



Bunker spill risk

Colin de la Rue, of Ince & Co, looks at the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

Sometimes it comes as a surprise to people to hear that pollution from ships' bunkers can be nearly as serious a problem as major cargo spills from tankers.

There are various reasons why this is so. For one thing, bunker spills can of course occur not only from tankers but from most of the world's fleet. Dry cargo ships and other non-tankers are much more numerous than tankers so bunker spills are therefore a common source of oil pollution from ships.

Although only oil tankers can cause very large spills, many bulk carriers and container ships carry bunker fuel of 10,000 tonnes or more – these are larger quantities than many of the world's tankers carry as cargo.

Most importantly, ships' bunkers normally consist of heavy fuel oils, which in general are highly viscous and persistent. A relatively small quantity of highly persistent bunker fuel can be disproportionately damaging and costly to remove in comparison, for example, with a substantial cargo of light crude oil.

The record for the most expensive ever oil

spill in terms of dollars per barrel was set by the 43,000 dwt wood chip carrier *Kure* when it struck the dock at a loading facility and ruptured a fuel oil tank in Humboldt Bay, California, in November 1997. The spill of 105 barrels of bunker fuel was followed by a response operation lasting 10 days at US\$1m per day. The final cost reached \$47m.

Other bunker spills in the US have been some of the most significant oil pollution cases since OPA 90 was introduced:

- the grounding in February 1999 of the woodchip carrier *New Carissa*, outside Coos Bay, Oregon;
- the bunker spill from the bulk carrier *Selandang Ayu*, which ran aground on Unalaska Island in the Bering Sea in November 2004; and
- and the spill of bunker fuel from the container ship *Cosco Busan*, which occurred when she struck the Oakland Bay Bridge in San Francisco Harbour in November 2007.

They have had significant political as well as financial consequences.

Outside the US, most bunker spills have until recently been outside the scope of any international compensation regime. Bunker spills from tankers fall within the 1992 Civil Liability and Fund Conventions, but those from other vessels have been governed only by domestic laws.

In many jurisdictions such laws have long been in place, but with few exceptions it has not been practicable for governments to impose their own independent rules to ensure that financial security is in place for payment of claims.

It was mainly for this reason that governments decided, after the HNS Convention had been adopted in 1996, that bunker spills represented a gap in international law which ought to be filled.

Work on the subject began at the International Maritime Organisation later that year and in March 2001 agreement was reached on the International Convention on Civil Liability for Bunker Oil Pollution Damage. This came into force on 21 November 2008

after attaining the requisite ratifications 12 months earlier. A total of 25 states have ratified and now that the Convention is in force many more can be expected to do so.

The corner-stones of the Convention are strict liability, compulsory insurance and limitation of liability. Many provisions borrow heavily from familiar counterparts in the Civil Liability Convention 1992 (CLC), but there are some important differences.

Liability for bunker oil pollution

The Convention imposes strict liability for 'pollution damage' resulting from a spill of bunkers. This in itself is not remarkable. The limited exemptions from liability also match those in CLC. However there are differences concerning the party liable.

CLC imposes liability solely on the 'registered owner' of the vessel and excludes liability, whether under the Convention or otherwise, of various other parties, notably managers, operators, charterers, salvors, pilots and the owner's servants or agents.

This so-called 'channelling' of liability to the registered owner is a feature of CLC which simplifies the liability regime and is acceptable when supplemental compensation is normally available from the IOPC Fund if claims exceed the CLC limit.

By contrast, the Bunkers Convention is a single-tier regime and governments decided to preserve rights of recovery from other parties in addition to the registered owner. Liability is therefore imposed on the 'shipowner', defined as meaning 'the owner, including the registered owner, bareboat charterer, manager and operator of the ship'. Each of these parties may be held jointly and severally liable under the Convention.

In the same vein, the Bunkers Convention differs from CLC in that it does not contain any 'channelling' provisions excluding claims against other parties: the Conference decided against giving 'responder immunity' to salvors, but a compromise was adopted in the form of a Resolution calling upon governments to consider doing so when implementing the Convention in their domestic legislation.

Compulsory insurance and financial security

The compulsory insurance requirements of the Convention are very similar to those in CLC. Ships must carry on board a certificate issued by the flag state administration attesting that

appropriate insurance or other financial security is in place to cover any liabilities incurred by the registered owner under the Convention.

The insurer or other guarantor named in the certificate is directly suable and may not rely upon policy defences other than wilful misconduct of the shipowner.

In this area the main differences from CLC are of a more practical nature. While it is one thing for flag state administrations and P&I Clubs to handle the paperwork required to certificate a few thousand oil tankers, the world's non-tanker fleet is far larger and the administrative burden involved is correspondingly greater. The Convention therefore contains provisions designed to avoid this burden becoming unnecessarily great.

One of these restricts the certification regime to ships of 1,000 gross tons or more; another excludes vessels engaged in purely 'domestic voyages'. Nonetheless, the number of vessels requiring certification has been very large, including many registered in states which are not parties to the Convention.

Although certificates can be issued by any contracting state, it was unclear, until a late stage before entry into force of the Convention, that there were contracting states with sufficient capacity to undertake this administrative work in addition to certifying their own vessels. Whilst significant problems have been avoided, the considerable work involved will need to be repeated, at least for vessels in International Group Clubs, to renew certificates from 20 February.

Limitation of liability

As always, insurance guarantees are available only if they are subject to clear limits. Consequently, as with CLC, the right of the shipowner and his insurer to limit liability goes hand in hand with the imposition upon them of strict liability and the compulsory insurance provisions.

In the Bunkers Convention the right of limitation is set out in Article 6, which provides:

'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 application national or international regime, such as the Convention on Limitation of Liability for Maritime Claims 1976 as amended.'

This arrangement differs from the

limitation regime in CLC, in that it does not provide for a free-standing limitation fund dedicated to pollution claims. Instead the liability limit is linked to that applying under the national or international regime, if any, which applies in the state concerned in relation to liability generally for maritime claims. LLMC 76 has become the most widespread international regime of this type.

As the Bunkers Convention does not provide for a dedicated limitation fund, pollution claims against an LLMC fund will rank alongside various other claims which may arise from the same incident, eg collision damage claims.

Significant increase

However, given the significant increase in limits introduced by the 1996 LLMC Protocol, only in rare cases should the higher figures be insufficient to cover all claims.

Of course, it is in the rare cases that limitation is most important for shipowners, and Article 6 is not as clear on all points as some might have wished. One of the concerns is that LLMC does not explicitly grant a right of limitation for pollution claims.

It may be that many typical claims for pollution, such as for property damage and clean-up costs, would fall within the wording of one or other of the different categories of claim which are subject to limitation under LLMC. However there are others where the position may not be so clear.

In the UK, where strict liability for bunker spills was introduced some years ago, any room for doubt has been eliminated by a provision in the Merchant Shipping Act 1995 (s. 168) which stipulates that all claims for bunker oil pollution are to be deemed to be claims for property damage within the meaning of Article 2.1(a) of LLMC.

Other governments might usefully be urged to consider enacting similar provisions for clarity when enacting the Bunkers Convention in their national laws.



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