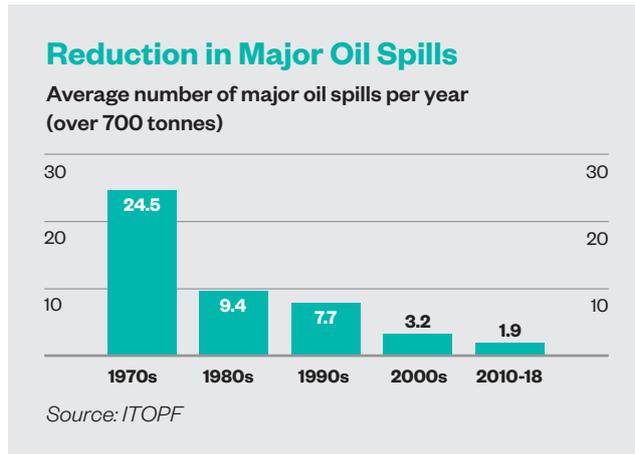




Key Issues

Defending the Global Pollution Liability Regime



Ships operate in an environment presenting a high degree of physical risk, and it has not yet been possible to eradicate maritime casualties completely. Over the past decade, there have only been about two serious oil spills each year (of over 700 tonnes) worldwide, compared to 30 or more per annum 40 years ago, despite a significant increase in maritime trade. Nevertheless, although major incidents are now much less frequent, any oil spill can have huge consequences for those affected, and the global compensation system for addressing pollution damage from tankers is a great success story.

The IMO Civil Liability (CLC) and Fund Conventions have been remarkably effective in providing those affected by oil spills with prompt compensation without protracted legal wrangling. Importantly, the shipowner's contribution is paid regardless of fault, and on the very rare occasions that claims have exceeded the shipowner's liability under CLC, additional compensation is provided by the International Oil Pollution Compensation Fund (IOPCF) financed by oil importers. The *quid pro quo* for shipowners' acceptance of strict liability is that this is limited to a level that allows the shipping industry to obtain access to the necessary cover through its third party liability insurers, principally members of the International Group of P&I Clubs.

In 2019, in countries that have signed up to the 2003 IMO Supplementary Fund Protocol, over US\$1 billion is available to cover the cost of clean-up and to compensate those affected by any single spill. However, the stability of this impressive global system is severely threatened by decisions by national courts and domestic legislation that are inconsistent with the manner in which the IMO liability regime is intended to function. This includes the

controversial judgment by the Spanish Supreme Court, in 2016, on the 'Prestige' disaster of 2002, and the enactment of a law in France, also in 2016, providing for unlimited liability for environmental damage. In both cases these decisions were inconsistent with fundamental principles of the IMO CLC/Fund Conventions, in particular the 1992 CLC 'limitation' and 'channelling' provisions.

The Spanish Supreme Court decision, which held the shipowner's insurer liable for over US\$1 billion, is particularly startling, being far in excess of the limit of shipowner liability agreed under the IMO CLC regime to which the Spanish Government is a State Party. It is therefore worth recounting the background to this remarkable case.

The 'Prestige' disaster occurred 17 years ago and led to the IMO agreement to accelerate the phase-out of single hull oil tankers, which have now all been withdrawn from international service. A fully laden tanker suffered damage in heavy seas and eventually sank some distance off the northern Spanish coast; the Master's request for access to a place of refuge having been denied by the Spanish authorities. Very controversially, the Master was then detained in Spain for two years, the first three months in a high security prison. Some years later, a lower court, after hearing evidence – including from the Master – subsequently acquitted him of all charges of criminal damage. It also acquitted the Spanish civil servant involved in the decision not to allow the ship into a place of refuge. The lower Court did not therefore award any compensation to the claimants in the case, which included the Spanish Government.





But in 2016, the Spanish Supreme Court overturned the decision of the lower trial Court and determined that the Master was guilty of the crime of reckless damage to the environment and that, as a result, the shipowner was not entitled to limit its liability under the international regime. The shipowner's P&I Club was also held directly liable above the IMO CLC limit, for up to US\$1 billion (the limit of cover provided by members of the International Group of P&I Clubs for oil pollution damage). The Supreme Court's judgment was reached after just one day, without hearing any new evidence and in the absence of the Master. At the same time, the Supreme Court confirmed the acquittal of the Spanish civil servant.

In December 2018, the Spanish Supreme Court delivered its final judgment ordering the shipowner and insurer to pay over €1.4 billion. This enormous amount includes €1.35 billion payable to the Spanish Government, far exceeding the assessment of losses for the Spanish State carried out by the IOPCF, which had quantified these at €300 million. The latest judgment also confirms the Court's previous decision that the shipowner's insurer is liable for all the damages caused by the incident, including moral and environmental damages, which are not admissible under the international regime. The judgment also confirmed that, under Spanish law, the IOPC Fund is liable for damages resulting from the spill, up to the maximum amount established under the international regime, but not including moral and environmental damages. The court in charge of the enforcement of the judgment issued a further decree, in February 2019, ordering the Master, the shipowner and the P&I Club to pay the amounts awarded by the Supreme Court plus 30% for interests and costs.

This extraordinary decision on the 'Prestige' case is of great concern because it follows on from the French court decision on the 'Erika' case (of 1999) which raised similar issues of inconsistent interpretation of the international regime. In 2012, the French Supreme Court determined that the international regime requirement for all liability to be 'channelled' to the shipowner did not apply because the damage from the 'Erika' had resulted from the recklessness of other parties. In 2016, legislation was then adopted which introduced unlimited liability for environmental damage into French law, despite the fact that France is a State Party to the IMO Conventions. However, the French Government delegation to the IOPCF has subsequently advised – after being pressed by ICS and the International Group of P&I Clubs (IG) – that the IMO Conventions would probably prevail over this domestic legislation in the event of any future shipping incident.

The court decisions in both these cases are inconsistent with the fundamental principles of the IMO CLC/Fund Conventions to which over 115 nations, including Spain and France, have subscribed, and they threaten to disturb the balance of interests on which the international compensation regime for ship source pollution damage is based. The ICS Maritime Law Committee has therefore kept this serious issue under close scrutiny, in co-operation with the IG.

In 2017, ICS and the IG made a joint submission on this critical matter to the IOPCF which generated a lengthy debate over several meetings, although this was ultimately derailed by a small group of states, led by Spain and France, which raised procedural impediments. As a result, agreement could not be reached on how to address the important issue of inconsistent interpretation of the IMO Conventions.

However, in March 2019, the IMO Legal Committee considered a fresh submission, this time led by Greece and the Marshall Islands, but with full ICS and IG support. This made the case that the test for breaking shipowners' right to limit liability also has serious implications for other IMO liability conventions. The submission therefore proposed a new output to the Legal Committee's work programme to develop a Unified Interpretation under all of the IMO Conventions on liability and compensation, something for which there was overwhelming support. Work will now begin immediately and is expected to conclude in 2021.

If an interpretive tool is developed by IMO, this should be extremely helpful to national courts and those tasked with drafting national legislation, to provide a better understanding of the intention of the IMO Conventions when they were originally agreed. It is hoped that this will lead to greater uniformity and certainty and, most importantly, ensure the long term future sustainability of the international compensation regime.

In parallel with the efforts being pursued for an interpretive tool, ICS is continuing to promote greater ratification by governments of the 2003 Supplementary Fund Protocol, which was adopted after the 'Prestige' incident and provides for much higher limits of liability. If the Protocol is in force in any nation that suffers a future pollution incident, it is likely that the higher levels of compensation available would discourage the kind of unhelpful actions that have recently been taken by the Spanish and French courts.