

Supplementing pollution funds

A diplomatic conference at the IMO in May is due to consider an increase in pollution compensation. Lars Rhodin, director of claims and legal support at The Swedish Club, considers the issues

This May, delegates will take their places at the International Maritime Organisation (IMO) headquarters in London, for the opening of the Diplomatic Conference to consider an increase in oil pollution compensation. The aim is to make an additional provision for the rare cases that exceed the maximum available under the two international conventions providing compensation for oil pollution victims.

The Diplomatic Conference will debate the establishment of a "third tier" of compensation to be funded by cargo interests. The objective is to ensure those suffering loss or damage have a greater chance of their claims being met in full in a "worst case" event (when the total amount available under the two conventions might prove insufficient).

This initiative has its roots in the loss of the tanker Erika in December 1999. The Erika claims (totalling some \$310m) exceeded the \$173m maximum compensation under the existing conventions. Almost certainly, the claims arising from the December 2002 Prestige spill will also exceed this figure by a significant margin.

The existing compensation regime

The two primary conventions are Civil Liability (CLC), concerned with shipowners' liability, and the Fund Convention, dealing with the responsibilities of cargo interests. These conventions were adopted in 1969 and 1971 respectively. The Fund provides additional compensation when the sum available under CLC is inadequate or unobtainable.

The CLC 1969 fixed the maximum shipowner liability at around \$18m per incident. The Fund and CLC combined offered a total of \$82m.

Protocols were adopted in 1984, with the aim of introducing higher limits, but this attempt proved abortive. Subsequently, the 1984 Protocols were superseded by the 1992 Protocols. The latter entered into force in 1996 and introduced the levels of compensation that currently apply.

The 1992 CLC Protocol applied the limits originally adopted in 1984:

- Ships not exceeding 5,000 GT: 3m Special Drawing Rights (SDRs), or around \$3.8m.
- Ships of 5,000 - 140,000 GT: 3m SDRs plus 420 SDRs (about \$538) for each additional unit of tonnage.
- Ships over 140,000 GT: 59.7m SDRs (around \$76.5m).

The 1992 CLC Protocol extended coverage to pollution damage in the Exclusive Economic Zone (EEZ). Furthermore, both laden and unladen tankers are covered - that is, bunker spills from seagoing tankers. There were changes relating to compensation for environmental damage. The 1992 CLC Protocol limits application, in this respect, to "reasonable measures" to reinstate a contaminated environment. In addition, the 1992 Protocol allows expenditure on preventive measures, even if no spill occurs (provided the pollution threat was "grave and imminent").

Coverage was also extended under the 1992 Fund Protocol. The maximum liability is 59.7m SDRs (USD 76.5m), bringing the total available under both 1992 Protocols to 135m SDRs (USD 173m) per incident. This is the current maximum.

This maximum, however, can increase to 200m SDRs (around \$256m) if three states contributing to the Fund receive more than 600m tonnes of oil per annum.

Higher compensation limits

Amendments to the 1992 Protocols, adopted in October 2000, will take effect in November of this year. In the case of the CLC, compensation limits will increase by 50 per cent on 1992 levels:

- Ships not exceeding 5,000 GT, up from 3m SDRs (\$3.8m) to 4.51m SDRs (USD 5.78m).
- Ships of 5,000 - 140,000 GT: up from 3m SDRs (\$3.8m) plus 420 SDRs (around \$538) for each additional unit of tonnage to 4.51m SDRs (\$5.78m), plus 631 SDRs (\$807) per gross tonne over 5,000.
- Ships over 140,000 GT: up from 59.7 million SDRs (around USD 76.5 million) to 89.77 million SDRs (USD 115 million).

The 2000 Amendments to the 1992 Protocols will bring the total compensation available under both conventions to the higher level of 203 million SDRs (USD 260 million), as against the current limit of 135 million SDRs (USD 173 million). If, however, three states contributing to the Fund receive more than 600 million tonnes of oil per annum, the maximum amount is raised to 300,740,000 SDRs (USD 386 million).

Introducing a third tier

The May 2003 Diplomatic Conference will consider a draft Protocol to the 1992 Fund Convention, providing for supplementary compensation should an incident produce claims exceeding the 1992/2000 limits.

The draft Protocol was prepared by a Working Group established by the 1992 Fund Assembly. It was approved at this Assembly's Sixth Session in October 2001 and subsequently endorsed by the IMO's Legal Committee in April of last year. Accession to the Supplementary Fund will be limited to those states party to the 1992 Fund Convention.

As before, the new Protocol will apply to pollution damage in territorial waters and the EEZ, with coverage also extending to "preventive measures". Article 4 of the draft is the key provision dealing with supplementary compensation. Article 4.1 states: "The Supplementary Fund shall pay compensation to any person suffering pollution damage if such person is unable to obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention, because there is a risk that the damage exceeds the applicable limit of compensation laid down in Article 4, paragraph 4, of the 1992 Fund Convention in respect of any one incident."

It is a matter for the 1992 Fund Assembly to decide when such a risk exists. In addition, there will be limits to the amount of Supplementary Compensation available. These limits will be agreed at the May Diplomatic Conference. If the total value of established claims against the Supplementary Fund exceeds these limits, distribution will proceed amongst all the claimants on the same basis.

The Supplementary Compensation is to be funded under the established "contributing oil" system and will be the responsibility of persons in contracting states receiving total quantities of oil exceeding 150,000 tonnes a year. Under the draft Protocol, each contracting state is deemed to receive a minimum level (currently set in the draft at one million tonnes).

The Supplementary Fund Protocol to the 1992 Fund Convention will be subject to entry into force provisions, to be agreed at the May conference. As envisaged in the current draft, it will take effect 12 months (or, possibly, less) from the date that the required number of states (proposed at eight) have ratified and, secondly, that notifications under Article 10 have been received during the preceding calendar year concerning a specified total of contributing oil (proposed in the draft Protocol at a level of at least 450m tonnes).

When the Supplementary Fund takes effect, the limits agreed will stay in place, free of amendment, for a specified period (set in the current draft at five years). There will also be limits on the magnitude of any future increase. This includes an upper ceiling: "No limit may be increased so as to exceed an amount which corresponds to the limit laid down in the Protocol multiplied by three."

On the other hand, if the limits laid down in the 1992 Fund Convention are increased, the limits for the Supplementary Fund may be increased by the same amount. In this situation, the restrictions on increasing the limits of the Supplementary Fund would not apply.

Key issues for debate

How important is the Supplementary Fund? The spill statistics tell the story, at least in part. Firstly, significant tanker spills are now rare occurrences - certainly compared to the numbers of big spills in the 1970s and 1980s. In the 1990-99 period, there were 360 spills. Of this total, over 95% of the non-US spills would have been compensated under CLC alone (as it now stands). In other words, shipowners and their insurers met the entire cost. Indeed all non-US spills - with the exception of the Erika - would have been compensated within the existing 1992 Protocol limits (\$173m).

The Erika, with claims totalling around \$300m, will also exceed the maximum compensation available (\$260m) following the entry into force this November of the 2000 Amendments.

With the traumatic experiences of the Erika and, more recently, the Prestige still very much in the public mind, politicians cannot afford to "go soft" on pollution. Hard-liners in the European Union now regard existing compensation provisions as inadequate and some believe that the balance of responsibilities between the players and their exposure to liability should be re-visited. In addition, some critics are calling for clear incentives for industry to use vessels of high quality.

That said, there are differences of opinion on the strength of the case for increasing the limits beyond the 2003 levels already agreed (although there is now likely to be less resistance in the wake of the Prestige!).

One persistent problem associated with the two conventions is the widespread lack of understanding over their purpose and function. The CLC and Fund Conventions were designed to provide compensation, NOT to act in any punitive way. Yet, whenever a case exceeds limitation, it is widely reported (and generally perceived) as unjust. There are those, of course, who question the entire principle of limitation - although they do have a tendency to overlook the all-important fact that risks must be insurable. No-one will insure unlimited liability for oil pollution.

There is broad consensus amongst the Clubs that it is important to defend the equitable sharing of liabilities between shipowners and cargo interests. Certainly, there is a strong desire to avoid fragmentation and maintain a uniform, global approach to compensation, even in the case of extreme pollution events.

One important problem cannot be resolved at a Diplomatic Conference. This is the challenge of convincing society that some element of pollution risk must be accepted, on the grounds that the overall benefit from ocean transportation of oil far outweighs such risk.

The Clubs support the view that additional compensation for worst case spills should be the responsibility of cargo interests. In return, the Clubs are willing to support a voluntary increase in CLC minimum liability - the small ships limit - beyond November 2003 levels in those states party to the Supplementary Fund.

This will be necessary, to preserve balance by ensuring that shipowners bear the full costs of a greater number of the smaller spills. While it would be wrong to attempt to second guess the outcome of the May Diplomatic Conference, it appears that the shipowners' liability in small ship cases (vessels not exceeding 5,000 GT) will have to

increase significantly - perhaps to the region of \$20m if cargo interests are to recognise an appropriate quid pro quo.