ISSUES ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGES FROM SHIPS

Axel Luttenberger, Ph.D., Associate Professor
Biserka Rukavina, M.Sc.
Loris Rak
University of Rijeka
Faculty of Maritime Studies Rijeka
Studentska 2, HR – 51000 Rijeka, Croatia
axel@pfri.hr, biserka@pfri.hr, loris.rak@pfri.hr

ABSTRACT

International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention), 2001, entered into force on 21st November 2008, after Sierra Leone adopted it as the last of the required 18 states. It covers the international regime of liability for pollution from bunker spills from all types of ships, thus fulfilling the gap of the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT 1992), as amended, which only concerned the oil pollution caused by tankers. The paper describes its background and elaborates the differences between regulations of these Conventions, e.g. the differences in definitions, distinction regarding the limitation of liability and provisions regarding the compulsory insurance. The authors analyzed the implications caused by implementation of the Bunkers Convention in the Adriatic region, especially for the Republic of Croatia, the environmental importance thereof and emphasized the necessity of common approach by neighbouring States in its enforcement and promotion in favour of environmental safeguard of the Adriatic Sea.

1 INTRODUCTION

The International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention), 2001 was adopted to ensure adequate, prompt and effective compensation to persons who suffer damage caused by spills of oil, when carried as fuel in non-tankers vessels. The Convention is modelled on the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC Convention), later amended by the Protocol of 1992, laying down the principle of strict liability of shipowners for the oil pollution damages and created the system of compulsory insurance or other financial security in respect of oil pollution damages. Jointly with the adoption of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) in 1971, later amended by the Protocol of 1992 and 2000 Amendment, and finally the 2003 Protocol establishing the Supplementary Fund, this system provided a useful mechanism for ensuring the payment of compensation for oil pollution damage.

The paper is focused on the Bunker Convention as import fraction in complementary measures to ensure the payment for compensation for damage caused by pollution resulting from the escape and discharge of bunker oil from ships, pointing to the main achievements as well to legal differences between Bunker Convention and the CLC and FUND stipulations.
2 THE CHALLENGES IN REGULATING BUNKER OIL POLLUTION

The CLC Convention did not comprehend all cases of oil pollution damages. Namely, it applies only to damages caused by persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel and lubricating oil, whether carried on board of ship as cargo or in the bunkers of such a ship and applies only to tanker or other ships and seaborne crafts constructed or adapted for the carriage of oil in bulk as cargo, but only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage.

Although the issue of bunker oil pollution was raised before the Legal Committee in 1969, during the negotiations leading up to the CLC Convention, and again during the preparations for reviews of CLC and FUND Conventions in 1991, it gave the priority to this problem in 1994, when Commonwealth of Australia brought this issue before IMO’s Marine Environment Protection Committee (MEPC) proposing the development of a regime for liability and compensation for damage in the event of damage caused by oil from ships’ bunkers. Furthermore, motivated even more after environmental disaster caused by bulk carrier Iron Baron, which grounded on Hebe Reef near Tasmania and began leaking bunker fuel oil, together with Canada, Finland, Norway, South Africa, Sweden and the United Kingdom, Australia brought a joint submission to the 75th session of the Legal Committee referring to the UK P&I Club’s Analysis of Major Claims 1993 which emphasized that the claims caused by bunker oil pollution damages represent nearly a half of total amount of pollution claims. In these circumstances, the Legal Committee gave the priority to settle this issue and by the 2001 the International Convention on Civil Liability for Bunker Oil Pollution Damage was adopted.

There were two main approaches regarding the form of regulations to deal with bunker oil pollution: the new convention that is to be adopted or the new Protocol or Amendment to the CLC Convention.

The main advantage of the first approach was found in flexibility. It was easier to regulate specific problems caused by bunker oil in new document then interpose them in the CLC Convention that deals only with persistent oil carried as cargo. Further more, the new document could make possible to change and even extend the definitions of oil and definition of damage. It could also introduce the possibility for the shipowners to transfer their liability to bareboat charterer, manager and operator of the ship, thus abandoning the CLC Convention regulation on strict liability of the shipowners.

The disadvantage of mentioned approach was longer and more difficult process of adoption. It is considered to be much easier to adopt the Protocol to the already existing document then entering in the process of adopting the new one.

After the debate in the 77th session of the Legal Committee, the majority opted for new convention, and the Committee worked on the text of new Convention until 2001 when the Convention draft was presented to the IMO Conference in London. The result was clear text with no or small number of open questions so the delegates of the seventy countries adopted the Convention on 19th March 2001.
ISSUES ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGES FROM SHIPS

3 COMPARATIVE ANALYSIS OF DEFINITIONS IN INTERNATIONAL INSTRUMENTS REGULATING OIL POLLUTION FROM SHIPS

3.1 Differences regarding the definition of the ship

The Bunker Convention extended the definition of the ship in relation to the CLC Convention. While the CLC Convention 1992 defines the ship as any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo. Furthermore, the CLC Convention determines that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard1.

On the other hand, the Bunker convention defines the ship as any seagoing vessel and seaborne craft, of any type whatsoever2. This wide definition of ship, nevertheless, does not include the tankers, i.e. the ships defined in the sense of CLC Convention, over the expressed exclusions of Bunker Convention in case were CLC Convention is applicable, whether or not compensation is payable in respect of it under that Convention3. It means that the Bunker Convention shall not apply to the civil liability for the damages caused by tankers even if the damage derives from the tankers bunker oil, unless the CLC Convention is not applicable, e.g. if the oil in bunkers is not carried as cargo.

Moreover, the Bunker Convention is excluded from damages caused by warships, naval auxiliary or other ships owned or operated by State and used, for the time being, only on Government non-commercial service. But the State Party is entitled to decide to apply the Convention to its warships or other ships, in which case it shall notify the Secretary-General thereof.

Finally, the Bunker Convention definition of ships excludes any seagoing vessel and seaborne craft, of any type whatsoever, which is not fuelled by bunker oil.

3.2 Differences regarding the definitions of the shipowner

The both CLC Convention and the Bunker Convention laid down the main principle of strict responsibility of the shipowners for the oil pollution damages. But there is a huge difference in definitions of the shipowner in those two Conventions that change significantly the group of persons that are held liable for pollution damages.

In terms of the CLC Convention, the 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. Yet, 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, the CLC Convention determines that “owner” shall mean such company.

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1 Article I of International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC Convention)
2 Article I of International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention)
3 Article IV of International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention)
Furthermore, the CLC Convention explicitly excludes from claims for compensation for pollution damage against:

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

Nevertheless, the mentioned persons shall be liable for the damages resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

On the other hand, the Bunker Convention gives much wider definition of the shipowner. In the sense of the Convention, the shipowner means the owner, including registered owner, bareboat charterer, manager and operator of the ship.

As it could be seen, the Bunker Convention extended the liability to all the persons which are somehow connected with the ship operations, even those who are explicitly excluded from the claims for compensation by the CLC Convention regime.

The regime of liability established by the CLC Convention can not be considered separately from the Fund Convention 1992. The victims of oil pollution damages who have been unable to obtain full and adequate compensation for the damages under the terms of the CLC Convention are entitled to seek the payment from the Fund established by the Fund Convention. Additionally, the 2003 Supplementary Fund Protocol provides compensation to victims of oil pollution in those relatively rare cases where the compensation provided by the 1992 CLC and Fund Convention does not suffice to cover the entire damage.

On the other hand, the Bunker Convention does not provide for such insurance for the victims. The Fund Convention does not apply in cases of bunker oil pollution damages (unless spilled from tankers in accordance with the CLC Convention), although the Bunker Convention provides the shipowners means to exempt or limit their liability under the terms of applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

Therefore, by introducing the wider definition of the shipowner, the Bunker Convention enables the victims the measures to preserve rights of recovery from other parties in addition to the registered owner.

It is important to emphasize that all the parties included in the definition of the shipowner may be held jointly and severally liable under the Convention. Although it is likely that the claims will be met from insurance taken out by the registered owners, who are obliged to maintain insurance or other financial security, there are no obstacles for the claimants to bring proceedings jointly against other parties as well as the registered owner.

Nevertheless, the Convention failed to comply with the reasonable demands to exempt from liability persons taking reasonable preventative measures in response to a bunker oil spill and to provide them legal protection, the most notable to the salvors. This solution might not be satisfactory in order to encourage a prompt and effective response to an incident
because the salvors, whose negligence caused or contributed to the pollution, could present the possible sources of compensation for the claimants. This could be considered as a first major shortcoming of the Bunker Convention.

Although Resolution on protection for persons taking measures to prevent or minimize the effects of oil pollution has been attached to the Bunker Convention that called the States Parties to provide provisions for the protection of persons responding to a casualty and taking measures to prevent or minimize the effects of oil pollution in their domestic legislation, the failure to provide such provision by itself constitute major drawback of the Bunker Convention.

4 DISTINCTION REGARDING THE LIMITATION OF LIABILITY

Both the CLC Convention and the Bunker Convention provide situations in which the shipowners can exclude their liability for the oil pollution damages. The Conventions expressly exclude the liability of the shipowners if the damage:

(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
(b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
(c) 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.

Nevertheless, the shipowners shall not be entitled to limit their liability under the provisions of both Conventions if it is proved that the pollution damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

However, there is essential difference in provisions of the Conventions regarding the limitation of liability. The Bunker Convention abandoned the principle of a free-standing limitation fund dedicated to pollution claims that were laid down by the CLC Convention. While the CLC Convention established the limits of compensation amounts, the limitation of liability in accordance to the Bunker Convention is linked to the provisions of national or international regime thus leaving the matter to be solved in every particular case.

This is a second major shortcoming of the Bunker Convention. It failed to uniform the provisions regarding this matter thus leaving the shipowning and insurance sectors in position of not knowing the amounts to which their liability can be limited.

Although Resolution on limitation of liability has been adopted by the Conference that urges the States Parties to ratify or accede to the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976, as amended, thus increasing the fund available for all claims – including bunker pollution claims, it does not solve the problems that can be incurred from such solution for the victims.

Some authors have already pointed the concerns that LLMC 1976 does not explicitly grant a right of limitation for pollution claims, but only for loss or damage to property and claims in respect of loss resulting from infringement of rights. It may be that many typical claims for pollution, such as for property damage and clean-up costs, would fall within the wording of one or other of the different categories of claim which are subject to limitation
under the LLMC 1976, but there are others where the position may not be so clear, for example typical claims for pure economic loss by parties such as fishermen and hotel operators. These can often form a significant proportion of the overall cost of a spill.

Furthermore, it should also be noted that limitation for clean-up costs would probably have to be claimed under the same provision as that dealing with wreck removal.4

5 THE ROLE OF COMPULSORY INSURANCE

The main reason for entering the provisions regarding the liability for oil pollution damages into international regime, as mentioned above, was to ensure adequate compensation for damages caused by escape or discharge of oil from ships, as well as to ensure that the compensation can actually be paid.

Such intent resulted with obligation for the shipowners to maintain insurance or provide other financial security to cover their liability. These provisions were introduced in international regime by the CLC Convention 1969.

The Bunker Convention follows such solution, as compulsory insurance has become a feature of recent liability conventions, e.g. the CLC and International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996. But the question has been asked during the process of adoption us to whom to impose such obligation. The conflict of interest rose between the states with vulnerable coastlines but few ships and states with large numbers of ships flying their flag. The first ones were keen to see the requirements applied to as many potentially polluting vessels as possible, and the second to see a minimum tonnage figure which was not too low.

As a compromise solution, the Bunker Convention stated that only the ships having a gross tonnage greater than 1000 shall be required to maintain insurance or other financial security. The amount of such insurance or financial security must be 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.

The States Parties are entitled to put reserve to such obligation and declare it does not apply to ships operating exclusively within the area of that State Party referred to in article 2(a)(i), i.e. in the territory, including territorial sea.

The question was raised before the Conference whether to allow the exception of compulsory insurance for vessels engaged in domestic voyages, but outside the 12 mile limit of territorial sea.

A number of States with complex islands or archipelagic waters (such as the Philippines and Indonesia) favoured the solution that domestic voyage should comprehend even the inter-island voyages that extend the 12 mile limit of territorial sea.

On contrary, several Mediterranean States (such as Cyprus, Malta and Italy) expressed their concern regarding such a proposal on the basis that the exclusive economic zone of

4 Colin de la Rue and Peter Murray, Oil Pollution from Ships – Current Legal Issues, Shanghai International Maritime Forum 2005, page 5.
Axel Luttenberger, Biserka Rukavina, Loris Rak
ISSUES ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGES FROM SHIPS

adjacent Mediterranean States overlap and vessels belonging to neighbouring States and operating within their exclusive economic zones could represent a serious pollution threat.

Their arguments prevailed and the Conference concluded that the exclusion had to be limited within the territorial sea.

It is important to emphasize that obligation for maintaining the insurance or other financial security is spread only to registered owners, but not to other persons considered to be shipowners in the sense of the Convention. This solution maybe does not provide for additional security for the victims of bunker oil pollution damages, but it is considered to be unsatisfactory for all the persons defined as shipowners to carry insurance according to provisions of the Convention. It is believed that victims could receive adequate compensation within the one compulsory insurance because in practice all claimants would seek to recover from the registered owner or directly from his liability insurer.

The Bunker Convention established the responsibility of the State Parties to issue ships the certificate confirming that appropriate insurance or financial security is in place. Although the Convention provides that a State Party may authorize another institution or organization to issue the certificates, the form of certificate has been prescribed by the Convention itself, as an annex.

6 CO-OPERATION ON REGIONAL BASIS

According to the United Nations Convention on the Law of the Sea (UNCLOS), 1982, State shall cooperate also on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with the Convention, for protection and preservation of the marine environment, taking into account characteristic regional features.

At the European level Council Decision of 19 September 2002 authorising Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers Convention) calls on Member States to take necessary steps to deposit their instruments of ratification or, accession to the Bunkers Convention. The time table is that member States shall make efforts to sign the Bunkers Convention before 30 September 2002, take necessary steps to deposit the instruments of ratification or, accession if possible before 30 June 2006 and inform the Council and the Commission before 30 June 2004 of prospective date of finalisation of their ratification or accession procedures. The substantive rules of the system established by Bunkers Convention fall under national competence of Member States and only the provisions of jurisdiction and the recognition and enforcement of judgment are matters covered by exclusive Community competence.

The Republic of Croatia affirmed that one of the reasons for acceding to Bunker Convention is desire to fulfil the regime of civil liability for oil pollution damages in its territorial sea and exclusive economic zone, which started by acceding the CLC Convention in 1997. Another reason is importance of harmonizing the Croatian maritime legislation with

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ISSUES ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGES FROM SHIPS

the aquis communautaire. Hence the Croatian Parliament ratified the Bunker Convention on 26th September 2006.\(^6\)

For an efficient implementation of the Bunker Convention the Republic of Croatia shall determine the authority entitled to issue the certificates attesting that insurance or other financial security is in force in accordance with the provisions of this Convention to the ships flying Croatian flag. One of the authorities that are recommended to issue the certificates is Croatian Register of Shipping. It is expected that this will present the major administrative burden to such authority. In addition, the jurisdiction of the courts in proceedings regarding the claims for compensation brought before them in accordance with the Bunker Convention should be resolved. That is to say, the current legislation does not provide the provisions for the territorial jurisdiction of the courts if the accident is placed in the exclusive economic zone and such a lack of provisions could constitute the serious obstacles for the claimants if not anticipated in the new legislation proposal.

The regional co-operation of the north Adriatic Sea States regarding the Bunker Convention is affirmative. Besides the Republic of Croatia, the Republic of Slovenia acceded to the Bunker Convention in 20\(^{th}\) May 2004\(^1\) and the Republic of Italy has not yet adopted the Bunker Convention and there has been no indication that Republic of Italy has abandoned the intent to adopt the Convention.

7 CONCLUSIONS

The possible damage to shorelines and the marine environment from oil spills has been clearly demonstrated by several instruments and pollution damage from oil spill of bunker oil presents a potentially greater threat than crude oil or other petroleum products because of its persistent physical properties. In authors’ opinion international convention have been, and continues to be, very successful means of harmonizing international maritime law, thus avoiding a patchwork of quilt of national legislation.

The Bunkers Convention contributes to that goal by providing a degree of confidence by shipowners about the potential exposure to liability, and for claimants about their rights to compensations for loss or damage caused by bunker spills. Together with the compulsory insurance and direct actions against the insurer, the Bunker convention presents an improvement over current legislation in this field.

In the case that the State is not ratifying the Bunker Convention it shall rely on its current legislation and by ratifying the Bunker Convention the coastal State interests will be better protected in terms of ability to recover damages resulting from pollution by bunker spills caused by non-tankers.

The authors are urging neighbouring coastal state to sign, ratify or accede the Bunker Convention filling a gap in the international regulation of marine pollution liability. What is more, the authors are advising to improve victim protection under international rules on marine pollution liability establishing treaties dealing with specific features on the particular environmental spot of the Adriatic Sea.

\(^6\) Zakon o potvrđivanju Međunarodne konvencije o gradskoj odgovornosti za štetu onečišćenja pogonskim uljem iz 2001. godine, Narodne novine, Međunarodni ugovori br. 9/06

REFERENCES


8. Zakon o potvrđivanju Međunarodne konvencije o gradanskoj odgovornosti za štetu onečišćenja pogonskim uljem iz 2001. godine, Narodne novine, Međunarodni ugovori br. 9/06


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