

Pollution and political fallout from the Prestige

Philip Roche, Assistant in the Maritime Trade and Energy Group of maritime law firm Norton Rose, explores the legal ramifications of the recent Prestige sinking

A sense of déjà vu followed the breaking up of the Prestige on November 19, 2002 off the Galician coast. There were echoes of the Erika, not only in the loss of the ship and the pollution caused but also in the ensuing political furor. Yet again, despite manifest errors of the Spanish government in handling this matter and in failing to provide a port of refuge, the political response has focused on the ship, the Master (again jailed for no sensible reason) and a raft of legislation aimed at the tanker industry. This legislation includes the banning of single-hull oil tankers from carrying heavy fuel oil to or from EU ports and the accelerated phasing-out of such vessels. The use of national navies to prevent the innocent passage of so-called 'high risk' tankers through Exclusive Economic Zones seems to be a pointless but ominous development, demonstrating an increasingly radical reaction from politicians who seem to know little and care less about the tanker industry as a whole.

Once the wave of outrage that followed the loss of and pollution from the Erika had died down, the EU produced a set of sensible steps to increase maritime safety and reduce the incidence of such accidents happening again. The so-called Erika I and II packages included strengthened directives on port state control, the activities of classification societies, the formation of a European Maritime Safety Agency and the accelerated phasing-out of single hull tankers. A black list of tankers banned from EU ports was also drawn up. Apart from directives on port state control and vessel traffic monitoring, entering into force in 2003 and 2004 respectively, the new measures only started to enter into force this year. Directive 2002/59/EC, which was drawn up to deal with vessel traffic monitoring, included a requirement that Member States plan to accommodate vessels in distress (ports of refuge). This was due to come into force in 2004. Because of the breaking up of the Prestige, an emergency meeting on this subject has been called for this month. It transpires that in fact none of the Erika measures were put in place before the Prestige was lost.

Despite this, the need to show that something is being done to deal with the 'ticking time bombs' of old, badly maintained single hull tankers has caused the EU to issue a proposed regulation in very quick time.

The EC Commission's proposals

The Commission proposes three amendments to the existing regime and urges the European Parliament and the Council to adopt them as soon as possible to ensure that they enter into force no later than during the month of March 2003:

1. A ban on single-hull vessels carrying heavy grade oil to or from EU ports.
2. An accelerated phasing-out of single hull vessels, with category 1 tankers to have a final cut-off point of 23 years and 2005, category 2 tankers to have a cut-off point of 28 years and 2010, and category 3 tankers to have a cut-off point of 28 years and 2015.
3. A more stringent enforcement of the Condition Assessment Scheme ("CAS") to assess the structural integrity of all single hull tankers of 15 years and older, regardless of design/dead weight.

Dealing with the second proposed amendment, the Commission is restating its original Erika I proposal. It does not represent a significant departure from the limits as set down by revised Regulation 13G of Annex I of MARPOL. Under the existing regime, the cut-off point for category 1 tankers is 26 years and 2007 while for category 2 and 3 tankers it is (generally) 30 years and 2015.

Under CAS, single-hull tankers aged 15 years and older should be inspected by the flag state and classification society every two and a half years. Currently, category 1 ships should be CAS-compliant from 2005. For category 2 ships, the threshold is 2010 while CAS does not apply at all to smaller category 3 ships. The Commission's new proposal is for all single-hull ships aged 15 years and over to be CAS-compliant with 2005 as a start-up date (we must assume that this is a concession to the currently inadequate number of inspectors throughout the EU and particularly in France!). This proposal will of course only affect category 2 and 3 vessels since, under the Commission's Prestige package, category 1 ships will have been phased-out by 2005.

In addition, the Commission has called on member states to recruit more Port State Control inspectors and take measures to increase the numbers of ships being inspected to meet the minimum inspection rate of 25 per cent set out in the Directive 1995/21/EC and still not achieved by the majority of EU states. Community legislation will also be drawn up to introduce penal sanctions against any person (including legal persons such as a shipowning company) who has caused pollution through grossly negligent behaviour. Pilots will be required to report on ships that they find in doubtful condition when carrying out pilotage services, while the Commission will investigate ways of re-balancing international law, which it regards as heavily biased in favour of maritime interests at the expense of freedom of navigation and innocent passage, so as to protect coastal seas and exclusive economic zones (EEZs).

Compensation and liability

Following the Erika incident, the Commission proposed the establishment of a new European fund to compensate up to €1bn the victims of oil spills within the EU. The ceiling of the current international fund rests at EUR185m. The Council, however, did not accept the Commission's proposal on the ground that such an initiative was an international and not a regional matter. In fact, the International Maritime Organisation (IMO) moved quickly to increase the limits payable under the Civil Liability Convention (CLC) and Fund Convention (FC) protocols of 1990 in order to preempt unilateral action by the EU. Discussions had also been in train for some time on a voluntary third tier of compensation to be provided in the case of small tankers by the shipowning community. It now seems that these efforts will come to nothing as the Commission has restated that, unless the International oil pollution conventions (the CLC and FC) swiftly provide a maximum level of compensation of €1 billion, then the EU will press ahead with the establishment of a third tier of compensation known as the fund for the Compensation of Oil Pollution damage (COPE) which will top up the international conventions to provide a compensation up to EUR1 billion.

The Commission's proposals regarding liability would introduce something of a radical overhaul of the existing liability regime. Its first proposal is not so controversial; it calls upon Member States to support proposals aimed at restricting the right of shipowners to limit their financial liability if the accident is due to their actual fault. At present, the limitation can be broken only in circumstances where the pollution was caused with intent or with recklessness and with knowledge that the pollution would result. This is a difficult test to satisfy; and the shipowner's right to limit is barely lost. By using the word "fault", it might be that the Commission is thinking of reverting to the earlier position on oil pollution, whereby limitation can be broken should the accident result from the shipowner's fault or privity - a much easier test to meet. If so, and this is by no means certain, it would be very easy for a claimant to break through the shipowner's limit of liability. This would be similar to the position in the USA under the US Oil Pollution Act 1990 (OPA). There is also the suggestion that the immunity of other players in the maritime adventure, such as charterers, cargo owners and disponent owners, would be removed. Under the CLC, all claims are channelled against the shipowner, whereas the new proposals would allow a wider scope of parties to be liable, as is the case under the OPA. Under this

proposal, managers and charterers will be liable for compensation claims following oil spills. These are radical proposals; it will be interesting to see if they are toned down once the political heat inevitably goes out of the issue.

Places of refuge

Directive 2002/59/EC (not due for transposition into national law until February 2004) establishes a Community vessel traffic monitoring and information system and provides that member states must draw up plans to accommodate ships in distress within their jurisdictions. In the light of the Prestige accident - and in particular Spain's response to it - the Commission has convened a meeting to speed up preparations to accommodate vessels in distress in places of refuge, with a view to adopting these measures at the time the Directive enters into force.

Territorial Seas and EEZs

On a national level, the most surprising reactions have been those of Spain and France in refusing innocent passage through the waters of their exclusive economic zones (EEZ), the outer limit of which extends 200 nautical miles (nms) from the coast. The sight of warships insisting that tankers of all nations remain outside the 200nm zone is a political gesture for consumption at home.

Under Article 57 of UNCLOS, the EEZ extends to "200 nautical miles from the baselines from which the breadth of the territorial sea is measured". States enjoy a number of rights in their EEZs including "[jurisdiction.. .with regard to:] the protection and preservation of the marine environment" (Article 56.1 (b)(iii)). However, these rights are subject to those enjoyed by other States, such as freedom of navigation (Articles 58 and 87 UNCLOS). This freedom of navigation is likewise not an unqualified right. Article 73 UNCLOS confers power on the coastal State to "take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention". Article 211.2 provides that States must adopt laws/regulations having "at least...the same effect as that of generally accepted international rules and standards established through the competent international organisation or general diplomatic conference". Articles 211.3 and 211.4 further allow States to establish particular requirements for the prevention, reduction and control of pollution of the marine environment from foreign ships or as a condition for the entry of foreign vessels into their ports/internal waters/off-shore terminals. However, these provisions are subject to the continued exercise by a vessel of its right to innocent passage

Under Article 21 UNCLOS, coastal States "may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of any of the following:...(f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof". What this would appear to mean is that Spain and France may exclude single-hull tankers carrying heavy grade oil from their territorial waters, in that case up to 12 nm.

However, the power of a State to restrict innocent passage through the EEZ is - as you would expect - not so strong. Under Article 211.6, "where the international rules...are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective EEZ is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required...", then such States - after consulting with IMO etc - may direct a communication to the competent international organisation (viz, IMO) submitting scientific and technical evidence in support of the special circumstances. IMO then has 12 months to determine that there are special circumstances. If there are, then the State may adopt additional measures to those imposed by the international regime. However, such laws will not be applicable to

foreign vessels until 15 months after the submission of the communication to the organisation. What this means is that it is not lawful for Spain and France to exclude single-hull tankers carrying heavy grade oils from their EEZs in the rapid and unilateral manner adopted.

Apart from the apparent illegality of this move, the practical benefits of such a ban are not clear. Ships will be forced to remain further out at sea in possibly worse sea conditions and further away from assistance and any port of refuge should they get into trouble. The Prestige has demonstrated the pointlessness of forcing a tanker out to sea since the heavy oil that does not quickly break down and disperse simply comes ashore a little later and against a wider expanse of coastline. We see this with the oil now washing up on the French coast many miles from the site of the loss. Saving a tanker by mooring her in calm, easily boomed waters will not endear the government to the local population but, in the case of the Prestige, would have greatly reduced the amount of oil going in to the water and the extent of pollution damage caused over long stretches of coastline.

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