



REED SMITH LLP
LITIGATION DEPARTMENT
SHIPPING GROUP
ADMIRALTY & CASUALTY DEPARTMENT

**THE BUNKER POLLUTION
CONVENTION 2001**

Konstantinos Bachxevanis

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THE BUNKER POLLUTION CONVENTION 2001

(1) Introduction.

Oil tankers are not the only vessels that cause oil pollution damage at sea. There have been numerous heavy fuel oil spills from non-tankers as a result of escape or discharge of bunker oil from them. According to statistics of ITOPF¹ for tankers only, 7% of incidents of small spills (i.e. less than 7 tonnes) and 2% with spilt quantities between 7 and 700 tonnes for the years 1974-2008 were accounted to bunkers. Inclusion of non-tankers would obviously increase this bunker spill figure. In UK² waters only, 2,188 bunker pollution incidents have been recorded for the years 1993-2004. There have been incidents involving bulk carriers that escape of bunker oil caused significant damage to the environment and economic losses to third parties. Some of them, such as the “*Kandalashka*” in 1993, the “*Borodinskye Polye*” in 1993, and the “*Cita*” which ran aground off the Isles of Scilly in 1997 caused extensive environmental damage and left large amounts of uncompensated losses to their victims.

The problems³ associated with the cost and damages recovery following a bunker pollution incident had to do with one or more of the following reasons:

- i. claimants should prove fault where a spill involved a persistent oil;
- ii. the vessel was flagged in another State and it might have been difficult to enforce a judgement;
- iii. there was no automatic right to pursue a claim in the State where the spill occurred;
- iv. the legal costs of pursuing a claim could be prohibitive;
- v. the shipowner, usually a single-ship company owning a valueless ship, had no other assets (and was usually insolvent);
- vi. the registered shipowner had no insurance; and
- vii. the vessel was insured but the insurer, with an insolvent shipowner unable to pay, was sheltered behind the “pay to paid” clause and/or any other policy coverage defences to avoid payment.

In response to the above problems and with the desire to fill the gap in a uniform way at international level, the IMO adopted the “*International Convention on Civil Liability for Bunker Oil Pollution Damage 2001*” (the “*Bunker Convention*”). It was developed as a preventive measure for the reduction and control of pollution to marine environment as

¹ ITOPF, (2009), “*Oil Tanker Statistics: 2008*”, <http://www.itopf.com>.

² Explanatory Memorandum to “The Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006” 2006/ 1244.

³ *ibid*

well as a mechanism providing compensation for damage caused by bunker pollution.⁴ The Bunker Convention is in force from the 21st November 2008 following ratification, acceptance, approval or accession by at least 18 States, 5 of which with a combined gross tonnage in excess than 1 million.⁵ As on July 2009, 38 States are party to the Bunker Convention. These are listed in the Appendix⁶.

(2) The Scope of the Convention.

(a) Bunker Convention -V- Civil Liability Convention – A comparison.

The Bunker Convention follows in many ways the CLC⁷ regime. However, it is different from the CLC/ Fund⁸ model in the following respects⁹:

- i. it has a different definition of “oil” [*see below 2(d)*];
- ii. there is no second tier “Fund” [*see below 3(a)*];
- iii. claims are not channelled only to the “registered owner” [*see below 3(a)*];
- iv. there is no civil liability responder immunity [*see below 3(e)*];
- v. it sets out no limits of its own (unlike the CLC/ Fund Conventions) but links to limits set out by the LLMC 1967/96 [*see below 4(c) & 5*];¹⁰ and
- vi. the compulsory insurance requirement is set at over 1,000 gt regardless of the type of ship (and not to ships carrying a minimum of 2,000 tonnes of oil cargo) [*see below 4(a)*].

(b) Spatial Applicability of the Bunker Convention.

According to Art.2, the Bunker Convention applies exclusively to “*Pollution Damage*” caused by “*Bunker Oil*” of a “*Ship*” in the territory, including the territorial sea, of a State Party, and in the Exclusive Economic Zone (EEZ) of a State party or, if no EEZ is established in accordance with international law, in the equivalent zone of 200 n. miles from the baselines from which the breadth of its territorial sea is measured. It applies also to “*Preventive Measures*”, *wherever taken*, to prevent or minimize such damage.

⁴ The Preamble of the Bunkers Convention (any reference to preamble, articles and paragraphs in footnotes is reference to preamble, articles and paragraphs of the Bunkers Convention unless otherwise stated).

⁵ Art.14 – Entry into Force.

⁶ The Ratification of Maritime Conventions (LLP) - Last updated on 06/04/2009. The latest State Party is Syria with a date of entry into force on 24/07/2009.

⁷ The “International Convention on Civil Liability for Oil Pollution Damage, 1992” (“CLC”).

⁸ The “International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992” (“Fund”).

⁹ Gaskell, N. & Forrest, G., (2008), “*Marine pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003*”, The University of Queensland Law Journal, Vol.2, No.2, pp.103-165.

¹⁰ The “*Convention on Limitation of Liability for Maritime Claims, 1976*” as amended by the Protocol of 1996.

Provided all the other constituent ingredients, as defined below, are present, the Bunker Convention is applicable. There is no need for the pollution “*Incident*” to take place within the territorial sea or the EEZ. It suffices that “*Pollution Damage*” has been suffered within these jurisdictional zones, even though the bunkers were actually spilled in the High Seas by a vessel whether in innocent passage or not.¹¹ It is arguable, however, that provisions of the Bunker Convention on compulsory insurance and certificate inspection are not applicable to a ship on innocent passage; this would be in direct conflict with the concept of innocent passage.¹²

(c) Definition of “*Ship*”.

“*Ship*” is defined¹³ as “*any seagoing vessel and seaborne craft, of any type whatsoever*”.

There is much case law as to what is or is not a “*ship*” under various regimes and it is not unlikely that the above definition will become, soon or later, subject to interpretation by a national court. The definition, however, is very wide so as to include *any ship whatsoever* (no matter her size and her type: bulk carrier, container ship, passenger ship, tug, fishing vessel, launch etc.) provided it is *seagoing*. The main restriction built into the definition is the reference to “*seagoing*”.¹⁴ Should the vessel be “*seagoing*” physically (i.e. capable to sail at sea), legally (i.e. permitted and documented to sail at sea), or actually employed at sea? For in the latter case, the definition would probably not cover a river vessel or a vessel which never in practice left a port or harbour¹⁵ (e.g. a small harbour tug which assists ships just near the dock during the berthing/unberthing operation). Another issue, in this respect, relates to air-cushion vehicles and offshore units. An air-cushion vehicle and a FPSO (Floating Production, Storage & Offloading) vessel or drilling unit can be argued to fit the very wide definition of a “*Ship*” under the Bunker Convention in which case any liability for Bunker Pollution would be strict but unlimited because the LLMC 1976/96 do not apply to such vessels.¹⁶

(d) Definition of “*Bunker Oil*”.

“*Bunker Oil*” is defined¹⁷ 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*”.

This definition is again wide so as to include HFO, IFO and lighter fuels such as MDO, MGO as well as lube oil, which in mariners’ common parlance are not bunkers,¹⁸ and engine room oily bilges, which usually are admixtures of water, bunker and lube oil.¹⁹ Solidified tank umpumpables, sludges or bunker that clings to a tank’s wall would be

¹¹ Tsimplis, M.N., (2005), “*The Bunker Pollution Convention 2001: completing and harmonizing the liability regime for oil pollution from ships?*” Lloyds Maritime and Commercial Law Quarterly, LLP, Part 1, pp.83-100.

¹² Tsimplis, *ibid.*

¹³ Art.1(1) – Definitions

¹⁴ Gaskell et al, *op.cit.*9.

¹⁵ Gaskell et al, *op.cit.*9.

¹⁶ Art.15(5) LLMC 1976.

¹⁷ Art.1(5) – Definitions.

¹⁸ The expression is : “*Bunkers and Lubes onboard*”.

¹⁹ If the convention was to exclude lubes it would be difficult to include the engine room oily bilges.

probably covered under the term “residues”,²⁰ though this term is not further defined.²¹ The only restriction here is the ‘test’ of *use* or *intention to use* for the operation or propulsion of the ship. The distinction between cargo and oil is based on the demonstration of intention.²² If it is stored in bunker tanks or pipelines this would probably be evidence for such use but where the oil is stored in other tanks, this may not prove as easy to demonstrate. Naturally, the very reason of a ship’s bunkering is her operation or propulsion and, by necessity, bunker oil, wherever stored, is used or intended to be used so. But the escape of HFO from the storage tanks of an AHST (Anchor Handling Supply Tank) which is below 1,000 gt and carries below 2,000 m.t. of such HFO as cargo is not covered by the compulsory insurance scheme of either the Bunker Convention or the CLC 1992.

(e) Definition of “Pollution Damage”, “Preventive Measures” & “Incident”.

“Pollution Damage” is defined²³ as :

“ (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.”

Apart from the substitution of the word “oil” with “*bunker oil*”, the definition is identical to that in the CLC 1992.

Paragraph (a) of the definition covers loss or damage “*by contamination resulting from the escape or discharge*” of bunker oil. It certainly covers basic clean up costs caused by contamination.²⁴ According to the definition, the “*compensation for impairment of the environment..... shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken*”. This applies to actual costs and not to hypothetical,²⁵ for, on its strict interpretation, claims related to general damage to the environment which is unquantifiable are presumably not recovered.²⁶ The definition also recognizes that there may be recovery of economic losses in the form of loss of profit from impairment of the environment. The CLC experience has shown that, in practice, economic loss claims by commercial interests usually exceed the costs of the environment’s reinstatement. It looks that in a system that was designed originally for environmental protection far more attention has been paid to tourist or fishing industries

²⁰ Gaskell et al, op.cit.9.

²¹ By analogy to the CLC/Fund practice which treats such remains and wastes as being within the CLC definition of “Oil”.

²² Tsimplis, op.cit.11.

²³ Art.1(9) – Definitions.

²⁴ Gaskell et al, op.cit.9.

²⁵ Gaskell et al, op.cit.9.

²⁶ Tsimplis, op.cit.11.

than in developing principles of environmental reinstatement.²⁷ Obviously, damage or loss by explosion or fire presumably is not covered. Also, death or injury is not covered, although it is accepted that injury actually caused by contamination would be covered.²⁸ Exclusion, however, of such claims is arguably subject to the interpretation of the Bunker Convention by national courts.²⁹

Paragraph (b) of the definition covers the so-called ‘*threat removal costs*’. The applicability of para. (b), however, depends on whether “**Preventive Measures**” actually took place and, therefore, must be read in conjunction with the definition of “*Preventive Measures*”³⁰ which means “*any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage*”. Provided that an incident has taken place, the cost of these measures, as long as the measures are reasonable, is covered. This in turn begs the question of what constitutes an “**Incident**” for the purposes of the Bunker Convention. This is defined³¹ as “*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*”. Compensation, therefore, for pro-active mobilization of equipment, even when no Bunker Oil actually leaked from the ship would be covered under the provision of the “*grave and imminent threat of causing such damage*”.³² What is “*actual and imminent threat*” in borderline cases with no escape of oil will probably be subject to the interpretation of the Bunker Convention by national courts.

(f) Time Limits in the Bunker Convention.

Art. 8 of the Bunker Convention is identical with Art. VIII of the CLC 1992 and provides for a time limit for action under the convention of *3 years* from the date when the *damage* occurred and, in any event, *6 years* from the date of the *incident* which caused the damage. Where the incident consists of a *series of occurrences*, the 6 years’ period shall run from the date of the *first* such occurrence.

(g) Exclusions from the Application of the Bunker Convention.

Art.4(1) provides that the Bunker Convention does “*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*”.

The Bunker Convention has been developed for the purpose of filling the gap left open by the CLC/Fund scheme in respect of oil pollution caused from bunkers and not as an alternative or additional scheme to the CLC/Fund. Art.1(4) preserves this balance.

²⁷ Gaskell, op.cit.9.

²⁸ The IOPC Fund Executive Committee in Gaskell et al, op.cit.9.

²⁹ Tsimplis, oc.cit.11.

³⁰ Art.1(7) – Definitions.

³¹ Art.1(8) – Definitions.

³² This was an amendment introduced by the 1992 CLC to the 1969 CLC.

Therefore, pollution damage caused by tankers (either from their cargoes of “persistent” oil or their bunkers) where the CLC/Fund regime is applicable is covered by the CLC/Fund scheme only. Claimants cannot look at the Bunker Convention for recovery of damages caused by oil pollution from such ships because adequate compensation (or compensation at all) cannot be retrieved under the CLC/Fund scheme.

Also, the Bunker Convention does 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 unless a State Party decides otherwise. In such a case the State Party must notify the Secretary-General of IMO and shall be subject to suit in the jurisdictions provided by the Bunker Convention.³³

(3) The Liability under the Bunker Convention.

(a) Who is liable?

Unlike the CLC/Fund regime where the liability is channelled only to the “*registered owner of the ship*”, the “Shipowner” in the Bunker Convention is defined³⁴ as “*the owner, including the registered owner, bareboat charterer, manager and operator of the ship*”.

These categories of persons could all expect to have an interest in the way the ship is run (as opposed to the voyage or time charterer).³⁵ There is no definition of the “manager” and “operator”. It is suggested, however, that guidance could be sought from other comparable environmental liability conventions,³⁶ such as the “Wreck Removal Convention 2007” (not yet in force) which gives, for instance, the definition of the “Operator” (i.e. the owner or any other person or organization, manager, bareboat charterer, “*who has assumed the responsibility for the safe operation from the owner of the ship.....*”).³⁷ “Manager” could be an associated company to the single shipowning company or a professional shipmanagement company that manages several ships from various owners under a shipmanagement agreement.³⁸ A person or company that had the ISM functions could be the operator or a manager of the ship. Either of the above categories could now be liable for Pollution Damage caused entirely by the negligent acts of the master or chief engineer employed by the shipowner.³⁹

However, the channelling of liability to several defendants (as opposed to the CLC/Fund regime and the HNS⁴⁰ regime (not yet in force) where the liability is channelled to the registered owner only) cannot not be seen as a means of recovering the same losses several times from each defendant or as a scheme of recovering losses in excess of the

³³ Art.4(2)–(4).

³⁴ Art.1(3) – Definitions

³⁵ Gaskell et al, op.cit.9.

³⁶ Gaskell et al, op.cit.9.

³⁷ Art.1(9) Wreck Removal Convention 2007.

³⁸ Gaskell et al, op.cit.9.

³⁹ Gaskell et al, op.cit.9.

⁴⁰ The “*International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996*”.

ship's Limitation Fund in the way it works in the two-tiered CLC/Fund scheme. Further, the additional defendants cannot take the place of the Fund, when, under the CLC/Fund scheme, its liability extends down to cover the entire claim where there is a defence to the registered owner under Art.3 of the CLC 1992.⁴¹ Clearly the obvious defendant is the registered owner who has compulsory insurance and the additional liability might conceivably be relevant where the registered owner and its insurer are insolvent, or where there is intentional or reckless conduct by one defendant, but not another.⁴²

(b) Strict liability.

Art.3(1) of the Bunker Convention provides that 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.....*”.

There is no requirement of fault for the liability to arise, i.e. the “Shipowner” is under strict liability for “Pollution Damage” caused by anyone onboard the ship provided bunker oil was “*on board or originating from the ship*”. The consequence of this is that, for instance, a bulk carrier may suffer a fracture damage at one of her bunker tanks whilst berthed on the dock as a result of a collision with a harbour tug, entirely caused by the tug. The bulk carrier will be liable for bunker pollution under the Bunker Convention and the claimants can (and will) go against the bulk carrier, despite the fact that the tug was 100% to blame.⁴³

(c) Joint & Several Liability.

Art.3(2) provides that “[w]here more than one person is liable in accordance with paragraph 1, their liability shall be joint and several”.

The above provision, in essence, means that the damaged third party or state authorities can ignore litigation between the parties falling under the definition of “Shipowner” and recover in accordance to the best option available from the financially healthiest shipowner.⁴⁴ However, the number of persons potentially liable under the Bunker Convention may create difficulties in situations where the damage was caused partly by “Bunker Oil” and partly by another substance covered by another convention (e.g. the HNS Convention⁴⁵ – not yet in force) where the liability is channelled only to *registered* owner. An early assessment as to the cause of the damage may be in need. Whilst the *registered* owner would be clearly the obvious defendant, the other parties falling within the definition of the “Shipowner” under the Bunker Convention would run the risk of paying damages arising by other substances.⁴⁶

Art.5 deals with situations of incidents involving two or more ships. It provides that “[w]hen an incident involving two or more ships occurs and pollution damage results

⁴¹ Gaskell et al, op.cit.9.

⁴² Gaskell et al, op.cit.9.

⁴³ Gaskell et al, op.cit.9.

⁴⁴ Tsimplis, op.cit.11.

⁴⁵ The “*International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996*”.

⁴⁶ Tsimplis. Op.cit.11.

therefrom, 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”.

The above provision refers to “*Pollution Damage*” within the meaning of the Bunker Convention caused by two or more ships and provides for joint and several liability when the damage is not “*reasonably separable*”. All the ships involved must be covered by the Bunker Convention. Where, for instance, damage caused by one ship is covered by the Bunker Convention while damage caused by the other is covered by another Convention (the obvious example is bunker pollution by a tanker covered by the CLC 1992), Art. 5 does not apply and there is no joint and several liability even if the damage is not separable.⁴⁷ In such a case, the claimant could presumably go against each ship separately, trying to quantify the damage suffered and showing the degree of fault. Such litigation may present difficulties and if takes place in several jurisdictions, there may be peculiarities such as double recovery.⁴⁸

(d) Defences to the Shipowner.

The Shipowner’s liability is strict but not absolute. The Bunker Convention follows the CLC/Fund scheme and provides for the same defences to the Shipowner. Art.3(3)-(4) provide as follows:

- “
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 either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the shipowner may be exonerated wholly or partially from liability to such person.*
-”

As there is no requirement for the “*natural phenomenon of an exceptional, inevitable and irresistible character*” to be unforeseeable as well, it could be argued that the availability of weather forecasts and warnings would not deprive the benefit of this defence to the Shipowner.⁴⁹ Foreseeability may point out negligence but such action against the Shipowner is disallowed by Art.3(5) [*see below 3(e)*]. Who is a third party is not clear. Does this include an act of crewmember outside the scope of his employment or an independent contractor? Intentional acts “*wholly committed by a third party*” arguably includes terrorist action. Controversy, however, may be caused by the use of the word “*wholly*” in both paras (b) & (c) of Art.3(3) which allows some degree of uncertainty as to whether

⁴⁷ Tsimplis, op.cit.11.

⁴⁸ Tsimplis, op.cit.11.

⁴⁹ Tsimplis, op.cit.11.

this exclusion would apply depending on the circumstances of the incident.⁵⁰ Could, for instance, defective or inadequate compliance of the ship's crew with their ISPS Code⁵¹ duties deprive the benefit of this defence to the Shipowner because the cause of damage was not attributed "wholly" to the terrorists act? Could, similarly, contributory negligence of the master in an incident where there was a failure by the relevant authority to maintain a navigational aid deprive the benefit of para. (c) defence to the Shipowner? According to Art.3(4), contributory negligence or intentional act by the victim of Pollution Damage may also exonerate the Shipowner wholly or partly against such party.

(e) Immunity from other Suit but no 'Responder Immunity' – Salvors Beware!

Art.3(5) provides that "[n]o claim for compensation for pollution damage shall be made against the shipowner otherwise than in accordance with this Convention".

Like the CLC/ Fund regime, the immunity of the Shipowner from suit otherwise than under the Bunker Convention (e.g. in tort) is maintained. The Bunker Convention is the only way to claim against the Shipowner but, in this respect, differs fundamentally from the CLC 1992. In contrast with the equivalent restriction of the CLC 1992, the channelling of claims within the Bunker Convention is restricted only to the Shipowner. Thus, parties which have been included in the CLC 1992 equivalent provision and protected from a lawsuit have been left out by the Bunker Convention. Parties, therefore, other than the registered owner, bareboat charterer, manager and operator of the ship (that is the Shipowner) are vulnerable to lawsuit by claimants out of the Bunker Convention regime (most obviously in tort but perhaps also under national instruments providing for strict liability⁵²). Parties left exposed include the servants and agents of the shipowner, all crew members, any pilot or other person performing services to the ship, any charterer (other than the bareboat charterer) and anyone taking preventive measures and their servants and agents (the so-called "*Responder Immunity*" – most notably state authorities and professional salvors). A time charterer, for instance, could be sued in tort for ordering a ship to an unsafe port.⁵³

The responder's immunity point, in particular, was strongly debated during the negotiations as there was joint reaction by the industry⁵⁴ with a joint submission by ITOPE, BIMCO, CMI, INTERTANKO, IAPH, ISU, ICS, OCIMF, and the International Group of P&I Clubs whereby they sought to re-introduce the responder immunity provision.⁵⁵ This was not accepted and instead a draft Resolution was agreed giving specific recommendation and urging the State Parties to legislate on a national level for such immunity to persons taking measures to prevent or minimize the effects of bunker oil pollution.⁵⁶ Many scholars have seen this omission as a serious mistake.⁵⁷ The consequence of this is that there is no protection from civil suit (or criminal prosecution)

⁵⁰ Marsh Ltd., (2009), "*Marine Practice: Application of the ICCL for 'Bunker Oil Pollution Damage 2001'*" <http://www.marsh.com>

⁵¹ The International Ship and Port Facility Security (ISPS) Code which was adopted through Amendments to the Annex to the International Convention for the Safety Of Life At Sea (SOLAS), 1974 by resolutions of the Conference Contracting Governments to the International Convention for the SOLAS, 1974 adopted on 12 December 2002 in the aftermath of the 9/11 terrorist attack.

⁵² In Tsimplis, op.cit.11. E.g. the Milford Haven Port Authority in the *Sea Empress* case was fined under the strict liability regime of the Water Resources Act 1991, s.85.

⁵³ Gaskell et al, op.cit.9.

⁵⁴ Tsimplis, op.cit.11.

⁵⁵ Tsimplis, op.cit.11.

⁵⁶ Tsimplis, op.cit.

⁵⁷ Gaskell et al, op.cit.9.

to persons such as salvors and those performing clean-up operations. This is a very real possibility, as is shown by the arrest of the salvage tugs and the detainment of the salvage master by the Pakistani authorities in the *Tasman Spirit* case in 2003.

(f) Shipowner's Right of Recourse.

Art.3(6) provides that “[n]othing in this Convention shall prejudice any right of recourse of the shipowner which exists independently of this Convention”.

Like the equivalent provision of the CLC 1992, the Shipowner has the right of recourse against any other party at fault if liability arose to him under the strict regime of the Bunker Convention as a result of that party's fault. Thus, he may have a recourse claim against a time charterer for ordering his ship to an unsafe port or, in the example with the harbour tug given earlier, against the tug and her owners (in the latter example, however, when damages exceed the relevant limits, limitation of liability may prevent full recovery of losses suffered by the bulk carrier owner as generally the tugboat's limits will be much lower). Naturally, the right of recourse between the parties falling within the definition of the Shipowner is preserved and, for such new liability, it would be expected that contractual arrangements be in place between them.

(4) The Compulsory Liability Insurance & the Direct action against the Insurer.

(a) Which Ships must be Insured?

Art.7 of the Bunker Convention provides for compulsory insurance or other financial security in much the same way as the CLC 1992 does. The obligation is prescribed only for *registered* owners⁵⁸ of ships greater than 1,000 gross tonnage⁵⁹.

The 1,000 gt threshold for the applicability of the compulsory insurance requirement was much debated as it excludes most tugs and long-distance fishing vessels which have the potential of carrying large amounts of bunkers. Some countries wanted a lower threshold (e.g. 400 gt or 300 gt)⁶⁰ whereas some shipowning countries, in an attempt to reduce the impact of the compulsory insurance provision on their fleets, wanted a higher threshold (e.g. 5,000 gt).⁶¹ Some statistics (based on data of Lloyd's Register of Shipping⁶² which, however, refer to limited types of ships) were presented showing that when general cargo ships and bulk carriers are considered the average capacity for bunkers is about 1,000 tons for a 10,000 gt registered vessel and also that vessels smaller than 2,000 tons use mainly diesel oil as fuel.⁶³ Also, the inclusion of vessels smaller than 1,000 gt would entail increased administrative burden on the certifying State Parties and, in this respect, worries voiced by some of them. The 1,000 gt figure was a political compromise by the

⁵⁸ Art.1(4) – “Registered Owner” means the person or persons who is registered as the owner.....or the company or Stateetc.

⁵⁹ Art.1(11) “Gross Tonnage” - as per the “International Convention on Tonnage Measurement of Ships, 1969”

⁶⁰ Gaskell et al, op.cit.9.

⁶¹ Tsimplis, op.cit.11.

⁶² Tsimplis, op.cit.11.

⁶³ Gaskell et al, op.cit.9.

diplomatic conference as part of a larger final package which included three elements: (i) the gross tonnage figure, (ii) the relatively high entry into force requirements of Art.14, and (iii) the inclusion of Art.7(15) relating to the right of a State Party to exclude vessels on domestic voyages from the compulsory insurance requirement.⁶⁴

Under Art.7(15), a Member State may declare that the provisions of compulsory insurance do not apply to vessels sailing within its territorial water.

(b) Who must be Insured?

Under Art.7(1), it is the *registered owner* alone who must have insurance cover. Whereas any of the parties falling within the definition of Shipowner may be sued and held liable under the Bunker Convention, only the registered owner must have insurance for such purposes. The managers and operators, at least, would want to cover this new liability through contractual undertakings from the ship's owner and this right of contractual recourse is preserved by Art.3(6). In practice, however, any bareboat charterer, manager or operator would probably want some form of insurance cover in case of insolvency of the registered owner. It would be expected that some form of joint cover (or P&I entry) could be arranged or for cover to be expressly extended to these other parties.⁶⁵

(c) The level of Insurance Cover.

According to Art.7(1), the insurance or other financial security must be enough “*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*”.

The amount insured is limited upwards by the limits set by the LLMC 1976 as amended; this is, at most, around one third of the total limitation fund because the Bunker Convention does not cover claims in respect of death or personal injury (this amount is approx. double to that in respect of any other claims). However, there is no provision for minimum insurance as this was left to the “*applicable national or international limitation regime*” of the State Party which is the ship's Flag State. There is no uniformity therefore on the level of cover. This may lead to situations where two ships (in all respects identical) have different levels of insurance cover but still both being properly certificated under the Bunker Convention scheme.

(d) Evidence of Insurance.

Not unexpectedly, the Bunker Convention follows the CLC 1992 certification scheme in this respect too. Art 7(2) provides that “[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.....*”.

⁶⁴ Tsimplis, op.cit.11.

⁶⁵ Gaskell et al, op.cit.9.

The State Parties will issue the certificates for the ships registered in their State as well as for those registered in States non-parties to the Bunker Convention following application. As with the CLC 1992, a list with all the particulars that must be contained in such certificate is given and a model certificate is appended at the end. Among the particulars is the “*name and principal place of business of insurer or other person giving security*”⁶⁶ and the “*period of validity of the certificate which shall not be longer than the period of validity of the insurance or other party*”⁶⁷.

Provided at least 3-month notification is given to the IMO, delegation by the State Party of the certificate issuing function to authorised institutions is allowed by Art.7(3). However, “[i]n 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”.

According to Art.7(5), “[t]he 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”.

Art.7(8) & (9) provide as follows:

- “
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.*
-”

According to the above provision, the administration of a State Party is bound to recognize all the certificates issued by the State Parties, even if the insurer is completely unknown and not a member of the International Group of the P&I Clubs. As to the financial standing of the insurer or other guarantor, an issuing State Party may rely on information by other States or organizations but that does not relieve that State from its responsibility as the issuer of the Certificate. When the financial standing and credibility of the insurer or other guarantor is in question a State Party may request consultation with the issuing State Party. This provision, without further defining of how “*consultation*” is to be conducted, is not very helpful. Which should be the proper course of action by Member States if, after consultation has been conducted, the financial ability of the insurer or other guarantor remains in question? Is the issuing State Party under an obligation to withdraw the certificate? Should the State Party which requested consultation accept the certificate or could unilaterally demand the issuance of a

⁶⁶ Art.7(2)(e).

⁶⁷ Art.7(2)(f).

certificate with a different insurer or guarantor?⁶⁸ Unfortunately, the Bunker Convention does not deal with such issues.

(e) Consequences if not Insurance is in place.

Art.7(11) provides that “[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” the provisions of the Bunker Convention. Further, Art.7(12) provides that “... 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”.

This, in effect, means that ships over 1,000 gt not registered in State Party without insurance shall not be allowed to use the ports or offshore facilities in the territorial sea of a State Party and ships registered in State Party shall not be allowed to operate at all. This provision applies only to the territorial waters and not to the EEZ. Pollution damage, however, within the EEZ is covered by the Bunker Convention and under Art.9 jurisdiction is given to the coastal State Party. But the coastal State Party cannot exclude uninsured ships from its EEZ. As a matter, further, of international law, a coastal state cannot stop a foreign flagged vessel to inspect certificates if she is merely exercising the right of innocent passage to transit national waters. All the above necessarily imply that some of the damages will be uninsured.⁶⁹

Naturally, administrative sanctions and penalties for failure to comply with the compulsory insurance requirement are provided for by national legislations. In the UK, for instance, sub-sections 5-7 of Reg.17 of ‘*The Merchant Shipping (Oil Pollution) (Bunker Convention) Regulations 2006*’⁷⁰, provide for:

- a summary conviction for the master or the owner to a fine not exceeding £5,000 or conviction on indictment with no statutory maximum fine in case a ship enters or leaves (or attempts to enter or leave) a UK port or terminal and does not carry a State Certificate as provided for by the Bunker Convention (ss.5);
- a summary conviction for the master to a fine not exceeding £5,000 in case a ship fails to carry, or the master of the ship fails to produce, a State Certificate (ss.6); &
- the ship’s detention where the obligation to maintain insurance is not met or a State Certificate is not carried on board a ship (ss.7).

(f) Who can provide Insurance Cover?

The CLC 1992 experience showed that about 95% of the world’s tanker fleet is entered with a P&I Club member of the International Group. It is anticipated that P&I Clubs and

⁶⁸ Tsimplis, op.cit.11.

⁶⁹ Tsimplis, op.cit.11

⁷⁰ 2006/1244.

providers of P&I Insurance will be the main providers of the financial security required under the Bunker Convention. For competition reasons, it was unlikely to reach an agreement for recognition only of the International Group certificates. Of course, there is always a risk for undercapitalized insurers entering the market and attaching themselves to flag of convenience States which exercise little or no administrative control. P&I Clubs cover a whole range of liability risks and the cover for bunker pollution is probably a simple automatic addition to the normal cover. It remains to be seen whether other insurers arise to meet the demand of a market that may really see the Bunker Convention certificate as passport to enter foreign ports rather than for its insurance protection.⁷¹ P&I Clubs can issue, in the normal way, the so-called “*Blued Card*” to their members evidencing that there is insurance in place meeting the liability requirements of the Bunker Convention.

(g) Direct action against the Insurer.

Art.7(10) provides as follows:

“
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.
.....”

Direct action against the insurer is a fundamental protection for the claimant. This, in fact, removes one of main difficulties many claimants had in past bunker pollution incidents to recover their costs and damages. The claimant can directly sue the insurer whether the Shipowner is solvent or not and whether the Shipowner is in breach of his insurance contract and he cannot, therefore, recover under it. The insurer, of course, can rely on all Art.3 defences open to the Shipowner himself and the limits of liability as allowed in Art.7. Further, the insurer is entitled to limit liability even if the Shipowner is not. This may be either because no limits are recognized by a State or because the insured Shipowner was guilty of intentional or reckless conduct.⁷² In the latter case, however, the insurer may have the complete defence of “*wilful misconduct*” which is the only policy defence of the insurer if sued on the basis of the certificate under the above provision. Other policy defences, such as breach of warranty, non-disclosure, misrepresentation, breach of good faith etc., are not allowed to the insurer for avoiding liability against third parties. Of course, the insurer, if sued, is given under the above provision explicitly the right to join the Shipowner in the proceedings.

⁷¹ Gaskell et al, op.cit.9.

⁷² Art.4, LLMC 1976/1996

(5) The Limitation of Liability.

Art.6 deals with limitation of liability and provides as follows:

“

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.

.....”

Linkage to existing applicable national or international limitation of liability regimes unavoidably leads to the huge and complex topic of limitation of liability, the analysis of which is outside the scope of this speech. A brief outline only of some of the concerns raised by this linkage is given below.

(a) The risk of Unlimited Liability.

It is expressly stated in the Preamble of the Bunker Convention that imposition of strict liability should be linked to appropriate limitation levels. The Bunker Convention neither sets new limits, nor affects the right of the Shipowner or his insurer to limit liability “*under any applicable national or international limitation regime*”. LLMC 1976 is expressly given as an example and “*such as*” as an example only could be probably interpreted. The wording of the above provision and in particular the reference to the “*applicable national or international limitation regime*” was characterised by a scholar as “*unusual and perhaps unfortunate*”.⁷³

Problematic areas are the following:

- (a) In effect, the above provision allows a State Party to choose which limitation regime to apply and Shipowners in some states may face no limit at all. Further, States not party to the LLMC 1976 or 1996 might well have provisions which themselves do not cover bunker pollution damage at all.⁷⁴
- (b) The claims for which liability may be limited under the LLMC 1976 are set out in sub-paragraphs (a) to (f) of Art.2(1) and the approach of the courts has been for the shipowner to bring himself strictly within the terms of Art.2.⁷⁵ If there is any doubt, or if there is a claim which is clearly not within the provision, the Shipowner then is unable to limit.⁷⁶
- (c) Sub-par. (a) includes claims for loss or damage to property and sub-para. (c) refers to claims in respect of loss resulting from infringement of rights. There have been strong arguments that the LLMC 1976 may give no general right to limitation for bunker pollution claims which do not involve physical damage to property or result to infringement of rights because such claims cannot be brought within the existing

⁷³ Gaskell et al, op.cit.9.

⁷⁴ Gaskell et al, op.cit.9.

⁷⁵ See “*The Tiruna*” [1987] 2 Lloyd’s Rep. 666

⁷⁶ Gaskell et al, op.cit.9.

wording of the above sub-paragraphs of Art.2(1) of the LLMC 1976.⁷⁷ An example is economic losses arising from disruption of business caused by bunker oil spill. Such claims are the claims by fishing and tourist industries which are unrelated to any damage to property. First, there may be no “property” damaged apart from the sea itself or the beaches. Secondly, a more natural reading of the relevant provision is that it refers to the consequential loss of the person whose property has been damaged. That would not probably apply to the hotelier (unless he owned the beach or the marina).⁷⁸

- (d) There is indeed difficulty with regard to the coastal clean-up operations and the cost of re-instatement; under which sub-paragraph do they fall? The stronger candidates are sub-par. (c) mentioned above (infringement of rights) and sub-par.(d) which refers to claims for “...rendering harmless of a ship which is sunk, wrecked, stranded abandoned, including anything that is or has been on board such ship”. But there may be⁷⁹ situations (e.g. operational discharges) or casualties (e.g. a minor collision) that do not fall within the quoted words; such an example is *The Wagon Mound* case. Further, under Art. 18(1) of LLMC 1976 the State Parties can opt-out of limitation under Art.2(1)(d).⁸⁰

(b) The risk of under-compensation – Dilution of the Limitation Fund.

By not providing, through the Bunker Convention, a separate free standing fund exclusively for bunker pollution claims, the claimants will have to prove their claims against any available limitation fund alongside and in competition with other property claims arising out of the same incident.⁸¹ With the strict liability, the Bunker Convention, in effect, expands the scope of damages to those related to non-physical loss. This expansion of claims for which compensation is available is welcome when the liability is unlimited or the limits of liability increase accordingly. The expansion of the number of claims only could lead to reduction in the recovery of other claims. The submission of further claims and the application of strict liability essentially restricts the ability of other claimants to recover.⁸² This was recognized by the diplomatic conference and a Resolution was agreed which urges all States to ratify or accede to the 1996 Protocol to the LLMC 1976 increasing thus the fund available for all claims, including bunker pollution claims.⁸³

⁷⁷ Griggs, P., (2001), “*International Convention on Civil Liability for Bunker Pollution Damage; 2001*”, <http://www.bmla.org.uk/documents/imo-bunker-convention.doc>

⁷⁸ Gaskell et al, op.cit.9.

⁷⁹ Tsimplis, op.cit.11

⁸⁰ Gaskell et al, op.cit.9.

⁸¹ Griggs, op.cit.77.

⁸² Tsimplis, op.cit.11

⁸³ Griggs, op.cit.77.

(6) Jurisdiction & Enforcement of Judgements.

(a) Jurisdiction.

According to Art.9(1), the Courts of State that suffered damage within its territory or EEZ have jurisdiction to hear any claim against the shipowner or the insurer or other guarantor. Some conflicts between neighbouring coastal states with no jurisdictional agreement may arise in this respect. Between EU countries where the Brussels Regulations⁸⁴ is in force, the court first seized of the dispute will have jurisdiction. Also, where the bunker pollution gives the right to arrest the ship and she is arrested in another State, the Arrest Convention 1952 gives jurisdiction at the place of arrest if the national law so provides. In this respect, the Bunker Convention and the Arrest Convention 1952 are in direct conflict and the ordinary rules for conflict of laws should then be applicable.⁸⁵

Art.9(2) provides that reasonable notice of any action taken under the Bunker Convention shall be given to each defendant.

(b) Recognition & Enforcement.

Art.10 deals with recognition and enforcement and provides as follows:

- “
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.*
-”

Final judgements from a State will be recognized and will be enforceable in all State Parties irrespective of which limitation regime is applicable in the State where the enforcement is sought. It appears that, with the exceptions only mentioned in the above provision, no other reason, whether related to public policy or otherwise, would allow a State Party to fail to recognize a foreign judgement. This would be probably the case even the party suffered pollution damage was under a contract with the Shipowner and the contract contained an exclusive jurisdiction clause. This clause would be unenforceable; and, if enforced, the resulting judgement would be in breach of the Bunker Convention.

⁸⁴ Council Reg. EC44/2001.

⁸⁵ Tsimplis, op.cit.11.

(7) Conclusions

The Bunker Convention was developed as a preventive measure for the reduction and control of pollution to marine environment as well as a mechanism providing compensation for damage caused by bunker pollution. It is an international convention which is hoped will fill a legislative gap left by the other pollution regimes, namely the CLC/Fund 1992 and the HNS 1996 – not yet in force (the Wreck Removal Convention 2007 is hoped to be the last piece of legislation by IMO towards a complete international legislative regime on pollution compensation).

Although, however, the Bunker Convention establishes strict liability in all State Parties, neither the limits of liability nor the amount of compulsory insurance are uniform. Any improvement for claimants under the Bunker Convention depends on the pre-existing national compensations regimes. It is heavily depended upon the LLMC 1976/1996 regime and without a second tier (similar to the Fund) safeguarding the availability of funds, the claimants' ability to recover depends on national law inasmuch as the limitation of liability is concerned as also the type of environmental damage that can be recovered. This is because the Bunker Convention does not clarify whether environmental claims other than those related to restoration or reinstatement of the environment are included or excluded from the definition of damage and whether it prohibits recovery in relation to such claims under national law. What is, also, unclear is whether Art.2(1) LLMC 1976 covers damage from bunker oil when no physical damage has been sustained. There is a risk, therefore, that, in jurisdictions where it will be taken not to cover such type of damage, the Bunker Convention will establish strict liability with no limitation applicable for such claims. This is obviously against the spirit of the Bunker Convention. On the whole, it may well be that the level of many bunker pollution claims does not warrant the need for a second tier, but it is equally clear that the effect of Art.6 on limitation of liability is problematic; linkage to the LLMC may well mean that pollution claimants have to share in a rather limited fund with other commercial claimants.

The undermining of the principle of “responder immunity” for salvors appears particularly unfortunate and lawsuits against bareboat charterers, managers and operators (i.e. the categories included in the Shipowner's definition) may lead to complications and extra costs, though the wish to have them included is partly explained by the uncertainty about whether the limits of liability will be sufficient.

Whilst in theory there might be, in some cases, unlimited liability, this in practice will be restricted by the maximum liability of the insurer under the direct action provisions. The compulsory insurance provision is, perhaps, the really new thing the Bunker Convention introduces on an international level. Though the level of compulsory insurance depends on national law, hence not uniform, the advantage now is that the Bunker Convention allows for a standard, internationally accepted, compulsory insurance certificate. This adds one more to the many other certificates of a ship, one more compliance check for the registered owner, an additional cover element for the P&I Clubs, a business opportunity for other P&I liability insurers and a further administrative burden for State Parties in issuing the required certificate. Most obviously, Port State controls will ensure compliance of ships with this provision.

September 2009

Konstantinos Bachxevanis

APPENDIX 1

The Ratification of Maritime Conventions

INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE, 2001

Last updated: 06/04/2009

State Party	date of signature	instr of	date of deposit	date of entry into force
Antigua and Barbuda		a	19/12/2008	19/03/2009
Australia ¹	23/09/2002			
Bahamas		a	30/01/2008	21/11/2008
Brazil	01/10/2001			
Bulgaria		a	06/07/2007	21/11/2008
Canada	27/09/2002			
China, People's Republic of		a	09/12/2008	09/03/2009
Cook Islands		a	21/08/2008	21/11/2008
Croatia		a	15/12/2006	21/11/2008
Cyprus		a	10/01/2005	21/11/2008
Denmark	27/09/2002	r	23/07/2008	21/11/2008
Estonia		a	05/10/2006	21/11/2008
Ethiopia		a	17/02/2009	17/05/2009
Finland ²	26/09/2002	r	18/11/2008	18/02/2009
Germany ³	27/09/2002	r	24/04/2007	21/11/2008
Greece		a	22/12/2005	21/11/2008
Hungary			30/01/2008	21/11/2008
Ireland		a	23/12/2008	23/03/2009
Italy	09/10/2001			
Jamaica		a	02/05/2003	21/11/2008
Latvia		a	19/04/2005	21/11/2008
Liberia		a	21/08/2008	21/11/2008
Lithuania		a	14/09/2007	21/11/2008
Luxembourg		a	21/11/2005	21/11/2008
Malaysia		a	12/11/2008	12/02/2009
Malta		a	12/11/2008	12/02/2009
Marshall Islands		a	09/05/2008	21/11/2008
Norway	26/09/2002	r	25/03/2008	21/11/2008
Panama		a	17/02/2009	17/05/2009
Poland		a	15/12/2006	21/11/2008
Russian Federation		a	24/02/2009	24/05/2009
Saint Vincent and the Grenadines		a	26/11/2008	26/02/2009
Samoa		a	18/05/2004	21/11/2008
Sierra Leone		a	21/11/2007	21/11/2008
Singapore		a	31/03/2006	21/11/2008
Slovenia		a	20/05/2004	21/11/2008
Spain	27/09/2002	r	10/12/2003	21/11/2008
Sweden	30/09/2002			
Syria		a	24/04/2009	24/07/2009
Tonga		a	18/09/2003	21/11/2008
Tuvalu		a	12/01/2009	12/04/2009
United Kingdom	26/09/2002	r	29/06/2006	21/11/2008
Vanuatu		a	20/08/2008	21/11/2008

1. Subject to ratification.
2. Subject to acceptance.
3. Federal Republic of Germany informs that the signature is in accordance with the Council Decision authorising the Member States to sign, ratify or accede, in the interest of the European Community, to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2002 (the Bunkers Convention).

APPENDIX 2

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, 1982¹, 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, 1992² and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992³ 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, 1996⁴ 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,

RECOGNIZING 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:

¹ Treaty Series No. 81 (1999) Cm 4524

² Treaty Series No. 106 (1975) Cmnd 6183

³ Treaty Series No. 95 (1978) Cmnd 7383

⁴ Miscellaneous No.5 (1997) Cm 3580

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, 1969⁵.
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:
 - (i) in the territory, including the territorial sea, of a State Party, and
 - (ii) 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.

⁵ Treaty Series No. 50 (1982) Cmnd 8716

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 either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, 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 therefrom, 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, 1976⁶, 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;

⁶ Treaty Series No. 13 (1990) Cm 955

- (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.

- (b) 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 million, 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.

IN WITNESS WHEREOF the undersigned being duly authorised by their respective Governments for that purpose have signed this Convention.

**CERTIFICATE OF INSURANCE OR OTHER FINANCIAL SECURITY
IN RESPECT OF CIVIL LIABILITY FOR BUNKER OIL POLLUTION
DAMAGE**

Issued in accordance with the provisions of article 7 of the
International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

Name of Ship	Distinctive Number or letters	IMO Ship Identification Number	Port of Registry	Name and full address of the principal place of business of the registered owner.

This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

Type of Security

Duration of Security

Name and address of the insurer(s) and/or guarantor(s)

Name

Address

.....

This certificate is valid until

Issued or certified by the Government of

.....

(Full designation of the State)

OR

The following text should be used when a State Party avails itself of article 7(3)

The present certificate is issued under the authority of the Government of(full designation of the State) by.....(name of institution or organization)

At On
(Place) (Date)

.....
(Signature and Title of issuing or certifying official)

Explanatory Notes:

1. If desired, the designation of the State may include a reference to the competent public authority of the country where the Certificate is issued.
2. If the total amount of security has been furnished by more than one source, the amount of each of them should be indicated.
3. If security is furnished in several forms, these should be enumerated.
4. The entry "Duration of Security" must stipulate the date on which such security takes effect.
5. The entry "Address" of the insurer(s) and/or guarantor(s) must indicate the principal place of business of the insurer(s) and/or guarantor(s). If appropriate, the place of business where the insurance or other security is established shall be indicated.

RESOURCES

- (1) Explanatory Memorandum to ‘*The Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006*’ 2006/ 1244.
- (2) Gaskell, N. & Forrest, G., (2008), “*Marine pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003*”, The University of Queensland Law Journal, Vol.2, No.2, pp.103-165.
- (3) Griggs, P., (2001), “*International Convention on Civil Liability for Bunker Pollution Damage; 2001*”, [http:// www.bmla.org.uk/documents/imo-bunker-convention.doc](http://www.bmla.org.uk/documents/imo-bunker-convention.doc)
- (4) ITOPE, (2009), “*Oil Tanker Statistics: 2008*”, <http://www.itopf.com>.
- (5) Marsh Ltd., (2009), “*Marine Practice: Application of the ICCL for ‘Bunker Oil Pollution Damage 2001’*” <http://www.marsh.com>
- (6) The “*Convention on Limitation of Liability for Maritime Claims, 1976*” as amended by the Protocol of 1996.
- (7) The “*International Convention on Civil Liability for Bunker Oil Pollution Damage 2001*” (the “*Bunker Convention*”).
- (8) The “*International Convention on Civil Liability for Oil Pollution Damage, 1992*” (“*CLC*”).
- (9) The “*International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996*” (“*HNS*”).
- (10) The “*International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992*” (“*Fund*”).
- (11) The “*International Ship and Port Facility Security (ISPS) Code*”
- (12) The Ratification of Maritime Conventions (LLP)
- (13) “*The Tiruna*” [1987] 2 Lloyd’s Rep. 666.
- (14) The “*Wreck Removal Convention 2007*”.
- (15) Tsimplis, M.N., (2005), “*The Bunker Pollution Convention 2001: completing and harmonizing the liability regime for oil pollution from ships?*” *Lloyds Maritime and Commercial Law Quarterly*, LLP, Part 1, pp.83-100.