seven Stones Reef while entering the English Channel on 18 March 1967 with resultant spilling of the entire cargo of approximately 119,000 tonnes of Kuwait crude oil. The escaped oil caused extensive damage in England and also affected France. More detailed information is available at: <http://www.itopf.com/information-services/data-and-statistics/case-histories/CP2.html#TORREY> (visited 11 May 2010).

⁵ Hill, Christopher, *Maritime Law*, 6th ed., 2003, p. 424.

⁶ Özçayir, Oya, *Liability for oil pollution and collisions*, London: LLP, 1998, p. 211.

⁷ The IMCO was subsequently changed to the IMO (the International Maritime Organisation) in 1982.

⁸ The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution, 1969.

⁹ The International Convention on Civil Liability for Oil Pollution Damage, 1969. The Convention came into force in 1975.

CLC was further backed-up by the 1971 Fund Convention¹⁰, which was introduced to provide substantial supplementary compensation where full or adequate compensation was not possible under the CLC system. As it can be observed, at that stage, the tanker ships carrying huge quantities of oil were seen as major pollutants and all the resources were concentrated on the development of the sufficient and adequate compensation regime for oil spills from tankers. Thus, the 1969 CLC and the 1971 Fund Convention created an international two-tier compensation regime through which compensation was made available to those affected by oil spills from tankers.¹¹ The first tier was paid by the shipowner or his insurer and, in case the compensation payable was insufficient to compensate in full for damage suffered by victims, the second tier compensation was provided under the 1971 Fund Convention by the International Oil Pollution Compensation Fund 1971.¹² Pending the widespread ratification of the international conventions two voluntary agreements of TOVALOP (Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution) and CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution) were devised by the tanker and oil industries in 1969 and 1971 respectively as interim arrangements.¹³

After several substantial pollution incidents it was agreed that the limits of compensation provided by the 1969 CLC and the 1971 Fund Convention were inadequate and unsuitable in terms of coverage to satisfy all reasonable claims and potentially high costs in case of a serious oil spill disaster. Therefore, both conventions were amended in 1992 by the adoption of two Protocols, which significantly increased the limits of compensation and enhanced scope of application of the Conventions. These revised Conventions come into force in 1996 and are commonly referred to as the 1992 Civil Liability Convention¹⁴ (or the 1992 CLC) and the 1992 Fund Convention¹⁵ (or the 1992 Fund). The aim of the 1992 Conventions to replace the earlier Conventions is partly achieved by now. While the 1971 Fund Convention was denounced in 2002, the 1969 CLC is still in force, as 38 States remain parties thereto.¹⁶ The limitation amounts stated in the 1992

¹⁰ The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. This Convention came into force in 1978 but was subsequently denounced on 24 May 2002.

¹¹ ITOPF Spill Compensation Regime Overview, available at: <http://www.itopf.com/spill-compensation/index.html> (visited 11 May 2010).

¹² Jacobsson, Måns, *Bunkers Convention in Force*, 15 JIML, 2009, p. 22.

¹³ The Agreements were ultimately terminated in 1997, after having been in force for 28 and 26 years respectively.

¹⁴ International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969.

¹⁵ International Maritime Organization Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1971.

¹⁶ As at 30 April 2010 these 38 States parties represent only 2.80% of world tonnage. Updated Status of the Convention is available at: http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (visited 11 May 2010).

CLC were subsequently increased by the adoption of the Resolution in October 2000.¹⁷

As the totality of claims, resulting from the *Prestige* catastrophe in 2002 exceeded the combined capacity of the CLC and the Fund to pay out claims in full, this pollution incident undoubtedly triggered the creation of an additional compensation layer.¹⁸ Thus, a third tier of compensation in the form of the International Supplementary Fund for Compensation for Oil Pollution Damage, 2003 (Supplementary Fund) was established in 3 March 2005 by means of a Protocol adopted in 2003.¹⁹ Similar to the levies made under the 1992 Fund Convention, the funds under the third tier are generated from contributions made by receivers of oil in participating states. It is hoped that this extra layer will at last ensure the availability of compensation in full for oil pollution claims and render the pro-rata system which had to be introduced and accepted as most fair solution due to the overall insufficiency of funds available under the existed two-tier compensation regime.²⁰ In addition, in 2006 two voluntary compensation agreements²¹ were established for the purpose of maintaining a balance between the financial burdens shared by the ship-owners and cargo-owners.

As regards marine pollution by substances other than oil, the Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) was adopted in 1996. The HNS Convention is modelled on the mechanism established by the CLCs and Fund Conventions, thus providing a two-tier compensation system. The HNS Convention has not yet become internationally effective but is expected to enter into force in the near future.

All abovementioned liability and compensation systems (except HNS Convention) are primarily concerned with cargo oil spills from tankers and only in some limited situations fuel oil spills are covered as well. The 1969 CLC is applicable only to bunker spills from a laden tanker while the 1992 CLC has somewhat enlarged scope of application and applies to bunker oil spills from unladen tankers as well, though under certain circumstances.²² Still, neither the 1969 CLC nor the 1992 CLC applies to bunker spills from

¹⁷ The Resolution was adopted by the Legal Committee of the IMO on 18 October 2000 and entered into force on 1 November 2003.

¹⁸ Hill, Christopher, p. 441.

¹⁹ Jacobsson, Måns, *The International Oil Pollution Compensation Funds and the International Regime of Compensation for Oil Pollution Damage*, in: Basedow, Jürgen & Magnus, Ulrich (eds.), *Pollution of the Sea – Prevention and Compensation*, Berlin, Heidelberg: Springer-Verlag, 2007, p. 137. To date 26 States are parties to the Protocol. Updated Status of the Protocol is available at: http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (visited 11 May 2010).

²⁰ Hill, Christopher, p. 441.

²¹ These arrangements, known as STOPIA (the Small Tanker Oil Pollution Indemnification Agreement) and TOPIA (the Tanker Oil Pollution Indemnification Agreement), were introduced on behalf of the majority of shipowners insured by the International Group of P&I Clubs.

²² Compare the 1969 Civil Liability Convention, Article 1.1 and the 1992 Civil Liability Convention, Article 2.1.

vessels other than oil tankers. As bunker spill pollution remained almost unregulated for quite a long time, it caused some concern to coastal states as the potential of pollution from bunkers increased significantly with the increased amounts of bunker oil carried onboard of larger non-tankers.²³ It took, however, a while before the issue was rendered priority on the IMO's work programme and several years more of heated negotiations before the Bunkers Convention was finally adopted in 2001.

The Bunkers Convention well may be the last missing link in an otherwise comprehensive and firmly established IMO liability and compensation package for vessel-source pollution. As regards marine pollution in general, there is one significant gap, which is yet not covered by any global international regime, namely civil liability for pollution damage from offshore operations. The absence of such a regime was, therefore, substituted by adoption of international agreements between the affected States in the regions where offshore oil and gas is explored.²⁴ Although such regional agreements may be regarded as valuable international instruments, there are different viewpoints as to their effectiveness. On the one hand, in most of the cases these agreements contain in general terms expressed concern by the States on the issue and readiness to cooperate and take appropriate measures but they present no definitiveness on the specific matters of liability and compensation. In addition, such agreements only have importance for the region in question and, being independent international agreements, lack uniformity, not to mention the lack of worldwide application.²⁵ On the other hand, owing to the fact that offshore operations take place in coastal waters or on the continental shelf, it appears to be self-evident that pollution damage from such operations should be regulated by the national laws of the State in question or any regional agreement it decides to conclude. Therefore, it is argued that regional agreements present much better means to deal with the issue of pollution from offshore operations as such agreements take into account the different conditions and peculiarities of any particular area, which a worldwide regime could impossibly do.²⁶

Thus, due to the absence of common liability and compensation standards in this field, and in the light of rapid growth since the early 1990s in the number and variety of offshore units, the questions have increasingly arisen as regards legal position in the case of oil pollution from offshore units and whether such offshore craft may be governed by international instruments applicable to ships.²⁷ While the issue of applicability of the Bunkers

²³ Gold, Edgar, Chircop, Aldo E. & Kindred, Hugh, M., *Canadian Maritime Law*, Toronto: Irwin Law, 2003, p. 699.

²⁴ Agyebeng, Kissi, *Disappearing Acts – Toward a Global Civil Liability Regime for Pollution Damage Resulting from Offshore Oil and Gas Exploration*, Cornell Law School LL.M. Papers Series, Paper 11, Cornell Law School, 2006.

²⁵ Agyebeng, Kissi.

²⁶ Gavouneli, Maria, *Pollution from Offshore Installations*, London: Graham & Trotman, 1995, p. 39.

²⁷ De la Rue, Colin M. & Anderson, Charles B., *Shipping and the Environment: Law and Practice*, 2nd ed., London: Informa, 2009, p. 243.

Convention to the offshore craft will be mentioned in the subsequent chapters, the considerations as to applicability of other international regimes for ship-source pollution to such craft fall beyond the scope of the thesis. Emphasizing the need for universal regime as regards offshore craft, the Canadian Maritime Law Association (CMLA) presented a draft of Convention²⁸ on the subject in 2001, which is still being examined by the Comité Maritime International (CMI). It is hoped that this new convention will be adopted in the near future. Though, the difficulties faced with during the drafting of the Bunkers Convention, presented in the next chapter, may indicate that preparatory work leading to a Convention can take a long time before a consensus is reached between the interested parties.

2.2 Legislative background of the Bunkers Convention

2.2.1 Preparatory work on the Bunkers Convention

Although the Bunkers Convention is a relatively new instrument in the international liability and compensation regime for ship-source pollution, the background work on the Convention on the international level can be traced back to the IMO Diplomatic Conference in Brussels in 1969 where the issue of bunker spill pollution was initially raised.²⁹ The purpose and the prior concern of the Conference, which was held in the wake of the *Torrey Canyon* disaster, was to create an international liability and compensation regime for large tankers' cargo spills. Although the conference was not devoted to the bunker spills problem, it was considered whether the future liability convention (the 1969 CLC) should embrace bunker spills or not. After some heated discussions the view prevailed that the focus should be kept on persistent oil carried as cargo but the bunker spills from laden tankers should be covered as well.³⁰ As the 1969 CLC was expected to be complemented by the Fund Convention, which would be generated by the oil industry, it was thought realistic and fair to expect cargo interests to contribute to compensation for damage caused by the escape of cargo oil or bunker oil from laden tankers.³¹ Conversely, it was felt that including bunker spills from all types of vessels in the future Convention would unnecessarily complicate the whole liability and compensation regime primarily designated to deal with cargo oil spills.³² Therefore, the liability

²⁸ The Draft Convention on Offshore Units, Artificial Islands and Related Structures Used in the Exploration and Exploitation of Petroleum and Seabed Mineral Resources.

²⁹ Wu, Chao, *Liability and Compensation for Bunker Pollution*, 33 J. Mar. L. & Com., 2002, p. 554.

³⁰ CMI Documentation, 1968-III.

³¹ Griggs, Patrick, *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, British Maritime Law Association, 2001, available at: <http://www.bmla.org.uk/documents/imo-bunker-convention.htm> (visited 11 May 2010).

³² Wu, Chao, p. 554. For more details on discussion, see CMI Documentation, 1968-III.

for bunker oil spills in relation to non-tankers as well as such spills from unladen tankers was clearly excluded from the scope of application of the 1969 CLC.

During the discussions leading to the adoption of the CLC Protocol 1992 the issue of bunker spill pollution was brought to the attention again as the legal regime for handling such pollution was considered necessary. The CLC mechanism was amended to cover bunkers spill from unladen tankers as well, given certain circumstances,³³ but otherwise it was considered unrealistic to include bunkers pollution from all types of vessels under the 1992 CLC without significant implications. The question of bunker oil spills was raised again in the beginning of the 1990s when a number of states tried to add provisions regulating bunker spills pollution to the HNS Convention³⁴ during its drafting. The efforts were, however, unsuccessful.

The first concrete suggestion to create an independent bunker pollution instrument was made in 1994 when Australia tabled such proposal at the 36th session of the IMO's Marine Environment Protection Committee (MEPC).³⁵ It was unanimously agreed that there was a high time for such a compensation regime to be created and, therefore, the issue was submitted to the IMO's Legal Committee for further consideration. The submission by Australia was tabled again at the Legal Committee's 73rd session, this time containing four concrete alternatives to regulate the bunkers pollution issue.³⁶ Two most favourable alternatives were either to adopt a protocol to the CLC or to establish a stand-alone treaty.³⁷ The advantages and disadvantages of both alternatives were compared and the preference was given to the latter one, namely to create a free-standing compensation regime, which would follow the precedents set by the existing IMO Conventions as far as practicable. Shortly after that followed a joint submission by several states with the first draft of the future regime on liability for bunkers pollution damage annexed thereto.³⁸ The submission requested the Committee to make rapid development of the proposed regime a priority item on the Committee's agenda for the 1996-97 biennium. Finally, after the adoption of the HNS Convention in May 1996, the Committee decided that the subject of compensation for pollution from ship's bunkers should be given the highest priority on the work programme.³⁹ Indeed, there were several convincing reasons that called for a reform in the field.

³³ The 1992 CLC, Art. 1.1.

³⁴ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention). The HNS Convention has not entered into force yet.

³⁵ LEG 73/12 and MEPC 36/21/6.

³⁶ LEG 73/12.

³⁷ LEG 73/12 and LEG 77/11.

³⁸ LEG 73/12/1. The proposal was submitted by the Netherlands, Norway, the Republic of Ireland, Sweden and the United Kingdom.

³⁹ LEG 74/4.

2.2.2 Factors calling for reform

2.2.2.1 The statistics

Ever since the *Torrey Canyon* disaster, the problem of oil pollution from tankers has been a major headache throughout the world. Although most public attention has always been focused on tanker accidents, these in fact are responsible for less than 10 % of marine pollution, which is a comparatively small proportion of total oil pollution to be given the highest priority since *Torrey Canyon* incident.⁴⁰ In a joint submission to the 75th session of the Legal Committee the reference was made to the UK P&I Club's Analysis of Major Claims 1993 according to which "half of the total number of pollution claims arose from incidents involving ships not carrying oil cargo".⁴¹ Although few statistics were available, Australian data showed that between 1975 and 1995 oil spills from non-tankers have accounted for over 83 % of all oil spills in Australian waters accounting for 78 % of the response costs incurred during the same period under Australia's national plan.⁴²

Such a high level of bunker spills could be explained by the fact that such spills are common source of oil pollution from vessels as they can occur not only from tankers but from the most of the world's fleet as well.⁴³ Although experience shows that the most serious and intensive oil spills are caused by such spills from tankers⁴⁴, dry cargo ships and other non-tankers are much more numerous than tankers, and thus, the probability of bunker spills is much higher.⁴⁵ In addition, some larger bulk carriers and container ships can have bunker capacity of 10,000 tonnes or more oil as fuel, which is much larger quantity than many of the world's tankers can take as cargo.⁴⁶ The point was also made that, while regulation 13G of Annex I of MARPOL 73/78⁴⁷ will result in the phasing out of many older tankers, with consequent reduction of the risk of pollution from tankers' bunkers, there were no similar procedure suggested for non-tankers.⁴⁸ It was also estimated that at any given time there is around 14 million tonnes of fuel oil carried by

⁴⁰ Özçayır, Oya, p. 159f.

⁴¹ UK P&I Club, Analysis of Major Claims 1993, available at: [http://www.ukpandi.com/ukpandi/resource.nsf/Files/AMC1993/\\$FILE/AMC1993.pdf](http://www.ukpandi.com/ukpandi/resource.nsf/Files/AMC1993/$FILE/AMC1993.pdf) (visited 12 May 2010).

⁴² LEG 74/2 and LEG 74/4/2.

⁴³ De la Rue, Colin, *Bunker spill risk*, 22(10) Maritime Risk International, Dec 2008/Jan 2009, p.18; LEG 74/4/2.

⁴⁴ The *Torrey Canyon* (the UK, 1967), the *Amoco Cadiz* (France, 1978), the *Haven* (Italy, 1991), the *Sea Empress* (the UK, 1996), the *Erika* (France, 1999), the *Prestige* (Spain, 2002), the *Hebei Spirit* (Republic of Korea, 2007) are examples of some high-profile incidents.

⁴⁵ De la Rue, Colin, *Bunker spill risk*, p.18.

⁴⁶ Wu, Chao, p. 555; De la Rue, Colin, *Bunker spill risk*, p.18

⁴⁷ The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto.

⁴⁸ For details, see submission of Australia at the 36th session of MEPC (MEPC 36/21/6).

non-tankers while approximately 130 million tonnes of oil are carried as cargo.⁴⁹ Hence, carrying significant quantities of bunker oil, non-tankers represent considerable oil contamination risk and cannot be negligible.⁵⁰

2.2.2.2 Technical factors

Another factor urging for a free-standing bunkers instrument was the fact that the physical properties of bunker oil differ significantly from the crude oil carried as cargo. Ships' bunkers normally consist of heavy fuel oils, which are among the most difficult to combat. The high viscosity of such oil leads to its prolonged persistence in marine environment and usually results in extensive contamination of the affected area.⁵¹ Relatively small spill of highly persistent bunkers can cause a comparatively widespread damage and give rise to claims for compensation that are disproportionate to the amount of oil spilled.⁵² The contamination by such oil often causes significant loss of amenity and damage to fisheries and mariculture facilities. As bunker oil can easily move around it constitutes a great threat to seabirds and other organisms, but when in some circumstances heavy fuel oils sink, the problems of contamination are, thereby, transferred to the seabed.⁵³

The cleaning up of fuel oil is proven to be more difficult, challenging and costly process in comparison with cargo oil spills.⁵⁴ Not only fuel oils tend to spread a great distance from the original spill location and accordingly require clean-up operations over a large area; the fact that such oils are resistant to many clean-up techniques, particularly at sea, additionally exacerbate the situation.⁵⁵ For example, in 1997 the spill of bunker oil from the wood ship carrier *Kure* resulted in clean-up claims amounting to 47 million USD in total.⁵⁶ Thus, the significance of the bunker spills issue remarked on the importance of a separate liability convention.

⁴⁹ LEG 75/5/1.

⁵⁰ Jacobsson, Måns, *Bunkers Convention in Force*, p. 21.

⁵¹ Ansell, D.V., *et al.* (ITOPF), *A Review of the Problems Posed by Spill of Heavy Fuel Oil*, Paper presented at: 2001 International Oil Spill Conference, March 26-29 2001, Tampa, Florida, available at: <http://www.itopf.com/assets/documents/iosc2001.pdf> (visited 17 May 2010).

⁵² Ansell, D.V., *et al.* (ITOPF), available at:

<http://www.itopf.com/assets/documents/iosc2001.pdf> (visited 17 May 2010).

⁵³ LEG 74/4/2, particularly annexed ITOPF submission - Technical aspects of bunker oil spillages, particularly from non-tankers.

⁵⁴ De la Rue, Colin, *Bunker spill risk*, p.18.

⁵⁵ LEG 74/4/2, particularly annexed ITOPF submission - Technical aspects of bunker oil spillages, particularly from non-tankers. See also Ansell, D.V., *et al.* (ITOPF), available at: <http://www.itopf.com/assets/documents/iosc2001.pdf> (visited 17 May 2010).

⁵⁶ More recent bunker oil spill incidents from non-tankers are the Cosco Busan (US, 2007), the Fedra (Gibraltar, 2008), the Sierra Nevada (Spain, 2007), the Don Pedro (Spain, 2007) and the Morning Sun (Taiwan, 2008). Although, in all these incidents the escaped bunker oil did not exceed 200 tonnes, the considerable pollution damage was caused which necessitated costly clean-up operations. In March 2009 the container ship Pacific Adventure lost some 270 tonnes of bunkers from its punctured fuel tank off the coast of Australia. Notwithstanding such a small quantity of the bunker oil spilled (if compared with large cargo oil spills involving thousands of tonnes of oil), 50 kilometres of coastline were polluted and the Government of Queensland declared the affected coast a disaster zone.

2.2.2.3 No uniform liability regime

The main rationale for the development of another pollution Convention was probably the absence of a uniform international legislation covering pollution damage from vessels other than tankers. Although the CLCs partly covered bunker spills from tankers, such spills from the rest of the world's fleet were falling outside the scope of any existent international compensation regime for oil pollution. Due to the absence of the uniform compensation and liability provisions on bunkers pollution, States had to deal with the problem on the national level. Some States, such as the UK, have extended the CLC strict liability regime to cover bunker spills as well, hence, "recommending" the shipowners to maintain financial security to be able to cover their liabilities⁵⁷; other States have decided to pass domestic law dealing with such types of pollution. For example, the US adopted the Oil Pollution Act (OPA 1990) which applies to oil damage from all types of vessels. Some other, including Australia and Canada, have implemented requirements for all vessels to have on board a document providing evidence that adequate insurance is in place when entering a port. Still, many jurisdictions did not have national legislation dealing with bunker spill pollution at all. However, even if the relevant domestic law existed in some jurisdiction, it has not been practicable for governments to impose their own domestic laws to ensure that financial security is available for payment of claims.⁵⁸

There were some additional disadvantages of having bunker spill issue regulated by domestic law instead of adopting a free-standing international regime. For example, vessels in transit were more likely to comply with uniform obligations imposed on international level than meet the requirements of national law of each coastal State.⁵⁹ Without uniform provisions on the matter, the involved parties would be uncertain as regards the extent of their rights and liabilities, and such obvious problems as identifying the person liable and deciding the right jurisdiction would be unavoidable. Moreover, the different domestic laws would provide shipowners with opportunity to choose the less demanding jurisdiction.⁶⁰ As the *Torrey Canyon* incident has shown, the most unprotected would be pollution victims, as those would face significant difficulties in finding the person liable and obtaining the compensation.

Although it is believed that there is only a minor risk of claims remaining unpaid after a bunker spill, there have been a couple of cases which proved

Thus, all above mentioned cases indicate the disproportionate damage that can be caused by a relatively small quantity of bunker oil. See also Jacobsson, Måns, *Bunkers Convention in Force*, p. 21f.

⁵⁷ The Merchant shipping act 1995, section 154. Strict liability for damage caused by bunker spills was also imposed under national law of the Netherlands, Norway, Sweden, etc.; LEG 73/12, LEG 73/12/1.

⁵⁸ LEG 73/12 and LEG 73/12/1.

⁵⁹ LEG 73/12/1.

⁶⁰ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, Berlin, Heidelberg: Springer-Verlag, 2007, p. 15.

that as long as there is no uniform regulation on the matter, coastal States may have some difficulties in recovering their response costs. A good example of this point is the bunker spill incident of the *Pionersk*, a fish-factory ship registered in Russia, which grounded off the coast of the UK in October 1994. Notwithstanding that the UK had already introduced the strict liability for bunker spills in its domestic legislation, the government of the UK did not succeed in recovering the clean-up costs incurred, simply because there were no adequate liability cover for the vessel. Probably, the *Pionersk*, being persuasive evidence that the solution on the national level was not an effective way out of the international problem, played its part in stimulating work on new international regime on liability and compensation for bunkers pollution.⁶¹

2.2.3 Adoption of the Bunkers Convention

With abovementioned factors in mind it was clear that the subject was worth of greater attention and that an international mechanism governing the matter was long overdue. Thus, after being on the IMO's work programme for more than thirty years, the issue of bunker spills was finally regulated when the International Convention on Civil Liability for Bunker Oil Pollution Damage was adopted on 23 March 2001 at a Diplomatic Conference convened under the auspices of the IMO. In addition, the same conference adopted three resolutions connected to the Bunkers Convention.⁶² The Convention entered into force on 21 November 2008 after attaining the required ratifications 12 month earlier, and at the time present 51 States representing more than 84% of tonnage are parties to the Convention.⁶³

Available IMO documentation has shown that while the main scope of the Convention was decided under late stage of its drafting, many vital aspects were left unresolved until the final Conference.⁶⁴ In its opening statement to the Conference, the Secretary-General of the IMO proclaimed that the failure to agree upon Bunkers Convention would "not only rebound to the discredit of the Legal Committee and Organisation but would also disappoint States and lead to the adoption of national legislation not based

⁶¹ De la Rue, Colin M., *Current Legal Issues Relating to Pollution Claims*, Lloyd's List Events, Oil Pollution 2002, London, 2002, p. 3.

⁶² These resolutions are: 1) Resolution on the limitation of liability; 2) Resolution on the promotion of technical cooperation; 3) Resolution on protection for persons taking measures to prevent or minimise the effects of oil pollution. A brief overview of the resolutions is available at: http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=666 (visited 18 May 2010).

⁶³ The IMO data represents the status of the Conventions as at 30th of April 2010, available at: http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (visited 12 May 2010).

⁶⁴ Tsimplis, Michael N., *The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships?*, Lloyd's Mar. & Com. L.Q., 2005, p. 99.

on an integrated international regime”.⁶⁵ It is self-evident that after such a statement the delegates were put under strong time pressure to reach agreement on the Bunkers Convention. As a result, several improvements and clarifications to the Convention, which were presented at the late stages of the drafting process, were disregarded due to the lack of time.⁶⁶

The rapid growth of the number of States parties with dominant fleets in such a short time undoubtedly indicates that the Bunkers Convention is largely a successful international instrument. At the same time, certain elements of the Convention have been strongly criticised for being not effective in order to provide the sufficient compensation to the bunkers pollution victims. Therefore, in the following chapters the provisions of the Bunkers Convention, and particularly its weaknesses, will be presented.

⁶⁵ LEG/CONF.12/RD/1.

⁶⁶ Tsimplis, Michael N., *The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships?*, 99.

3 Main features of the Bunkers Convention

3.1 The purpose of the Convention

The purpose of the Bunkers Convention, according to its Preamble, is to ensure that adequate and effective compensation is promptly available to persons who suffer damage caused by spills of bunker oil. The corner-stones of the Convention, namely, strict liability imposed on the ship's owner, limitation of liability and system of compulsory insurance, follow a pattern which in many respects is analogous to that of the CLCs. Still, notwithstanding its similarities with the CLCs and the fact that many provisions are modelled on familiar counterparts in the 1992 CLC, there are a number of notable differences between these two conventions.⁶⁷ Thus, in addition to summarising the key features of the Bunkers Convention, the following section will seek to identify and explain those differences as well as spot the shortcomings if there are any.

3.2 Definitions

3.2.1 Ship

The definition of "ship" in the Bunkers Convention, which is identical with the corresponding provision of the HNS Convention, embraces "any seagoing vessel and seaborne craft, of any type whatsoever".⁶⁸ Such a broad definition will cover bunker spills not only from all types of traditional ships but also from a large number of floating objects in the sea.⁶⁹ Notwithstanding such a broad definition, the Bunkers Convention does not apply to oil tankers or oil pollution damage resulting from escape of bunker oil from tankers as such in most cases are covered by the CLCs.

The wording "seaborne craft" indicates the intention of the drafters to provide a wide application that goes beyond the scope of "seagoing vessel". Although the term "seaborne craft" is not further defined in the Convention, it appears that the wording encompasses such offshore units as MOUs, FPSOs, FSUs and mobile drilling rigs.⁷⁰ Whether the Bunkers Convention is

⁶⁷ De la Rue, Colin M. & Anderson, Charles B., p. 259.

⁶⁸ The Bunkers Convention, Art. 1.1; HNS Convention, Art. 1.1.

⁶⁹ Griggs, Patrick, available at: <http://www.bmla.org.uk/documents/imo-bunker-convention.htm> (visited 11 May 2010).

⁷⁰ The Standard P&I Club, Standard Bulletin – Bunkers Certificates for Offshore Units, 24 March 2009, available at: http://www.standard-club.com/docs/14809_SB_MAR_09_disclaimer.pdf (visited 12 May 2010); Gard P&I Club, Special Circular - Entry into force of the Bunker Convention, November 2008, available at:

likewise applicable to all other floating offshore structures, such as jack-ups, (semi-)submersibles, drilling ships, is however, less clear as the status of those structures is per se debated in maritime law.⁷¹ The records of the IMO's sessions reflecting the drafting process of the Bunkers Convention do not contain any indication that seaborne craft was closely considered, it rather appears that the wording was directly taken from the corresponding provision in the HNS Convention. Therefore, the fact that offshore units are embraced by the definition may be considered merely as a side effect of strong intention of the drafters not to let any vessel to escape from bunkers pollution liability. Consequently, several loopholes were created as regards offshore craft, particularly on issues connected with insurance and limitation of liability.

3.2.2 Shipowner

To reach a consensus on definition of "shipowner" was one of the most challenging tasks during the preparatory work on the Bunkers Convention, as it was well understood that the definition would have a direct impact on such essential issues as liability and insurance, to name a few. In the later stage of negotiations two main options of definition were considered by the delegates, namely, one based on the corresponding provision of the LLMC, the other was identical to the provision in the 1992 CLC.⁷² While the LLMC definition made a wide range of persons liable, the 1992 CLC channelled the liability only to registered owner of the ship. As it was widely understood that the limitation regime provided by LLMCs would apply to bunker spills liability, the first alternative was preferred for the purpose of ensuring uniformity between these two regimes.⁷³

The "shipowner" is defined in Article 1.3 of the Bunkers Convention as "the owner, including the registered owner, bareboat charterer, manager and operator of the ship". As the Convention applies to seaborne craft as well, accordingly, the registered owner and other above listed persons involved in operation of such craft will equally be held liable in case of bunkers pollution. It is, nevertheless, emphasised in Article 3.5 that such a wide range of persons strictly liable is only designated for the purpose of the Convention by prescribing that no claims for compensation for pollution damage may be made against the "shipowner" outside the Bunkers Convention.

<http://www.gard.no/ikbViewer/Content/63022/Special%20Circular%20MOU%20-%20Safeguard.pdf> (visited 12 May 2010).

⁷¹ Agyebeng, Kissi.

⁷² The LLMC, Art. 1.2; the 1992 CLC, Art.1.3; See also LEG 80/4/1.

⁷³ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 26f; LEG 80/4/1.

3.2.3 Bunker oil

The Bunkers Convention covers only bunker oil, which is defined as “any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil”.⁷⁴ Accordingly, the proof of intention of use would be required in order to make distinction between fuel and cargo oil. This may not cause any difficulty when bunker oil is stored in the consumption tanks or in the pipelines as necessary evidence seems to be provided. Though, in case when bunker oil is stored in other tanks, it may be easily presumed that its purpose of use is other than operation of the vessel, and thus, it may be difficult to provide an evidence of its real intention of use.⁷⁵ It should also be mentioned that while the Bunkers Convention covers spills of persistent bunker oil as well as spills of non-persistent bunker oil (for example medium fuel oil), the application of the 1992 CLC in cases of bunkers pollution from tankers is limited only to persistent oil spills.⁷⁶

3.2.4 Pollution damage

The definition of “pollution damage” in the Bunkers Convention accords with the corresponding provision in the 1992 CLC and acknowledges four types of such damage.⁷⁷ According to the criteria laid down in Article 1.9(a), the compensation may be sought for property damage, pure economic losses and, to limited extent, some forms of environmental reinstatement. The compensation for impairment of the environment “other than loss of profit from such impairment” will however be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. The proviso in Article 1.9(a) shows that concept of the pollution damage under the Convention is limited to damage of an economic nature that actually can be calculated. The compensation is not admissible for damage calculated merely on the theoretical basis or of a punitive nature, nor can it be awarded for damage of a non-economic character.⁷⁸ It means that claims for damage to the marine environment as such would not be acceptable, because such damage cannot be estimated financially (monetarily). Though, claims for the economic consequences resulting from damage to the environment, for example losses suffered by the fisheries and

⁷⁴ The Bunkers Convention, Art. 1.5.

⁷⁵ Tsimplis, Michael N., *The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships?*, p. 86.

⁷⁶ The 1992 CLC, Art. 1.5.

⁷⁷ The Bunkers Convention, Art. 1.9; The 1992 CLC, Art. 1.6.

⁷⁸ Admissibility of Claims for Compensation for Environmental Damage Under the 1992 Civil Liability and Fund Conventions, available at: <http://www.itopf.com/assets/documents/admissibilityofclaims.pdf> (visited 13 May 2010). Although, the information concerns the 1992 CLC, it is likewise relevant for the Bunkers Convention as the proviso in question is identical in both Conventions; see the Bunkers Convention, Art. 1.9(a) and the 1992 CLC, Art. 1.6(a).

tourism industries, are falling inside the scope of the Convention.⁷⁹ Hence, damage is recoverable subject to it being quantified by experts.

The fourth type of damage is defined by Article 1.9(b), which means costs of reasonable preventive measures and further loss or damage caused by such measures. The definition of preventive measures can be found in Article 1.7 of the Bunkers Convention where such measures are defined as “any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage”.⁸⁰ Since an “incident” for the purpose of the Convention means “any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage”, preventive measures may fall within the concept of pollution damage even if oil was not actually spilt.⁸¹

3.3 The scope of application

The geographical sphere of the Bunkers Convention embraces pollution damage occurred within the territory, including the territorial sea, of a State party and also within the exclusive economic zone or equivalent area of such State, as determined in accordance with international law.⁸² This article indicates that the residence, domicile or nationality of the defendant is not relevant; the only criterion that is of importance is territorial. Accordingly, the place of damage is determining as regards the applicability of the Convention to the particular accident, while the place where the oil actually escaped is of little concern.⁸³ On practice, it would mean that the Convention might be applicable to incidents involving bunker oil spills on the high seas, provided that pollution damage is sustained within the territorial sea or the exclusive economic zone of a contracting State.⁸⁴

According to Article 2(b) the Convention also applies to preventive measures, wherever taken, to avoid or minimize bunker oil pollution damage.⁸⁵ The wording of this provision means that the costs incurred in

⁷⁹ Jacobsson, Måns, *Bunkers Convention in Force*, p. 25.

⁸⁰ Preventive measures should be distinguished from salvage, as the purpose of the latter is to save vessel or cargo and the costs incurred in the salvage operation will be paid by the hull insurer.

⁸¹ The Bunkers Convention, Art. 1.8; Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 24.

⁸² The Bunkers Convention, Art. 2(a). A State Party which has not established an exclusive economic zone may, for the purpose of the application of the Bunkers Convention, determine an area beyond its territorial sea not extending 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. See Art. 2(a)(ii).

⁸³ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 23f.

⁸⁴ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 24.

⁸⁵ The Bunkers Convention, Art. 2(b).

undertaking preventive measures are not subject to geographical limits mentioned above, and therefore, will be covered by the Convention independently of the geographical area in which they are undertaken.⁸⁶ The Bunkers Convention covers liability and compensation for pollution damage caused by oil spills, when carried as fuel in non-tanker vessels. For the purpose of preserving the balance and avoiding an overlap with the CLCs, tanker vessels are clearly excluded from the application of the Bunkers Convention by Article 4.1 irrespectively of whether compensation is obtainable under the 1992 CLC or not. On the one hand, by express provision that the Bunkers Convention is not applicable to such pollution damage as defined in the 1992 CLC, the drafters definitely succeeded in their aim to avoid an overlap of these two Conventions. On the other hand, as a by-effect of such a general exclusion, loophole was created with a result that some specific situation are not covered by either of two Conventions.

It may also be briefly mentioned that the Bunkers Convention does not apply to warships, naval auxiliary or other ships owned or operated by a State and used on Government non-commercial service. Still, the State party may decide to apply the Convention to such ships as well.⁸⁷

3.4 Scope of liability

3.4.1 Wide range of liable persons

As was mentioned above, Article 1.3 of the Bunkers Convention places liability on multiple parties within the definition of “shipowner” which embraces thereto the owner, including the registered owner, bareboat charterer, manager and operator of the ship. Where more than one person is liable in the meaning of the Convention, their liability is joint and several.⁸⁸ Likewise, when an incident involves two or more ships and pollution damage results therefrom, the shipowners of all the ships concerned shall be jointly and severally liable for all the damage, provided the damage may not be reasonably separable.⁸⁹ The “joint and several liability rule” entitles the victims of the bunkers pollution to claim compensation from anyone of the broad range of defendants or from any combination of them.⁹⁰

On the issue of channelling of liability, the Bunkers Convention differs notably from the CLCs as well as the HNS Convention, under which the liability is channelled solely to the registered owner of the ship in question. The issue of the channelling of liability involved lengthy debates throughout the preparations. Apart from the adopted regime and the CLC model, a

⁸⁶ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 24.

⁸⁷ The Bunkers Convention, Art. 4.2 and 4.3.

⁸⁸ The Bunkers Convention, Art. 1.3 and 3.2.

⁸⁹ The Bunkers Convention, Art. 5.

⁹⁰ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 136.

compromise alternative was presented by the International Group of P&I Clubs, which suggested creation of a two-steps compensation regime. According to the proposition, the liability would be channelled to the registered owner in the first place, with the effect of prompt compensation either from him or from his insurer.⁹¹ In the vast majority of cases, such compensation would be sufficient to cover all the properly documented claims for pollution damage. In addition, the absence of ambiguity connected to several liable parties would accelerate the litigation process and, accordingly, payment of claims. However, in case the registered owner and his insurer fail to provide the payment, the other parties falling within the definition of shipowner would be obligated to jointly and severally assume the liability and respond to the compensation claims.⁹² Thus, the possibility to hold the other parties liable would constitute a sort of supplementary tier of compensation, which would be effectuated only when the inability of the registered owner to meet the responsibility has been established.

Unfortunately, the suggestion was not further investigated due to the time constraints and in the end, the U.S. Oil Pollution Act 1990 (OPA 90) approach on the matter was chosen as a model for the Bunkers Convention.⁹³ It was emphasized that the system practiced by the United States “had proved to be workable, practical and simple while consistent with traditional legal liabilities and duties”.⁹⁴ Probably, the linkage of the limitation of liability under the Bunkers Convention to the LLMC may be another cause of the enlarged definition of the “shipowner” as those same persons enjoy the limitation rights under that Convention.⁹⁵

During the preparatory work, it was suggested that liability should attach not only to registered shipowner but also to the persons who are in one way or another responsible for day-to-day operation of the vessel, as damage caused by bunkers is more likely to be linked to operation of the ship.⁹⁶ It was therefore considered to be more appropriate if liability was attached to the responsible party rather than was attributed to the registered owner, as the latter not necessarily was personally involved in operation of the ship in question.⁹⁷ Exemption of operators and charterers from liability would serve as a disincentive to high standards onboard ships and due care in their operations.⁹⁸ In case oil spill occurred, these potentially liable persons would have been more motivated to minimise damage as well as their own

⁹¹ LEG/CONF.12/9.

⁹² LEG/CONF.12/9.

⁹³ Jacobsson, Måns, *The International Liability and Compensation Regime for Oil Pollution from Ships - International Solutions for a Global Problem*, 32(1) Tul. Mar. L. J., 2007-2008, p.20.

⁹⁴ LEG 77/11.

⁹⁵ Hill, Christopher, p. 440.

⁹⁶ LEG 74/4/1.

⁹⁷ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 35; LEG 74/4/4.

⁹⁸ Wu, Chao, p. 558.

probable liability by taking appropriate measures in response to oil spill pollution.⁹⁹

The reason for holding the bareboat charterer liable on par with the shipowner is attributable to the fact that in practice, the bareboat charterer steps into the shoes of the shipowner and assumes control over the management and operation of the vessel.¹⁰⁰ The operator of the ship is directly connected with the ship's operation. However, the shipowner is normally presumed to be the operator of the ship at the same time, and therefore, may be held liable as such, unless he succeeds in proving that this position is held by someone else.¹⁰¹ Thus, the meaning of "operator" will normally depend on the circumstances in each case and be decided on a case-by-case basis.¹⁰²

The ship manager is considered to be the agent of the shipowner and is responsible for the management of the ship.¹⁰³ The wording "ship manager" may however be wrongly understood as referring to an individual employed as a manager by the shipowner.¹⁰⁴ In practice, though, "ship manager" is usually either an associated company to the single ship-owning company to which all the operational management of the ship is delegated, or a separate professional ship management company, which works for several owners.¹⁰⁵ Therefore, due to the liability being joint and several, each of the abovementioned defendants runs the risk of being held liable for bunkers pollution damage, which may be entirely attributable to the negligent navigation of the master employed by the shipowner.¹⁰⁶

Although the persons defined as a shipowner may be held jointly and severally liable, Article 3.6 prescribes that the provisions of the Bunkers Convention do not preclude any right of recourse that such persons may enjoy independently of the Convention. Accordingly, the shipowner who alone had to compensate for the pollution damage may then seek recourse from the other persons who may have contributed to the damage. Still, the right of recourse would have little or no effect at all where such persons are insolvent or do not have financial means to meet the liability.

⁹⁹ Jacobsson, Måns, *Bunkers Convention in Force*, p. 26; LEG 77/11.

¹⁰⁰ Zhu, Ling, *Can the Bunkers Convention Ensure Adequate Compensation for Pollution Victims?*, 40 J. Mar. L. & Com., 2009, p. 206.

¹⁰¹ Chen, Xia, *Limitation of Liability for Maritime Claims: a Study of U.S. Law, Chinese Law, and International Conventions*, The Hague: Kluwer Academic Publishers, 2001, p. 8.

¹⁰² Chen, Xia, p. 8.

¹⁰³ Willingale, Malcolm, *Ship Management*, 3rd ed., London: LLP, 1998, p. 136.

¹⁰⁴ Gaskell, Nicholas & Forrest, Craig, *Marine Pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003*, 27(2) U. Queensland L. J., 2008, p.138.

¹⁰⁵ Gaskell, Nicholas & Forrest, Craig, p.138.

¹⁰⁶ Gaskell, Nicholas & Forrest, Craig, p.138.

3.4.2 Strict liability

According to the Bunkers Convention, a shipowner is strictly liable for pollution damage caused by bunker oil that originated from his ship.¹⁰⁷ In the context of the Bunkers Convention, strict liability means that shipowner is liable as soon as his ship spilt bunker oil and caused pollution damage, irrespective of whether there is any fault attributable to the shipowner personally or not.¹⁰⁸ With other words, there is no need for claimants to prove any fault on the part of the shipowner.¹⁰⁹ Yet, the shipowner's strict liability does not preclude his right of recourse outside the scope of the Bunkers Convention.¹¹⁰

As definition "shipowner" embraces certain group of persons under the Convention, the group will be strictly liable as a whole. In addition, due to the right of direct action prescribed in the Convention, the liability insurer may be held strictly liable for the registered owner's liability as well.¹¹¹ Both the concept of strict liability and the grounds for exoneration of liability match the corresponding provisions contained in the 1992 CLC. Unlike the situation with the CLC, the proposal of establishing strict liability per se did not involve any heated discussions during negotiations leading to convention as such solution was favoured by most of delegations.¹¹² Still, the issue of adequacy of strict liability under the Bunkers Convention was raised by CMI. It was reminded that strict liability under the CLC was considered acceptable only in conjunction with other important features of the system, such as supplementary fund of compensation and clear right of limitation for pollution claims. As neither a supplementary fund would be established under the Bunkers Convention, nor would Convention contain any concrete rules on limitation of liability, there were no justifiable reasons to impose strict liability on the shipowner.¹¹³

3.4.3 Exclusions from liability

The liability in accordance with the Bunkers Convention is not an absolute one since the shipowner can be exculpated from liability provided that any of the exceptions under the Convention is applicable in his case.¹¹⁴ The defences available for the shipowner are on a par with those listed under the CLCs and the HNS Convention.

¹⁰⁷ The Bunkers Convention, Art. 3.1.

¹⁰⁸ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 213.

¹⁰⁹ Wu, Chao, p. 557.

¹¹⁰ The Bunkers Convention, Art. 3.6.

¹¹¹ The Bunkers Convention, Art. 7.10.

¹¹² LEG 78/5/2; Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 82.

¹¹³ LEG 74/4/2.

¹¹⁴ The Bunkers Convention, Art. 3.3 and 3.4.

Thus, to avoid liability the shipowner has to establish that the damage resulted from an act of war or natural phenomenon, according to Article 3.3(a), was caused by an act or omission of a third party with intent to cause damage according to Article 3.3(b) or was caused by the negligence or wrongful act of any government or other authority responsible for maintaining navigational aids according to Article 3.3(c). In addition, where contributory negligence or sabotage by the pollution victims can be shown, the shipowner may be exonerated from liability partly or fully.¹¹⁵ Nevertheless, the attention should be drawn to the fact that exemptions (b) and (c) would not be applicable if any contributory negligence, even minor, could be shown on the part of any persons falling within the definition of shipowner.¹¹⁶

3.4.4 Limitation of liability

It is a generally accepted principle that strict liability should be subject to limitation in maritime law. Otherwise, strict liability without any limits would be recipe for financial disaster and it would be nearly impossible to insure without a possibility of assessment of the maximum liability in advance.¹¹⁷ The Bunkers Convention is no exception as regards the recognition of this principle, although it does not contain any express limitation rules but merely refers to other instruments dealing with the issue. According to Article 6 of the Bunkers Convention nothing in the Convention shall affect the right of the shipowner or his insurer to limit liability under any applicable national or international regime, such as the LLMC, 1976, as amended. Accordingly, all concrete aspects of limitation, such as amount of limitation, conditions of establishment of limitation fund and its distribution among the pollution victims are to be found in other international or national instruments that regulate the issue.¹¹⁸

The right to limit liability applies to all persons embraced by the definition of the shipowner. In addition, if the insurance is purchased voluntarily by the persons other than registered shipowner, the right to limit liability will be extended to their liability insurers as well.¹¹⁹

Although the limitation system under the 1996 LLMC is expressly recommended to be used, in situations when neither of the LLMCs is applicable other international or national regimes would be applicable. Thus, the Bunkers Convention does not provide any certain answer as to the level of liability for bunker pollution, as right to limit the liability and

¹¹⁵ The Bunkers Convention, Art. 3.4.

¹¹⁶ Jacobsson, Måns, *Bunkers Convention in Force*, p. 26.

¹¹⁷ Tsimplis, Michael N., *The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships?*, p 84.

¹¹⁸ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 152.

¹¹⁹ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 152.

particularly amount of limitation utterly depends on the law of State where pollution occurs.¹²⁰

Reasonably enough, in the absence of separate limits of liability under the Bunkers Convention, there is no limitation fund dedicated specifically to bunkers pollution claims. Therefore, claims brought under the Bunkers Convention will have to compete with other claims limitable under applicable regimes. In cases where either of the LLMC is applicable, all the persons embraced by the definition of shipowner will be entitled to limit their liability, and there will be a single limitation amount for their aggregate liabilities.¹²¹ Although the issue was discussed during the negotiations, the absence of a separate limitation fund was not considered to be a potential problem as past spill experiences have encountered only few accidents in which claims for bunker spill damage had to compete for reimbursement with other claims eligible for limitation under the LLMCs.¹²²

Seeing from the claimants' perspective, a separate limitation fund would probably have been more convenient alternative. On the other hand, considering problem from the shipowners' and insurers' perspective, a separate limitation fund would have imposed an additional administrative burden on them. As a result, in majority of incidents, at least two limitation funds would have to be established when the bunker spill occurs, namely, a fund under the Bunkers Convention and additional fund under the LLMC or some other applicable limitation regime. Moreover, if an incident occurs involving a ship with HNS cargo, a third limitation fund would have to be established under the HNS Convention as well. Although it cannot be denied that one limitation fund for all claims would be a more economical way of settling the claims, still, one should bear in mind a potential risk of shipowner's unlimited liability where neither of the existing limitation regimes is applicable.¹²³

3.5 Compulsory insurance

3.5.1 Compulsory insurance requirement

As with the 1992 CLC, one of the key requirements in the Bunkers Convention is a system of compulsory liability insurance. Although strict liability imposed by the Convention extends beyond the registered owner to bareboat charterer, operator and manager of the ship, the registered owner of a ship greater than 1000 GT is the only person obliged to cover his liability by insurance.¹²⁴ Instead of liability insurance, the shipowner is permitted to

¹²⁰ Wu, Chao, p. 561.

¹²¹ Jacobsson, Måns, *Bunkers Convention in Force*, p. 28f.

¹²² Wu, Chao, p. 564.

¹²³ Wu, Chao, p. 565.

¹²⁴ The Bunkers Convention, Art. 7.1.

cover his liability by other financial security.¹²⁵ Although there are no clear rules as regards the acceptable providers of financial security a bank guarantee is usually deemed to be sufficient.

Establishing a relatively high threshold, 1,000 GT, the Bunkers Convention exempt from the requirement of compulsory insurance most of the ships operating in local area.¹²⁶ Another permitted exception from requirement of compulsory insurance is related to ships that operate exclusively within the territorial sea of a State party. It is up to each State party to decide upon the matter and subsequently make a declaration if ships engaged exclusively on “domestic voyages” should be excluded from the requirement.¹²⁷ Still, it should be emphasized that, although shipowners of abovementioned categories are not obliged to maintain compulsory insurance, such ships are submitted to liability provisions of the Bunkers Convention.

Although compulsory insurance requirement is only imposed on the ships registered in a State party, the wording of Article 7.12 prescribes a somewhat extended application of the insurance requirement. According to this provision, each State party shall ensure under its national law that insurance or other financial security is in force in respect of any ship greater than 1000 GT, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an offshore facility in its territorial sea.¹²⁸ Consequently, ships greater than 1000 GT, whether registered in a State party or not, are obliged to take out insurance in order to be permitted to enter a port of a State party. In contrast, the requirement of compulsory insurance by no means would be applicable to ships registered in a non-State party, and not intended to call a port of a State party.¹²⁹

The level of compulsory cover must be equal to the limits of liability prescribed by the applicable national or international limitation regime, but in no case exceeding an amount calculated in accordance with the 1976 LLMC, as amended.¹³⁰ Thus, for example, in a State party where no general limitation of liability rules are applicable for the shipowner, the strict liability prescribed in the Bunkers Convention as well as the required compulsory insurance would, apparently, have to be unlimited.¹³¹ One should also bear in mind that the wording of Article 7.1 as regards “applicable national or international limitation regime” implies the regime applicable in the State where pollution damage occurs, and not that applicable in the State of the ship’s registry. The insurance certificate attesting financial capability of the shipowner to cover his liability in

¹²⁵ The Bunkers Convention, Art. 7.1.

¹²⁶ Wu, Chao, p. 565.

¹²⁷ The Bunkers Convention, Art. 7.15 and 2(a)(i).

¹²⁸ The Bunkers Convention, Art. 7.12.

¹²⁹ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 33f.

¹³⁰ The Bunkers Convention, Art. 7.1.

¹³¹ Tsimplis, Michael N., *The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships?*, p. 83.

accordance with any applicable regime is, nonetheless, issued from the State of the ship's registry.

It should also be mentioned that the compulsory insurance requirement applies to various offshore units as well, as such fall within the definition of the ship in Article 1.1.

3.5.2 Insurance certificates

In order to confirm that insurance is in place that meets the requirements of the Convention the insurer will normally issue to the shipowner a standard document known as a "Blue Card". The shipowner needs further to submit this document to the appropriate authority in the State of the ship's registry, which in turn will issue a certificate of insurance in accordance with Article 7.2 of the Bunkers Convention.¹³² In case the State in question is not a party to the Convention, such certificate may be issued by any other State that is. At the first sight, the possibility of different certificate options may be somewhat confusing due to the variety of limitation systems that may be applicable. One should, however, remember that the certificate serves only as a proof that the insurance meets the requirements of the Article 7 of the Bunkers Convention, and it does not have to contain any particular sum of insurance.¹³³ Thus, as long as the certificate is valid according to Article 7.2, the issuing State and limitation regime applicable in it will be out of importance.

In accordance with Articles 7.2, the certificates attesting that insurance in accordance with the Bunkers Convention is in force shall be issued for each ship. As a rule, the certificates shall be carried on board of the ship but the Convention permits the certificates to be kept in electronic form as well.¹³⁴ A State party may give notification that ships entering or leaving its ports are not obliged to carry on board the Bunkers certificates, provided that the State party that issues the certificates maintains records in an electronic form accessible to all States parties attesting the existence of the certificates in question.

According to Article 7.11, each State party shall ensure that all the ships operating under its flag have a valid insurance certificate. Furthermore, the States parties are obliged to ensure that all the ships entering or leaving their ports (or arriving at or leaving offshore facilities in their territorial sea) have valid Bunkers certificates in place.¹³⁵ In case the certificates are kept in electronic form and the records confirming that such certificates are in place are available electronically to all States parties, the port States are discharged from their obligation in accordance with Article 7.12.¹³⁶

¹³² Jacobsson, Måns, *Bunkers Convention in Force*, p. 30.

¹³³ Wu, Chao, p. 565f.

¹³⁴ The Bunkers Convention, Art. 7.5 and 7.13.

¹³⁵ The Bunkers Convention, Art. 7.12.

¹³⁶ The Bunkers Convention, Art. 7.13.

As already have been mentioned before, certain types of offshore units fall within the definition of the ship provided by Article 1.1 and, accordingly, the bunkers certificates shall be issued for such units as well in order to confirm that sufficient insurance is in place.

3.6 Direct action against the insurer

3.6.1 Claimants' right of direct action

Another key element of the Bunkers Convention is the possibility for direct action, which allows a claim for compensation for pollution damage to be brought directly against the insurer or other persons providing financial security.¹³⁷ In this context it should be mentioned that the concept of direct action breaches old principle of indemnity insurance, which is commonly referred to as “pay to be paid” rule of P&I Clubs. According to this principle, the insured would not be indemnified by the insurer until the insured himself has made the compensation to the claimants. Neither would a third party have any right to bring the action directly against the P&I Clubs.¹³⁸ Nonetheless, after having been accepted in other liability Conventions, the concept did not raise any strong oppositions from the International Group of P&I Clubs in the context of the Bunkers Convention.¹³⁹

The right of direct action is not limited to the cases when the compulsory insurance is in place, as the claim may be brought against the insurer of the vessel of less than 1000 GT, provided that voluntarily insurance is taken out by the registered owner of the vessel in question.¹⁴⁰ Conversely, it is interesting to note that the right of direct action is expressly stated only in respect of the liability insurer of the registered owner.¹⁴¹ Therefore, it remains unclear whether claim for pollution damage may as well be brought directly against the insurer of liable person other than the registered owner in case the insurance was taken out by him voluntarily.¹⁴²

This right of direct action is certainly advantageous for pollution victims as the insurer is normally in a much secure financial position than the

¹³⁷ The Bunkers Convention, Art. 7.10.

¹³⁸ Hazelwood, Steven J., *P&I Clubs: Law and Practice*, 3rd ed., London: Lloyd's of London Press, 2000, p. 141f.

¹³⁹ Griggs, Patrick, available at: <http://www.bmla.org.uk/documents/imo-bunker-convention.htm> (visited 11 May 2010).

¹⁴⁰ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 40f.

¹⁴¹ Art. 7.10: “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...”

¹⁴² Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 183.

shipowner. Moreover, there may be cases where the insured is not financially capable to compensate the claimants unless he is first indemnified by his insurer.¹⁴³ The accessibility problem may also be mentioned in this regard. The right of direct action has proved to be an efficient solution to common problem of the unavailability of the shipowner of polluting ship or the exhausting pursuits of the beneficial owners, as the insurer will normally be available in order to remain in business.¹⁴⁴

3.6.2 Defences available to the insurer

In case a claim is brought directly against the insurer, he in turn may invoke the same defences, which would have been available to shipowner (other than bankruptcy or winding up of the shipowner).¹⁴⁵ In addition, the insurer may invoke that the pollution damage resulted from the wilful misconduct of the shipowner according to Article 7.10. It is worth mentioning that the precise meaning of “wilful misconduct” varies dependant on the context since the interpretation is strongly influenced by public policy considerations.¹⁴⁶ For instance, interpretation of wording “wilful misconduct” in relation to limitation of liability rules may be different from that in relation to insurance law.¹⁴⁷ Therefore, as the term is not further defined under the Bunkers Convention, its interpretation may vary dependent on the court, which delivers decision on the case. The burden of proving the fact of wilful misconduct on the part of the shipowner and it being a proximate cause of the pollution damage lies on the insurer. In case when the insurer succeeds to prove that damage resulted from the wilful misconduct of the shipowner, the latter one himself will have to bear the entire compensation costs.¹⁴⁸

The insurer may as well validly invoke non-payment of premium by the insured, which per se constitutes a fundamental breach of the contract and results in loss of the insurance cover. Though, where a right of set-offs in respect of unpaid premiums is expressly stated in the insurance contract, the failure of the insured to make a duly payment would not constitute a legitimate reason for refusal to compensate third-party claimants.¹⁴⁹

¹⁴³ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 174.

¹⁴⁴ Røsæg, Erik, *Compulsory Maritime Insurance*, Scandinavian Institute of Maritime Law Yearbook 2000, MarIus No 258, Oslo: Nordisk Institutt for Sjørett, p.3; available at: <http://folk.uio.no/erikro/WWW/corrgr/insurance/simple.pdf> (visited 12 May 2010).

¹⁴⁵ The Bunkers Convention, Art. 7.10.

¹⁴⁶ Clarke, Malcolm A., *The Law of Insurance Contracts*, 4th ed., London: LLP, 2002, p. 802.

¹⁴⁷ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, pp. 185-189.

¹⁴⁸ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, pp. 185, 41.

¹⁴⁹ Hazelwood, Steven J., p. 314f.

Apart from the policy defence of wilful misconduct (which is expressly allowed) and non-payment of premium, the insurer may not invoke defences based on the insurance contract (such as misrepresentation, breach of good faith obligation, etc.) that he could otherwise invoke in proceedings initiated by the shipowner against him.¹⁵⁰ Thus, the right of direct action may be considered as highly advantageous for the claimants as it may be exercised by claimants even in the circumstances when the shipowner is actually deprived of the right to compensation from his insurer due to policy defences.¹⁵¹

Furthermore, independently of whether the shipowner is entitled to limit liability, the insurer may be able to limit his direct liability to an amount of the insurance required by article 7.1 of the Bunkers Convention, which in no event will exceed an amount calculated in accordance with the 1996 LLMC.¹⁵² Accordingly, even when the shipowner is not entitled to limitation under Article 6, the insurer may still be able to limit his liability. In this regard the insurer enjoys a somewhat better position than the shipowner does. On the other hand, although the concrete liability ceiling under the Bunkers Convention is provided for the insurer's direct liability, it does not relieve the insurer of the risk of indemnifying the shipowner under an insurance policy in case the latter is found liable for much greater amount in a State without any limitation law.¹⁵³ In any event, the insurer may require the shipowner to be joined in the legal proceedings when the right of direct action is used by the claimants.¹⁵⁴

3.6.3 Insurer's right of recourse

Article 3.6 prescribes that nothing in the Bunkers Convention shall prejudice any right of recourse of the shipowner, which exists independently of the Convention. In regard of the right of recourse of the insurer the Convention is silent. It remains uncertain whether the insurer would be entitled to indemnity from the shipowner in case where the insurer had to compensate a claimant who brought a direct action against him but where he could have invoked a valid defence if the claim under the insurance policy was brought against him by the shipowner. As the issue is not regulated in the Convention, the answer is to be found either in the provisions of the insurance contract in question or in the law that governs that contract. When neither of these sources provides the answer, the applicable rules will have to be decided by the principles of private international law.¹⁵⁵

¹⁵⁰ Jacobsson, Måns, *Bunkers Convention in Force*, p. 31.

¹⁵¹ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 41.

¹⁵² The Bunkers Convention, Art. 7.1 and 7.10.

¹⁵³ Wu, Chao, pp. 562, 566.

¹⁵⁴ The Bunkers Convention, Art. 7.10.

¹⁵⁵ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 196.

Neither does the Bunkers Convention provide whether the shipowner's right of recourse can be assigned to or be subrogated by his insurer in case the direct action is brought by the claimant.¹⁵⁶ In practice, the doctrine of subrogation applies to all insurance contracts, including the contracts of indemnity between P&I Clubs and their members. Therefore, the insurer who has made compensation to the third party claimants in case of bunkers pollution, would probably be entitled to obtain all the rights and remedies that the insured has in relation to that third party.¹⁵⁷

¹⁵⁶ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, pp. 196-197.

¹⁵⁷ Hazelwood, Steven J., p. 303f.

4 Selected issues under the Bunkers Convention

4.1 Compatibility of the Bunkers Convention with other international regimes

The Bunkers Convention is said to be “the final piece in the puzzle of Conventions concerning oil pollution from ships”¹⁵⁸. Therefore, it appears to be relevant to examine how well does this “final piece of the puzzle” fit in the existing liability and compensation systems. Certain rights and obligations set out in the Bunkers Convention, such as liability to pay compensation and the right to limit liability, will partly depend on the relevant provisions of other international regimes concerning the matter. For the apparent reasons, the Bunkers Convention should be closely co-ordinated with other international instruments concerned with oil pollution. As will be seen below, the right to claim compensation will not only depend on provisions of the Bunkers Convention as certain rules of the CLCs should be taken into account as well. As regards the shipowner’s right to limit his liability for claims brought under the Bunkers Convention, such right has to be admissible not only by the Bunkers Convention but by other limitation regimes that might be applicable in each particular case.

4.1.1 Compatibility with the CLCs

As was mentioned before, the damage caused by ship’s bunkers is partly covered by the CLC regimes. In order to avoid overlaps with the 1992 CLC, the Bunkers Convention makes it clear that it does not purport to replace the existing provisions of the 1992 CLC by stating that: “*This Convention shall not apply to pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention*”.¹⁵⁹

Although tankers are expressly excluded from the Bunkers Convention, there may be some limited situations when the Convention would be applicable to the tanker vessels as well. While the 1992 CLC applies to bunker spills from laden tankers and to bunker spills from unladen oil tankers that have residues of persistent oil from a previous voyage on board¹⁶⁰, the Bunkers Convention would cover the remaining gap as regards

¹⁵⁸ Tsimplis, Michael N., *The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil Pollution from Ships?*, p. 83.

¹⁵⁹ The Bunkers Convention, Art. 4. “Civil Liability Convention” means the 1992 CLC; the Bunkers Convention, Art. 1.6.

¹⁶⁰ The 1992 CLC, Art. 1.1 and 1.5.

oil tankers, namely, apply to bunker spills from unladen tankers that have no such residues on board.¹⁶¹

Unfortunately, not in all scenarios the balance between the Bunkers Convention and the CLCs is achieved. Some undesired gaps in application may be caused by the exclusion in Article 4.1 of the Bunkers Convention and particularly by the phrase “whether or not compensation is payable” under the 1992 CLC.¹⁶² For example, an unfortunate scenario would appear in a case of bunker spill pollution from a laden tanker in a State, which is not a party to either of the CLCs, but is a party to the Bunkers Convention. In such circumstances, neither of the mentioned Conventions would apply.¹⁶³ The Bunkers Convention would not be applicable because such damage falls within the definition of pollution damage provided in the 1992 CLC and thus, is excluded by Article 4.1 of the Bunkers Convention from its scope of application. The CLCs would not apply simply because the State in question is not a party to them.

Another unfortunate situation due to the prescribed exclusion would emerge in a case of bunker spill pollution from an unladen tanker with residues of a persistent oil cargo from a previous voyage on board caused in a State party to both the 1969 CLC and the Bunkers Convention but not to the 1992 CLC.¹⁶⁴ The 1969 Convention would not be applicable as its scope of application is limited to ships actually carrying oil in bulk as cargo and, therefore, unladen tankers are not covered by its provisions.¹⁶⁵ The Bunkers Convention would not apply as the damage caused falls within the definition of pollution damage stipulated in the 1992 CLC, namely damage caused by spills of bunker oil from an unladen tanker having residues from a previous voyage on board.¹⁶⁶ The 1992 CLC itself would not apply, as the State in question is not a party to it.

It appears that these two loopholes were not considered during the preparatory work and their creation is a mere side-effect of the Convention. Probably, the risk that abovementioned scenarios will occur is comparatively minor, still, theoretically two legal gaps have been created which per se undermine the uniformity that the Bunkers Convention is aimed to provide.

4.1.2 Compatibility with Limitation Regimes, LLMCs particularly

As have been pointed out, the liability for bunkers pollution will be determined by the Bunkers Convention, while the limitation of liability by

¹⁶¹ Jacobsson, Måns, *Bunkers Convention in Force*, p. 24.

¹⁶² Tsimplis, Michael N., *Marine Pollution from Shipping Activities*, 14 JIML, 2008, p. 123.

¹⁶³ Jacobsson, Måns, *Bunkers Convention in Force*, p. 24.

¹⁶⁴ Jacobsson, Måns, *Bunkers Convention in Force*, p. 24f.

¹⁶⁵ The 1969 CLC, Art. 1.1.

¹⁶⁶ The Bunkers Convention, Art. 4.1 and 1.6; the 1992 CLC, Art. 1.1.

other applicable regimes. To be workable, such mechanism has to be subjected to functioning interplay between both instruments involved.

Although different limitation scenarios are theoretically possible under the Bunkers Convention, the statistics imply that either the 1976 LLMC in its original version or as amended by the Protocol thereto adopted in 1996 will most likely be applicable for bunker oil pollution.¹⁶⁷ For that reason, the interaction between the Bunkers Convention and the LLMCs will be illustrated in discussion below.¹⁶⁸ Other international limitation regimes will be mentioned if deemed relevant and necessary in the context.

4.1.2.1 Inconsistency regarding “pollution damage”

As have been presented above, “pollution damage” recognised by the Bunkers Convention may be roughly divided in four categories which are property damage, pure economic losses, some forms of environmental reinstatement and costs of preventive measures. As on the limitation matters the Convention is tightly linked to other limitation regimes the eligibility of bunkers pollution damage for limitation would depend solely on recognition of the same categories of damage by those other regimes.

In its submission to the Diplomatic Conference the International Group of P&I Clubs pointed out that there was an erroneous assumption that in the States parties where either of the LLMCs applies it would provide an unconditional right of limitation for pollution damage caused by ship’s bunkers. The attention was drawn to the risk that the LLMCs may give no general right of limitation for bunker pollution claims in case pollution does not result in physical damage to property or indicates infringement of rights (for example economic loss caused by disruption to a business due to oil spill) as such claims fall outside the existing wording of the LLMCs.¹⁶⁹ The CMI was more specific on this issue by clearly pointing out areas of potential difficulties and their effects. In its submission the CMI urged for reconsideration of workability of a instrument on liability for bunker spills without a uniform system of limitation.¹⁷⁰ Unfortunately, although the problems were identified and recognised, the matter was not further investigated due to the time constraints.¹⁷¹

As the LLMCs do not explicitly grant the right to limit liability for pollution claims, it is necessary to examine whether bunkers pollution damage claims

¹⁶⁷ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 145.

¹⁶⁸ Since the 1996 LLMC neither alter in any way provisions of the 1976 LLMC concerned with claims subject to limitation, nor does it contain any amendments or clarifications of the issues concerning the limitation of liability for bunker spill claims, both Conventions will be jointly referred to as the LLMCs.

¹⁶⁹ Griggs, Patrick, available at: <http://www.bmla.org.uk/documents/imo-bunker-convention.htm> (visited 11 May 2010).

¹⁷⁰ LEG 74/4/2.

¹⁷¹ Griggs, Patrick, available at: <http://www.bmla.org.uk/documents/imo-bunker-convention.htm> (visited 11 May 2010).

would be eligible for limitation under some of the provisions. Thus, for ease of reference claims subject to limitation under Article 2.1 of the LLMCs are presented below:

(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 connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;

(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;

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(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.

The issue of limitation of liability for pollution claims under the LLMCs was first considered in the litigation arising from the *Aegean Sea* incident that occurred in 1992.¹⁷² The court held that pollution claims eligible for limitation in this case would include: i) claims for property damage; ii) property clean-up costs or preventive measures; iii) loss of use and loss of profit claims by fishing boat owners, fishermen, shop owners, local municipalities etc. All three types of claim were either “in respect of damage to property” or “consequential loss claims” and therefore were falling within Article 2.1(a) of the LLMCs. The court’s summary on the claims eligible for limitation revealed that some more common types of pollution claims were not specifically distinguished by the LLMCs and as a consequence, would not be covered.¹⁷³ Therefore, some typical claims for pollution damage are considered in this regard below.

Clean-up expenses and preventive measures

Claims for clean-up costs and preventive measures are to be expected in any pollution incident, bunker spill pollution being no exception. When claims for such costs are made under the Bunkers Convention, the shipowner may limit his liability under the LLMCs provided that either Article 2.1(d), which is mainly concerned with wreck removal and related claims, or Article 2.1(f), which deals with preventive measures, is applicable. However, a brief look at Article 2.1(d) would suffice to understand that

¹⁷² *Aegean Sea Traders Corp v Repsol Petroleo SA. (The Aegean Sea)* [1998] 2 Lloyd’s Rep. 39.

¹⁷³ De la Rue, Colin M. & Anderson, Charles B., p. 796.

right to limitation under this category is restricted to situations where a ship is “sunk, wrecked, stranded or abandoned”. Thus, in practice, the right of limitation under this category may successfully be claimed in cases where bunker oil is leaking from ruptured double bottoms of the ship as a result of a grounding.¹⁷⁴ It is, however, obvious that possible causes of bunkers pollution are not limited to groundings, as other types of incidents, such as collisions, may as well lead to equally devastating pollution without necessity of ship being wrecked, stranded or abandoned. Still, the wording of the Article makes it clear that the right to limitation is linked to a state of a polluter ship, while cause of pollution is out of importance.¹⁷⁵

Furthermore, Article 2.1(d) is not in force in the national laws of all States, which have ratified the LLMCs, as the right to exclude wreck removal claims from limitation when enacting the LLMCs in domestic legislation is prescribed by Article 18.1 of the LLMCs.¹⁷⁶ Some states have chosen to exercise this right for the purpose of preserving a policy of unlimited liability for wreck removal. As a consequence, other claims that could have been brought under Article 2.1(d), including certain types of bunker pollution claims, will be excluded from the right to limitation.¹⁷⁷

In cases where Article 2.1(d) is not applicable, the shipowner may still limit his liability for clean-up costs or preventive measures under Article 2.1(f), provided that the measures were taken to avert or minimize the losses for which liability may be limited in accordance with the Convention. Thus, the applicability of Article 2.1(f) will partially depend on interpretation of other categories of claims listed in Article 2.1. If Article 2.1(d) is not applicable, the only losses remaining under Article 2.1 would be those for property damage, and in certain cases, economic loss.¹⁷⁸ Taking into account that these types of losses are mainly suffered by private sector, while preventive and clean-up measures are usually taken by public authorities, the question may arise whether such measures were taken in order to minimize such losses or whether the measures have incidentally had such effect?¹⁷⁹ The risk should not be neglected that this provision may be interpreted differently depending on the circumstances in each particular case.

In addition, the wording of Article 2.1(f) clearly shows that it applies only to measures undertaken by “a person other than the person liable”. With other words, the shipowner may limit his liability incurred for the costs of response measures or clean-up operations undertaken by others, though he is not allowed to submit his own “response costs claim” for payment from his limitation fund.¹⁸⁰ In this regard it should be mentioned that both CLCs and

¹⁷⁴ LEG 74/4/2.

¹⁷⁵ LEG 74/4/2.

¹⁷⁶ The reservation in this regard was made by several states, such as Australia, Belgium, China, Cyprus, France, Germany, Ireland, Japan, the Netherlands, Norway, Singapore and the UK.

¹⁷⁷ LEG 74/4/2; De la Rue, Colin M. & Anderson, Charles B., p. 798.

¹⁷⁸ The LLMC, Art. 2.1(a) and (c); De la Rue, Colin M. & Anderson, Charles B., p. 798.

¹⁷⁹ LEG 74/4/2; De la Rue, Colin M. & Anderson, Charles B., p. 798.

¹⁸⁰ Wu, Chao, p. 563; De la Rue & Anderson, p. 798.

the HNS Convention take account of costs and sacrifices incurred by the shipowner in preventing or minimizing damage by allowing him to submit his own “response costs claim” for payment from his limitation fund. Such construction in these Conventions was chosen for the purpose of providing the shipowners with incentive to take prompt actions when pollution incident occurs, as such in many cases would be a pre-requisite for a successful pollution response.¹⁸¹

In practice, spill response measures are normally organised and financed (wholly or in part) by the shipowner and his insurer, as this is proved to be more effective way to combat the pollution than simply leaving authorities to arrange the response measures themselves and subsequently claim compensation. However, it should be remembered that in case of bunker spill the shipowner will not be ranked as a claimant against his own limitation fund for the response costs incurred by him. Therefore, as a logical consequence, there undoubtedly may be cases where the shipowner and his insurer would decide not to take any response measures at all, as their financial interests would be better served by leaving the task entirely to third parties.¹⁸²

As regards clean-up cost, the 1957 Limitation Convention¹⁸³ should be mentioned as well. As the provisions of the Convention regarding claims admitted for limitation do not differ significantly from the corresponding articles of the LLMCs, all the difficulties attributable to the application of the LLMCs will equally arise when the 1957 Limitation Convention is applicable. Still, it is important to mention that the latter Convention does not contain any provision similar to Article 2.1(f) of the LLMCs. Thus, when the 1957 Limitation Convention is applicable, the shipowner’s right to limitation of liability for clean-up costs and removal operations will be limited only to cases when the ship is sunk, stranded or abandoned.¹⁸⁴

Pure economic loss

The Bunkers Convention recognises the right of pollution victims to indemnity for economic loss, including pure economic loss. The experience has shown that the vast majority of claims for economic loss in case of oil pollution from ships are claims for pure economic loss suffered as result of damage to the marine environment as such, rather than attributable to some property.¹⁸⁵ Such loss is usually suffered by the tourist and fishing industries for income sustained as a result of pollution to the environment in the area but without any damage to their proprietary interests.¹⁸⁶ Claims for recovery of pure economic loss are normally recognised by most legal systems, including the Bunkers Convention, without regard to the fact that the

¹⁸¹ Wu, Chao, p. 563; De la Rue & Anderson, p. 798f.

¹⁸² LEG 74/4/2; De la Rue & Anderson, p. 799.

¹⁸³ International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957.

¹⁸⁴ Wu, Chao, p. 564.

¹⁸⁵ De la Rue, Colin M. & Anderson, Charles B, p. 797.

¹⁸⁶ LEG 74/4/2.

claimants do not have any rights of ownership in the polluted natural resources on which they depend for their incomes.¹⁸⁷ The situation is somewhat uncertain as regards the limitation of liability for this category of claims under the LLMCs. In cases where economic loss is suffered as a consequence of a property damage it would be embraced by Article 2.1(a). Where the loss is not a consequence of any damage to the property of the claimant, the right of limitation may only be claimed under Article 2.1(c), which embraces "claims in respect of other loss resulting from infringement of rights".¹⁸⁸

The phrase "infringement of rights" may nevertheless be interpreted differently and lead to conflicting decisions in courts.¹⁸⁹ Although the draftsmen of the 1976 LLMC agreed upon exclusion of claims involving contractual rights, such as claims for non-performance of charterparties, they did not engaged in further discussions as to the precise meaning of the non-contractual rights.¹⁹⁰ As neither the precise legal nature of infringed non-contractual right, nor the nature of the legal liability incurred by its infringement is clear, the outcome in each case will vary dependent on interpretation of the meaning of "infringement of rights". For example, in some civil law countries there is no distinction between consequential and pure economic loss and the recoverability of claims for economic loss may be admitted on the basis that the claimant's rights have been infringed.¹⁹¹ Therefore, it might seem reasonable that, following the same path of interpretation, the right to limit liability for pure economic loss under Article 2.1(c) would be recognised as well. A different approach is adopted at common law, where the concept of "rights" being "infringed" is relatively unusual and a physical attachment has traditionally constituted a prerequisite to recovery for economic losses.¹⁹² In consequence, claims for pure economic loss admitted under the Bunkers Convention may fall outside the application of the LLMCs with a consequence of liability for this types of claims being unlimited.

As it can be seen, the LLMCs may be interpreted differently in various jurisdictions, and therefore, to some extent it remains unclear whether the claims for pure economic loss brought under the Bunkers Convention would be eligible for limitation or not.

Environmental damage

Under the Bunkers Convention, claims for damage to the marine environment are limited to the costs of reasonable measures of reinstatement. At the first sight it may seem that liability for a claim for the

¹⁸⁷ De la Rue, Colin M. & Anderson, Charles B., p. 797.

¹⁸⁸ Wu, Chao, p. 563.

¹⁸⁹ LEG 74/4/2. The wording "infringement of rights" is likewise present in the 1957 Brussels Limitation Convention, which has given rise to conflicting decisions in national courts. The main issue was whether contractual rights are embraced by the phrase.

¹⁹⁰ Griggs, Patrick, Williams, Richard & Farr, Jeremy, *Limitation of Liability for Maritime Claims*, 4th ed., London: LLP, 2005, p. 22; LEG 74/4/2.

¹⁹¹ De la Rue, Colin M. & Anderson, Charles B., p. 797.

¹⁹² Wu, Chao, p. 563.

costs of this kind will be limitable under Article 2.1(f) of the LLMCs, as liability for a claim in respect of “measures to minimize loss”. Unfortunately, this will not be the case as the environmental damage itself is nor recognised as a “loss” by the LLMCs.¹⁹³

4.1.2.2 Inconsistency regarding “ship”

The problem of inconsistency regarding “ship” is purely definitional non-compliance between the Conventions, still, it leads to quite undesirable consequences. The Bunkers Convention defines a “ship” as “any seagoing vessel and seaborne craft of any type whatsoever”.¹⁹⁴ This means that various offshore structures, independently of whether they are moveable or have to be moved, are covered by the Bunkers Convention. Consequently, such offshore structures as floating production, storage and offloading units (FPSOs) and mobile offshore units (MOUs) will be required to maintain insurance in accordance with the Convention and have Bunkers Certificates issued to them if they are flagged by a State party or if they are entering or leaving a port of a State party.

As regards the LLMCs, the right of limitation is available to the owner, charterer, manager and operator of any “seagoing ship”.¹⁹⁵ Although the concept of “seagoing ship” is not further defined, Article 15.5 clarifies that the LLMCs are not applicable to “aircushion vehicles” and “floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof”. Considering the variety of modern offshore craft and the ongoing debates regarding their status in relation to ships, no concrete answer can be expected as to which types of such craft do enjoy the right of limitation under the LLMCs and which do not. Certain categories of offshore craft, such as mobile drilling units, would probably not be embraced by the exclusion of Article 15.5(b) regarding floating platforms. Still, in order to be covered by the LLMCs, such craft should be regarded as “seagoing ships” in the meaning of the LLMCs.¹⁹⁶ The same dilemma would be faced when FPSOs are involved. As certain types of such units are equipped with their own means of navigation and propulsion, the exclusion in Article 15.5(b) would not be applicable. It is however open to debate whether such units may be regarded as “seagoing ships”.¹⁹⁷

The Bunkers Convention allows the action to be brought directly against insurer whose liability in such case would be limited in accordance with the 1996 LLMC. On this point the linkage with the 1996 LLMC is far from successful as, taking into account the 1996 LLMC’s definition of “ship” and particularly the exclusion of the offshore units, the insurer’s liability under the Bunkers Convention will most certainly not be eligible for limitation.

¹⁹³ Wu, Chao, p. 564.

¹⁹⁴ The Bunkers Convention, Art. 1.1.

¹⁹⁵ The 1976 LLMC, Art. 2.1.

¹⁹⁶ De la Rue, Colin M. & Anderson, Charles B., p. 800.

¹⁹⁷ De la Rue, Colin M. & Anderson, Charles B., p. 800.

Thus, issuing Bunkers Blue Cards for such offshore units, the P&I Clubs would in such a way certify that the insurance is in place for unlimited liability.¹⁹⁸

At the first sight the definition of “ship” in the Bunkers Convention may merely appear to indicate a strong desire of the drafters to extend the application of the Convention beyond the traditional meaning of the ship. However, considering the issue from the insurers’ perspective, it may be seen as “a major liability loophole” within the Bunkers Convention.¹⁹⁹ The drafters of the Convention unintentionally have created a problem for P&I Clubs and their members – the operators of offshore units, since provided definition of “ship” differs from that in the LLMCs, the limitation regime recommended to be used in conjunction with the Bunkers Convention.²⁰⁰ Therefore, although the right to limitation is recognised both in Article 6 of the Bunkers Convention as well as in its preamble, the application of such right as to the offshore units in practice will be barred due to inconsistency with LLMCs.

4.2 Does the Bunkers Convention ensure the adequate compensation for pollution damage?

As the adequate compensation to the pollution victims is in focus for the Bunkers Convention, it is necessary to confront the basic question, namely, whether the Convention will succeed in ensuring that such compensation will be available. Since only few high-profile bunker spills incidents have ever occurred, it is quite difficult to evaluate the efficacy of the Convention for any potential bunker spillage. Nevertheless, some distinguishing elements that will undoubtedly have impact on the efficacy of the Convention will be highlighted in this sub-chapter.

4.2.1 No supplementary layer of compensation

Most of the differences between the Bunkers Convention and the 1992 CLC in essence may be attributable to the fact that the Bunkers Convention is a single-tier compensation system, while the 1992 CLC is supplemented by the second and third layers.²⁰¹ Although during the drafting process of the Bunkers Convention the alternative of a two-tier compensation mechanism was considered, the current regime was given preference due to several factors. It was considered that a single-tier compensation system would be

¹⁹⁸ Standard Bulletin, available at: http://www.standard-club.com/docs/14809_SB_MAR_09_disclaimer.pdf (visited 12 May 2010).

¹⁹⁹ LLOYD’S LIST, *Solutions Found for Mobile Offshore Unit Bunker Loophole*, 1 September 2009.

²⁰⁰ Standard Bulletin, available at: http://www.standard-club.com/docs/14809_SB_MAR_09_disclaimer.pdf (visited 12 May 2010).

²⁰¹ De la Rue, Colin M, p. 3-4.

sufficient in most cases to ensure full payment to those who are affected by the bunker spills. As the Bunkers Convention deals with bunkers pollution linked to operation of the vessel, there is no such cargo interests involved that should be called upon to contribute in compensation by means of establishing a second-tier, as the case with the CLCs and HNS Convention.²⁰² In addition, keeping in mind the difficulties encountered during the preparatory work on the HNS Convention as regards the second compensation tier, it was decided that by adoption of a one-tier mechanism it would be easier to reach a compromise between the parties affected by the Convention.²⁰³

Thus, in the absence of any supplementary fund of compensation the shipowner constitutes the sole source of compensation. Therefore, at the diplomatic conference most delegates preferred the adoption of the OPA 90 approach on the issue, thereby extending the definition of the shipowner to encompass the other persons as well.²⁰⁴

4.2.2 Does the strict liability imposed on several defendants increase the prospects of compensation?

In the absence of any second compensation tier, the increased number of liable persons was deemed to be a perfect solution in order to guarantee that those who suffer from bunkers pollution damage would be efficiently compensated. It was stated that the channelling provisions under the CLCs, although proved to be workable, were deemed to be not suitable for the compensation mechanism created under the Bunkers Convention.²⁰⁵

Theoretically, these arguments in support of non-channelling solution seem to be justified. Though, in the context of the whole system provided by the Bunkers Convention, the effect of strict liability imposed on several defendants may be limited. It should be kept in mind that the registered shipowner is the only one who is required to take out compulsory liability insurance or provide other equivalent financial security in order to guarantee sufficient indemnity. In practice it probably will mean that all claimants will in first place seek compensation from the registered owner or from his liability insurer and ignore the other persons falling within the definition of shipowner, save in some exceptional cases.²⁰⁶ Since the liability insurance is

²⁰² Gaskell, Nicholas & Forrest, Craig, p. 137; Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 35.

²⁰³ Jacobsson, Måns, *Bunkers Convention in Force*, p. 23.

²⁰⁴ Gaskell, Nicholas & Forrest, Craig, p. 137f.

²⁰⁵ Gaskell, Nicholas & Forrest, Craig, p. 137f.

²⁰⁶ Griggs, Patrick, available at: <http://www.bmla.org.uk/documents/imo-bunker-convention.htm> (visited 11 May 2010).

optional for other potentially liable persons under the Bunker Convention, there is no guarantee that the compensation will be received from them.²⁰⁷

Unfortunately, the Bunkers Convention is silent on the question how the joint and several liability of multiple defendants should work in practice. Thus, in absence of any specific provisions the outcome seems to depend totally on the claimants' choice of liable parties. The claimant may enforce the liability against any particular person falling within the definition of shipowner by an individual action or against several persons by a joint action, choosing any combination of them he deems as most secure. In case the action is brought against several defendants simultaneously another problem will arise, namely, how should the liability be distributed between several defendants and what share of compensation should each of them stand for.²⁰⁸ As the Bunkers Convention does not clearly prescribe whether the limitation rights of the persons encompassed by the definition of the shipowner are independent or joint, the question may arise whether the compensation may be demanded from each of these persons up to the applicable limits for each of them.²⁰⁹ The LLMCs are clear on this point by stating that a limitation fund constituted by one responsible person shall be regarded to be established for all persons.²¹⁰ Therefore, recovery of the same losses several times over from each defendant would not be possible.²¹¹ On the other hand, where the right to limitation will be governed by the national legislation the issue may be interpreted differently and in such case the prospects of adequate compensation may be increased.²¹²

The Bunkers Convention does not stipulate how the test for the right of limitation should be applied and whether one defendant's wilful misconduct would deprive the other persons of their right of limitation as well.²¹³ In principle, when one of the liable persons is deprived of his right to limitation due to his behaviour, the right of limitation of other defendants who are jointly and severally liable with that persons should not be affected. However, in some areas of marine insurance law, fault on the side of agents and subordinates of the shipowner is channelled to the alter ego of the company due to the close relationship between the management and ownership of the vessel. Still, it is quite difficult to define whose wilful misconducts the insured would be responsible for, particularly considering that this issue is not limited to marine insurance.²¹⁴ In Article 7.10 of the

²⁰⁷ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 136.

²⁰⁸ Wu, Chao, p. 559.

²⁰⁹ Tsimplis, Michael N., *Marine Pollution from Shipping Activities*, p. 127.

²¹⁰ The LLMCs, Art. 11.3.

²¹¹ Gaskell, Nicholas & Forrest, Craig, p. 139.

²¹² Tsimplis, Michael N., *Marine Pollution from Shipping Activities*, p. 127.

²¹³ Wu, Chao, p. 559.

²¹⁴ Wilhelmsen, Trine-Lise, *Issues of Marine Insurance: Misconduct of the Assured and Identification*, 2002, p. 27; available at:

http://www.comitemaritime.org/future/pdf/misconduct_a_id.pdf (visited 13 May 2010).

Although some common features regarding responsibility for faults of others are identified in this article, the author points out that the more detailed regulations on the issue vary.

Bunkers Convention only wilful misconduct of the shipowner is mentioned and there is no indication that such would extend to embraces the wilful misconduct of the shipowner's servants as well. Still, a wilful misconduct on the part of any of the persons encompassed by the definition of shipowner may free the shipowner's insurer from his indemnity obligation.²¹⁵

In conclusion, it may be pointed out that apart from the requirement of compulsory insurance, the Bunkers Convention does not actually guarantee that funds would be available for payment even for the shipowner's strict liability. In any event, the amount of such insurance under no circumstances will exceed an amount calculated in accordance with the 1996 LLMC.²¹⁶ In cases where the LLMCs are applicable no distinction will be made for bunkers pollution claims and such will be ranked alongside various other claims.²¹⁷ Therefore, where the bunkers pollution damage is suffered together with other property damage, the prospects of recovery in full for all claimants may be reduced due to the liability limits.²¹⁸ Bearing in mind the absence of any concrete provisions on the distribution of liability, the liable parties and their underwriters are unlikely to agree quickly on how the liability to be apportioned between them. Considering the vitality of immediate response demanded by all pollution incidents, the entrustment of defendants and their insurers with the task of practical apportionment of liability will inevitably slow down the process of payment of the compensation.²¹⁹

4.2.3 Funds available in case of bunkers pollution incident

Although several different limitation regimes may be applicable in case of bunker spill, in most of the incidents either of the LLMCs will be applicable. Therefore, it is necessary to evaluate and compare the amounts available for claimants under both regimes. Primarily, it should be clarified that in case of bunkers pollution the limitation fund will be constituted by the shipowner in accordance with the applicable limitation regime. Out of this fund the victims of pollution damage will be compensated in proportion to their established claims. The same model is used for oil pollution from tankers under the CLCs.

Thus, under the 1976 LLMC the limits of liability for claims other than loss of life or personal injury is fixed at 167,000 SDR (Special Drawing

²¹⁵ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 189f.

²¹⁶ The Bunkers Convention, Art. 7.1.

²¹⁷ De la Rue, Colin, *Bunker spill risk*, p. 19.

²¹⁸ Tsimplis, Michael N., *Marine Pollution from Shipping Activities*, p. 126.

²¹⁹ LEG/CONF.12/9.

Rights)²²⁰ for the vessels not exceeding 500 tonnes. For each additional tonne the following amounts will be added: 167 SDR for each tonne from 501 to 30,000; 125 SDR for each tonne from 30,001 to 70,000; 83 SDR for each tonne in excess of 70,000.²²¹

With some passage of time the limits prescribed by the 1976 LLMC were not sufficient anymore to provide an adequate compensation and therefore, the LLMC Protocol 1996 was adopted in order to increase the limits. Thus, under the 1996 LLMC the limit of liability for property claims for ships not exceeding 2,000 gross tonnes is fixed at 1 million SDR instead of 417,500 SDR under the 1976 LLMC. For each additional tonne the following amounts will be added: 400 SDR for each tonne from 2,001 to 30,000; 300 SDR for each tonne from 30,001 to 70,000; 200 SDR for each tonne in excess of 70,000.²²²

For the sake of comparison, the limitation amounts provided by the 1992 CLC, as amended²²³, should be stated as well, as such amounts would be applicable in case of bunker spill from a tanker. According to the 1992 CLC the owner of a ship is entitled to limit his liability in respect of any incident to an aggregate amount calculated as follows: 4,510,000 SDR for a ship not exceeding 5,000 gross tonnes; 631 SDR for each additional tonne of a ship with a tonnage in excess thereof. The aggregate amount shall in no event exceed 89,770,000 SDR.²²⁴

The chart below shows the amounts of compensation that will be available in a bunker spill incident involving a vessel of 5,000 gross tonnes when either of the regimes is applicable:

Applicable limitation regime	A tanker of 5,000 gross tonnes	A non-tanker of 5,000 gross tonnes	
	CLC 1992 (post-Nov 2003)	LLMC 1996	LLMC 1976
Limitation amounts (SDR ²²⁵)	4,510,000	2,200,000	918, 500

²²⁰ SDR stands for the Special Drawing Right as defined by the International Monetary Fund. As regards the calculation of the value of the SDR and the conversion of the amounts into the national currency of the States, see the 1976 LLMC, Art. 8.1.

²²¹ The 1976 LLMC, Art. 6.1(b).

²²² The 1996 LLMC, Art. 3.1(b).

²²³ The Resolution was adopted by the Legal Committee of the IMO on 18 October 2000 which adopted the amendments of the limitation amounts in Article 5.1 of the 1992 CLC as presented in here. The Resolution entered into force on 1 November 2003 and thus, lower amounts applied to incidents occurring before 1 November 2003.

²²⁴ The 1992 CLC, Art. 5.1, as amended by the Resolution.

²²⁵ Exchange rate for SDR is available at:

http://www.imf.org/external/np/fin/data/param_rms_mth.aspx (visited 15 May 2010).

From the numbers presented in this simple chart one can see directly the huge difference in limitation amounts provided by three Conventions that may be applicable in case of bunkers pollution. Thus, in case of bunker spill from an oil tanker the available compensation amount will be considerably higher than in case of such pollution from a non-tanker. One should also remember that in case of the 1992 CLC there would be two additional layers of compensation.²²⁶

Moreover, it is self-evident that in case of the 1992 CLC the prospects of the claimants to be fully compensated are much greater as this regime is wholly dedicated to oil pollution claims. Where the LLMCs are applicable, the claims for bunkers pollution damage and other maritime claims would be brought at the same time and, thus, the limitation fund constituted by the shipowner will be distributed among all the claimants after the ascertainment of the liability.²²⁷ In addition, the amount of compensation will differ significantly dependent on which of the LLMCs is applicable in the case.

This chart illustrates a quite straightforward situation, namely, when one limitation regime is applicable. Undoubtedly, the most “desirable” scenario in case of a bunker oil incident would be if such resulted exclusively in bunkers pollution damage and all the States affected were the parties to the 1996 LLMC. In practice, however, it may as well happen that the incident will involve several States in which different limitations regimes are in force.²²⁸

4.2.4 Bunkers pollution claims data

Notwithstanding the lack of practical application of the Bunkers Convention, certain claims data as regards bunker spills were provided by the International Group of P&I Clubs at the IMO’s 96th session in August 2009. The main issue of concern was whether the limitation system prescribed by the Bunkers Convention would be sufficient to cover the costs arising out of bunkers pollution incident. In total, information on 595 incidents that occurred during the period 2000 to August 2009 was provided. The presented claims data was based on the information rendered by all 13 member Clubs of the International Group in regard of bunker oil pollution damage caused by ships entered in their Clubs. Since the total cost of a significant number of cases was minimal and limitation of liability did not represent a problem, the statistics provided by a number of member

²²⁶ The second layer of compensation up to 203,000,000 SDR will be provided by the 1992 Fund. The Supplementary Fund guarantees the compensation up to 750,000,000 SDR. See, the 1992 Fund Convention, Art. 4.4; the Supplementary Fund Protocol, Art. 4.2. See also <http://www.itopf.com/spill-compensation/clc-fund-convention> ITOPF - Maximum amounts of compensation available under the CLC and Fund Conventions (visited 15 May 2010).

²²⁷ Zhu, Ling, *Can the Bunkers Convention Ensure Adequate Compensation for Pollution Victims?*, p. 217.

²²⁸ Zhu, Ling, *Can the Bunkers Convention Ensure Adequate Compensation for Pollution Victims?*, p. 217.

Clubs excluded cases where the total costs of claims were less than 100,000 USD.²²⁹

The provided statistics has shown that only in eight incidents the costs of pollution damage exceeded the limits of the 1996 LLMC (independent of the fact whether or not the regime is in force in the State in whose waters the incident occurred).²³⁰ In four of these incidents, the 1996 LLMC was applicable, but in each case its limits were significantly exceeded, ranging from approximately 9.5 million USD above the 1996 LLMC limit (involving a ship with 10,957 GT) to approximately 50-60 millions USD above the 1996 LLMC limit (involving a ship with 1,466 GT).²³¹

In two other cases the 1996 LLMC limits were not in force at the time when the incidents occurred but came into force subsequently. While in one of the cases the total cost of claims would have exceeded the 1996 LLMC limits by a relatively small amount (approximately 1 million USD), in the other incident (involving a vessel with 22,412 GT) the 1996 LLMC limits would have been exceeded by a significant amount (approximately 19 million USD). In the remaining two cases, both States in whose waters the incidents involving bunker spills occurred were neither party to the 1976 LLMC nor the 1996 LLMC, and this remained the case at the time the data was provided.²³²

Thus, according to the statistics presented by the International Group, the limits of liability prescribed by the 1996 LLMC in the vast majority of cases were sufficient to meet in full the claims brought for bunkers pollution damage. Only in eight cases these limits were exceeded, which represents 1.34% of the total number of reported bunker spill incidents.

These statistics undoubtedly indicate that there is relatively low risk that the limitation amount in accordance with the 1996 LLMC would be insufficient. One should, however, bear in mind that there are only 37 States parties to the 1996 LLMC, and mentioned limits would be applicable only in cases when the bunkers pollution occurs in waters of States parties. Therefore, the provided data represents sufficiency of the compensation available under the Bunkers Convention subject to the applicability of the liability limits of the 1996 LLMC. Although, the applicability of the liability limits of the 1996 LLMC is most favourable scenario, the fact that the other limitation regimes may be applicable as well may not be ignored. There are 52 States parties to the 1976 LLMC, the liability limits of which are more than two times lower than those prescribed by the 1996 LLMC. Unfortunately, there are no similar data available to estimate the risk of the limitation amount to be

²²⁹ LEG 96/6/2.

²³⁰ The analysis was based on the limits of liability provided by the 1996 LLMC due to the fact that this regime is the most recently adopted global limitation regime that is in force. See LEG 96/6/2.

²³¹ LEG 96/6/2. In the latter case the provided figure is quoted approximately since at the time the data in question was reported, the case remained open.

²³² LEG 96/6/2.

exceeded where the 1976 LLMC is applicable. Still, it is obvious that the percentage of the bunker spills incidents with the pollution damage costs exceeding the available limitation amount would be much higher in cases where the 1976 LLMC would be applicable.

In addition, the statistics have indicated that even a vessel with comparatively insignificant tonnage cannot be neglected as a potential polluter as the damage caused by it may end up with a relatively high amount. The abovementioned incident involving a ship with only 1,466 GT has so far been estimated to exceed the liability limits of the 1996 LLMC with 50-60 million USD. Accordingly, an incident involving a vessel with a gross tonnage slightly under the 1,000 GT (that is not required to be insured in accordance with the Bunkers Convention), may as well end up with relatively high cost of pollution damage. In such case, however, there may be no insurance in place and it is highly doubtful whether the shipowner himself may be considered as a sufficient compensation source.

4.3 Adequacy of the Convention

During the preparatory work on the Bunkers Convention the submission of the International Group of P&I Clubs pointed out that although a uniform system for bunkers pollution undeniably would be preferable, there was no pressing need for such regime. It was also stated that, judging from the experience of the P&I Clubs, the bunkers pollution so far has been combated satisfactory in most jurisdictions under national law.²³³ The valid point was made by the Group that the efficacy of the future Convention should not be diluted by provisions which are neither necessary nor practical.²³⁴ Indeed, the supremacy of the international instrument should not be taken for granted merely due to the fact of it being a worldwide regime; its superiority should be distinguished by thoroughly evaluated and selected provisions that provide a reasonable balance between the interests of all the concerned parties. Thus, this subchapter is devoted to evaluation of certain aspects of the Bunkers Convention in order to see how adequate are the means provided by the Convention in relation to the purpose they serve.

4.3.1 No uniform limitation regime

During the drafting of the Bunkers Convention three main alternatives for the limitation regime were considered by the delegates.²³⁵ The first option was to establish a free-standing limitation system under the Convention. It was, however, emphasized that the existing limitation Conventions do not exclude bunker spill claims from their application and therefore, establishing a separate limitation scheme exclusively devoted to bunkers

²³³ LEG/CONF.12/9.

²³⁴ LEG/CONF.12/9.

²³⁵ LEG/77/11.

pollution claims would be problematic, since it would create an overlap with these limitation regimes.²³⁶ The second option was to tie the limits of liability to the existing regime of the 1992 CLC, while the third alternative was to tie the limits to already existing global limitation system, the 1996 LLMC, thereby avoiding linkage problems. However, considering the fact that the States parties to the Bunkers Convention not necessarily may be parties to the 1996 LLMC a significant limitation gap would have been created in respect of such States if the linkage was established merely with the 1996 LLMC. Still, the majority of the delegates agreed that bunkers pollution claims should be subject to already existing limitation rules. Therefore, it was decided that the shipowner or his insurer should have the right to limit liability under any applicable national or international regime, such as the 1996 LLMC.²³⁷

Obviously, the availability and applicability of several different limitation regimes disrupt the uniformity and predictability intended to be provided by any international instrument. Therefore, emphasizing the importance of uniform liability limits, the resolution on the limitation of liability was adopted, the purpose of which was to facilitate the ratification of the 1996 LLMC.²³⁸ The resolution urges all States that have not yet become party to the 1996 LLMC to do so. The States are also encouraged to denounce the Limitation Conventions of 1924 and 1957.²³⁹

At present 37 States representing 42% of world tonnage are parties to the 1996 LLMC while 52 States representing almost 50% of tonnage are still parties to the 1976 LLMC.²⁴⁰ These statistics per se indicate that the limitation amount will differ significantly dependent on the State in which bunkers pollution occurs. In addition, it should be remembered that some States have not ratified either of mentioned instruments but remain parties to the 1957 or 1924 Limitation Conventions both of which prescribe very low limits of liability.²⁴¹ Furthermore, some States, which are not parties to any international limitation regime, will instead apply the limits of liability provided by their domestic legislation, such as OPA 90 in the US. Other states, China being one example, may have no such national limitation law for pollution damage at all, and therefore the liability will be unlimited.²⁴²

The shortcomings of several possible limitation scenarios are obvious. First of all, the linkage of the Bunkers Convention to several limitation schemes subjects persons liable for similar damage to very different levels of

²³⁶ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 152.

²³⁷ The Bunkers Convention, Art. 6.

²³⁸ See LEG 82/3/3.

²³⁹ The International Convention relating to Limitation of Liability of Owners of Sea-Going Ships, 1957 and The International Convention for Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-Going Vessels, 1924.

²⁴⁰ The IMO data represents the status of the Conventions as at 30th of April 2010, available at: http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (visited 12 May 2010).

²⁴¹ Jacobsson, Måns, *Bunkers Convention in Force*, p. 29.

²⁴² Jacobsson, Måns, *Bunkers Convention in Force*, p. 29; Wu, Chao, p. 562.

limitation dependent on the State where the pollution damage occurs. Furthermore, the disparity and uncertainty of limitation ceilings makes it nearly impossible for the shipowner and his insurer to estimate various financial risks that may be encountered in different jurisdictions.²⁴³

4.3.2 No priority for responder immunity

Responder immunity was another issue that involved protracted debates on a number of occasions within the Legal Committee. “Responder immunity” is a generally used expression to describe a guaranteed protection from suit for salvors and clean-up contractors. The responder immunity clauses are traditionally included in international pollution liability Conventions as their crucial importance can impossibly be exaggerated. Responder immunity clauses provide an enormous incentive to salvors and other persons, who take measures to prevent or reduce damage, to duly perform their services without threat of being held liable for their actions.²⁴⁴ The necessity of such encouragement is obvious considering the nature of the operations in question. Firstly, among all the persons that might have the possibility to prevent, minimize or respond to the damage, those who perform such operations professionally in their day-to-day work, namely, salvors and clean-up contractors, are in the best position to take the necessary actions required by the circumstances. Secondly, it should be remembered that both salvors and clean-up contractors perform their work purely on contractual basis and they have neither legal nor moral duty to act unless they expressly agree to do so. Reasonably, the main incentive for performance of their dangerous services is a prospect of being paid. Equally reasonable, a prospect of being held liable for their actions serves as a considerable disincentive. Unfortunately, this dilemma would be faced each time the bunkers pollution occurs, as the Bunkers Convention does not provide for responder immunity.

The issue of responder immunity involved lengthy debates during the drafting of the Bunkers Convention. A joint submission of group of NGOs, including inter alia ITOPF and CMI, urged for the insertion in the Convention of a provision, which would ensure the legal protection of persons taking measures to prevent or minimise damage caused by bunker oil spill. It was emphasized that such “responder immunity” would encourage prompt and effective response.²⁴⁵ The International Group of P&I Clubs as well manifested its support of inclusion of responder immunity. The Group emphasized that those persons who might be able to undertake preventive measures or make a considerable contribution in response to bunker oil spill should be motivated to perform those tasks. Where no such immunity exists, those persons, particularly salvors, would be dissuaded to

²⁴³ Wu, Chao, p. 562.

²⁴⁴ Wu, Chao, p. 560.

²⁴⁵ Griggs, Patrick, available at: <http://www.bmla.org.uk/documents/imo-bunker-convention.htm> (visited 11 May 2010).

act under the prospect of being held liable.²⁴⁶ The parallel was also drawn to the 1969 CLC under which immunity from suit for anyone who undertakes preventive measures is guaranteed except for cases where the damage is a result of a wilful misconduct or personal act or omission.²⁴⁷

Additionally, the 1992 CLC and the HNS Convention may be considered in this regard. Due to the Conventions' channelling provision, ships' operators, managers and bareboat charterers enjoy protection from suit for pollution damage.²⁴⁸ In addition, such immunity is also prescribed for salvors and clean-up contractors as well as persons taking preventive measures.²⁴⁹ Although, early drafts of the Bunkers Convention contained the responder immunity provision copied from the 1992 CLC, at the end of the day the proposition to provide for such immunity in the Convention was rejected. It was proclaimed that the inclusion of such provision would be unjustified due to the absence of the second layer of compensation.²⁵⁰

As proposal to expressly provide for "responder immunity" was rejected, a compromise solution was put forward by a number of States. This led to the Bunkers Convention being accompanied by the Resolution, which encouraged States parties, when implementing the Convention, to consider the need to introduce in their national legislations provisions for the protection of persons responding to an incident and taking measures to prevent or minimise the effects of oil pollution.²⁵¹ The effect of the Resolution may however be questioned as the States, although encouraged to take appropriate actions, are free to decide whether the protection for salvors and other respondents should be arranged on the national level or not.²⁵²

Thus, the decision to exclude the responder immunity provisions has gravely undermined the commonly recognised principle that salvors and other pollution responders should be encouraged to perform their duties without threat of civil claims or criminal prosecutions.²⁵³ Although not related to the bunker spill, the incident of *Tasman Spirit* that occurred in Pakistan in 2003 is highly illustrative on the issue. As at that time Pakistan was not Party to the 1992 CLC, it enabled the Pakistani authorities to arrest the tugs that performed the salvage operations. The arrest in question is stated to be "part of a mechanism to put pressure on insurers to provide large financial guarantees".²⁵⁴ Taking into consideration that quite similar situation may occur in case of bunkers pollution, it may happen that in

²⁴⁶ LEG/CONF.12/9.

²⁴⁷ LEG/CONF.12/9.

²⁴⁸ The 1992 CLC, Art. 3.4(a-c); the HNS Convention, Art. 7.5(a-c).

²⁴⁹ The 1992 CLC, Art. 3.4(d) and (e); the HNS Convention, Art. 7.5(d) and (e).

²⁵⁰ Gaskell, Nicholas & Forrest, Craig, p. 140.

²⁵¹ Griggs, Patrick, available at: <http://www.bmla.org.uk/documents/imo-bunker-convention.htm> (visited 11 May 2010).

²⁵² Griggs, Patrick, available at: <http://www.bmla.org.uk/documents/imo-bunker-convention.htm> (visited 11 May 2010).

²⁵³ Gaskell, Nicholas & Forrest, Craig, p. 140.

²⁵⁴ Gaskell, Nicholas & Forrest, Craig, p. 140.

certain cases salvors and other clean-up responders will be reluctant to provide their services, which in turn may entail grave consequences. Time however will show whether the exclusion of the responder immunity provisions is a serious mistake or not.

In this context it is relevant to mention Article 2.1(f) of the LLMC as well. Under this provision the right of limitation is rendered only to "claims of a person other than the person liable", which clearly prohibits the shipowner to submit his response cost claim for payment from the established limitation fund. This means that the shipowner will not enjoy the right of limitation notwithstanding the fact that he would usually be one of the first to respond in one way or another when the incident occurs.²⁵⁵

Totally different approach on the issue was adopted by both the CLCs and the HNS Convention, which stipulate that the costs incurred by the shipowner in preventing or minimizing damage can be ranked as other admissible claims against the shipowner's own limitation fund.²⁵⁶ Such protection is deemed to be necessary as it gives shipowner a strong incentive to respond promptly once the incident occurs. Unfortunately, neither the Bunkers Convention nor any international limitation regime contains any similar provision, which may in certain circumstances turn out to be a huge disincentive for the shipowners to take response actions.²⁵⁷

4.3.3 The certification system – how advantageous it is?

The significance of compulsory insurance for bunker oil spills cannot be doubted. According to the calculations presented at the 74th session of the IMO, ships representing approximately 5-10% of the world tonnage were estimated to be uninsured or underinsured. Roughly calculated, these ships could be carrying on board 90,000-180,000 tonnes of bunkers oil at any given time. It was also pointed out that even when P&I insurance is in place for a ship, such would not necessarily cover the liability for bunkers pollution.²⁵⁸

Compulsory liability insurance and certificates carried onboard the vessels constitute potential advantage to the coastal States as they can be confident that cover is available for bunker spills. Nevertheless, there are certain inconveniences of administrative nature created by this insurance system as issuing insurance certificates to quite a large number of vessels places an enormous burden on authorities occupied with the task. The extent of this

²⁵⁵ Wu, Chao, p. 563

²⁵⁶ The CLCs, Art. 5.8; the HNS Convention, Art. 9.8.

²⁵⁷ Wu, Chao, p. 563.

²⁵⁸ LEG 75/5/1.

administrative burden and the cost involved have however not been calculated during the preparations.²⁵⁹

4.3.3.1 Administrative burden corollary to the requirement of insurance certificates

Before the introduction of the 1969 CLC compulsory insurance requirement for maritime liabilities was almost unheard of in international Conventions. Since that, compulsory insurance has become an inevitable and rather self-evident element of various instruments concerned with maritime liability. The inclusion of requirement of compulsory insurance into the Bunkers Convention per se did not involve any notable objections or protests during preparatory work. Instead, concerns were expressed as to the administrative burden that would be created by the proposed insurance system and particularly by the issuance of the certificates.²⁶⁰ It has been rightly pointed out that arrangements of compulsory insurance would be administratively burdensome per se, in addition the burden would be intensified by the requirement to certify that such insurance or other financial security is in place.²⁶¹

However, in the end of the discussions the current insurance and certificate system, which is largely modelled on that of the 1992 CLC, was agreed upon. The 1992 CLC imposes compulsory insurance and certificate obligation only on ships carrying more than 2,000 tonnes of oil in bulk as cargo. Therefore, the system adopted in the 1992 CLC has not given rise to any major capacity problems, as in that case administrative burden has been quite insignificant since the obligation was imposed only on some 4,000 oil tankers.²⁶²

The degree of difficulty in implementation of the certification provisions in practice is significantly increased in case of the Bunkers Convention. While the 1992 CLC requires certificates only for a few thousand oil tankers, the Bunkers Convention requires production of the bunkers certificates for the world's entire merchant fleet.²⁶³ Therefore, certain provisions were designed to avoid unnecessarily great administrative burden under the Bunkers Convention. Thus, ships with gross tonnage of less than 1,000 were exempt from the insurance requirement under the bunkers Convention, and accordingly, no certificates have to be issued for such ships. Neither are bunkers certificates required for the ships operating exclusively within the territory of a State party, provided that the notification of such exemption was given to the Secretary-General of IMO by the State party in question.²⁶⁴

²⁵⁹ Griggs, Patrick, available at: <http://www.bmla.org.uk/documents/imo-bunker-convention.htm> (visited 11 May 2010).

²⁶⁰ LEG/77/11.

²⁶¹ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p.12; LEG/77/11.

²⁶² Jacobsson, Måns, *Bunkers Convention in Force*, p. 32.

²⁶³ Wu, Chao, p. 566.

²⁶⁴ The Bunkers Convention, Art. 7.15.

Still, even with these exemptions from the insurance and certificates requirement, it was estimated that the bunkers certificates would have to be issued for some 40,000 ships.²⁶⁵

4.3.3.2 Issuing certificates – a bureaucratic problem?

Another drawback of the adopted insurance and certificate regime is said to be a lot of bureaucracy it involves. Although such criticism originally was aimed at the 1992 CLC regime, the arguments are obviously relevant as far as the Bunkers Convention is concerned, as procedures involved are quite the same under both Conventions. Thus, both Conventions require the insurance certificates to be carried on board of each ship to which the Conventions are applicable. In order to be valid, the certificates have to be duly renewed on regular basis. The issuance and renewal of each certificate involves the P&I Club, which issues a Blue Card, and the relevant State authorities that are concerned with issuance or authorisation of the certificates and inspection of the insurer. In addition, one should not neglect a frequent logistics problem in getting the certificate on board the ship in due time.²⁶⁶

In practice, the bureaucracy of the insurance and certification regime is said to be proved by the fact that in most of the cases the ships that have been detained for lack of the CLC certificates actually had a valid insurance cover, but not the relevant documentation.²⁶⁷ Therefore, probably in order to reduce the administrative burden, as well as to combat the bureaucracy problem, relevant provisions under the Bunkers Convention were somewhat modified.

It is obvious that provisions allowing delegation of the issuance of certificates were aimed at dispensing involvement of the governments in the issue.²⁶⁸ According to Article 7.3(a) of the Bunkers Convention, a State party may authorise an organisation or an institution to issue bunkers certificates. Although such possibility may be more practical solution, still, it does not reduce the administrative burden, but merely shifts the burden on those authorised institutions.²⁶⁹

4.3.3.3 Certificates for ships registered in States non-parties

Already pending entry into force of the Bunkers Convention, a number of issues have been highlighted regarding implementation of the Convention,

²⁶⁵ Jacobsson, Måns, *Bunkers Convention in Force*, p. 32f.

²⁶⁶ Røsæg, Erik, p. 12f, available at: <http://folk.uio.no/erikro/WWW/corrgr/insurance/simply.pdf> (visited 12 May 2010).

²⁶⁷ Røsæg, Erik, p. 13, available at: <http://folk.uio.no/erikro/WWW/corrgr/insurance/simply.pdf> (visited 12 May 2010).

²⁶⁸ Røsæg, Erik, p. 13, available at: <http://folk.uio.no/erikro/WWW/corrgr/insurance/simply.pdf> (visited 12 May 2010).

²⁶⁹ Wu, Chao, p. 566.

particularly in regard of certification uncertainties as regards ships registered in States non-parties. These issues were raised by the P&I Clubs in the IOPC Funds' meetings in March and June 2008, but since such meetings were stated to be the wrong forum for discussion of such matters, the mentioned issues were first considered at the 94th session of the Legal Committee in September 2008.²⁷⁰

In accordance with Article 7.2 of the Convention a ship registered in a State party to the Bunkers Convention, must obtain a bunker certificate from the appropriate authority of that State. In case the ship is registered in a State non-party to the Convention but is intended to trade with a State party, such ship is required to obtain bunkers certificate from any State party.²⁷¹ However, until August 2008 (which is approximately three months before the entry into force of the Convention), no State party was prepared or able to accept the burden of issuance of certificates to ships registered in States non-parties, unless such ship was aimed to enter a port or a terminal in the State in question.²⁷²

Therefore, concerns were expressed that in respect of the ships flying the flags of States non-parties, the entry into force of the Convention would involve serious problems that would require an immediate solution. Although, subsequently, some States parties agreed to issue bunkers certificates to ships of States non-parties, still there was a sufficient risk that such a short period of time before entry into force of the Convention would not be sufficient to provide bunkers certificates to all the vessels for which the certificates would be required. Moreover, the same problem of time pressure would be faced again after the Convention comes into force since the issued certificates would be valid only to the end of the current P&I policy year on 20 February 2009 and, thus, would need to be replaced with new certificates in three months time.²⁷³

4.3.3.4 Offshore units – additional burden

While various offshore units such as offshore rigs and FPSOs are encompassed within the term “any seagoing vessel and seaborne craft, of any type whatsoever” and, accordingly, are required to maintain bunkers Blue Cards, they are expressly excluded from the right to limitation under the LLMC's Article 15.5. Thus, unfortunately, offshore units fall through the gaps created by the inconsistency of these two Conventions. In theory, issuing bunkers Blue Cards for such offshore units, the P&I Clubs would in such a way certify that the insurance is available for unlimited liability. It is evident that this anomaly was created unintentionally and thus let it be

²⁷⁰ LEG/94/11/2.

²⁷¹ The Bunkers Convention, Art. 7.2.

²⁷² LEG/94/11/2.

²⁷³ LEG/94/11/2.

applicable in practice would be highly inappropriate, especially considering that the reinsurance of the P&I Clubs is limited.²⁷⁴

The problem of inability of the P&I Clubs to limit liability for offshore units seems to have been disregarded during the preparations to the Bunkers Convention as no wordings can be found that intended to clarify the issue.²⁷⁵ Even after the adoption of the Convention the issue regarding ability of the insurers to establish liability limits for offshore units was not addressed until a short time before the Convention came into force. The reason why the problem was not addressed earlier was explained to be the specific nature of the coverage, as there are only the Gard Club and the Standard Club that insure MOUs to any extent.²⁷⁶

Although the existence of the problem was acknowledged, no action was taken by the international maritime community aimed to provide a uniform solution. It seems that those affected by the issue were left to handle the situation by their own means and thus, not surprisingly, the insurance providers have chosen quite different ways to combat the problem.²⁷⁷ For example, the Gard Club has chosen to set up a special division to provide the required bunkers Blue Cards for the offshore units for which their owners pay a premium. This solution has however proved to be disproportionately cost-demanding for the members in relation to insignificant additional risk for the insurer.²⁷⁸ The Standard Club has chosen to issue bunkers Blue Cards for offshore units by creation of a specific wording in the insurance policy. The wording refers to the liability limit calculated by applying the limitation amounts prescribed in the 1996 LLMC to the gross tonnage of the unit.²⁷⁹ The Standard Club has further established tight cooperation with various jurisdictions in order to ensure that such construction is accepted internationally.²⁸⁰ The Standard Club's bunkers Blue Cards issued with such reference have been accepted by all the States parties where offshore units entered with the Club are registered, among which the UK, Liberia and the Bahamas.²⁸¹

4.3.3.5 Achievement of certification regime

Although quite a short time has passed since the Bunkers Convention came into force, theoretical solutions have been provided for the most of the problems or uncertainties created by the certification provisions of the

²⁷⁴ Standard Bulletin, available at: http://www.standard-club.com/docs/14809_SB_MAR_09_disclaimer.pdf (visited 12 May 2010).

²⁷⁵ LLOYD'S LIST, *Solutions Found for Mobile Offshore Unit Bunker Loophole*.

²⁷⁶ LLOYD'S LIST, *Solutions Found for Mobile Offshore Unit Bunker Loophole*.

²⁷⁷ LLOYD'S LIST, *Solutions Found for Mobile Offshore Unit Bunker Loophole*.

²⁷⁸ Standard Bulletin, available at: http://www.standard-club.com/docs/14809_SB_MAR_09_disclaimer.pdf (visited 12 May 2010).

²⁷⁹ Standard Bulletin, available at: http://www.standard-club.com/docs/14809_SB_MAR_09_disclaimer.pdf (visited 12 May 2010).

²⁸⁰ LLOYD'S LIST, *Solutions Found for Mobile Offshore Unit Bunker Loophole*.

²⁸¹ Standard Bulletin, available at: http://www.standard-club.com/docs/14809_SB_MAR_09_disclaimer.pdf (visited 12 May 2010).

Convention. However, it should be remembered that considerable load of paperwork required for the proper functioning of the system will have to be repeated annually in order to renew the certificates.²⁸² Therefore, in order to somewhat decrease the administrative burden, the Convention only requires the issuing authorities to ensure that the presented cover is in conformity with the Bunkers Convention. At the same time the Convention only sets forth certain requirements as to the form and some basic content of the certificates, while such important matters as conditions for issuing of the certificates and their validity are delegated to the States parties.²⁸³

When issuing bunkers certificates the authorities are only obliged to ascertain that the financial security presented corresponds with the monetary amount required by the Bunkers Convention while there is no requirement to validate the financial standing of the security provider. According to Article 7.8, the issuing State will normally rely on information as regards financial guarantors obtained from other States or relevant organisations as the Bunkers Convention does not oblige any State to provide assistance in obtaining such information and ensuring its accuracy. However, by the virtue of the same Article the State relying on such information will not be relieved from its responsibilities as an issuing State. Thus, a State that has issued a bunkers certificate in accordance with information provided by another State may still be held responsible in case it turns out that the financial guarantor in question is not capable to meet his obligations under the Convention.²⁸⁴ In accordance with Article 7.9 a State party may at any time request consultation with the issuing or certifying State should it believe that the security provider named in certificate is not financially capable to meet the obligations imposed by the Convention. This provision may however be of little assistance in cases where the insurance company named in the certificate is not located in the issuing or certifying State.²⁸⁵

As it have been rightly pointed out, in order to ensure that the certificates effectively fulfil their purpose (as well as the purpose of the whole Convention), the financial standing of the insurance provider and his ability to meet the compensation claims will undoubtedly be decisive. The Convention however does not prescribe the criteria in order to determine the financial viability of the security provider, neither does it impose an obligation on the issuing authorities to verify the information on his financial standing.²⁸⁶ Perhaps, this may also be seen as an attempt not to increase already significant administrative burden of issuing the certificates to the whole world's fleet. Seeing from the other angle, one may question

²⁸² De la Rue, Colin, *Bunker spill risk*, p. 19.

²⁸³ *Bunker Oil Pollution – a New Liability Convention*, (Editorial), 14(5) JIML 2008, p. 376.

²⁸⁴ Zhu, Ling, *Can the Bunkers Convention Ensure Adequate Compensation for Pollution Victims?*, p. 209f.

²⁸⁵ Zhu, Ling, *Can the Bunkers Convention Ensure Adequate Compensation for Pollution Victims?*, p. 209.

²⁸⁶ *Bunker Oil Pollution – a New Liability Convention*, p. 376; Gaskell, Nicholas & Forrest, Craig, p. 142.

the effectiveness of the formally “valid” certificate based on the false information provided by the guarantor.

In addition, the States are obliged to accept the certificates issued under the authority of other States parties, even when the insurer is completely unknown and is not a member of one of the reputable P&I Clubs.²⁸⁷ The undercapitalised insurers who enter the market and attach themselves to “flag of convenience States”, which have little or no administrative control, have always imposed a threat to maritime community. Although the vast majority of the world’s merchant fleet is insured by the P&I Clubs, members of the International Group, which is per se a reliable guarantee for the States, still, it remains to be seen whether other insurers will be able to meet the insurance requirements once bunkers pollution incident occurs.²⁸⁸

It was stated that threat of intense administrative burden was only a minor drawback compared with the advantages the system of insurance certificates would mean to the State parties, once an incident occurs in their port area.²⁸⁹ However, in conjunction with abovementioned provisions of the Bunkers Convention the purpose of the certificates may be highly questioned. Moreover, it can be said that in the context of the whole insurance and certification system, the achievement made by the compulsory insurance requirement is quite modest in proportion to the very cumbersome burden it involves.

²⁸⁷ The Bunkers Convention, Art. 7.9; *Bunker Oil Pollution – a New Liability Convention*, p. 376; Gaskell, Nicholas & Forrest, Craig, p. 142.

²⁸⁸ Gaskell, Nicholas & Forrest, Craig, p. 143.

²⁸⁹ Zhu, Ling, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, p. 211.

5 Conclusions

The Bunkers Convention was adopted after being on the work programme of the IMO for more than thirty years. It took seven years more after its adoption for the Convention to enter into force. Although the Bunkers Convention has been in force quite a short time, yet already 51 States representing more than 84% of the world's tonnage are parties to the Convention. Such a wide adherence per se indicates that the Bunkers Convention should be regarded as successful international regime. However, likewise with any other international instrument the adoption of the Bunkers Convention is a result of several compromises. A number of vital elements of the Convention were not agreed upon until the final Conference. Moreover, due to strong time pressure several proposed amendments to the Convention had to be withdrawn, though otherwise they could have clarified certain problematic areas of the Bunkers Convention. Therefore, it is not surprising that there are several apparent weaknesses of the Convention.

Although during the drafting process it was stated that so far the bunkers pollution has been successfully dealt with under the national laws, it should be acknowledged that, on balance, a unified regime is undoubtedly preferable. On the other hand, as have been presented in this thesis, several impractical and less successful provisions dilute the efficacy of the whole Convention. Since there was no pressing need for the immediate adoption of the Bunkers Convention, its problematic elements could have been further evaluated and, perhaps, replaced by more thoroughly drafted provisions.

The stated goal of the Convention, namely, to provide adequate protection to the pollution victims, is achieved to certain extent. As the Bunkers Convention is largely modelled on the CLC regime, the attempts were made to provide as extensive protection to the victims as possible. However, comparing with the 1992 CLC, the position of the bunkers pollution victims is considerably undermined due to several factors, the major one being absence of any supplementary compensation tier. The drafters tried to neutralise this major drawback by adoption of other provisions, which were aimed at establishing workable alternatives. Thus, the registered shipowner, who constitutes a key source of compensation, is obliged to maintain a compulsory insurance in order to ensure that the funds are available once the pollution incident occurs. Conversely, imposition of the requirement of compulsory insurance will not constitute an unconditional guarantee that the pollution victims will receive an adequate compensation. Many aspects of the compulsory insurance requirements are not mentioned under the Bunkers Convention. Apart from certain basic information as to the content of the certificates, no provisions were drafted to clarify how the financial capability of the guarantors should be evaluated and by whom. Thus, apart from certain defences available to the shipowner or his insurer that may

discharge them from indemnity obligation, the possibility of insolvency of the financial guarantor may not be neglected either.

Enlarging the definition of the shipowner to embraces other persons is ineffective attempt of the drafters to provide additional source of compensation, “a second tier”. As neither of these other defendants is required to cover their liability by the insurance, they may doubtfully be regarded as a reliable source of compensation. Even in the cases where the insurance is obtained on voluntarily basis, the other defendants’ involvement may be relevant only in some limited scenarios. Thus, such contribution may be valuable when the registered shipowner or his insurer becomes insolvent, or when there is a wilful misconduct on the part of one of the liable persons, provided that all the defendants are not co-insured by the same underwriter. Still, in the vast majority of cases, where the shipowner would be entitled to limit the liability, his insurance would probably suffice, as there would be an aggregate limitation fund for all defendants encompassed by the definition of the shipowner. Thus, as it would be impossible to require payment up to the calculated limit from each of the defendants, their insurance would be superfluous.

While the advantage of several defendants approach is quite minor, there are certain apparent difficulties that may be encountered in settling claims brought against several defendants simultaneously, which may result in protracted proceedings. As a result, such complications will be in total contradiction with the aim of prompt compensation strived to be achieved by the Convention. In this context, it should be mentioned that the rationale behind the insertion of the provisions on strict liability was claimed to be the prospects of prompt compensation due to the avoidance of protracted proceedings. Indeed, the lengthy proceedings that could have been involved in proving the fault on the part of the shipowner may successfully be avoided. However, there is no guarantee that in case the action will be brought against several defendants the liability will be smoothly apportioned between them and their insurers without involvement of protracted dispute settlement in the matter. Thus, it can be said that the possible advantage that can be derived from providing several sources of compensation may be partly or wholly neutralised by the threat of protracted proceedings on the apportionment of liability it may involve.

Perhaps, in the absence of any supplementary fund the adopted approach of several defendants theoretically responds with the aim of the Bunkers Convention. Adopting channelling provisions to one single source of compensation, the registered shipowner, would be too risky considering the possibility of him become insolvent, and thus, further reassurance of satisfactory payment was considered as highly advantageous. Though, being attractive in theory by eliminating the risk of non-payment, this solution produces some apparent practical problems. Overall, its contribution in the quest of adequate compensation is quite modest comparing with the confusion it may involve.

The compromise alternative proposed by the International Group of P&I Clubs (*see chapter 3.4.1*) could have been a well-balanced practical solution to the apparent dilemma of sufficient compensation against quick settlement of claims. Making only one person liable in the first instance would simplify the liability and compensation regime, which in turn would considerably speed up and reduce litigations as well as accelerate payment of compensation. Unfortunately, this suggestion has been totally disregarded due to the time constraints.

The significance of the Bunkers Convention is frequently emphasised by mentioning that the adopted regime ensures that common liability and compensation standards apply in all the States parties to the Convention. Undeniably, several elements of the Convention contribute to simplifying the process of claiming the compensation. The right of direct action as well as the clarifications on the liabilities of shipowner undoubtedly play a vital role in this regard. Unfortunately, the elements concerned with sufficient compensation itself, such as compulsory insurance and limitation of liability, will be governed by different instruments applicable in the States parties. Thus, due to the lack of common standards on these issues, the different amounts of compensation will be available to the victims who suffer from comparatively same bunkers pollution damage, which in turn significantly disrupt the uniformity aimed to be provided by the Convention.

Although some apparent shortcomings of the chosen limitation system were highlighted already during the drafting process, the statement made in the preamble indicates that the Bunkers Convention was created under the strong persuasion that the traditional combination of strict liability and the right to limitation constitute the only acceptable means for dealing with the bunkers pollution. Therefore, the conclusion may be drawn that the drafters of the Convention assumed that the liability for oil pollution damage under the Bunkers Convention should be coupled with the right to limitation. However, the mere assumption or intention does not constitute sufficient means for legally binding right to limitation of liability. As a result, the established system of limitation of liability under the Bunkers Convention is said to be the major loophole created by the Convention.

Comparing with the 1992 CLC, the limitation amounts available under both the LLMCs will be considerably low. Although provided data on the bunkers pollution claims indicate that only in some limited cases the limitation amount available under the 1996 LLMC may be exceeded, one should remember that this regime is applicable only in 37 States parties. In cases where other limitation systems will be applicable, the risk of the available compensation to be exceeded is much more significant. Hopefully, the liability limits provided by various limitation regimes will suffice in the majority of bunker spill incidents. Nevertheless, provided compensation limits may turn out to be insufficient when a large-scale incident occurs. Moreover, victims of bunkers pollution will have competing claims with other property claimants from the same incident. As the 1992 CLC provides its own limits of liability it was possible to increase the prescribed amount

several times in order to insure the adequate compensation. In case the available compensation payable in accordance with the Bunkers Convention turns out to be insufficient, it would be much more difficult to pass the necessary amendments in the same way.

In addition, the linkage to other limitation regimes may constitute considerable problems due to the inconsistency of two regimes involved. As have been illustrated, in case of the LLMCs some definitional non-correspondence with the Bunkers Convention may result in liability being unlimited for most common categories of pollution damage. The shipowner may limit his liability for property damage claims and consequential loss thereof. This category may embrace claims for the costs of replacing a damaged ship, as well as claims for financial loss as a consequence of the ship being unavailable for operation. Still, the vast majority of claims for pollution damage are those either for pure economic loss or for environmental reinstatement. Although the shipowner will be held liable for those claims under the Bunkers Convention, his liability may not be limitable under the LLMCs. Moreover, the liability would be unlimited for various offshore units as such fall outside the scope of the LLMCs, although being encompassed by the Bunkers Convention.

The mere acknowledgement by the drafters that these loopholes were created unintentionally does not provide any workable alternatives and thus, some considerable problems may be encountered once the Bunker Convention would be applicable. The phrase “pollution damage” will be subject to decisions of national courts and its interpretation may result in contradictory outcomes. The dilemma of offshore units is not limited only to definitional incompatibility, as it likewise involves the issue of compulsory insurance and certification. Thus, according to the Bunkers Convention such offshore units are required to maintain insurance certificates, which, issued in accordance with recommended limitation regime, the 1996 LLMC, would guarantee the compensation for unlimited liability. Still, although this anomaly was pointed out, no action was taken by the maritime community to provide a uniform solution. As a result, the P&I Clubs had to figure out workable alternatives on their own, which to some extent disrupt the uniformity intended to be provided by the Convention.

The avoidance of overlaps with other international regimes was given high priority by the drafters of the Bunkers Convention and, indeed, on this point the Convention may be regarded as successful. However, several loopholes were created due to inconsistency of the Bunkers Convention with other international Conventions that may be applicable in case of bunkers pollution. Perhaps, as concerns inconsistency with the CLCs the problem may be regarded as minor as such would arise only in certain limited circumstances (*see chapter 4.2.1*). In case of the LLMCs, the problem of inconsistency, and particularly the issue of “pollution damage”, will arise each time the LLMCs will be applicable. Although, on the one hand, it is clear that adoption of a separate limitation regime under the Bunkers Convention would have created an unnecessary overlap with the existing

LLMCs, resulting in two competing mechanisms applicable to the same pollution incident. On the other hand, one may consider whether the adopted alternative, which have created several legal gaps, provide much better solution.

The lack of “responder immunity” provisions is another significant drawback of the Convention. The Bunkers Convention does not forbid the action to be brought against the salvors and other pollution responders independently of the Convention. Therefore, there might be a certain risk that those who are in the best position to minimize the impact of pollution will be reluctant to take any actions considering the risk of being punished if their attempts end up being unsuccessful. Since there is no second layer of compensation the absence of responder immunity provisions was deemed as justifiable as such would widen the scope of potential claim targets for the bunkers pollution victims. However, even if the drafters of the Convention may consider such construction to be a righteous tactic to enforce, it is highly doubtful whether the salvors and other pollution responders share that opinion and will be willing to run the risk of being sued for the benefit of pollution victims.

Probably bunkers pollution claimants will in the first case seek the compensation from the shipowner and thus, one may argue that there is only a minor risk for salvors to be sued. Indeed, the prospect of being held liable may not be a decisive element for pollution responders in all cases of bunkers pollution. For instance, where the risk of bunker spill damage is not grave, the absence of responder immunity provisions most likely will not preclude salvors from acting. However, in other circumstances, where serious bunkers pollution damage is rather an inevitable fact, unprotected position of the salvors and other pollution respondents may be a cornerstone in decision-making in question of taking actions. Thus, bearing in mind the possibility of being “a secondary compensation source” for the liability amounting to huge sums of money, the salvors and other pollution respondents perhaps will not be so eager to render their services in certain cases.

Deeming from the recordings of the final Conference, and particularly from the opening statement of the Secretary-General, the delegates have felt certain press upon themselves to reach an agreement on the Bunkers Convention. On the other hand, there was no such pressing need in the maritime world for the establishment of the international regime for bunkers pollution liability. Although several elements of the Convention were recognised as problematic, the suggestions to amend or clarify certain provisions were disregarded due to the “lack of time”. Two resolutions adopted by the Conference were aimed at prompting the States to overcome some of these problematic areas on the national level. Thus, the limitation of liability resolution urged the States to ratify the 1976 LLMC, as amended, in order to ensure that common limitation rules are applicable to bunkers pollution claims. The resolution concerned with “responder immunity” prompted the States to enact under their national laws necessary provisions

in order to provide protection for salvors and other pollution responders. However, urging the States parties to fill the created loopholes on the individual basis, the drafters seem to abandon such a distinguishing feature of any international instrument as uniformity, which would be disrupted by such national enactments.

Thus, as have been presented, there are several strong arguments, which undermine the usefulness of the Bunkers Convention as an international instrument. The compensation available to the pollution victims will vary in each case and, thus, the efficacy of the Convention in relation to the aim pursued will largely depend on the sufficiency of limitation amount available. Therefore, it is doubtful whether the Bunkers Convention, which in order to be effective depends on the States' wide adherence to the 1996 LLMC, may be regarded as successful international instrument.

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Appendix: Text of the Bunkers Convention

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

The States Parties to this Convention,

Recalling article 194 of the United Nations Convention on the Law of the Sea, 1982, which provides that States shall take all measures necessary to prevent, reduce and control pollution of the marine environment,

Recalling also article 235 of that Convention, which provides that, with the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the further development of relevant rules of international law,

Noting the success of the International Convention on Civil Liability for Oil Pollution Damage, 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 in ensuring that compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil carried in bulk at sea by ships,

Noting also the adoption of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 in order to provide adequate, prompt and effective compensation for damage caused by incidents in connection with the carriage by sea of hazardous and noxious substances,

Recognising the importance of establishing strict liability for all forms of oil pollution which is linked to an appropriate limitation of the level of that liability,

Considering that complementary measures are necessary 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,

Desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

Have agreed as follows:

Article 1 Definitions

For the purposes of this Convention:

1 "Ship" means any seagoing vessel and seaborne craft, of any type whatsoever.

- 2 "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.
- 3 "Shipowner" means the owner, including the registered owner, bareboat charterer, manager and operator of the ship.
- 4 "Registered owner" means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "registered owner" shall mean such company.
- 5 "Bunker oil" means any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil.
- 6 "Civil Liability Convention" means the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended.
- 7 "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.
- 8 "Incident" means any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage.
- 9 "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; and
 - (b) the costs of preventive measures and further loss or damage caused by preventive measures.
- 10 "State of the ship's registry" means, in relation to a registered ship, the State of registration of the ship and, in relation to an unregistered ship, the State whose flag the ship is entitled to fly.
- 11 "Gross tonnage" means gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex 1 of the International Convention on Tonnage Measurement of Ships, 1969.
- 12 "Organization" means the International Maritime Organization.
- 13 "Secretary-General" means the Secretary-General of the Organization.

Article 2

Scope of application

This Convention shall apply exclusively:

(a) to pollution damage caused:

in the territory, including the territorial sea, of a State Party, and in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by

that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

(b) to preventive measures, wherever taken, to prevent or minimize such damage.

Article 3

Liability of the shipowner

1 Except as provided in paragraphs 3 and 4, the shipowner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship, 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.

2 Where more than one person is liable in accordance with paragraph 1, their liability shall be joint and several.

3 No liability for pollution damage shall attach to the shipowner if the shipowner proves that:

(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or

(c) the damage was 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.

4 If the shipowner proves that the pollution damage resulted wholly or partially 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, the shipowner may be exonerated wholly or partially from liability to such person.

5 No claim for compensation for pollution damage shall be made against the shipowner otherwise than in accordance with this Convention.

6 Nothing in this Convention shall prejudice any right of recourse of the shipowner which exists independently of this Convention.

Article 4

Exclusions

1 This Convention shall not apply to pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention.

2 Except as provided in paragraph 3, the provisions of this Convention shall not apply to warships, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service.

3 A State Party may decide to apply this Convention to its warships or other ships described in paragraph 2, in which case it shall notify the Secretary-General thereof specifying the terms and conditions of such application.

4 With respect to ships owned by a State Party and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in article 9 and shall waive all defences based on its status as a sovereign State.

Article 5

Incidents involving two or more ships

When an incident involving two or more ships occurs and pollution damage results there from, the shipowners of all the ships concerned, unless exonerated under article 3, shall be jointly and severally liable for all such damage which is not reasonably separable.

Article 6

Limitation of liability

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

Article 7

Compulsory insurance or financial security

1 The registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

2 A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This certificate shall be in the form of the model set out in the annex to this Convention and shall contain the following particulars:

(a) name of ship, distinctive number or letters and port of registry;

- (b) name and principal place of business of the registered owner;
- (c) IMO ship identification number;
- (d) type and duration of security;
- (e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;
- (f) period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

3 (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

(b) A State Party shall notify the Secretary-General of:

- (i) the specific responsibilities and conditions of the authority delegated to an institution or organization recognised by it;
- (ii) the withdrawal of such authority; and
- (iii) the date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

(c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

4 The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages and, where the State so decides, the official language of the State may be omitted.

5 The certificate shall be carried on board the ship and a copy shall be deposited with the authorities who keep the record of the ship's registry or, if the ship is not registered in a State Party, with the authorities issuing or certifying the certificate.

6 An insurance or other financial security shall not satisfy the requirements of this article if it can cease, for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate under paragraph 2 of this article, before three months have elapsed from the date on which notice of its termination is given to the authorities referred to in paragraph 5 of this article, unless the certificate has been surrendered to these authorities or a new certificate has been issued within the said period. The foregoing provisions shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this article.

7 The State of the ship's registry shall, subject to the provisions of this article, determine the conditions of issue and validity of the certificate.

8 Nothing in this Convention shall be construed as preventing a State Party from relying on information obtained from other States or the Organization or other international organisations relating to the financial standing of providers of insurance or financial security for the purposes of this Convention. In such cases, the State Party relying on such information is not relieved of its responsibility as a State issuing the certificate required by paragraph 2.

9 Certificates issued or certified under the authority of a State Party shall be accepted by other States Parties for the purposes of this Convention and shall be regarded by other States Parties as having the same force as certificates issued or certified by them even if issued or certified in respect of a ship not registered in a State Party. A State Party may at any time request consultation with the issuing or certifying State should it believe that the insurer or guarantor named in the insurance certificate is not financially capable of meeting the obligations imposed by this Convention.

10 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. In such a case the defendant may invoke the defences (other than bankruptcy or winding up of the shipowner) which the shipowner would have been entitled to invoke, including limitation pursuant to article 6. Furthermore, even if the shipowner is not entitled to limitation of liability according to article 6, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the pollution damage resulted from the wilful misconduct of the shipowner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the shipowner against the defendant. The defendant shall in any event have the right to require the shipowner to be joined in the proceedings.

11 A State Party shall not permit a ship under its flag to which this article applies to operate at any time, unless a certificate has been issued under paragraphs 2 or 14.

12 Subject to the provisions of this article, each State Party shall ensure, under its national law, that insurance or other security, to the extent specified in paragraph 1, is in force in respect of any ship having a gross tonnage greater than 1000, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an offshore facility in its territorial sea.

13 Notwithstanding the provisions of paragraph 5, a State Party may notify the Secretary-General that, for the purposes of paragraph 12, ships are not required to carry on board or to produce the certificate required by paragraph 2, when entering or leaving ports or arriving at or leaving from offshore facilities in its territory, provided that the State Party which issues the certificate required by paragraph 2 has notified the Secretary-General that it maintains records in an electronic format, accessible to all States Parties, attesting the existence of the certificate and enabling States Parties to discharge their obligations under paragraph 12.

14 If insurance or other financial security is not maintained in respect of a ship owned by a State Party, the provisions of this article relating thereto

shall not be applicable to such ship, but the ship shall carry a certificate issued by the appropriate authority of the State of the ship's registry stating that the ship is owned by that State and that the ship's liability is covered within the limit prescribed in accordance with paragraph 1. Such a certificate shall follow as closely as possible the model prescribed by paragraph 2.

15 A State may, at the time of ratification, acceptance, approval of, or accession to this Convention, or at any time thereafter, declare that this article does not apply to ships operating exclusively within the area of that State referred to in article 2(a)(i).

Article 8 **Time limits**

Rights to compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought more than six years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the six-years' period shall run from the date of the first such occurrence.

Article 9 **Jurisdiction**

1 Where an incident has caused pollution damage in the territory, including the territorial sea, or in an area referred to in article 2(a)(ii) of one or more States Parties, or preventive measures have been taken to prevent or minimise pollution damage in such territory, including the territorial sea, or in such area, actions for compensation against the shipowner, insurer or other person providing security for the shipowner's liability may be brought only in the courts of any such States Parties.

2 Reasonable notice of any action taken under paragraph 1 shall be given to each defendant.

3 Each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under this Convention.

Article 10 **Recognition and enforcement**

1 Any judgement given by a Court with jurisdiction in accordance with article 9 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any State Party, except:

- (a) where the judgement was obtained by fraud; or
- (b) where the defendant was not given reasonable notice and a fair opportunity to present his or her case.

2 A judgement recognised under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.

Article 11 **Supersession Clause**

This Convention shall supersede any Convention in force or open for signature, ratification or accession at the date on which this Convention is opened for signature, but only to the extent that such Convention would be in conflict with it; however, nothing in this article shall affect the obligations of States Parties to States not party to this Convention arising under such Convention.

Article 12 **Signature, ratification, acceptance, approval and accession**

1 This Convention shall be open for signature at the Headquarters of the Organization from 1 October 2001 until 30 September 2002 and shall thereafter remain open for accession.

2 States may express their consent to be bound by this Convention by:

- (a) signature without reservation as to ratification, acceptance or approval;
- (b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or
- (c) accession.

3 Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

4 Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention with respect to all existing State Parties, or after the completion of all measures required for the entry into force of the amendment with respect to those State Parties shall be deemed to apply to this Convention as modified by the amendment.

Article 13 **States with more than one system of law**

1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2 Any such declaration shall be notified to the Secretary-General and shall state expressly the territorial units to which this Convention applies.

3 In relation to a State Party which has made such a declaration:

- (a) in the definition of "registered owner" in article 1(4), references to a State shall be construed as references to such a territorial unit;
- (b) references to the State of a ship's registry and, in relation to a compulsory insurance certificate, to the issuing or certifying State, shall be construed as referring to the territorial unit respectively in which the ship is registered and which issues or certifies the certificate;
- (c) references in this Convention to the requirements of national law shall be construed as references to the requirements of the law of the relevant territorial unit; and
- (d) references in articles 9 and 10 to courts, and to judgements which must be recognized in States Parties, shall be construed as references respectively to courts of, and to judgements which must be recognized in, the relevant territorial unit.

Article 14 **Entry into Force**

1. This Convention shall enter into force one year following the date on which 18 States, including five States each with ships whose combined gross tonnage is not less than 1,000,000, have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.

2 For any State which ratifies, accepts, approves or accedes to it after the conditions in paragraph 1 for entry into force have been met, this Convention shall enter into force three months after the date of deposit by such State of the appropriate instrument.

Article 15 **Denunciation**

1 This Convention may be denounced by any State Party at any time after the date on which this Convention comes into force for that State.

2 Denunciation shall be effected by the deposit of an instrument with the Secretary-General.

3 A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General.

Article 16 **Revision or amendment**

1 A conference for the purpose of revising or amending this Convention may be convened by the Organization.

2 The Organization shall convene a conference of the States Parties for revising or amending this Convention at the request of not less than one-third of the States Parties.

Article 17
Depositary

1 This Convention shall be deposited with the Secretary-General.

2 The Secretary-General shall:

(a) inform all States which have signed or acceded to this Convention of:

(i) each new signature or deposit of instrument together with the date thereof;

(ii) the date of entry into force of this Convention;

(iii) the deposit of any instrument of denunciation of this Convention together with the date of the deposit and the date on which the denunciation takes effect; and

(iv) other declarations and notifications made under this Convention.

(b) transmit certified true copies of this Convention to all Signatory States and to all States which accede to this Convention.

Article 18
Transmission to United Nations

As soon as this Convention comes into force, the text shall be transmitted by the Secretary-General to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article 19
Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

Done at London this twenty-third day of March two thousand and one.