

A Developing Solution to Marine Pollution?

Major Casualty

On the morning of 18th January this year the “MSC NAPOLI”, a UK registered containership, experienced difficulties on the French side of the English Channel, some 40 miles off Cornwall. Her crew were ordered by the Master to abandon ship, and once they had been rescued a condition assessment of the vessel was made by the Anglo - French Joint Maritime Contingency Plan and the UK Secretary of State’s Representative for Maritime Salvage and Intervention (the SOSREP). They decided that due to her fragile condition the vessel should be towed to a place of refuge in UK waters, and the nearest feasible location was Portland harbour.

Sense and Sensitivity?

The selection of a place of refuge depends entirely on the circumstances of the incident, but it often follows a controversial decision. Here, given the environmental threat posed by the vessel and her cargo the South Coast of England may have seemed to offer better overall possibilities, but the choice of Portland harbour was contentious as the surrounding waters and coastline are environmentally sensitive. During the tow the vessel’s condition deteriorated and it was decided safest to beach her in the sheltered waters of Lyme Bay, a similar area just to the east of Sidmouth. On 20th January tugs attempted to pull the “MSC NAPOLI” hard aground, and at that point there was some leakage of oil and a boom had to be deployed to contain an 8 kilometre wide slick. The vessel was carrying about 2,300 containers, some with hazardous materials. Many containers were lost, and the salvage operation continues.

The “MSC NAPOLI” is one of the most significant casualties to occur in the British Isles during the last few years. The resulting salvage operation and liability and related issues are of great interest to those in the maritime industry, and prompt the following review of some of the regimes which apply at national and international levels in relation to pollution from all types of vessel. For the full text of the legislation referred to please see the footnoted links.

Planning and Preparation

Under both national and international legislation there are specific procedures for co-ordinating the pollution clean-up operations and dealing with hazardous cargo.

Looking first at oil pollution, under the **International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC 1990)**¹ (which came into force on 13th May 1995), the various Convention states must take “*all appropriate measures*” to prepare for and respond to an oil pollution incident, which is broadly defined as an occurrence which results or may result in a discharge of oil which causes a threat to the environment or to the coastline, and requires an immediate response. This Convention applies to all countries in the EU. Also, **Directive 98/42/EC dated 19 June 1998**² provides that all states must enforce the requirement for vessels to carry a shipboard emergency plan. The UK has put all this legislation into effect via the **Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998**³, such that for example in UK waters all ships under the UK flag must have a shipboard oil pollution emergency plan.

Pollution caused by hazardous and noxious substances is dealt with by the **Protocol on Preparedness, Response and Co-operation to pollution Incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol)**⁴. This protocol is coming into force on 14 June 2007. The OPRC-HNS Protocol is similar to OPRC 1990. It requires signatories to establish measures for dealing with pollution incidents, and vessels will be required to carry a shipboard pollution emergency plan to deal specifically with incidents involving hazardous and noxious substances.

Incident Response Procedure in the UK

The Maritime and Coastguard Agency (MCA) is the UK authority which responds to pollution from shipping and offshore installations, and has established the UK’s National Contingency Plan for Marine Pollution (NCP), which sets out the command and control procedures for responding to an incident. The NCP’s main aspects are salvage, clean-up at sea and clean-up on shore.

We have already mentioned the SOSREP, who is a civil servant with overall control of (and responsibility for) any salvage operation when there is an incident presenting a threat of significant pollution. The SOSREP can act immediately and with full authority, in a role created following the “TORREY CANYON” casualty in 1967 and to enable the Government to intervene in the public interest when pollution threatens. The current SOSREP, Robin Middleton, has received favourable media commentary for his work on the “MSC NAPOLI” incident. Following the **Marine Safety Act 2003**, the SOSREP has gained greater powers of intervention, and now has the power to commandeer any berths, wharves or jetties that need to be used for salvage or counter-pollution operations.

The MCA maintains an emergency network which can respond to casualties 24 hours a day. A serious maritime incident will generally first be reported to Her Majesty’s Coastguard, which performs any necessary rescue operations, also if necessary contacting the MCA’s Counter Pollution and Response branch via the relevant regional Counter Pollution and Salvage Officer on duty, one of whom is based at the MCA Headquarters in Southampton. These officers decide the appropriate level of response and if necessary will also alert the SOSREP. Under the NCP, the MCA can establish a marine emergency information room in the event of a major incident, and co-ordinate designated response centres for salvage, counter-pollution operations and shoreline clean-up.

The MCA can also commandeer equipment, such as towing vessels. The UK aims to keep four such vessels on station around the country, and there are also specific agreements with a number of salvage companies, such that they can even be called off other jobs by the MCA. To ensure that the costs of such services are covered adequately, the MCA now seeks “letters of understanding” from P&I Club and other representatives of those thought responsible, and in extreme cases will look to seize ships, sister ships and other assets. However, the MCA sometimes will not actually recover its costs until it commences formal legal action.

The Role of the MAIB

Serious casualties will often also be *investigated* by the government of the relevant country. In the UK the body for this is the **Marine Accident Investigation Branch (MAIB)**, which is part of the Department of Transport, not part of the MCA. The MAIB has authority under the Merchant Shipping Accident and Investigation Regulations 2005. It has very wide powers of investigation,

but cannot prosecute and its findings cannot be used in criminal or civil actions. Its focus is to prevent future occurrences, rather than apportion liability. Masters and shipowners are required to report incidents to the MAIB and preserve as much evidence as possible so the MAIB may review it in order to make a report, and the MAIB has the power to take witness statements and interview crew. The MAIB's final reports are published and are made available on their website, and there are penalties for obstructing or failing to cooperate with an MAIB investigation.

The Liability Regime

Dealing with the effects of marine pollution is protracted, costly and labour-intensive, with clean-up costs usually borne first of all by those who have to incur them, such as local governments, landowners or harbour authorities, with these parties later seeking to recover from those responsible for the incident. Their prospects may depend on the type and the source of pollution, which we discuss by way of the following five categories:

- Oil pollution caused by a tanker;
- Oil pollution caused by any other ship;
- Pollution caused by bunkers;
- Hazardous and noxious substances emanating from ships; and
- Other, non-hazardous/noxious, forms of pollution emanating from ships.

Oil Pollution Caused by a Tanker

Historically, a claimant's difficulties have included identifying and proving the source of the pollution, where to bring the claim, proving fault to the required standard and a defendant's insolvency.

The international liability regime in relation to oil pollution caused by tankers is now governed by three key Conventions, which seek to address some the above problems:

- (1) **The International Convention on Civil Liability for Oil Pollution Damage 1969, as replaced by its 1992 Protocol and as amended in 2000 (1992 CLC)⁵**

(2) The International Convention on the Establishment of an International Fund for Compensation and Oil Pollution Damage 1992 (1992 Fund Convention)⁶

(3) The Protocol of 2003 to The International Convention on the Establishment of an International Fund for Compensation and Oil Pollution Damage 1992 (2003 Protocol)⁷

The 1992 CLC was implemented in the UK by **Chapter III of the Merchant Shipping Act 1995 (MSA 1995)⁸**

The above regime covers all seagoing vessels which are constructed or adapted to carry persistent oil in bulk as cargo, and provides a three tier structure which applies to pollution damage occurring within the territorial waters of countries that are signatories. Shipowners are liable without proof of fault for oil pollution damage, subject only certain specific exemptions, including act of war, natural disaster, act of God, and sabotage.

For each incident shipowners can limit liability according to the vessel's tonnage. Owners of vessels that can carry over 2,000 tonnes of persistent oil must maintain insurance or other financial security to cover their potential liability, and many thus carry P & I club cover accordingly.

Those who suffer loss or damage as a result of pollution can obtain compensation for clean-up costs, including the costs of cleaning up the coastline, disposal of oily debris, hire of equipment, preventive measures and reinstatement, and also for economic loss such as loss of livelihood. However, if public authorities have assisted with the clean-up using permanently employed staff, vessels and equipment, only additional costs can be claimed.

Compensation is funded in the first instance by the shipowner under the 1992 CLC, up to limits determined by the size of the vessel and up to a maximum of 89.7 million SDRs (about US\$ 135 million). When faced with a claim the shipowner may establish a limitation fund, and may himself start a limitation action in the appropriate jurisdiction. If necessary there can be a second layer of compensation, under the 1992 Fund Convention, which is provided by the International Oil Pollution Compensation Fund (IOPC Fund) and funded by levies on oil carried by sea. A third layer of compensation can also be invoked, which is the Supplementary Fund under the 2003 Protocol, so there is an overall maximum potential fund of 750 million SDRs, or about US\$

1,132 million at today's rates. If the total of all valid claims exceeds the aggregate available compensation, the claimants will share it pro rata.

Oil Pollution from Other Ships

The 1992 CLC does not address pollution from vessels other than tankers, and there is presently no other relevant applicable convention, so until recently a claimant in the UK who had suffered a loss due to oil pollution from another type of vessel was usually confined to common law remedies in tort, inevitably facing many of the problems mentioned above.

However, the UK now has national legislation which confers strict liability on the owners of vessels not caught by the 1992 CLC for pollution damage caused by persistent oil. This is embodied in the **MSA 1995 section 154**⁹

The damage must occur within UK territorial waters and the compensation provisions and exemptions are similar to those under the 1992 CLC. However the MSA 1995 section 154 does not allow shipowners to limit their liability as they can under the 1992 CLC.

For the rest of the EU, **Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004**¹⁰, on environmental liability, aims to bring countries into line with the UK, as the first stage in establishing a common framework for liability and as far as possible preventing environmental damage caused by marine incidents.

Pollution from Bunkers

When in force, the **International Convention on Civil Liability for Bunker Oil Pollution Damage 2001**¹¹ (Bunker Convention 2001) will make shipowners strictly liable for pollution damage caused by bunkers. This Convention will operate independently from the other pollution liability regimes and will apply to all vessels whose bunkers cause pollution damage, other than tankers, which are already covered under the 1992 CLC. Similarly, shipowners will also be required to maintain insurance to meet potential liabilities.

Such claims will have to be brought in the Contracting State in whose territorial waters damage occurs, but instead of there being separate layers of compensation these claims rank equally with other third party claims against the shipowner. The Convention will allow claims to be

bought directly against an insurer, and shipowners will be able to limit liability against all claims arising on any distinct occasion under national or international limitation regimes applying in the State concerned.

EU member states have been authorised to ratify or accede to the Bunker Convention 2001 by **Council Decision 19 September 2002**¹².

The UK ratified this Convention on 29th June 2006, but it requires ratification by 18 states before it comes into force. As at 24 April 2007, 15 states had ratified.

Hazardous and Noxious Substances Emanating from Ships

At present, there are no international conventions or UK statutes in force that deal with liability for pollution damage caused by *substances other than persistent oil*. For many years this has been a gap in the liability regime, to the likely detriment of coastal communities affected by pollution involving other substances. An example of this is the “MV CITA”, which ran aground on the Isles of Scilly in 1997. Containers were washed ashore containing a huge variety of cargoes including plastics, car parts and clothing. The clean-up operation was carried out by the Isles of Scilly Council, but the expenses incurred by them were not recoverable from the shipowner under the relevant law (German), and no international convention applied.

The situation is under review. In May 1996 the IMO adopted a **Convention on Liability and Compensation for damage in Connection with Carriage by Sea of Hazardous and Noxious Substances 1996**¹³ (HNS Convention), which has already been ratified by the UK. By **Council Decision 18 November 2002**¹⁴ the target date for ratification by the EU member states was 30 June 2006, but so far only 8 countries have ratified it and 12 must do so before it enters into force. Until then, national laws apply.

The HNS Convention deals with all chemical and non-oil pollutants carried by ships, i.e. any substance other than oil which, if introduced into the marine environment, is likely to create hazards or damage. This includes the risks posed by cargo washed up on beaches.

Under the HNS Convention a shipowner will be strictly liable for damage or loss - including the cost of preventive measures - caused by hazardous or noxious substances. The Convention will

allow shipowners to limit liability up to 100 million SDRs, or about US\$ 151 million, depending on the vessel's gross tonnage, and each shipowner must have insurance up to the vessel's HNS limitation figure. As with the 1992 CLC, there is a number of defences available to the shipowner, and overall the regime will be very similar.

The HNS convention will not apply to claims arising from contracts of carriage, oil pollution covered by the CLC or radioactive materials.

Other (Non-Hazardous/Noxious) Pollutants from Ships

There are currently no international conventions that deal with these forms of pollution, and a claimant would have to invoke the law of the country involved. In the UK, there is currently no legislation dealing specifically with this form of pollution from ships, so either private contract or the common law of tort would be the bases of any claim.

Criminal Liability and the Ship Source Pollution Directive

Legislation in the EU now requires member states to extend criminal liability to pollution incidents, and it is important to appreciate the significance of criminal liability in this area.

EC Directive 2005 No 35 and EU Council Decision 2005/667/JHA¹⁵ is the relevant EU legislation, and states that ship source pollution discharges in breach of Community law constitute a criminal offence. Penalties, both criminal and administrative, must be imposed if the persons concerned are found to have caused or participated in the act, either with intent or as a result of negligence.

The regime means that each Member State must ensure that illegal discharges of polluting substances, and participation in and incitement to carry out such discharges, are penalised as criminal offences. The penalties must be applied to anyone deemed responsible for the pollution, e.g. the shipowner but perhaps also the owner of the cargo. When the damage is prevalent and significant, each Member State must include imprisonment as a possible penalty. Lesser penalties, such as fines or disqualification from performing a regulated activity, can also be applied to individuals. Penalties against companies and other entities may include fines, disqualification from engaging in commercial activities, judicial supervision and winding-up.

When an offence is committed within a Member State's territory, on board a ship flying its flag or by one of its nationals, that State must try to establish jurisdiction to hear the case.

This legislation was required to be brought into force by 1st April 2007, but its practical application awaits a ruling from the ECJ following a reference by the English Courts on the basis that it is 'fundamentally flawed'. The basis of the problem is the meaning of "serious negligence", as stated in the EU legislation.

European Community Maritime Safety Packages

Major casualties bring safety issues to the forefront. The sinking of the tanker "ERIKA" off the French coast in December 1999 spurred new developments in the establishment of Europe's maritime safety policy, and two legislative packages were developed to address that. A mere three months after that incident, on 21 March 2000, the Commission adopted the first package, a "**Communication on the safety of the seaborne oil trade**"¹⁶ together with a number of proposals for specific measures to prevent such incidents. The second set of measures, which aimed to bring about a lasting improvement in the protection of European waters against the risk of accidents at sea and marine pollution, was presented on 6 December 2000¹⁷. In summary these provisions are as follows:

Package I: This entered fully into force on 22 July 2003, and the legislation has three key functions. Firstly it bans from all ports of the EU ships older than fifteen years that have been detained more than twice during the two preceding years, on the basis of a "blacklist" which the European Commission publishes every six months. Secondly, Classification Societies are required to apply much stricter rules. Thirdly, a programme has been implemented to speed up the replacement of single-hull oil tankers, with double-hull oil tankers following a timetable similar to that adopted in the United States (2005, 2010, 2015 depending on tonnage).

Package II: An enhanced traffic control system was proposed, so the European Union can acquire the means to monitor and control more effectively the traffic off its coasts and take more effective action in the event of critical situations arising at sea. This package sets up a further compensation fund: the additional fund complements the existing regime on liability and compensation for oil pollution damage by tankers by creating a European supplementary fund,

which is called the COPE Fund, to compensate victims of oil spills in European waters. The package also establishes a European Maritime Safety Agency to monitor EC legislation in this field, and to evaluate its effectiveness.

The above is a summary of extensive and often complex provisions which apply to pollution incidents, some of which have yet to come into force. This area is constantly developing and we will be circulating periodic updates.

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¹ http://www.imo.org/Conventions/contents.asp?topic_id=258&doc_id=682

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0042:EN:HTML>

³ <http://www.opsi.gov.uk/si/si1998/19981056.htm>

⁴ http://www.imo.org/Conventions/mainframe.asp?topic_id=258&doc_id=683

⁵ http://www.imo.org/Conventions/contents.asp?doc_id=660&topic_id=256#4

⁶ http://www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=661

⁷ http://www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=661#suppfund

⁸ http://www.opsi.gov.uk/ACTS/acts1995/Ukpga_19950021_en_10.htm#mdiv152

⁹ http://www.opsi.gov.uk/ACTS/acts1995/Ukpga_19950021_en_10.htm#mdiv152.

¹⁰ <http://ec.europa.eu/environment/liability/index.htm>

¹¹ http://www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=666

¹² <http://www.emsa.europa.eu/Docs/legis/council20dec201920sept202002bunkeroil.pdf>

¹³ http://www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=665

¹⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D0971:EN:NOT>

¹⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:255:0011:01:EN:HTML>

¹⁶ <http://europa.eu/scadplus/leg/en/lvb/l24230.htm>

¹⁷ <http://europa.eu/scadplus/leg/en/lvb/l24242.htm>

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