



Key Issues

Pollution Liability Regime Under Threat

The global regime for oil pollution damage from tankers is widely regarded as a success story. The IMO Civil Liability (CLC) and Fund Conventions have been remarkably effective in ensuring that those affected by oil pollution from tankers are provided with prompt compensation without legal wrangling. The shipowner's contribution is paid regardless of fault, and on the rare occasions that valid claims exceed the shipowner's liability under the CLC, additional compensation is provided by the International Oil Pollution Compensation Fund (IOPCF) financed by oil importers.

Today, over US \$1 billion is available in countries that have joined the Supplementary Fund to cover the cost of clean-up and to compensate those affected by a single spill. However, the stability of this system is threatened by decisions of national courts and domestic legislation that are inconsistent with the manner in which the regime is intended to function.

These include the controversial decision of the Spanish Supreme Court in 2016 on the 'Prestige' incident (of 2002), and the enactment of a law in France in August 2016 providing for unlimited liability for environmental damage, following a decision of the French Supreme Court in 2012 on the 'Erika'

incident (of 1999). The court decisions in both cases were inconsistent with fundamental principles of the IMO Civil Liability and Fund Conventions (CLC/Fund), in particular the 1992 CLC 'limitation' and 'channelling' provisions.

In the 'Prestige' case, the Spanish Supreme Court overturned the decision of the trial court and held that the Master was guilty of the crime of reckless damage to the environment and that as a result the Master and shipowner were not entitled to limit their liability under the CLC. The shipowner's insurer was also held directly liable above the CLC limit, for up to US \$1 billion (the limit of cover provided by member clubs of the International Group of P&I Clubs (IG) for oil pollution damage).

In November 2017, the local court in La Coruña delivered a judgment on the quantification of the losses resulting from the incident. This confirmed that the 1992 Fund is liable for damages resulting from the spill in accordance with the 1992 Fund Convention. However, the Court has recognised moral and environmental damages and has awarded over €1.6 billion in compensation. This amount includes €1.57 billion payable to the Spanish Government, €61 million to the French Government as well as various amounts to individual claimants.





At the April 2018 session of the 1992 Fund Executive Committee, it was reported that the 1992 Fund and other parties have appealed the judgment to the Spanish Supreme Court. In particular, the 1992 Fund has requested the Supreme Court to declare that the 1992 Fund's liability does not include pure environmental damage or moral damage, since these types of damages are outside the scope of the 1992 Fund Convention. The compensation awarded exceeds by far the assessment of losses carried out by the 1992 Fund which quantified them at €300 million for the Spanish State and €42 million for the French State. The Supreme Court's decision is expected later this year.

The ICS Maritime Law Committee has kept this serious issue under close scrutiny, in co-operation with the IG. In 2017, at a session of the IOPCF governing bodies, an ICS and IG submission on this critical issue generated a lengthy debate. Almost all of the many delegations that spoke, with the notable exceptions of France and Spain, were in favour of further work to address the industry's concerns.

The IOPC Funds Director was requested to develop a discussion paper providing a range of options for consideration at a meeting in October 2017, which was duly prepared in consultation with ICS and the IG. The paper helpfully identified measures to address the issue of inconsistent interpretation of the Conventions, and also to encourage wider ratification and better implementation of the Conventions in national law – including the important 2003 Supplementary Fund Protocol, which provides claimants with access to a third tier of compensation of more than US \$1 billion per incident. Unfortunately, the IOPCF discussion at the October 2017 session was confused and ultimately derailed by a small group of states led by Spain and France that raised procedural impediments.

It was decided that work could proceed on the ratification and implementation measures that had been identified in the discussion paper. However, agreement could not be reached on how to address the important issue of inconsistent interpretation of the Conventions, and it was left open for delegations to come forward with further submissions at future meetings. This outcome was disappointing because it had been hoped to build upon the support and momentum for further work that had been generated by the previous industry submission to the IOPCF.

ICS is now carefully considering how this matter can best be taken forward. A clearer exposition of the industry's concerns and how they could be addressed might be needed.

Meanwhile, although the extent of any pollution damage is not yet fully known, the tragic 'Sanchi' incident in January 2018 could cause China to reconsider its stance on membership of the 1992 IOPC Fund, which is currently in force for Hong Kong only. China is a party to the 1992 CLC and has its own national oil pollution compensation fund, but the amount is considerably less than would be available under the 1992 Fund or the Supplementary Fund. The incident highlights the potential for pollution from 'passing' tankers i.e. not calling at ports in China, and could also be a spur for ratification of the HNS Convention concerning liability and compensation for dangerous cargoes.