9

LIABILITY AND COMPENSATION FOR SHIP-SOURCE POLLUTION

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9.1 The Development of the International Regimes

There are three international regimes governing liability and compensation for marine pollution dealing respectively with tanker oil spills, spills of bunker oil, and damage caused by hazardous and noxious substances carried by sea.

Compensation for pollution damage caused by spills from oil tankers is governed by an international regime elaborated under the auspices of the International Maritime Organization (IMO) in the wake of the *Torrey Canyon* oil spill in 1967. The framework for the regime was originally the 1969 International Convention on Civil Liability for Oil Pollution Damage[1] (1969 Civil Liability Convention) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage[2] (1971 Fund Convention). These Conventions entered into force in 1975 and 1978 respectively.

This 'old' regime was amended in 1992 by two Protocols,[3] and the amended Conventions are known as the 1992 Civil Liability Convention and the 1992 Fund Convention. The 1992 Conventions provide higher limits and an enhanced scope of application. The 1992 Conventions entered into force in 1996.

[1] Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969, entered into force 19 June 1975) 973 UNTS 3 (1969 Civil Liability Convention).

[2] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 18 December 1971, entered into force on 16 October 1978) 1110 UNTS 57.

[3] Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage (London, 27 November 1992, entered into force 30 May 1996) 1956 UNTS 255; Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (London, 27 November 1992, entered into force 30 May 1996) 1953 UNTS 330.

It should be mentioned that in 1984 an attempt was made to revise the 1969 and 1971 Conventions by the adoption of two Protocols, but the 1984 Protocols never entered into force. The 1992 Protocols are identical to the 1984 Protocols except for the entry into force conditions.[4]

A third tier of compensation in the form of a Supplementary Fund was established by means of a Protocol to the 1992 Fund Convention adopted in 2003[5] (the Supplementary Fund Protocol) which entered into force in 2005. Only States parties to the 1992 Fund Convention may become parties to the Protocol.

The 1992 Conventions have become a truly global regime, having been ratified by a large number of States. As of 31 December 2015, 134 States were parties to the 1992 Civil Liability Convention, and 114 States were parties to the 1992 Fund Convention. Thirty-one States had ratified the Supplementary Fund Protocol. The old regime based on the 1969 and 1971 Conventions has thus been largely replaced by the regime established by the 1992 Conventions.

As of 31 December 2015, there were, however, still thirty-four States that remained parties to the 1969 Civil Liability Convention. The 1971 Fund Convention ceased to be in force on 24 May 2002. Before the 1971 Fund could be wound up, all pending compensation claims resulting from incidents occurring prior to that date had to be settled and all remaining assets distributed to the 1971 Fund contributors. The 1971 Fund was dissolved with effect from 31 December 2014.[6]

It should be noted that the United States have not become a party to the Civil Liability and Fund Conventions, but have adopted their own legislation in the form of the Oil Pollution Act 1990 (OPA-90).[7] The People's Republic of China is a party to both the 1992 Civil Liability Convention and the 1992 Fund Convention, but has limited the application of the latter Convention to the Special Administrative Region of Hong Kong.[8]

In 1995 the IMO Legal Committee began work on a convention dealing with liability and compensation for pollution damage caused by spills of bunker oil, and this work led to the adoption, in 2001, of the International Convention on Civil

[4] As regards the reasons for the non-entry into force of the 1984 Protocols see M Jacobsson, 'The International Liability and Compensation Regime for Oil Pollution from Ships—International Solutions for a Global Problem' (2007) 32 *Tulane Maritime Law Journal* 10–12.

[5] 2003 Protocol to the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (London, 16 May 2003, entered into force 3 May 2005).

[6] IOPC/OCT14/11/1, section 8.2.

[7] For the main differences between the international regime and OPA-90 see Jacobsson 'International Solutions' (n. 4) at 19–21. A detailed description of the legislation in the United States can be found in C de la Rue and CB Anderson, *Shipping and the Environment, Law and Practice* (2nd edn Informa, 2009) at 177–241.

[8] As regards the reason for this limitation see M Jacobsson, 'Liability and compensation for ship-source oil pollution in China' (2013) *Journal of International Maritime Law* 146.

Liability for Bunker Oil Pollution Damage[9] (Bunkers Convention). The Convention entered into force in 2008 and, as of 31 December 2015, eighty-one States had ratified it.

The IMO Legal Committee had already started work on the elaboration of a convention dealing with liability and compensation for damage caused by hazardous and noxious substances other than oil in the late 1970s. A draft convention was submitted to a Diplomatic Conference held in 1984, but this Conference failed to adopt a convention. It was not until 1996 that a new Diplomatic Conference succeeded in adopting a convention on the subject: the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (normally known as the HNS Convention).

As a number of States considered that there were serious obstacles to their ratifying the HNS Convention, the Convention did not enter into force. In 2010 a Diplomatic Conference adopted a Protocol to the HNS Convention for the purpose of eliminating these obstacles. As of 31 December 2015, no State had ratified the 2010 Protocol, which consequently has not yet entered into force.

9.2 The Regime Relating to Liability and Compensation for Tanker Oil Spills

9.2.1 Introduction

The 1969 and 1992 Civil Liability Conventions govern the liability of shipowners for oil pollution damage. The Conventions lay down the principle of strict liability for shipowners and create a system of compulsory liability insurance. Shipowners are normally entitled to limit their liability to an amount which is linked to the tonnage of the ship. The 1971 and 1992 Fund Conventions, which are supplementary to the respective Civil Liability Conventions, establish a regime for compensating victims through an international fund when the compensation under the applicable Civil Liability Convention is inadequate.

The Supplementary Fund Protocol adds a third layer of compensation for pollution damage in States parties to the Protocol when the amount of compensation available under the 1992 Conventions is inadequate to compensate all established claims in full.

Each of the Fund Conventions and the Supplementary Fund Protocol establish an intergovernmental organization to administer the compensation regime created by

[9] International Convention on Civil Liability for Bunker Oil Pollution Damage (London, 23 March 2001, entered into force 21 November 2008) UKTS No. 8 (2005).

the respective treaty, the International Oil Pollution Compensation Funds 1971 and 1992 (hereinafter referred to as the 1971 Fund and the 1992 Fund, respectively) and the International Oil Pollution Compensation Supplementary Fund. These three organizations are normally collectively referred to as *the IOPC Funds*. As mentioned above, the 1971 Fund was dissolved with effect from 31 December 2014, and thereafter the expression *the IOPC Funds* relates only to the 1992 Fund and the Supplementary Fund.

The 1992 Fund has an Assembly, which is composed of representatives of all Member States. The Assembly is the supreme organ governing the Fund, and it holds regular sessions once a year. When the Assembly is unable to obtain a quorum, an Administrative Council is convened to act on behalf of the Assembly. The Assembly elects an Executive Committee comprising 15 Member States. The main function of this Committee is to approve settlements of compensation claims.

The Supplementary Fund has its own Assembly composed of representatives of its Member States.

During the winding up period, the 1971 Fund was governed by an Administrative Council, composed of all States which at any time were parties to the 1971 Fund Convention.

The 1992 Fund and the Supplementary Fund have a joint Secretariat located in London (United Kingdom). Until 31 December 2014 that Secretariat administered also the 1971 Fund. The Secretariat is headed by a Director and has some thirty staff members.

Since their establishment, the 1971 and 1992 Funds have been involved in approximately 150 incidents. Some of these incidents have given rise to thousands of compensation claims.[10] So far, the Supplementary Fund has not been involved in any incidents.

The present section is focused on the 'new' compensation regime under the 1992 Conventions and the Supplementary Fund Protocol, but on a number of points comparison is made with the 'old regime' under the 1969 Civil Liability Convention and the 1971 Fund Convention.

The definitions of the basic concepts in the Civil Liability and Fund Conventions are not very detailed, and the Conventions contain only a few provisions on the procedures to be followed in the handling of compensation claims. This has made it possible for the governing bodies of the IOPC Funds to develop the international regime in the light of the experiences gained from major oil spills.

[10] For instance the *Erika* incident (France, 1999) gave rise to some 8,000 compensation claims, the *Solar 1* incident (the Philippines, 2006) resulted in some 32,000 claims and the *Hebei Spirit* incident (Republic of Korea, 2007) has given rise to some 128,000 individual claims.

There are relatively few court cases on the interpretation and application of these treaties. The governing bodies of the IOPC Funds (ie the governments of the States parties to the Fund Conventions) have, however, in dealing with particular incidents, had to take a position on the interpretation of various provisions in the treat ies. In connection with the settlement of compensation claims, the governing bodies have developed certain principles as regards the interpretation of the definition of 'pollution damage'.

Important decisions by the governing bodies are set out in the IOPC Funds' Annual Reports and (from 2009) in the yearly publication 'Incidents involving the IOPC Funds'. There is also a database on practically all decisions by the governing bodies available on the IOPC Funds' website at <http://www.iopcfund.org>. The position taken by the governing bodies on a number of issues are reflected in this section.[11]

The 1992 Fund has published a Claims Manual that contains general information on how claims should be presented, and sets out the general criteria for the admissibility of various types of claims.[12] Guidelines for presenting and assessing claims in the fisheries and tourism sectors have also been published.[13] Guidelines for presenting claims for clean-up and preventive measures were published in 2015. There is also a document containing guidance for Member States to facilitate the claims handling process. These publications are available on the IOPC Funds' website.

It should be noted that the definitions of various basic concepts in the Civil Liability Conventions (Art. I, V.9 and V.10) are by reference included in the Fund Conventions (Art. 1.2, 1.4 and 1.5) and the Supplementary Fund Protocol (Art.1.5, 1.6 and 1.7).

Information on the international compensation regime and the IOPC Funds is available on the above-mentioned website, which contains a list of the States Parties to the 1992 Conventions, the 1969 Civil Liability Convention and the Supplementary Fund Protocol.[14]

9.2.2 Geographical scope of application

Whereas the scope of application of the 1969 Civil Liability and 1971 Fund Conventions is confined to the territory (including the territorial sea) of a State Party,

[11] In this chapter reference is made to a number of documents relating to sessions of the IOPC Funds' governing bodies which are accessible on the Funds' website under *Document services, Meeting documents*.

[12] Claims Manual (October 2013 edn), available on the Funds' website (hereinafter 'Claims Manual').

[13] Guidelines for presenting claims in the fisheries, mariculture and fish processing sectors (for claimants), Technical Guidelines for assessing fisheries sector claims (for technical experts) and Guidelines for presenting claims in the tourism sector.

[14] For a detailed presentation of the international regime see de la Rue and Anderson (n. 7).

the 1992 Conventions and the Supplementary Fund Protocol apply to pollution damage suffered in the territory (including the territorial sea) of a State Party to the respective treaty, or in the exclusive economic zone (EEZ) or equivalent area of such a State (Art. II).[15] The criterion for applicability is thus a geographical one, ie the place of the damage. The nationality of the ship involved in the oil spill is irrelevant for this purpose.

The Conventions also apply to reasonable measures, wherever taken, to prevent or minimize pollution damage.

The 1992 Conventions apply to incidents occurring in inland waters (whether tidal or not), provided the vessel in question falls within the definition of ship, ie is a seagoing vessel.[16]

Measures taken within the territorial waters of a State not party to the respective Civil Liability and Fund Conventions to prevent pollution damage in a State Party fall in principle within the scope of application of the Conventions.[17]

9.2.3 Definition of ship[18]

In the 1969 Civil Liability Convention and the 1971 Fund Convention the concept of 'ship' is defined as any seagoing vessel and any seaborne craft of any type whatsoever actually carrying oil in bulk as cargo (Art. I.1). Oil tankers in ballast fall therefore outside these Conventions.

The definition in the 1992 Conventions is wider, and refers to any seagoing vessel and any seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo.[19] The 1992 Conventions apply in general to oil tankers but not to spills from dry cargo ships, passenger ships, and other non-tankers.

The definition of 'ship' does not require that the craft should have any means of steering or propulsion. The Civil Liability and Fund Conventions would therefore in principle apply to barges and other craft without such means, provided they fulfil the requirement of being seagoing.[20]

[15] States Parties having established an EEZ or declared such an area have been invited to inform the 1992 Fund accordingly (1992 Fund Resolution No 4, 92FUND/A.1/34, Annex IV).

[16] 1992 Fund Executive Committee in the *Victoriya* incident (Russian Federation, 2003) which occurred on the River Volga 1,300 kilometres from the Caspian Sea; 92FUND/EXC.22/14 para. 3.8.13.

[17] 1971 Fund Executive Committee in the *Kihnu* incident (Estonia, 1993); 71FUND/EXC.49/12, para. 3.4.6.

[18] For a discussion of the definition of 'ship' see de la Rue and Anderson (n. 7) at 86–92.

[19] With respect to the expression 'adapted for the carriage of oil in bulk as cargo', see the *Dolly* incident (Martinique, 1999), 92FUND/EXC.11/6, paras 4.2.3–4.2.5, and the *Zeinab* incident (United Arab Emirates, 2001), 92FUND/EXC.13/7, paras 3.4.4–3.4.6.

[20] See the *Pontoon N° 300* incident (United Arab Emirates, 1998); 71FUND/EXC.57/15 para. 3.11.4.

The 1992 Fund Executive Committee has taken the view that, if a vessel was actually operating at sea at the time of the incident, the vessel should be considered seagoing and therefore fall within the definition of ship in the 1992 Conventions.[21]

There is a proviso to the definition in the 1992 Conventions to the effect that a vessel capable of carrying oil and other cargoes is to be considered as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage, unless it is proved that it has no residues of such carriage of oil in bulk aboard. The proviso, which was drafted with combination carriers (ie ships that are designed to carry oil cargoes on some voyages and dry bulk cargoes on others) in mind, has given rise to uncertainty as to its interpretation. The 1992 Fund Assembly has taken the view that the expression 'other cargoes' should be interpreted to include all cargoes other than persistent oil and not only solid bulk cargoes; consequently the proviso applies not only to combination carriers but also to tankers capable of carrying clean-oil cargoes (ie cargoes of non-persistent oil) or other chemicals as well as cargoes of persistent oil. The Assembly has also decided that the expression 'any voyage' should be interpreted literally and not be restricted to the first ballast voyage after the carriage of a cargo of persistent oil. The burden of proof that there were no residues of a previous persistent oil cargo on board would normally fall on the shipowner.[22]

Important questions of principle as to the interpretation of the definition of 'ship' in the 1992 Conventions had to be considered in relation to the *Slops* incident which occurred in Greece in 2000. The *Slops* had originally been designed and constructed for the carriage of oil in bulk as cargo, but had undergone a major conversion in the course of which its propeller had been removed and its engine deactivated and officially sealed, and the craft had thereafter been permanently at anchor and used exclusively as a waste storage and processing unit. Taking the view that the carriage of oil as envisaged in the 1992 Conventions involved the notion of transport, the 1992 Fund Executive Committee decided that, since the *Slops* had not been engaged in the carriage of oil in bulk as cargo, it should not be regarded as a ship for the purpose of the 1992 Conventions.[23]

The Greek Supreme Court considered, however, that the requirement to be 'actually carrying oil in bulk as cargo' in the proviso to the definition of ship referred only to combination carriers. The Court held that the *Slops* should be regarded as a ship as defined in the 1992 Conventions, since it had the character of a seaborne craft which, following its modification into a floating separating unit, stored oil products in bulk and, furthermore, it had the ability to move by self-propulsion or by way of towage as well as the ability to carry oil in bulk as cargo, without it being

[21] The *Al Jaziah* incident (United Arab Emirates, 2000); 92FUND/EXC.8/8 para. 4.2.5.
[22] 92FUND/A.5/28, paras 23.2 and 23.6.
[23] 92FUND/EXC.8/8, para. 4.3.8.

necessary for the incident to have taken place during the carriage of the oil in bulk as cargo, that is, during a voyage.[24]

The 1992 Fund Assembly has had to consider whether, and if so to what extent, the 1992 Conventions applied to offshore craft, namely floating storage units (FSUs), and floating production, storage, and offloading units (FPSOs). The Assembly decided that offshore craft should be considered as 'ships' under the 1992 Conventions only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate. It was also decided that offshore craft would fall outside the scope of the 1992 Conventions when they leave an offshore oil field for operational reasons or simply to avoid bad weather. The Assembly emphasized that the decision as to whether the 1992 Conventions applied to a specific incident would be taken in the light of the particular circumstances of the case.[25]

Another question that has arisen is under which conditions permanently and semi-permanently anchored vessels engaged in ship-to-ship oil transfer operations should be regarded as 'ships' under the 1992 Civil Liability and Fund Conventions. The 1992 Fund Assembly decided in 2006 that such vessels should be regarded as ships only when they carried oil as cargo on a voyage to or from a port or terminal outside the location in which they normally operated, but that in any event the decision as to whether such a vessel fell within the definition of ship should be made in the light of the particular circumstances of the case.[26] In 2010 the Assembly decided that 'mother' vessels involved in extended ship-to-ship or floating storage operations were to be considered 'ships' under the Conventions and that consequently spills from such vessels would be covered by the 1992 Conventions.[27]

In October 2011, the 1992 Fund Assembly established a Working Group with the mandate to study certain issues relating to the interpretation of the definition of 'ship' in the 1992 Civil Liability Convention. On the basis of the Working Group's Final Report, in October 2015 the 1992 Fund Administrative Council adopted an illustrative list of vessels falling clearly within or outside that definition.[28]

[24] IOPC Funds' Annual Report 2006 at 95–100. For a discussion of this case see de la Rue and Anderson (n. 7) at 247.

[25] 92FUND/A.4/32, paras 24.3 and 24.10.

[26] 92FUND/A.11/35, para. 32.12.

[27] IOPC/OCT10/11/1, para. 4.4.39; IOPC/OCT10/4/3/1 paras 3.1–3.5; cf IOPC/OCT11/11/1 paras 4.4.6–4.4.10.

[28] IOPC/OCT15/11/1, para 4.3.23.

The Civil Liability Conventions do not apply to warships or other ships owned or operated by a State and used, at the time of the incident, only on government non-commercial service (Art. XI.1).

9.2.4 Definition of oil

There is no clear definition of the concept of 'oil' in the 1992 Conventions. It is simply provided that oil means 'any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil' (Art. I.5).[29] Spills of non-persistent oil, for example, gasoline, light diesel oil, and kerosene, are therefore not covered by the Conventions.[30]

The provision makes it clear that spills of non-mineral oils, for instance, palm oil and whale oil, fall outside the 1992 Conventions.

It should be noted that the definition of oil in the 1969 Civil Liability Convention is not restricted to mineral oils and does specifically include whale oil (Art. I.5). The 1971 Fund Convention confined, however, the definition to persistent hydrocarbon mineral oils (Art. 1.2).

The reason that the Conventions are restricted to persistent oils is that such oils are slow to dissipate when spilled into the environment and therefore require clean-up, whereas non-persistent oils normally evaporate quickly after an oil spill, so that no clean-up is necessary.

It appears that the distinction between persistent and non-persistent oil has not given rise to any difficulties in the application of the Conventions.[31]

The Conventions apply to spills of persistent oil whether the oil is carried in a ship (as defined) as cargo or in the bunkers of such a ship.

In order for the Conventions to apply, the oil must be carried on board a ship at the time of its escape into the sea. This appears to imply that the oil must not only be on board the ship but also be there for the purpose of transport, but it does not mean that the ship must be under way at the time of the oil spill for the Conventions to apply.[32]

[29] In 1981 the 1971 Fund prepared A Non-Technical Guide to the Nature and Definition of Persistent Oil (FUND/A.4/11, Annex).

[30] The 1971 Fund Assembly has decided that 'orimulsion', a bitumen-based fuel consisting of bitumen mixed with about 30% fresh water, should be considered as 'persistent oil'; 71FUND/A.15/28 para. 20.2.

[31] Cf the *Maritza Sayalero* incident (Venezuela, 1998); 71FUND/EXC.59/17 para. 3.13.3.

[32] With respect to the applicability of the Conventions to spills occurring during pumping operations see de la Rue and Anderson (n. 7) at 97.

9.2.5 Concept of damage

9.2.5.1 Types of damage covered

An oil pollution incident can generally result in five types of damage:

- property damage
- costs of clean-up operations at sea and on shore
- economic losses suffered by fishermen and those engaged in mariculture
- economic losses in the tourism sector
- costs for reinstatement of the environment

9.2.5.2 Property damage

Pollution incidents often cause damage to property; the oil may contaminate fishing boats, fishing gear, yachts, piers, and embankments. Costs for cleaning polluted property are admissible for compensation under the Conventions. If the polluted property (eg fishing gear) cannot be cleaned, the cost of replacement qualifies for compensation, subject to deduction for wear and tear.

9.2.5.3 Preventive measures

'Pollution damage' includes the cost of 'preventive measures', that is, reasonable measures to prevent or minimize pollution damage, as well as loss or damage caused by preventive measures (Art I.6 and I.7).

Preventive measures may, for instance, consist of the deployment of vessels to combat the oil spill at sea or the use of booms to contain the oil or to protect vulnerable resources, seawater intakes of industrial plants or mariculture facilities. Clean-up operations at sea or onshore have generally been considered to fall within the concept of preventive measures.

Preventive measures only qualify for compensation if taken in order to prevent or minimize damage which falls under the Conventions, including within its geographical limits.[33]

Expenses incurred for preventive measures are recoverable under the 1992 Conventions even when no spill occurs, provided the measures are taken after an 'incident' has taken place.[34] The definition of 'incident' in the 1992 Conventions is fairly broad, namely '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' (Art. I.8). The issue of whether in a particular situation there was a grave and imminent threat of damage could give rise to disputes.

[33] Cf. Report of the IMO Legal Committee, document LEG 74/13, paras 60–2.

[34] Under the 1969 and 1971 Conventions only costs for preventive measures taken after an oil spill had occurred qualified for compensation, preventive measures being defined as measures taken after an incident which causes pollution damage has taken place (Art. I.7 and I.8); cf the *Tarpenbeck* incident (United Kingdom, 1979); FUND/EXC.14/3.

In order for the preventive measures to qualify for compensation, the measures must be reasonable. The governing bodies of the IOPC Funds have repeatedly stated that whether or not a measure is reasonable should be determined on the basis of objective criteria in the light of the facts available at the time of the decision to take the measures. The fact that a Government or a public authority decided to take certain measures does not, in the view of these bodies, in itself mean that the measures are reasonable for the purpose of compensation under the Conventions. Claims for costs of preventive measures are not admissible if it could have been foreseen that the measures taken would be ineffective. On the other hand, the fact that the measures proved to be ineffective is not in itself a reason for rejection. The costs incurred, and the relationship between these costs and the benefit derived or expected, should in the opinion of the governing bodies also be reasonable (principle of proportionality).[35]

In 2006, the 1992 Fund Assembly decided not to widen the criteria for the admissibility of claims for the costs of preventive measures so as to include social and/or political considerations. It also decided that when considering the reasonableness of such measures, account should be taken of the potential environmental damage which could be caused if the measures were not taken.[36]

The Funds have accepted to pay compensation for reasonable costs of cleaning and rehabilitation of contaminated birds and mammals, provided the measures were taken by qualified personnel and there was a reasonable chance that the animals would actually survive the process.[37]

In many countries clean-up operations are carried out by public authorities using permanently employed personnel or vessels and vehicles owned by these authorities. There has never been any doubt that reasonable 'additional costs' incurred by the authorities, ie expenses that arose solely as a result of the incident and the relating operations and which would not have been incurred had the incident not taken place, are to be compensated pursuant to the Conventions. An important question is whether compensation is payable under the Conventions also for so-called 'fixed costs', that is, costs that would have arisen for the authorities even if the incident had not occurred, such as normal salaries for permanently employed personal. The IOPC Funds' governing bodies have decided that a reasonable proportion of fixed costs qualify for compensation, provided that these costs correspond closely to the clean-up period in question and do not include remote overhead charges.[38]

[35] For a detailed analysis of the concept of reasonableness see M Jacobsson, 'How clean is clean? The concept of "reasonableness" in the response to tanker oil spills' in *Scritti in Onore di Francesco Berlingieri*, special issue of *Il Diritto Marittimo* (2010) Vol I 565; see also Claims Manual section 3.1; de la Rue and Anderson (n. 7) at 371–390, 998.

[36] 92FUND/A.11/35, paras 26.22–26.23; Jacobsson, 'How clean is clean?' (n. 35) at 579–80.

[37] Claims Manual para. 3.1.4.

[38] Claims Manual paras 3.1.13 and 3.1.14.

Salvage operations may in some cases include an element of preventive measures. The IOPC Funds' governing bodies have taken the position that the costs incurred for such operations qualify in principle for compensation under the Civil Liability and Fund Conventions if the primary purpose of the operations was to prevent pollution damage ('primary purpose test'); should the operations have another purpose, such as saving the ship or cargo, they would not fall within the definition of preventive measures and the costs incurred would not be admissible under the Conventions. The governing bodies have further decided that if the operations were undertaken for the purpose of both preventing pollution and saving the ship or cargo, but it is not possible to establish with any certainty the primary purpose ('dual purpose test'), the costs should be apportioned between pollution prevention and salvage. It has also been decided that compensation for the costs of the operations should not be assessed on the basis of the criteria applied for determining salvage awards, but the compensation should be limited to costs incurred, including a reasonable element of profit.[39]

Loss or damage caused by reasonable preventive measures is also compensated under the 1992 Conventions (Art. 1.6(b)). For example, if clean-up operations result in damage to roads, piers and embankments, the cost of the resulting repairs will be compensated.[40]

9.2.5.4 Consequential and pure economic loss

Persons whose property has become contaminated by oil may suffer loss of earnings, for example a fisherman who is unable to fish while his fishing gear is being cleaned (consequential economic loss). Such losses qualify for compensation in most jurisdictions, and this is also the case under the Civil Liability and Fund Conventions.

Persons whose property has not been damaged can also suffer losses. A fisherman whose gear did not get damaged may have had to abstain from fishing for a period of time to avoid having his nets contaminated. An hotelier or restaurateur whose premises are close to a polluted public beach may suffer losses because the number of guests decreases during the period of contamination. Such losses are in common law jurisdictions referred to as *pure economic loss*. In most common law jurisdictions the courts have been very reluctant to accept claims for pure economic loss. In many countries outside the common law system the legal situation is unclear. In some of these countries pure economic loss is not considered to be a separate type of damage. The courts outside the common law system may apply the criterion of foreseeability and remoteness or require that there is direct link of

[39] With respect to the development of the IOPC Funds' practice in this regard see J Nichols, 'Admissibility of claims: development of the IOPC Funds' policy' in *The IOPC Funds' 25 years of compensating victims of oil pollution incidents* (2003) 105–106; Claims Manual para. 3.1.15.

[40] Claims Manual para. 3.1.3.

causation between the damage and the defendant's action, and that the damage must be certain and quantifiable in monetary terms.

The Civil Liability and Fund Conventions do not explicitly indicate whether pure economic loss qualifies for compensation under the Conventions. The relevant provisions in the Civil Liability and Fund Conventions ('loss or damage caused outside the ship by contamination') have however been consistently interpreted by the governing bodies of the IOPC Funds to cover in principle pure economic loss, and these bodies have developed certain criteria for the admissibility of claims for such losses, in particular that there must be a sufficiently close link of causation between the contamination and the loss. A claim is not admissible just because an oil spill has occurred; the starting point is the pollution and not the incident.

When considering whether the criterion of a sufficiently close link of causation is fulfilled, the IOPC Funds' governing bodies take into account the following elements:

- the geographic proximity between the claimant's business activity and the contaminated area
- the degree to which a claimant's business is economically dependent on an affected resource
- the extent to which a claimant has alternative sources of supply or business opportunities
- the extent to which a claimant's business forms an integral part of the economic activity within the area affected by the spill.[41]

The IOPC Funds' governing bodies have taken the view that measures to prevent or minimize pure economic loss could be considered as falling within the definition of 'preventive measures'. Such measures could, for instance, be aimed at counteracting the negative impact of an oil pollution incident on the local industry in the fishery and tourism sectors. The governing bodies have decided that in order to qualify for compensation the measures should fulfil the following requirements:

- the cost of the measures is reasonable
- the cost of the measures is not disproportionate to the further damage or loss which they are intended to mitigate
- the measures are appropriate and offer a reasonable prospect of being successful
- in the case of a marketing campaign, the measures relate to actual targeted markets.[42]

[41] As regards consequential economic loss and pure economic loss see de la Rue and Anderson (n. 7) at 415–30; Jacobsson, 'International Solutions' (n. 4) at 24–8; Nichols (n. 39) at 106–11; Claims Manual sections 3.3 and 3.4; Baris Soyer, 'Ship-sourced Oil Pollution and Pure Economic Loss' (2009) 17 *Torts Law Journal* 270.

[42] Claims Manual para. 3.5.2.

To be admissible, the costs should relate to measures to prevent or minimize pure economic losses which, if sustained, would qualify for compensation under the Conventions. Claims for the cost of marketing campaigns or similar activities are accepted only if the activities undertaken are in addition to measures normally carried out for this purpose.[43]

9.2.5.5 Environmental damage

In several cases involving the 1971 Fund, claims were presented for damage to the marine environment as such or otherwise of a non-economic nature. The 1971 Fund's governing bodies insisted repeatedly that such claims were not admissible under the 1969 Civil Liability and 1971 Fund Conventions, and took the view that compensation could only be granted to a claimant who had suffered a quantifiable economic loss,[44] a position that in some cases was not accepted by national courts.[45]

For the purpose of clarifying that claims for damage of a non-economic nature are excluded, a proviso was inserted in the Civil Liability Convention (Art. I.6(a)) and by reference in the Fund Convention through the 1992 Protocols thereto to the effect 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 (Art. 1.6 (a)). Claims for damage to the marine environment per se are therefore not admissible under the Conventions, but only claims for the economic consequences of such damage, for example losses suffered by fishermen or businesses in the tourism industry resulting from damage to the marine environment. The proviso also excludes damage calculated on the basis of theoretical models or of a punitive character. The governing bodies of the 1992 Funds have repeatedly emphasized that claims for such damage are not admissible under the 1992 Civil Liability and Fund Conventions.[46]

[43] Examples of cases in which this issue has been dealt with by the IOPC Funds are given in Nichols (n. 39) at 111–13.

[44] 1971 Fund Resolution N°3 in FUND/A/ES.1/13, Annex; FUND/A.4/10 paras 18 and 19 and FUND/A.4/16 para. 13.

[45] Eg the *Patmos* (Italy, 1985), *Haven* (Italy, 1991) and *Nissos Amorgos* (Venezuela, 1997) incidents; see Nichols (n. 39) at 114–17.

[46] See Nichols (n. 39) at 114–17; M Jacobsson, 'L'indemnisation des dommages résultant des atteintes à l'environnement dans le cadre du régime international CLC/FIPOL' (2010) *Le Droit Maritime Français* 469–80. In the *Volgoneft 139* case (Russian Federation, 2007) the Russian authorities had submitted a claim for environmental damage based on a mathematical formula, in accordance with national legislation. The claim was however rejected by a Russian court which referred to the above-mentioned proviso in Art. I.6(a) of the 1992 Civil Liability Convention (IOPC/OCT10/3/9, section 10). It should be noted that that Convention only governs the liability of the registered owner and that the liability of others is governed by the applicable national law, except if the person in question is entitled to benefit from the protection of the channelling provisions. In a judgment in the *Erika* case rendered by the French Court of Cassation in September 2012 four defendants other than the registered owner were held jointly and severally liable for, inter alia,

It should be emphasized that measures of reinstatement of the environment qualify for compensation only if they are reasonable. As for the concept of reasonableness, reference is made to what is stated above in respect of preventive measures (Section 9.2.5.3).

Studies are sometimes required to establish the nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible. Such studies will not be necessary after all spills, and will normally be most appropriate in the case of major incidents where there is evidence of significant environmental impact. The Funds have decided that they may contribute to the costs of such studies provided that they concern damage which falls within the definition of pollution damage in the Conventions, including reasonable measures of reinstatement of the contaminated environment. The Funds will require that the studies are likely to provide reliable and useful information and that they are carried out with professionalism, scientific rigor, objectivity, and balance. The scale of the studies should be in proportion to the extent of the contamination and predictable effects.[47]

9.2.6 Shipowner's liability

Under the Civil Liability Conventions the registered owner of a tanker has strict liability (ie is liable also in the absence of fault) for pollution damage caused by oil spilled from the ship as a result of an incident (Art. III.1). The shipowner is exempt from liability under the Convention (Art. III.2) only if he 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,[48] or
(b) the damage was wholly caused intentionally by a third party, or
(c) the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.[49]

ecological damage, loss of image, moral damage, and damage to reputation (IOPC/OCT12/3/5/1). M Jacobsson. 'The French Court of Cassation and the *Erika* case—some issues relating to civil liability' (2014) *Journal of International Maritime Law* 24.

[47] Claims Manual paras 3.6.7–3.6.11.

[48] With respect to the interpretation of the expression 'a natural phenomenon of an exceptional, inevitable and irresistible character', see M Forster, 'Civil Liability of Shipowners for Oil Pollution' (1973) *Journal of Business Law* 23; G Gauci, *Oil Pollution at Sea: Civil Liability and Compensation for Damage* (Wiley & Sons, 1997) at 73. In the *Volgoneft 139* case (Russian Federation, 2007), a Russian court rejected the shipowner's defence pursuant to this provision; Incidents involving the IOPC Funds 2010 at 28.

[49] The provision in the 1969 Civil Liability Convention (Article III.2.c) identical to item (c) above was interpreted by the Swedish Supreme Court in the *Tsesis* case (Sweden, 1977). The Court held that the shipowner was not liable for the pollution damage, since the incident was wholly caused by negligence on the part of the Swedish State due to its failure to update a navigational chart and to adjust the white sector from a lighthouse; for the facts of this case see de la Rue and Anderson (n. 7) at 101.

The exemption under (a) applies when the damage *resulted from* an act of war or similar act or a grave natural disaster. It is suggested that this exemption would apply if such an act was the dominant or proximate cause of the damage even if other factors contributed to the damage. It is also suggested that if, for instance, the incident was due to a major tsunami but negligence on the part of the crew contributed to the extent of the damage, the shipowner would still be exempt from liability.

For the exemptions under (b)—which appears to cover acts of terrorism and piracy—and (c) to apply, the damage must have been *wholly caused by* the intentional act of the third party or the negligence of the public authority. It is submitted that these exemptions would not apply if there were any contributory negligence, even minor, on the part of the shipowner. The expression *wholly caused* may cause difficulties in interpretation.[50]

If the damage resulted wholly or partially from an act or omission done with the 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 against that person, but his liability to other persons is not affected (Art. III.3). This defence could, for instance, be invoked against a claim by a government authority for clean-up costs if the incident was not wholly but only partially caused by its negligence in the maintenance of navigational aids.

An incident involving more than one ship may cause pollution damage. In such a case, the shipowners of all ships concerned are jointly and severally liable for all such damage that is not reasonably separable, unless they may invoke one of the exemptions from liability referred to above (Art. IV).

9.2.7 Limitation of liability

Under certain conditions, shipowners are entitled to limit their liability under the 1969 or 1992 Civil Liability Convention to an amount which is linked to the tonnage of the vessel. The limitation amounts under the 1992 Convention are—after increases by 50.73 per cent with effect from 1 November 2003—as follows:[51]

(a) for a ship not exceeding 5,000 units of gross tonnage, 4,510,000 Special Drawing Rights (SDR) (US$6.2 million);
(b) for a ship with a tonnage between 5,000 and 140,000 units of tonnage, 4,510 000 SDR (US$6.2 million) plus 631 SDR (US$874) for each additional unit of tonnage; and

[50] With respect to the interpretation of that expression see M Jacobsson, 'The HNS Convention and its 2010 Protocol' in B Soyer and A Tetterborn (eds), *Pollution at Sea: Law and Liability* (Lloyds List, 2012), chap 3, at 33; de la Rue and Anderson (n. 7) at 100.

[51] In this chapter, the SDR has been converted into United States dollars at the rate of exchange applicable on 31 December 2015, ie 1 SDR=US$1.385730.

(c) for a ship of 140,000 units of tonnage or over, 89 770 000 SDR (US$124 million).[52]

Claims that fall within the scope of the 1992 Civil Liability Convention may in certain cases also be subject to limitation of liability under the 1969 Civil Liability Convention. If, for instance, a ship registered in a State party to the 1969 Civil Liability Convention but not party to the 1992 Civil Liability Convention causes damage falling under the latter Convention in a State party to both the 1992 Civil Liability Convention and the 1969 Convention, the latter State will have to respect the shipowner's right to limit his liability under the 1969 Convention which provides for much lower limits than the 1992 Convention.[53]

Claims for pollution damage subject to the 1992 Civil Liability Convention may in some cases be subject to limitation under older conventions dealing with global limitation of maritime claims, ie Conventions on that subject of 1957 or 1924.[54] If, for instance, a ship registered in a State party to the 1957 Convention but not party to the 1992 Civil Liability Convention causes damage falling under the latter Convention in a State party to both the 1992 Civil Liability Convention and the 1957 Convention, the latter State will have to respect the shipowner's right to limit his liability under the 1957 Convention which provides for much lower limits than the 1992 Convention (Art. XII).[55]

This problem does not arise in respect of the 1976 Convention on Limitation of Liability for Maritime Claims[56] (LLMC) (in its original version or as amended by the 1996 Protocol thereto), since the 1976 Convention excludes from its scope of application 'claims for pollution damage within the meaning of the 1969 Civil Liability Convention or any amendment or Protocol thereto which is force' (Art. 3(b)).[57]

[52] The limitation amounts under the 1969 Civil Liability Convention are significantly lower, namely 133 SDR (US$184) for each ton of the ship's tonnage up to a maximum of 14 million SDR (US$19.4 million).

[53] This situation arose for instance in respect of the *Nakhodka* incident (Japan, 1997); Japan was party to both the 1969 and 1992 Civil Liability Convention, whereas the State of the ship's registry (Russian Federation) was only party to the 1969 Convention.

[54] The International Convention relating to Limitation of Liability of Owners of Sea-Going Ships, 1957 (Brussels, 10 October 1957, entered into force 31 May 1968) 1412 UNTS 73 and the International Convention for Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-Going Vessels, 1924 (Brussels, 25 August 1924, entered into force 2 June 1931).

[55] Cf. Art. 30.4(b) of the Vienna Convention on the Law of Treaties.

[56] Convention on Limitation of Liability for Maritime Claims (London, 19 November 1976, entered into force 1 December 1986) 1456 UNTS 221 (LLMC).

[57] With respect to the interpretation of this provision see E Selvig, 'The 1976 Limitation Convention and pollution damage' (1979) *Lloyd's Maritime and Commercial Law Quarterly* 21; P Griggs, R Williams, and J Farr, *Limitation of Liability for Maritime Claims* (4th edn, Informa, 2005) 27–8; NA Martínez Gutiérrez, *Limitation of Liability in International Maritime Conventions, The relationship between global limitation conventions and particular liability regimes* (*IMLI Studies in International Maritime Law*) (Routledge, 2011) at 48.

Under the 1969 Civil Liability Convention, as under the 1957 Limitation Convention referred to above, the shipowner loses the right to limit his liability if the incident occurred as a result of his actual fault or privity. The 1992 Civil Liability Convention introduced the same much more restrictive test as the 1976 LLMC. The shipowner is thus, under the 1992 Convention, deprived of the right to limit his liability if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result (Art. V.2).

9.2.8 Constitution of limitation fund

In order to be entitled to limitation of liability, the shipowner must, under the Civil Liability Conventions, establish a limitation fund corresponding to the limit of his liability by depositing that amount in court or by producing a guarantee acceptable to the court (Art. V.3).[58] The limitation fund should be constituted with the competent court (or other competent authority) in one of the States parties where an action for compensation has been brought against the shipowner under the Convention or, if no such action has been brought, with any court in one of the States parties where such an action can be brought under the Convention.

In some jurisdictions the courts accept that the limitation fund is constituted by means of a letter of guarantee, for instance by a Protection and Indemnity Association (P&I Club), whereas in other jurisdictions the limitation amount will have to be paid into the court.

The Conventions do not address the question of whether any provision for interest should be included in the limitation fund, so this issue will have to be decided in accordance with the applicable national law.

The insurer of the owner of the ship liable for the pollution is entitled to constitute a limitation fund having the same effect as if it were constituted by the shipowner. The insurer may constitute such a fund even if the shipowner is not entitled to limit his liability, but in such a case the constitution of the fund shall not prejudice the rights of any claimants against the shipowner (Art. V.11).

Under the 1969 Civil Liability Convention there is no exception to the shipowner's obligation to constitute a limitation fund. In view of the fact that the establishment of such a fund could impose a disproportionate burden on the shipowner or his insurer, the 1971 Fund did, however, waive that requirement in a number of cases where the limitation amount was very low. The 1992 Fund Convention expressly authorises the 1992 Fund to do so in exceptional cases (Art. 4.6).

[58] The limitation amounts are to be converted into national currency on the basis of the value of that currency by reference to the SDR on the date of the constitution of the limitation fund (Art. V.9(a)).

Where the shipowner or any of his servants or agents or the insurer has paid compensation for pollution damage before the limitation fund is distributed, he acquires by subrogation, up to the amount he has paid, the rights which the person so compensated would have enjoyed under the Civil Liability Convention (Art. V.5). The same right of subrogation may also be exercised by any other person in respect of any amount of compensation for pollution damage he has paid, but only to the extent that such subrogation is permitted under the applicable national law (Art. V.6).

When distributing the limitation fund, the court may set aside part of the fund to protect the interests of those who have outstanding claims (Art. V.7). The court would, in such cases, make an interim distribution of the limitation fund.

Claims for expenses reasonably incurred or sacrifices reasonably made by the shipowner voluntarily to prevent or minimize pollution damage shall rank equally with other claims against the limitation fund (Art. V.8).

When a shipowner who is entitled to limit his liability has constituted a limitation fund, no person having a compensation claim for pollution damage arising out of the incident may exercise any rights against other assets of the shipowner in respect of that claim. In addition, the court in any State party shall order the release of any ship or other property belonging to the shipowner which has been arrested in respect of a claim for pollution damage arising out of that incident, and any bail or other security furnished to avoid such arrest shall also be released. This applies, however, only if the claimant has access to the court administering the limitation fund and the fund is actually available in respect of his claim (Art. VI).

9.2.9 Channelling of liability

The 1969 and 1992 Civil Liability Conventions contain provisions on so-called 'channelling of liability'.

Claims for pollution damage under the 1969 and 1992 Civil Liability Conventions can be made only against the registered owner of the ship concerned (Art. III.1). Claims may not be pursued against the shipowner otherwise than in accordance with the respective Convention (Art. III.4). Except as set out below, this does not in principle preclude victims from claiming compensation outside the Convention from persons other than the shipowner, but such claims cannot be based on the Convention but must be based on the applicable national law.

The 1969 Civil Liability Convention provides that no claims for pollution damage may be brought against the servants or agents of the shipowner. The 1992 Civil Liability Convention goes further and prohibits not only claims against the servants or agents of the shipowner or the members of the crew, but also claims against the pilot or any other person who, without being a member of the crew,

performs services for the ship. The 1992 Convention also prohibits claims against any charterer (including a bareboat charterer), manager, or operator of the ship, against any person performing salvage operations with the consent of the shipowner or on the instructions of a competent public authority and against any person taking preventive measures, as well as claims against the servants or agents of these persons. This prohibition does not apply if the damage resulted from the personal act or omission of the person concerned, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result (Art. III.5).[59]

9.2.10 Compulsory insurance

The owner of a ship registered in a State party to one of the Civil Liability Conventions and carrying more than 2,000 tonnes of persistent oil as cargo is obliged to maintain insurance or other financial security to cover the liability under the applicable Convention (Art. VII.1).

A certificate attesting that insurance or other financial security in accordance with the applicable Civil Liability Convention is in force shall be issued for each ship to which the insurance provisions apply. For ships registered in a State party to the Convention, the certificate shall be issued by the competent authority of that State. For ships not registered in a State party, the competent authority of any State party may issue the certificate. The certificate shall be carried on board the ship (Art. VII.2 and VII.5).

In practice, the insurer issues the shipowner with a certificate in standard form (known as 'the blue card'). The shipowner submits this document to the competent authority, which issues a certificate of insurance in the form prescribed in the Convention.[60]

A State party to the 1969 or 1992 Civil Liability Convention shall not permit a ship under its flag subject to the insurance requirements to trade unless a certificate has been issued. When entering or leaving a port or terminal installation of a State party to one of these Conventions, such a certificate is also required for ships flying the flag of a State which is not a party thereto (Art. VII.10 and 11).

[59] In a judgment rendered in September 2012 in the *Erika* case (France, 1999) the French Court of Cassation held that the channelling provisions applied to classification societies since such societies should be considered as 'any other persons who performs services for the ship'. The classification society involved was nevertheless held liable for pollution damage since it was considered as having acted recklessly and with knowledge that pollution damage would probably result of its action. Jacobsson, 'French Court of Cassation' (n. 46) at 21.

[60] The main providers of shipowners' third party liability insurance are the Protection and Indemnity Associations (P&I Clubs) which are mutual insurers. The International Group of P&I Clubs is a group of 13 mutual insurers that collectively provide liability insurance for approximately 90% of the world's ocean-going tonnage and for some 95% of the world's ocean-going tanker tonnage.

Claims for pollution damage under the Civil Liability Conventions may be brought directly against the insurer of the shipowner's liability for pollution damage (so called *direct action*) (Art.VII.8). In cases of direct action under these Conventions, the insurer has more limited defences than those available under general legislation in many jurisdictions.[61] The insurer may invoke the defences (other than bankruptcy or winding up of the shipowner) which the shipowner would have been entitled to invoke, but may not invoke defences that he would have been entitled to invoke in proceedings brought by the shipowner against him, ie defences based on the insurance policy. The insurer may, however, invoke that the pollution damage resulted from the wilful misconduct of the shipowner. In addition, the insurer is entitled to limitation of liability even if the shipowner has been deprived of such right (Art. VII.8).

The proliferation in recent years of acts of terrorism and piracy has caused difficulties for insurers of third party liability under certain maritime conventions. After the terrorist attack on the World Trade Center in New York on 11 September 2001, the P&I Clubs excluded acts of terrorism from their standard cover. Shipowners instead included cover for terrorism as part of their war risks policy.

As mentioned above, the shipowner is under the Civil Liability Conventions, as under several other maritime liability conventions, exonerated from liability for damage *wholly caused* by an intentional act of a third party. The fact that the shipowner may be liable for damage caused by acts of terrorism in cases where there was contributory negligence, perhaps even minor, on the part of the shipowner, has in recent years given rise to considerable concern on the part of shipowners and P&I Clubs, since this is a risk which the Clubs no longer cover. The P&I Clubs have, however, continued to certify that cover is in place under the Civil Liability Conventions for damage resulting from acts of terrorism. This is subject to the requirement that the shipowner has war risks cover on standard terms with a separate limit for P&I liabilities.[62]

9.2.11 The IOPC Funds' obligations

The 1992 Fund shall pay compensation to those suffering pollution damage covered by the 1992 Civil Liability Convention in a State party thereto who do not obtain full compensation from the shipowner and his insurer in the following cases (Art. 4.1):

(a) no liability arises for the shipowner under the 1992 Civil Liability Convention; or

[61] See de la Rue and Anderson (n. 7) at 749–51.

[62] With respect to the problems encountered by the P&I Clubs relating to acts of terrorism and piracy see Jacobsson, 'The HNS Convention' (n. 50) at 37.

(b) the shipowner is financially incapable of meeting his obligations under the 1992 Civil Liability Convention in full and his insurance does not cover or is insufficient to satisfy the compensation claims; or
(c) the damage exceeds the shipowner's liability as limited under the 1992 Civil Liability Convention or under any other Convention which was in force or open for signature or ratification on 27 November 1992 (the date when the 1992 Civil Liability Convention was adopted).

It should be noted that the 1992 Fund is only obliged to pay compensation under item c) if the shipowner is entitled to limit his liability.

As mentioned above, the shipowner could in certain circumstances be entitled to limit his liability under the 1969 Civil Liability Convention or under Conventions of 1957 or 1924 dealing with global limitation of liability for maritime claims. These treaties provide for limits that are significantly lower than those provided for under the 1992 Civil Liability Convention. In such cases, the 1992 Fund will provide compensation to the extent that the aggregate amount of the established claims exceeds the limit applicable to the ship in question under any such convention (Art. 4.1(c)). As previously mentioned, this problem does not arise in respect of the 1976 LLMC (in its original version or as amended by the 1996 Protocol thereto) since the 1976 Convention excludes from its scope of application 'claims for pollution damage within the meaning of the 1969 Civil Liability Convention or any amendment or Protocol thereto which is force' (Art. 3(b)).[63]

The 1992 Fund will provide additional compensation up to a maximum of 203 million SDR (US$280 million)[64] for each incident, including any amount paid by the shipowner and his insurer (Art.4.4(a)).[65] However, if the pollution damage resulted from a natural phenomenon of an exceptional, inevitable, and irresistible character, in which case the shipowner would be exonerated from liability, that amount applies to all pollution damage resulting from the phenomenon and is not available for each incident caused by that phenomenon (Art. 4.4(b)).

The 1971 Fund Convention contains corresponding provisions regarding the 1971 Fund's obligation to compensate victims who did not obtain full compensation under the 1969 Civil Liability Convention. The maximum amount available under the 1971 Fund Convention was however only 60 million SDR (US$84 million), including the amount paid under the 1969 Civil Liability Convention. As

[63] Similarly, if the shipowner was entitled to limit his liability under the 1957 or 1924 Convention, the 1971 Fund provided compensation to the extent the aggregate amount of the established claims exceeded the applicable limitation amount under one of these Conventions.

[64] The amount shall be converted into national currency on the basis of the value of that currency with reference to the SDR on the date of 1992 Fund Assembly's decision as to the first date of payment of compensation (Art. 4.4(e)).

[65] Interest accrued on the limitation fund constituted by the shipowner shall not be taken into account for the computation of the maximum amount payable by the 1992 Fund (Art. 4.4(d)).

mentioned above, the 1971 Fund Convention ceased to be in force in 2004, and the 1971 Fund was dissolved with effect from 31 December 2014.

The Supplementary Fund provides additional compensation for pollution damage in States parties to the Supplementary Fund Protocol if the aggregate amount of the established claims exceeds, or there is a risk that it will exceed, the amount available under the 1992 Conventions (Art. 4.1). The maximum amount payable under the Protocol is 750 million SDR (US$1 040 million) for each incident, including the amounts available under the 1992 Conventions (Art. 5.2).

Only those claims may be pursued against the Supplementary Fund which have been recognized by the 1992 Fund or been accepted as admissible by a decision of a competent court binding on the 1992 Fund not subject to ordinary forms of review. A further condition is that the claim would have been fully compensated if the limit in respect of the amount available for compensation under the 1992 Fund Convention had not been applied to the incident in question ('established claim'; Supplementary Fund Protocol Arts 1.8 and 4.4).

If the total amount of the established compensation claims exceeds the amount available for compensation under the applicable treaties, all claims will be reduced proportionally (Art. 4.5).

Expenses reasonably incurred or sacrifices reasonably made by the shipowner voluntarily to prevent or minimize pollution damage shall be treated as pollution damage, and the shipowner can therefore claim compensation from the Fund involved (Art. 4.1).

In order to enable the competent Fund to determine whether it will become involved in a particular incident, it must be established whether the shipowner is entitled to limitation of liability. It may, however, take many years before the courts have finally decided this issue. The policy of the 1971 and 1992 Funds has been not to wait for the court's decision on this point, but to commence compensation payments when the payments by the shipowner/insurer have reached the limitation amount. The Fund acquires by subrogation the claimants' right against the shipowner, and the Fund would therefore be entitled to recover the sums above the limitation amount it has paid to victims in the event that the shipowner were to lose the right to limitation of liability.

Difficulties have arisen in some incidents involving the 1971 Fund and/or the 1992 Fund where the aggregate amount of the claims arising from a given incident exceeded the maximum amount available for compensation under the applicable Conventions, or where there was a risk that this would occur. Under the Fund Conventions, the Funds are obliged to ensure that all claimants are given equal treatment (Art. 4.5). The Funds have had to strike a balance between the importance of paying compensation to victims as promptly as possible and the need to

avoid an over-payment situation. In a number of cases, the Funds have therefore had to limit payments to victims to a percentage of the agreed amount of their claims (so called 'pro-rating'). The P&I Club involved has in such cases normally limited its payments to the same percentage of the agreed amount. In some major incidents the Government of the State involved has facilitated compensation payments by undertaking 'to stand last in the queue' in respect of its compensation claims and those of other public bodies, that is, not to pursue such claims if and to the extent the presentation of such claims would result in the total amount of all claims arising out of the incident exceeding the maximum amount available for compensation.

In most cases it eventually became possible to increase the level of compensation payments to 100 per cent, once it had been established that the total amount of admissible claims would not exceed the amount available for compensation. The delay in payment of part of the compensation has, however, in many cases caused financial hardship to victims, for example to fishermen and small businesses in the tourism industry.

The Supplementary Fund Protocol will greatly improve the situation for victims in States becoming parties to it. In view of the very high amount available for compensation of pollution damage in these States, it should in practically all cases be possible to pay all established claims in full from the outset.

9.2.12 The IOPC Funds' defences

The grounds for exemption of liability of the Funds are much narrower than those of the shipowner. The Funds are thus exempt from liability only if the pollution damage resulted from an act of war, hostilities, civil war, or insurrection or was caused by a spill from a warship or other ship owned or operated by a State and used, at the time of the incident, only on government non-commercial service (Art. 4.2(a)).

Unlike the shipowner, the Funds are therefore liable to pay compensation if the incident was caused by a grave natural disaster, for instance, a major tsunami. Furthermore, the Funds are not exempt from liability in cases where the incident was wholly caused by an intentional act by a third party, for example, by an act of terrorism or piracy, unless the act falls within the concept of acts of war, hostilities, civil war, or insurrection. The line between acts of war and similar acts, on the one hand, and acts of terrorism, on the other, could sometimes be blurred, for example in case of so-called state-sponsored terrorism.

The 1992 Fund is not liable to pay compensation if the claimant cannot prove that the damage resulted from an incident involving one or more ships as defined in that 1992 Civil Liability Convention, that is, in general terms an oil tanker (Art. 4.2(b)). This provision raises the question of whether the 1992 Fund is under

an obligation to pay compensation for spills from unidentified ships. The 1992 Fund Executive Committee has taken the view that the 1992 Fund Convention applies to spills of persistent oil even if the ship from which the oil came cannot be identified, provided that it is shown to the satisfaction of the Fund or a competent court that the oil originated from a ship as defined in the 1992 Civil Liability Convention, that is, normally, a tanker. In such cases, the 1992 Fund would have to compensate the entire damage, since there would not be any shipowner who could be held liable.[66]

As a result of the restrictions with respect to the claims that may be pursued against the Supplementary Fund mentioned above, the Supplementary Fund will be exempt from liability if the 1992 Fund is so exempt (Supplementary Fund Protocol Arts 1.8 and 4.4).

With respect to contributory negligence on the part of the claimant, the Funds have in principle the same defence as the shipowner. However, the Funds are not entitled to invoke contributory negligence as grounds for total or partial exoneration in respect of preventive measures (Art. 4.3).

9.2.13 Increase of the limitation amounts

The 1992 Civil Liability and Fund Conventions and the Supplementary Fund Protocol provide for a simplified procedure for amendments to the limits laid down in the treaties (known as 'the tacit acceptance procedure') (Art. 15, Art. 33, and Art. 24 of the final clauses, respectively). Under that procedure, amendments to these limits may be decided by the IMO Legal Committee by a two-thirds majority, and such an amendment is deemed to have been accepted unless within a period of eighteen months (twelve months as regards the Supplementary Fund Protocol) at least one-quarter of the States parties communicate their objection to the IMO. An amendment deemed to have been accepted enters into force for all States parties, including for those that have opposed the amendment, eighteen months (twelve months as regards the Supplementary Fund Protocol) after its acceptance.

There are certain restrictions on the amendments that may be made to the limits. Firstly, no amendments may be considered less than five years (three years as regards the Supplementary Fund Protocol) from the date of the entry into force of the previous amendment. Secondly, no limit may be increased so as to exceed an amount which corresponds to the original limit increased by 6 per cent per year calculated on a compound basis from the date when the Convention or Protocol

[66] Incident in the United Kingdom in 2002 (92FUND/EXC.18/14 para. 3.12.13); incident in Bahrain 2004 (92FUND/EXC.25/6, paras 3.3.14–3.3.16). The position of the claimants was more difficult under the 1971 Fund Convention since in order to get compensation from the 1971 Fund the claimant had to demonstrate that the oil originated from a ship as defined in the 1969 Civil Liability Convention, ie a craft actually carrying persistent oil in bulk as cargo (Art. I.6); cf. incident in Sweden 1987 (71FUND/EXC.24/5 para. 15).

was opened for signature (ie 15 January 1993 for the 1992 Conventions and 31 July 2003 for the Supplementary Fund Protocol). Finally, no limit may be increased so as to exceed the original limit multiplied by three.

The tacit acceptance procedure was applied by the IMO Legal Committee in 2000, resulting in an increase of the limits laid down in the 1992 Civil Liability and Fund Conventions by 50.73 per cent.[67] The new limits apply to incidents occurring after 31 October 2003. The limitation amounts set out above are the increased limits.

9.2.14 STOPIA 2006 and TOPIA 2006

In view of the experience gained from some major incidents, in particular the *Erika* incident (France, 1999), the question of whether the 1992 Conventions should be revised was raised in the 1992 Fund, and in 2000 the 1992 Fund Assembly established a Working Group to consider this matter. The deliberations in the Working Group, which held a number of meetings during the period 2000–2005, resulted in the adoption of the Supplementary Fund Protocol.

The compensation regime created by the Civil Liability and Fund Conventions was intended to ensure an equitable sharing of the economic consequences of a tanker oil spill between the shipping and oil industries. One of the issues debated in the Working Group was whether shipowners should make a greater contribution to the costs of the regime, and the *Prestige* incident (Spain, 2002) was considered as supporting the need for amendments to this effect. It had been suggested by the oil industry that its share of the economic burden had become unfairly high. In the end it emerged that there was not sufficient support from the States parties for a revision of the Conventions, either as regards the distribution of the economic burden or in any other respect.

As an alternative to a revision of the Conventions, the shipping and insurance industries offered to create, on a voluntary basis, a compensation package consisting of two agreements, the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006, and the Tanker Oil Pollution Indemnification Agreement (TOPIA) 2006. These voluntary but legally binding agreements entered into force on 20 February 2006.[68]

STOPIA 2006, which applies to pollution damage in States for which the 1992 Fund Convention is in force, is a contract between owners of small tankers to

[67] Resolutions adopted by the IMO Legal Committee on 18 October 2000.

[68] STOPIA 2006 and TOPIA 2006 and their Explanatory Notes are reproduced in 92FUND/A/ES.10/13, Annexes IV and V. The main framework for the implementation of STOPIA 2006 and TOPIA 2006 is laid down in a Memorandum of Understanding between the 1992 Fund and the Supplementary Fund, on the one hand, and the International Group of P&I Clubs, on the other hand, reproduced in 92FUND/A/ES.11/6, Annex.

increase, on a voluntary basis, the limitation amount applicable to such tankers under the 1992 Civil Liability Convention. The contract applies to all tankers of 29,548 gross tonnage or less entered in one of the P&I Clubs which are members of the International Group and reinsured through the Group's pooling arrangements. The owners of the relatively small number of ships insured by an International Group Club which are not covered by the pooling arrangement may agree with the Club concerned to be covered by STOPIA 2006.

STOPIA 2006 does not affect the rights of victims under the 1992 Fund Convention, so the 1992 Fund continues to be liable under the 1992 Fund Convention to compensate the victims if and to the extent that the total damage exceeds the limitation amount applicable to the ship in question under the 1992 Civil Liability Convention. The owner of a ship to which STOPIA 2006 applies will, however, reimburse the 1992 Fund for any compensation paid by it under the 1992 Civil Liability Convention as a result of the limitation amount applicable to the ship under that Convention being less than 20 million SDR (US$28 million), which is equivalent to the limitation amount for a ship of 29,548 tons. The effect of STOPIA 2006 is therefore that the maximum amount of compensation payable by owners of ships of 29,548 gross tonnage or less is 20 million SDR.

TOPIA 2006, which is a contract between tanker owners, applies to all tankers entered in one of the International Group Clubs and reinsured through the Group's pooling arrangements. In respect of incidents which affect a State party to the Supplementary Fund Protocol involving a ship covered by TOPIA 2006, the Supplementary Fund will continue to be liable to compensate victims under the Supplementary Fund Protocol, but the Supplementary Fund is entitled to indemnification by the shipowner of 50 per cent of the compensation payments it has made to claimants.[69]

The 1992 Fund and the Supplementary Fund are not parties to the respective agreement, but the agreements confer legally enforceable rights on the 1992 Fund and the Supplementary Fund of indemnification from the shipowner concerned.

STOPIA 2006 has applied to one incident (*Solar 1*, Philippines, 2006), whereas as at 1 September 2015 there had been no incident covered by TOPIA 2006.

9.2.15 Claims handling in incidents involving the IOPC Funds

In the handling of claims the IOPC Funds have cooperated closely with the shipowner and his insurer, who, in nearly all major cases, has been one of P&I Clubs belonging to the International Group. The framework of the cooperation is laid

[69] For details of STOPIA 2006 and TOPIA 2006 see de la Rue and Anderson (n. 7) at 172–5.

down in a Memorandum of Understanding between the 1992 Fund and the Supplementary Fund, on the one hand, and the International Group, on the other.[70]

Since the IOPC Funds have a small Secretariat, they normally use external experts to assist the permanent staff to monitor the clean-up operations and to examine and assess claims, at least in respect of major incidents. The external experts are usually appointed jointly by the Fund involved in the incident and the P&I Club concerned.

In some cases, claims are channelled through the office of a designated local surveyor. Occasionally, when an incident gives rise to a large number of claims, the Fund involved and the P&I Club have jointly set up a local claims office so that claims may be processed more easily. Neither designated local surveyors nor local claims offices decide on the admissibility of claims; such decisions are taken by the respective Fund and the P&I Club.

The decisions as to whether claims are admissible and on the admissible quantum are taken by both the Fund involved and the shipowner/P&I Club. As regards the IOPC Funds, these decisions are taken by the Funds' governing bodies or the Funds' Director; the role of the experts is always only that of advisers. In order to expedite the payment of compensation, the Director has been given extensive authority to settle and pay compensation claims.

The policy of the 1971 and the 1992 Funds has been to start paying compensation only after the shipowner's insurer has made compensation payments up to the limitation amount applicable to the ship in question. Claimants have from the outset in most cases been paid the full amount of their established claim, first by the P&I Club involved and, after the aggregate of the Club's payments has reached the limitation amount, by the 1971 Fund or the 1992 Fund, as the case may be.[71] As mentioned above, problems have arisen in some cases where the aggregate amount of the established claims was expected to exceed the total amount available for compensation under the applicable Civil Liability and Fund Conventions, or where there was a risk that this could occur (cf. Section 9.2.11). Discussions have been taking place between the 1992 Fund and the P&I Clubs on how to overcome these problems, but so far the matter has not been resolved.[72]

[70] See n. 68.

[71] In the *Prestige* case (Spain, 2002), however, the 1992 Fund Executive Committee decided that the 1992 Fund should, in view of the particular circumstances of that case, make payments to claimants from the outset, although the P&I Club involved decided not to pay compensation directly to claimants but paid the limitation amount into the court. With respect to the reasons for the P&I Club's position see 92FUND/EXC.21/5 paras 3.2.11 and 3.2.34.

[72] The issue of interim payments traditionally made by the P&I Clubs has in recent years given rise to concerns on the part of the Clubs (IOPC/OCT13/11/1, section 4.3); see the analysis by M Jacobsson and R Shaw in IOPC/APR12/10/1.

In a number of major incidents giving rise to large number of compensation claims, the Fund involved and the P&I Club concerned have encountered difficulties in assessing the claims without undue delay. For these reasons a Working Group was set up by the 1992 Fund in 2009 to consider the procedures for the assessment of large numbers of claims for relatively small amounts, in particular where claimants could not prove their losses. In October 2012 the 1992 Fund Administrative Council adopted amendments to the Claims Manual which introduced procedures for the purpose of facilitating the assessment of such claims. In cases where insufficient documentary evidence is provided to support a claim and it is unjustified to request or expect additional data, compensation may be paid on the basis of an estimate of losses calculated from a recognized and reliable economic model. Any such model must be derived from actual data closely associated with the loss claimed and taken from the relevant sector or industry.[73]

The revised Manual also introduces a 'fast track' assessment of small claims. In order to avoid undue delay in the settlement of small claims, the 1992 Fund Executive Committee could decide, on a case-by-case basis, after considering the cost effectiveness and merits of assessing large numbers of small claims, to approve the use of 'fast track' assessments for a particular incident and set the quantum of 'small' claims for that incident. Such assessments will be made on the basis of a brief investigation by the Fund and its experts of the circumstances of the loss, but must include confirmation that such losses did actually occur and that there was a clear link of causation with the incident. Alternatively, claimants may prefer to await a settlement based on an in-depth, comprehensive assessment which will inevitably take longer. Claimants who disagree with the settlement offer under a 'fast-track' assessment will only have the assessment of their claim reconsidered based on the provision of new information proving their loss. Such a reassessment may result in higher or lower assessment than that offered under the 'fast track' assessment process.[74]

The fact that it has been possible to handle compensation claims efficiently is to a large extent due to the excellent cooperation that has existed over the years between the P&I Clubs and the IOPC Funds. Certain events associated with the *Nissos Amorgos* case in Venezuela and the liquidation of the 1971 Fund has, however, caused tensions as regards this longstanding relationship (see IOPC/OCT14/11/1, sections 3.3 and 8.2). It is crucial that the 1992 Fund/Supplementary Fund and the Clubs will be able to re-establish this important relationship, in order to ensure the efficient operation of the international compensation regime.

[73] Claims Manual para. 1.4.11.
[74] Claims Manual para. 2.7.5.

9.2.16 Financing of the IOPC Funds

The 1992 Fund and the Supplementary Fund are, and the 1971 Fund was, financed by contributions levied on any person who has received in the relevant calendar year more than 150,000 tonnes of crude oil and heavy fuel oil (contributing oil)[75] in ports or terminal installations in a State party to the respective Fund Convention or the Supplementary Fund Protocol after carriage by sea. A person whose receipts do not exceed 150,000 tonnes will still be liable to pay contributions for the quantity he has received if his receipts would exceed 150,000 tonnes when aggregated with the quantity of contributing oil received in the same State in the same year by any associated person or persons, defined as any subsidiary or commonly controlled entity (Art. 10).[76]

The financing of the IOPC Funds is based on a system of post-event contributions. The amounts required for compensation payments are thus levied in retrospect. Levies of contributions for major incidents are normally spread over several years.

Payments made by the Funds in respect of claims for compensation for oil pollution damage may vary considerably from year to year, resulting in fluctuating levels of contributions.

The levy of contributions is based on reports of oil receipts in respect of individual contributors. A State shall communicate every year to the Funds' Secretariat the name and address of any person in that State who is liable to contribute, as well as the quantity of contributing oil received by any such person (Art. 15). This applies whether the receiver of oil is a Government authority, a State-owned company or a private company.

Contributing oil is counted for contribution purposes each time it is received at ports or terminal installations in a State party after carriage by sea (Art. 10.1). The term 'received' refers to receipt into tankage or storage immediately after carriage by sea. The place of loading is irrelevant in this context; the oil may be imported from abroad, carried from another port in the same State or transported by ship from an offshore production rig. Oil received for transshipment to another port or received for further transport by pipeline is also considered received for contribution purposes. Discharge into a floating tank within the territorial waters of the State party (including its ports) constitutes a receipt, irrespective of whether the tank is connected with onshore installations via pipeline or not. Ships are

[75] A detailed definition of 'contributing oil' is given in Art. 1.3 of the Fund Conventions. A list of contributing and non-contributing oil to serve as a guide for contributors is set out in the Annex to the 1992 Fund's Internal Regulations which are available on the IOPC Funds' website.

[76] The question of whether a person falls within this definition is to be determined by the national law of the State concerned (Art. 10.2(b)).

considered to be floating tanks in this connection only if they are 'dead' ships, that is, if they are not ready to sail.[77]

The issue of whether oil transferred to/carried on board 'mother' vessels during a ship-to-ship oil transfer operation should be considered as received for the purpose of the contribution provisions in the 1992 Fund Convention and therefore taken into account for the levy of contributions, has been referred to the Working Group referred to in Section 9.2.3. The Working Group has also considered whether the 1992 Fund Assembly should confirm its decision taken in 2006 that oil discharged into permanently or semi-permanently anchored vessels engaged in ship-to-ship oil transfer operations should qualify as contributing oil. While considering the final Report of the Working Group in October 2015, the 1992 Fund Administrative Council decided to reverse that decision.

Annual contributions are levied by the Funds to meet the anticipated payments of compensation and administrative expenses during the coming year. Each contributor pays a specified amount per tonne of contributing oil received. The amount levied is decided each year by the respective Assembly.

The 1992 Fund has a General Fund and Major Claims Funds. Separate Major Claims Funds are established for incidents for which the total amount payable exceeds 4 million SDR (US$5.6 million).[78] Contributions to the General Fund are based on quantities of contributing oil received in the preceding calendar year, whereas contributions to Major Claims Funds are based on quantities of contributing oil received in the year preceding that in which the incident occurred, and contributions to Major Claims Funds are only to be paid by contributors in States that were parties to the 1992 Fund Convention on the date of the incident (Art. 13.2(b)).[79]

The contribution system for the Supplementary Fund differs from that of the 1992 Fund in that if the total quantity of contributing oil actually received in a State party to the Supplementary Fund Protocol is less than 1 million tonnes, that State will itself be liable to pay contributions for a quantity of contributing oil corresponding to the difference between 1 million tonnes and the aggregate quantity of actual oil receipts reported in respect of that State (Art. 14 and Art. 12 respectively).

[77] 92FUND/A.11/35 paras 32.19–32.21; IOPC/OCT15/11/1 para 4.3.23.

[78] The maximum amount payable from the General Fund was for the 1971 Fund 1 million SDR (US$1.4 million).

[79] As regards the Supplementary Fund only administrative expenses are charged to the General Fund (Art. 11.2(a)).

The contributions are payable by the individual contributors directly to the respective Fund. A State is not responsible for the contributions levied on contributors in that State, unless it has voluntarily accepted such responsibility (cf. Art. 14).[80]

A major problem has been caused by many States parties not fulfilling their obligations under the respective Fund Convention to submit oil reports to the Fund Secretariat. A number of States have had outstanding oil reports for several years. The governing bodies have repeatedly expressed their serious concern as regards the non-submission of oil reports, since these reports are crucial to the proper functioning of the Fund. The 1971 and 1992 Fund Conventions do not contain any provisions giving the governing bodies the power to impose sanctions against States that do not fulfil their obligations to submit oil reports.[81] In view of failure of a number of States to fulfil their obligations in this respect, the 1992 Fund Assembly nevertheless took a policy decision in October 2008 to the effect that where a State is two or more oil reports in arrears, any claim submitted by the Administration of that State or a public authority working directly on the response or recovery from the pollution incident on behalf of that State would be assessed for admissibility but payment would be deferred until the reporting deficiency was rectified.[82]

In the light of the difficulties that had arisen in the operation of the 1971 and 1992 Funds, a provision was inserted in the Supplementary Fund Protocol to the effect that compensation under the Protocol will be denied temporarily or permanently in respect of pollution damage in States that have failed to submit their oil reports (Supplementary Fund Protocol Art 15.2 and 15.3). It will be for the Supplementary Fund Assembly to decide whether compensation should be denied.

9.2.17 Recourse and subrogation

The provisions in the Civil Liability Conventions are without prejudice to the shipowner's right of recourse against third parties (Art. III.5). The shipowner is therefore entitled to pursue claims for recovery of the amounts paid by him in compensation by way of recourse against any third person who has caused or contributed to the incident or the resulting pollution, including those covered by the channelling provisions, for instance salvors and persons taking preventive measures.[83] Such recourse actions cannot, however, be actions under the Civil Liability Convention but must be based on the applicable national law.

[80] With respect to the distribution of contributions between Fund Member States see IOPC Funds' Annual Report 2014 at 20–1.

[81] Under Art. 15.4 of the 1971 and 1992 Fund Conventions, a State that does not fulfil its obligation to submit reports on contributing oil, and this results in a loss for the Fund, shall be liable to compensate the Fund for its loss. These provisions have never been invoked. The Supplementary Fund Protocol also contains such a provision (Art. 13.2).

[82] 92FUND/A.13/25 para. 15.14, 92FUND/A.13/13/1, section 6.

[83] de la Rue and Anderson (n. 7) at 107.

The 1992 Fund Convention provides that the 1992 Fund shall, in respect of any amount of compensation it has paid, acquire by subrogation the rights that the person so compensated may enjoy under the 1992 Civil Liability Convention against the shipowner or his insurer (Art. 9.1). Subject to the shipowner's/insurer's right to limitation of liability, the 1992 Fund is therefore entitled to take recourse action against the shipowner/insurer to recover the amounts that the Fund has paid in compensation to claimants.

It is further provided that nothing in the 1992 Fund Convention shall prejudice the right of the 1992 Fund concerned to subrogation against persons other than the shipowner and his insurer, and the Fund's right of subrogation against such persons shall not be less favourable than that of an insurer of the person compensated by the Fund (Art. 9.2 and 9.3).[84] As regards recourse actions against any other third parties the Fund would be subject to the same restrictions as such insurer.

The Supplementary Fund Protocol contains corresponding provisions, as did the 1971 Fund Convention.

It appears therefore that, as regards amounts paid by any of the Funds in compensation to the shipowner/insurer, that Fund would be entitled to bring recourse action also against persons protected by the channelling provisions, since the shipowner would be entitled to do so. With respect to compensation payments made by the Fund to persons other than the shipowner/insurer, the Fund would not be entitled to bring recovery actions against persons protected by the channelling provisions since the persons compensated would not be entitled to take such actions. The Fund would, however, be entitled to take recourse action in respect of subrogated claims against persons not protected by the channelling provisions, for example the owner of a colliding ship.

The 1971 and 1992 Funds have in a number of cases taken recourse action against entities not protected by the channelling provisions. These actions have been settled out of court and some of these cases have resulted in the Fund involved recovering significant amounts.[85]

In many incidents a State party to the Fund Convention or an agency of a State party pays compensation for pollution damage in accordance with national law. In such a case the State or agency acquires by subrogation the rights the person so

[84] As for the IOPC Funds' policy in respect of recourse actions see M Jacobsson,' 'The international compensation regime 25 years on' in *The IOPC Funds' 25 years of compensating victims of oil pollution incidents* at 18–20. See also de la Rue and Anderson (n. 7) at 165–7.

[85] An example of such a recourse action is the *Sea Empress* case (Wales, United Kingdom, 1996) in which the 1971 Fund took legal action against Milford Haven Port Authority on the grounds that the port authority had been in negligent breach of duty in relation to safe navigation within the Haven resulting in the grounding of the vessel. As a result of an out-of-court settlement the 1971 Fund recovered £20 million (US$30 million); Annual Report 2003 at 60–2.

compensated would have enjoyed under the Fund Convention (Art. 9.3). The Supplementary Fund Protocol contains a corresponding provision (Art. 9.4).

9.2.18 Time bar

Rights to compensation under the 1969 and 1992 Civil Liability Conventions from the shipowner and his insurer shall be extinguished unless legal action is brought within three years from the date when the damage occurred (Art. VIII). Rights to compensation from the 1971 and 1992 Fund shall be extinguished unless legal action is brought against the Fund concerned, or the Fund has been notified in accordance with the formalities required by the law of the court seized of the action against the shipowner within three years from the date when the damage occurred (Art. 6; cf. Art. 7.6).

Since oil spills may cause damage a considerable period of time after the incident occurred, for instance damage resulting from an escape of oil from a wreck, it was considered necessary to provide for an ultimate point in time after which claims may not be presented. It is therefore provided in the Civil Liability and Fund Conventions that in no case shall an action be brought after six years from the date of the incident which caused the damage. If the incident consisted of a series of occurrences, the six years period runs from the date of the first such occurrence (Art. VIII; Art. 6 and Art. 1.9). It should be noted that the notification to the Fund of an action against the shipowner does not interrupt the six years period.

Rights to compensation against the Supplementary Fund are extinguished only if they are extinguished against the 1992 Fund under the 1992 Fund Convention, and a claim against the 1992 Fund shall be considered as a claim made by the same claimant against the Supplementary Fund (Art. 6).

The interpretation of the time bar provisions in the Civil Liability and Fund Conventions, in particular how the time bar periods can be interrupted, have been subject to repeated discussions in the governing bodies of the 1971 and 1992 Funds. When the original Conventions, that is, the 1969 Civil Liability Convention and the 1971 Fund Convention, were drafted, only the English and French texts were authentic. The English text uses the expression that *rights to compensation shall be extinguished* unless an action is brought before the expiry of the relevant period, and the French text uses the expression *les droits à indemnisation s'éteignent.* The official translations of these Conventions into Spanish published by the IMO (which do not have the status of authentic texts) use as regards the 1969 Civil Liability Convention the wording *los derechos prescribirán a menos que se interponga una acción* and with respect to the 1971 Fund Convention *los derechos caducarán.* The translations of both the 1992 Civil Liability Convention and the 1992 Fund Convention use the word *prescibirán*. It should be noted that under Spanish legal principles, which also apply in the Latin American countries, the word *prescribirán*

indicates that the time period in question can be interrupted otherwise than by legal action whereas *caducarán* indicates that it cannot.

It is submitted that it is clear from the wording of the English and French texts of the Civil Liability and Fund Conventions (*shall be extinguished, s'éteignent*) that the periods in those Conventions can only be interrupted by legal action taken before the expiry of the relevant time periods. The preparatory works leading up to the first treaty containing such a time bar provision, that is, the 1969 Civil Liability Convention, also show that it was the intention of the drafters of these provisions that the running of the periods could only be interrupted by legal action.[86]

9.2.19 Jurisdiction and enforcement of judgments

Under the Civil Liability and Fund Conventions, the courts of the State where the damage was caused or where the preventive measures were taken have exclusive jurisdiction over actions for compensation against the shipowner and his insurer and against the respective Funds (Art. IX.1 and Art. 7.1).[87]

If an incident causes damage to which the Conventions apply in more than one State, the courts of all affected States parties have jurisdiction. In such cases, all claims could be brought before the courts in one of these States, but it is also possible that courts in several States will be seized with claims arising from the same incident.

After a limitation fund has been constituted by the shipowner, the courts of the State where that fund is constituted have exclusive jurisdiction to determine matters relating to the apportionment and distribution of the limitation fund (Art. IX.3). This provision does not, however, affect the competence of courts in other affected States to entertain actions for compensation.

It should be noted that the Conventions only govern the distribution of competence between the jurisdictions of the States parties. It is for each State party to decide which of its national courts should be competent to hear cases under the Conventions.

A final judgment by a court competent under the Conventions, which is enforceable in the State where the judgment is rendered and where it is no longer subject

[86] With respect to the consideration by the IOPC Funds governing bodies of the interpretation of these provisions reference is made to 71FUND/AC.19/5, paras 4.2.6–4.2.25 and IOPC/OCT10/11/1, para. 3.3.30; M Jacobsson, 'Uniform application of the international compensation regime on liability and compensation for oil pollution damage' in T Malick Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah* (Brill, 2007) at 426–7.

[87] If an action has been brought under the Civil Liability Convention in a court in a State party to that Convention but not to the Fund Convention, action against the Fund shall be brought, at the claimant's option, either before a court of the State where the Fund has its Headquarters or before any court of a State party to the Fund Convention competent under the former Convention.

to ordinary forms of review, shall be recognized and enforceable in all other States parties without the merits of the case being reopened. This does not apply where the judgment was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present his case (Art. X and Art. 8).[88] As regards the Funds, enforceability of a judgment is subject to any decision concerning the distribution of the amount available for compensation under the applicable Fund Convention (or the Supplementary Fund Protocol) taken by the Fund's competent governing body (Art. 8; cf. Art 4.5 and Art. 18.7).[89]

9.2.20 Uniform application of the Conventions

As mentioned above, the IOPC Funds' governing bodies have taken a position on the interpretation of various provisions in the Civil Liability and Fund Conventions. So far, there have been only a limited number of cases in which national courts have interpreted and applied these Conventions in a manner which is at variance with the position taken by the governing bodies, ie by the governments of the States parties. Some decisions by national courts have, however, given rise to concern, for instance as regards the admissibility of claims for environmental damage,[90] the interpretation of the definition of ship,[91] the provisions concerning time bar[92] and the provisions which channel the liability to the registered owner and prohibit compensation claims against, inter alia, the master of the ship.[93]

The governing bodies of the IOPC Funds have repeatedly emphasized the importance of uniform application of the Civil Liability and Fund Conventions. In 2003 the 1992 Fund Administrative Council, acting on behalf of the Assembly, adopted a Resolution on the interpretation and application of the 1992 Civil Liability Convention and the 1992 Fund Convention.[94] In the Resolution it was stated that it

[88] In the *Plate Princess* case (Venezuela, 1997) the 1971 Fund Administrative Council maintained in October 2012 the instructions previously given to the Director not to make any payments in respect of the incident and to oppose any enforcement of the judgment by the Venezuelan Supreme Court on the basis of Article X of the 1969 Civil Liability Convention, ie that the judgment had been obtained by fraud and that the principles of due process had not been followed and on the basis of Art. 4.5 of the 1971 Fund Convention on equal treatment of claimants; IOPC/APR12/12/1 para. 3.2.60 and IOPC/OCT12/11/1 para. 3.4.36. As regards the possibilities for enforcement of this judgment reference is made to the legal opinion by Dr Thomas A Mensah reproduced in IOPC/OCT12/3/4/1 Annex II. Since the 1971 Fund has been dissolved, the judgment cannot in any event be enforced against that Fund. See also IOPC/OCT15/3/11.

[89] With respect to the possible conflict with EU Regulation No 44/2001 on jurisdiction and enforcement of judgments in civil and commercial matters see M Jacobsson, 'Perspective of the global compensation regimes; the relationship between EU legislation and maritime liability conventions' (2012) *European Journal of Commercial Contract Law* 63. See also H Ringbom, 'EU Regulation 44/2001 and Its Implications for International Maritime Liability Conventions' (2004) *Journal of Maritime Law and Commerce*.

[90] *Erika* incident (France, 1999) (n. 46).

[91] *Slops* incident (Greece, 2000); IOPC Funds' Annual Report 2006 at 94–100.

[92] *Plate Princess incident* (Venezuela, 1997); Incidents involving the IOPC Funds 2011 at 71–3.

[93] Jacobsson, 'Uniform application' (n. 86) at 435.

[94] 1992 Fund Resolution No 8 (92FUND/AC.1/A/ES.7/7, Annex).

was crucial for the proper and equitable functioning of the regime established by the 1992 Conventions that these Conventions were implemented and applied uniformly in all States parties, and that claimants for oil pollution damage were given equal treatment as regards compensation in all States parties. The Resolution also emphasized the importance of national courts in States parties giving due consideration to the decisions of 1971 and 1992 Funds on such matters.

9.3 International Convention on Liability for Bunker Oil Pollution Damage (Bunkers Convention)

9.3.1 Introduction

The Bunkers Convention deals with spills of bunkers from ships not covered by the 1992 Civil Liability Convention, that is, in general terms ships other than oil tankers. Like the 1992 Civil Liability Convention, the Bunkers Convention provides for strict liability and compulsory insurance, and contains provisions on jurisdiction and enforcement of judgments.

The Bunkers Convention is a single-tier regime. There is no second tier of compensation provided by an international fund as is the case in respect of oil pollution caused by tanker oil spills through the 1992 Fund Convention. During the negotiations that led to the adoption of the Bunkers Convention it was considered that it would be easier to reach consensus on a one-tier regime and that such a regime would be sufficient in most cases to ensure full compensation to victims of bunker oil spills.

Although there are important differences between the Bunkers Convention and the 1992 Civil Liability Convention, many of the provisions in the two Conventions are identical. It is submitted that it would be a great advantage, therefore, if the experience gained in the application of the Civil Liability and Fund Conventions were taken into account in the application of the Bunkers Convention and, in particular, if the interpretation of the concept of pollution damage adopted by the IOPC Funds' governing bodies were taken as a guide in the application and interpretation of the Bunkers Convention.[95]

9.3.2 Scope of application

The Bunkers Convention applies to pollution damage caused by spills of bunker oil. The geographical scope of application of the Bunkers Convention is identical

[95] For a detailed analysis of the Bunkers Convention see M Jacobsson, 'Bunkers Convention in force' (2009) *Journal of International Maritime Law* 21; M Jacobsson,' 'La Convención Bunker en vigor' in *Analisis de 10 años de vigencia de las leyes marítimas venezolanas*, Academia de Ciencias Políticas y Sociales, Universidad Central de Venezuela, Serie Eventos 28, 2012, 407; de la Rue and Anderson (n. 7) at 255–66.

to that of the 1992 Civil Liability Convention (Art. 2). It applies thus to pollution damage caused in the territory, including the territorial sea, of a State party to the Bunkers Convention and in the EEZ or equivalent area of such a State, and to reasonable measures, wherever taken, to prevent or minimize pollution damage which falls under the Convention.

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 (Art. 1.5). The criterion for determining whether oil on board a ship falls within this definition is therefore its intended use.

The Bunkers Convention applies not only to spills of persistent bunker oil but also, unlike the 1992 Civil Liability Convention, to spills of non-persistent bunker oil, for instance medium fuel oil.

The concept of 'ship' is defined in the Bunkers Convention as any seagoing vessel or seaborne craft of any type whatsoever (Art. 1.1). This definition covers in principle oil tankers. Also Mobile Offshore Drilling Units (MODUs) fall within that definition.

As is the case in respect of the Civil Liability Conventions, the Bunkers Convention does not apply to warships and other ships owned or operated by a State and used at the time of the oil spill only on government non-commercial service. A State may, however, decide to apply the Bunkers Convention also to its warships and other ships on non-commercial service (Arts 2 and 4.3).

The Bunkers Convention does not apply to pollution damage 'as defined in the 1992 Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention' (Art. 4.1).[96] As mentioned above (Section 9.2.3), the latter Convention applies to ships constructed or adapted for the transport of oil in bulk as cargo, with the proviso that a ship that is capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk on board. The 1992 Civil Liability Convention therefore applies to bunker spills from laden oil tankers and to bunker spills from unladen oil tankers having residues of persistent oil from a previous voyage on board, whereas the Bunkers Convention applies to bunker spills from ships other than oil tankers and to bunker spills from unladen oil tankers having no such residues on board.

[96] The LLMC contains a similar provision (Art. 3(b)) but that provision refers to claims for pollution damage *within the meaning of* the 1969 Civil Liability Convention or any amendment or Protocol thereto that is in force. Different views have been expressed as to the scope of this latter provision; see Jacobsson, 'Bunkers Convention' (n. 95) at 24–5; de la Rue and Anderson (n. 7) at 795; Griggs et al (n. 57) at 27–8; Selvig (n. 57) at 21; Martínez Gutiérrez (n. 57) at 190–5.

9.3.3 Concept of damage

The definition of pollution damage in the Bunkers Convention (Art. 1.9) is identical to that in the 1992 Civil Liability Convention (cf. Section 9.2.5).

As is the case for the Civil Liability Conventions, the Bunkers Convention covers only pollution damage and does not apply to damage caused by for instance fire or explosion.

9.3.4 Shipowner's liability

Whereas the 1992 Civil Liability Convention imposes liability only on the registered owner of the ship from which the oil originates, the Bunkers Convention imposes liability on 'the owner, including the registered owner, bareboat charterer, manager and operator of the ship' (Art. 1.3).[97]

The shipowner—as defined—has under the Bunkers Convention (Art 3.3 and 3.4) strict liability for pollution damage caused by oil spilled from the ship as a result of an incident. The owner's defences under the Bunkers Convention are identical to those under the Civil Liability Convention (see Section 9.2.6).

The persons falling within the definition of shipowner are jointly and severally liable under the Bunkers Convention (Art. 3.2). The Convention does not address the issue of how the liabilities are to be distributed between the liable parties, so that issue will have to be determined in accordance with the applicable national law.

No claims for compensation for pollution damage resulting from a bunker oil spill may be made outside the Bunkers Convention against any of the persons falling within the definition of shipowner (Art. 3.5).

As is the case under the Civil Liability Convention, the Bunkers Convention does not prejudice any right of recourse that the shipowner—as defined—may have independently of the Convention (Art. 3.6).

An incident involving more than one ship may give rise to bunker pollution damage. The shipowners—as defined—of all ships concerned are in such a case jointly and severally liable for all such damage that is not reasonably separable, unless they may invoke one of the exemptions from liability referred to above (Art. 5).

9.3.5 No channelling of liability

Unlike the 1992 Civil Liability Convention, the Bunkers Convention does not contain any channelling provisions excluding claims against parties other than the registered shipowner. This means that members of the crew, pilots, salvors, and

[97] Concerning the reasons for making several persons jointly and severally liable see Jacobsson, 'Bunkers Convention' (n. 95) at 26.

persons taking measures to prevent or minimize pollution damage are not protected against compensation claims.[98]

States are free, however, to introduce channelling provisions in their national legislation. It had been suggested during the preparatory work that the absence of channelling provisions in the Bunkers Convention could act as a disincentive for salvage operations and preventive measures. To meet the concerns in this regard expressed by a number of States and by the industries concerned, the Diplomatic Conference that adopted the Convention also adopted a Resolution inviting States to consider, when implementing the Bunkers Convention, the need to introduce in their national legislation immunity for salvors and persons taking preventive measures.

9.3.6 Limitation of liability

The Bunkers Convention does not create a special regime as regards limitation of liability, but it is provided that nothing in the Convention shall affect the right of the shipowner—as defined—and the insurer to limit liability under any applicable national or international regime, such as the 1976 LLMC as amended (Art. 6). The issue of limitation is therefore to be resolved pursuant to the national or international regime, if any, which applies in the State concerned in respect of limitation of liability for maritime claims in general.[99]

The most likely international regime to be applied is the 1976 LLMC, in its original version or as amended by the 1996 Protocol thereto.[100] If the LLMC applies, the owner, charterer, manager and operator of the ship are entitled to limit their liability pursuant to the terms of that Convention, and there will be a single limitation amount for the aggregate liabilities.

It should be noted that, whereas the entire limitation amount under the Civil Liability Conventions is available for claims under these Conventions, claims under the Bunkers Convention will, if the right of limitation is governed by the LLMC, have to compete in the limitation amount with other types of claim.

The linkage to the applicable national and international regime results in uncertainty on several points. Firstly, the limitation amount will differ, dependent on the State in which the pollution occurs. Many States are still parties to the 1976 LLMC whereas others have ratified the 1996 Protocol thereto. A number of States

[98] With respect to the reasons for the difference on this point between the 1992 Civil Liability Convention and the Bunkers Convention, see Jacobsson, 'Bunkers Convention' (n. 95) at 27–8.

[99] With respect to the relationship between the LLMC and the Bunkers Convention see Martínez Gutiérrez (n. 57) at 190–196.

[100] In April 2012 the IMO Legal Committee decided, by application of the so called 'tacit acceptance procedure', to increase the limitation amounts provided in the LLMC by 51%. The amendments entered into force on 8 June 2015.

have not ratified either of these instruments but are parties to a Convention of 1957 dealing with the subject, and some States remain parties to a Convention adopted in 1924, both of which provide very low limits. Other States are not parties to any Convention on limitation of liability but have national legislation on the subject. If the State party to the Bunkers Convention where the pollution damage occurred does not provide in its national law for limitation of liability for maritime claims, the liability under the Bunkers Convention will be unlimited.[101]

Secondly, the LLMC does not explicitly grant the right of limitation as regards pollution claims. Some categories of claim that normally arise from oil pollution, eg claims for property damage and clean-up costs, would probably fall within the list of the different categories of claim which are subject to limitation under the LLMC. There are, however, other claims where the situation may not be clear, for example claims for pure economic loss suffered by fishermen and businesses in the tourism industry.[102]

Unlike what is the case under the Civil Liability Conventions, the constitution of a limitation fund is not pursuant to the LLMC a condition for limitation of liability, and this would apply also to claims under the Bunkers Convention. A State party to the LLMC may, however, in its national law provide that a person is only entitled to invoke the right of limitation in its courts if a limitation fund has been established (Art. 10).

Pursuant to the LLMC, as under the 1992 Civil Liability Convention, a liable person is not entitled to limit his liability if the loss resulted from *his* personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result (Art. 4). In cases where the right of limitation for bunker pollution claims is to be determined under the LLMC, the fact that one of the liable persons loses his right of limitation as a result of *his* behaviour should not, in principle, affect the right to limitation of other persons who are jointly and severally liable with the former under the Bunkers Convention. However, since there is often a close relationship between the management and ownership structures, it is possible that the *alter ego* (ie the person(s) for whose

[101] Recognizing this uncertainty, the 2001 Diplomatic Conference adopted a Resolution (Conference Resolution 1) in which States that had not already done so were urged to ratify the 1996 Protocol to the LLMC and encouraged to denounce the 1976 LLMC; States parties to the 1924 or 1957 Conventions were encouraged to denounce these Conventions.

[102] The problem was recognized at the 2001 Diplomatic Conference but the issue was not pursued. As regards the question of which categories of claim are entitled to limitation under the LLMC see Griggs et al (n. 57) at 17–26; Martínez Gutiérrez (n. 57) at 190–6; de la Rue and Anderson (n. 7) at 263. The United Kingdom legislation appears to have eliminated this uncertainty by providing that, for the purpose of limitation of liability, all claims for bunker pollution should be deemed to be claims for property damage within the meaning of Art. 2.1(a) of the LLMC (Merchant Shipping Act 1995 as amended s. 168).

acts a legal person is liable) of both liable persons would be considered to be the same.[103]

9.3.7 Compulsory insurance

The Bunkers Convention provides for a system of compulsory liability insurance which shall cover the liabilities under the Convention. The obligation to maintain insurance or other financial security rests only on the registered owner of the ship (Art. 7.1). The provisions in the Bunkers Convention on insurance, including the possibility for claimants to bring compensation claims directly against the insurer, and on issuance of insurance certificates, are to a large extent identical to the corresponding provisions in the 1992 Civil Liability Convention.

The insurance requirement under the Bunkers Convention only applies to ships having a gross tonnage over 1000 (Art. 7.1). States are given the possibility to exempt from the insurance obligation vessels engaged purely on domestic voyages, ie operating exclusively in its territory and territorial sea (Art. 7.15).

The insurance shall cover 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 under the 1976 LLMC as amended (Art. 7.1).

Insurance certificates shall be issued by the State of the ship's registry, provided it is a party to the Bunkers Convention. As for ships flying the flag of a State not a party to the Convention, the certificate shall be issued by another State that is a party thereto (Art. 7.2).

As regards the problems that have arisen in respect of insurance cover relating to certain acts of terrorism and piracy, reference is made to what is stated above concerning the Civil Liability Conventions (Section 9.2.10). As is the case in respect of the Civil Liability Conventions, the P&I Clubs have been prepared to certify that cover is in place under the Bunkers Convention for damage resulting from acts of terrorism.

Insurance certificates issued by the authority of a State party to the Bunkers Convention shall be accepted by the other States parties (Art. 7.9). The corresponding provision in the Civil Liability Conventions appears not to have caused any problems, because the ships to which those Conventions apply, mainly oil tankers, are normally insured for third party liabilities by one of the P&I Clubs belonging to the International Group of P&I Clubs, and there has not been considered to be any real risk that such an insurer would not be able to honour its obligations under the insurance policy. The situation is not the same for ships other than oil tankers, where a considerable number of ships are insured by or provided with financial

[103] Griggs et al (n. 57) at 31–5; Martínez Gutiérrez (n. 57) at 62–4.

guarantees by less well-known entities, and it could be difficult for States when issuing certificates under the Bunkers Convention to assess the solvency of some of these insurers or guarantors.[104] The ship holding a certificate issued by the authority of a State party may, however, not be refused entry to the ports of another State party on the grounds that there is doubt about the solvency of the insurer.

The Bunkers Convention contains a provision to the effect that a State party may at any time request consultation with the State having issued an insurance certificate if it believes that the insurer named in the certificate is not financially capable of meeting the obligations imposed by the Convention (Art. 7.9). It appears that the identical provisions in respect of certificates issued under the Civil Liability Conventions (Art. VII.7) have never been invoked.

The Bunkers Convention takes account of the fact that some States may prefer insurance certificates to be kept in electronic form. A State party may therefore notify the Secretary-General of IMO that ships are not required to carry on board or to produce an insurance certificate when entering or leaving its ports, provided that the State party that issues the certificate has notified the Secretary-General that it maintains records in an electronic format, accessible to all States parties, attesting the existence of the certificate (Art. 7.13).

The IMO Assembly has adopted a Resolution on the issuing of insurance certificates under that Bunkers Convention for bareboat chartered ships. In the Resolution, while acknowledging that there had been different interpretations of the Bunkers Convention on this matter (ie whether certificates for such ships should be issued by the State of the underlying registry or by the State where the bareboat charter is registered and whose flag the ship is flying), it is recommended that all States parties should recognize that certificates for ships under bareboat charter should be issued by the flag State, if that State is a party to the Convention.[105]

The IMO Assembly has also adopted a Resolution in which the States parties to the Bunkers Convention are recommended to require that ships flying their flag or entering or leaving their ports hold a certificate as prescribed by that Convention, even when the ship concerned also holds a certificate issued under the Civil Liability Convention.[106]

[104] In November 2010 the IMO Legal Committee adopted Guidelines for accepting documentation from insurance companies, financial security providers and P&I Clubs addressed to States parties to the Bunkers Convention (IMO document LEG 97/15 Annex 3). It is recommended in the Guidelines that States parties should accept documentation from International Group Clubs and that they should when receiving documentation from insurers or financial security providers outside the International Group verify the financial standing and solvency of such insurers or providers.

[105] Resolution A.1028(26); as regards the discussions in the IMO Legal Committee see IMO document LEG 96/13, paras 6.1–6.16.

[106] Resolution A.1055(27); with respect to the discussion of this issue in the IMO Legal Committee see IMO document LEG 97/7, paras 9–13.

Certificates of insurance under the Bunkers Convention will also have to be issued for Mobile Offshore Drilling Units (MODUs). It should be noted that, although MODUs may be considered as seagoing ships, the LLMC does not apply to such units (Art. 15.5(b)).[107]

9.3.8 Recourse and subrogation

The provisions on recourse and subrogation in the Bunkers Conventions (Art. 3.6) are identical to those in the Civil Liability Conventions (see Section 9.2.17).

9.3.9 Time bar

The time bar provisions in the Bunkers Convention (Art. 8) are identical to the corresponding provisions in the Civil Liability Convention. As regards the interpretation of these provisions reference is made to Section 9.2.18.

9.3.10 Jurisdiction and enforcement of judgments

The provisions in the Bunkers Convention on jurisdiction and recognition and enforcement of judgments in respect of actions against the shipowner (as defined) and his insurer (Art. 9) follow those in the Civil Liability Convention (cf. Section 9.2.19).[108]

9.4 The Regime Relating to Damage Caused by Hazardous and Noxious Substances

9.4.1 Introduction

Damage caused by hazardous and noxious substances is governed by the 1996 HNS Convention.[109] The HNS Convention will establish a two-tier system of compensation, with the first tier being paid for by the individual shipowner or his insurer and the second by the International Hazardous and Noxious Substances Fund (HNS Fund).[110]

[107] See IMO document LEG 97/15 paras 7.6–7.9.

[108] With respect to the possible conflict with EU Regulation No 44/2001 see Jacobsson, 'EU legislation' (n. 89) at 70. See also Ringbom: EU Regulation 44/2001 (n. 89).

[109] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London, 3 May 1996, not in force) (the 'HNS Convention').

[110] For a detailed analysis of the HNS Convention see Jacobsson, 'The HNS Convention' (n. 50); M Jacobsson, 'El Protocolo de 2010 relativo al Convenio Internacional sobre Responsabilidad e Indemnización de Daños en Relación con el Transporte Marítimo de Sustancias Nocivas y Potencialmente Peligrosas, 1996 (Convenio SNP)—¿Se han eliminado los obstáculos para la entrada en vigor del Convenio?' (2014) 58 *Revista de Estudios Marítimos* 19. See also de la Rue and Anderson (n. 7) at 269–93; M Göransson, 'The HNS Convention' (1997) *Uniform Law Review* 249.

As mentioned above, the 1996 HNS Convention which did not enter into force has been amended by a Protocol to the Convention adopted in 2010.[111] The 2010 Protocol has not yet entered into force.

The 1996 HNS Convention and the 2010 Protocol shall be read and interpreted as one single instrument. The 1996 HNS Convention, as amended by the 2010 Protocol, shall constitute the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (2010 HNS Convention) (Art. 18 of the 2010 Protocol).

The HNS Convention has been modelled on the 1992 Civil Liability and Fund Conventions, and many of the provisions in the HNS Convention are identical or very similar to the corresponding provisions in the 1992 Conventions. It is submitted that it would preferable if the experience gained in the application of the Civil Liability and Fund Conventions were taken into account in the application of the HNS Convention.

9.4.2 Definition of hazardous and noxious substances

The definition of hazardous and noxious substances (hereinafter referred to as *hazardous substances*) in the HNS Convention is largely based on lists of individual substances that have been previously identified in a number of IMO Conventions and Codes designed to ensure maritime safety and prevention of pollution. The concept of 'hazardous substances' is defined in Article 1.5 as any substances, materials, and articles carried on board a ship as cargo referred to in a number of IMO instruments as set out below (subject to certain qualifications):[112]

- The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), Annex I Appendix I (oils carried in bulk);
- MARPOL 73/78 Annex II. Appendix II (dangerous liquid substances carried in bulk);
- The International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983 (IBC Code) (dangerous liquid substances carried in bulk);
- The International Maritime Dangerous Goods Code (IMDG Code) (dangerous, hazardous, and harmful substances carried in packaged form);
- The International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983 (IGC Code) Chapter 19 (liquefied gases);

[111] 2010 Protocol to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (adopted London, 30 April 2010, not in force).

[112] The definition of the substances covered by the HNS Convention is very detailed, and it has not been possible to give an exhaustive description thereof in this section.

- The Code of Safe Practice for Solid Bulk Cargoes (BC Code), Appendix B (solid bulk materials possessing chemical hazards) to the extent the materials are also subject to the IMDG Code when carried in packaged form.

The definition also covers liquid substances carried in bulk with a flashpoint not exceeding 60° as well as residues from previous carriage in bulk of substances referred to in the above instruments.

The definition includes bulk solids, liquids including oils (both persistent and non-persistent), liquefied gases such as liquefied natural gases (LNG) and liquefied petroleum gases (LPG).

A number of bulk solids such as coal, grain, and iron ore and certain types of fishmeal are excluded because of the low hazards they present.

Packaged goods are only included to the extent they are covered by the IMDG Code.

The number of substances covered by the definition of hazardous substances in the HNS Convention is very large. It is estimated that the definition incorporates some 6,000 substances. The IMDG Code, for instance, lists hundreds of materials which can be dangerous when shipped in packaged form. In practice, however, the number of hazardous substances covered by the definition that are shipped in significant quantities is relatively small.

The references in the definition to the various instruments are to the instruments as amended, that is, their most recent versions. As a result, amendments to these instruments adopted by the competent bodies of IMO (in most cases by application of a tacit acceptance procedure) will be automatically included in the HNS Convention, which in this manner will be continuously adapted to the developments within the chemical industry. There is one exception to this approach, namely the reference in Article 1.5(vii) which is to the IMDG Code in its 1996 version.[113]

9.4.3 Geographical scope of application

The HNS Convention applies (Art. 3) to:

(a) any damage caused in the territory, including the territorial sea, of a State party, provided that damage to property is covered only if caused outside the ship carrying the hazardous substances;

[113] This provision, as amended by the 2010 Protocol, reads: 'solid bulk materials possessing chemical hazards covered by the International Maritime Solid Bulk Cargoes Code, as amended, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code in effect 1996, when carried in packaged form'. As regards the discussion concerning this provision at the 2010 Diplomatic Conference see Jacobsson, 'The HNS Convention' (n. 50) at 52–3.

(b) damage by contamination of the environment caused in the exclusive economic zone (EEZ) or equivalent area of a State party;
(c) damage, other than damage by contamination of the environment, caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State party; and
(d) preventive measures wherever taken.

The scope of application is a geographical one, and depends on the place where the damage occurred and not on the place of the incident. The type of damage caused is also relevant and, as regards item (c) above, the nationality of the ship involved.

Any damage caused in the territory or territorial sea of a State party is covered with the proviso that property damage is covered only if caused outside the ship carrying the hazardous substances; loss of life and personal injury is covered whether caused on board or outside the ship (cf. Art. 1.6(a) and (b)).

The applicability outside the territorial sea depends on the type of the damage. Damage by contamination of the environment is covered also if caused in the exclusive economic zone of a State party. Other types of damage caused outside the territorial sea are covered only if caused by substances carried by a ship registered in a State party.

9.4.4 Ships covered by the HNS Convention

'Ship' is defined in the HNS Convention as 'any seagoing vessel or any seaborne craft of any type whatsoever' (Art. 1.1). This is in contrast to the 1992 Civil Liability Convention, which only applies to vessels constructed or adapted for the carriage of oil in bulk as cargo (ie in general terms to oil tankers). The definition in the HNS Convention would probably include barges and other craft without means of steering or propulsion.

The shipowner is only liable under the Convention for damage caused by hazardous substances *in connection with their carriage by sea* on board the ship (Art. 7.1). 'Carriage by sea' is defined as the period from the time when the hazardous substances enter any part of the ship's equipment, on loading, to the time when they cease to be present in any part of the ship's equipment, on discharge. If no ship's equipment is used, the period begins and ends respectively when the hazardous substances cross the ship's rail (Art. 1.9).

A State may declare that the HNS Convention does not apply to ships which do not exceed 200 gross tonnage and which carry hazardous substances only in packaged form while the ships are engaged on voyages between ports or facilities of that

State. Two neighbouring States may agree to extend their declarations to cover voyages between them (Art. 5.1 and 5.2).

The HNS Convention does not apply to warships, naval auxiliary, or other ships owned or operated by a State and used, at the time of the relevant incident, only on government non-commercial service. A State may, however, decide to apply the HNS Convention to its warships and other ships on non-commercial service (Art. 4.4 and 4.5).

9.4.5 Exclusion relating to contracts of carriage

The HNS Convention does not apply to claims arising out of any contract for the carriage of goods and passengers (Art. 4.1).[114]

9.4.6 Damage covered by the HNS Convention

The concept of damage in the HNS Convention is much wider than in the 1992 Civil Liability Convention. The following types of damage will be covered under the HNS Convention (Art. 1.6):

- loss of life or personal injury on board or outside the ship carrying hazardous substances;
- loss of or damage to property outside the ship;
- economic loss resulting from contamination of the environment, eg in the fisheries and tourism sectors;
- costs of preventive measures (ie reasonable measures to prevent or minimize damage);
- costs of reasonable measures of reinstatement of the environment.

In order for the HNS Convention to apply, the damage must be caused by the hazardous or noxious character of the substances involved (Art. 1.6, third subparagraph).

The HNS Convention does not apply to pollution damage as defined in the 1969 Civil Liability Convention as amended, which in most cases means the 1992 Civil Liability Convention (Art. 4.3(a)). This exclusion applies whether or not compensation is payable under the latter Convention. This provision results in any pollution damage caused by persistent oil being excluded from the scope of the HNS Convention.

The exclusion provision is not restricted to cases where the Civil Liability Convention is in force in the State where the pollution damage occurred and thus actually applies to the incident. As a result, neither the Civil Liability Convention nor the

[114] As for the interpretation of this provision see Jacobsson, 'The HNS Convention' (n. 50) at 29.

HNS Convention will apply to pollution damage caused by persistent oil in States not parties to the former Convention.[115]

It should be noted that damage caused by persistent oil carried as cargo other than pollution damage is covered by the HNS Convention, for instance damage caused by fire or explosion. Furthermore, any damage caused by non-persistent oil, both pollution damage and other types of damage, is covered by the HNS Convention.

The HNS Convention does not apply to damage caused by bunker fuel oils but is confined to oil carried as cargo (cf. Art. 1.5(a)). During the preparatory work, it was considered that including bunker oil would complicate the Convention since it would basically affect any vessel of whatever type.[116]

Damage caused by certain types of radioactive material is also excluded from the scope of the HNS Convention (Art. 4.3(b)).

The definition of 'preventive measures' in the HNS Convention is identical to the corresponding definition in the 1992 Civil Liability Convention (cf. Section 9.2.5.3).

The definition of damage in the HNS Convention contains the same proviso as the 1992 Civil Liability Convention, namely 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 (Art. 1(c))(cf. Section 9.2.5.5).

If it is not reasonably possible to separate damage caused by hazardous substances from that caused by other factors, all such damage shall be considered as having been caused by the hazardous substances. This does not apply, however, if and to the extent that the damage caused by other factors falls within the definition of pollution damage laid down in the Civil Liability Convention (Art. 1.6, second subparagraph).

9.4.7 Shipowner's liability

Under the HNS Convention, the registered shipowner will have strict liability for any damage caused by hazardous substances in connection with their carriage by sea on board his ship (Art. 7.1).

The shipowner may under the HNS Convention (Art. 7.2) invoke the same grounds of exoneration as those provided for in the 1992 Civil Liability Convention (see Section 9.2.6).

[115] As mentioned above the LLMC contains a similar provision. With respect to the interpretation of that provision see n. 96.

[116] Concerning the discussions during the preparatory work see Göransson (n. 110) at 257.

In addition, the shipowner is exempt from liability under the HNS Convention if the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped *either* caused the damage, wholly or partly, *or* led the owner not to obtain insurance. This defence is not available to the shipowner if he or his servants knew or ought reasonably to have known of the hazardous and noxious nature of the substances shipped (Art. 7.2(d)).

The shipowner has, pursuant to the HNS Convention, the same defence as under the Civil Liability Convention against a person who has suffered damage but has intentionally or negligently contributed to the damage (Art. 7.3) (cf. Section 9.2.6).

No claims for compensation for damage caused by hazardous substances covered by the HNS Convention may be made against the shipowner otherwise than in accordance with that Convention (Art. 7.4).

There are special provisions for incidents involving more than one ship each of which is carrying hazardous substances. Unless exonerated from liability under the HNS Convention, the shipowners are jointly and severally liable for all such damage that is not reasonably separable. However, each shipowner is entitled to the liability limit applicable to him, and the rights of recourse between the shipowners are not affected (Art. 8).

9.4.8 Limitation of liability

The shipowner will under the 1996 HNS Convention normally be able to limit his liability to the following amounts:

(a) 10 million SDR (US$13.9 million) for ships not exceeding 2,000 units of gross tonnage;
(b) for ships with a tonnage in excess thereof, the following amount in addition to 10 million SDR
    (i) for each unit of tonnage from 2,001 to 50,000 units, 1,500 SDR (US$2 079);
    (ii) for each unit in excess of 50,000 G, 300 SDR (US$415);

up to a maximum of 100 million SDR (US$139 million) for ships of 100,000 units or over.

As mentioned below (Section 9.4.16.4), the 2010 Diplomatic Conference decided that hazardous goods carried in packaged form will under the 2010 Protocol be excluded from the contribution system to the HNS Fund, but that incidents involving packaged goods will still be covered by the HNS Fund to ensure that victims will be protected in case of a major incident. In order to maintain the concept of shared liability between the shipping industry and the cargo interests, the

shipowner's limitation amount for ships carrying packaged hazardous goods will under the 2010 Protocol be increased by 15 per cent in comparison with the original HNS Convention. As a result, the limitation amounts for such ships under the 2010 Protocol will start at 11.5 million SDR (US$16.2 million) for ships up to 2,000 units of gross tonnage, increasing to 115 million SDR (US$162 million) for ships of 100,000 units or over.

Claims in respect of personal injury and death have under the HNS Convention been given priority over other claims in so far as the aggregate amount of such claims does not exceed two-thirds of the limitation amount. The balance of the limitation amount is distributed proportionally between all claimants (Art. 11).

In order to be entitled to limit his liability the shipowner must under the HNS Convention constitute a limitation fund for the sum representing the limit of liability applicable to the ship. The provisions in the HNS Convention on the constitution and distribution of a limitation fund and the effect of such a fund having been established (Arts 9.3–9.7, 9.11 and Art. 10) mirror the corresponding provisions in the 1992 Civil Liability Convention.

Claims in respect of the shipowner's voluntary expenses for preventive measures rank equally with other claims against the limitation fund (Art. 9.8).

As under the 1992 Civil Liability Convention, the shipowner will be deprived of his right to limit his liability if it is proved that the damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result (Art. 9.2).

Complications may arise due to the fact that claims for damage caused by hazardous substances that fall within the scope of the HNS Convention may also be subject to limitation of liability under various international conventions dealing with global limitation of maritime claims, ie the LLMC (in its original 1976 version or as revised by the 1996 Protocol thereto) and Conventions on the same subject of 1957 or 1924.[117] In this regard, reference is made to Section 9.2.7.[118]

This issue has been addressed in the 1996 Protocol to the 1976 LLMC, which gives States parties to the Protocol the possibility to make a reservation excluding from the application of the amended Convention claims for damage within the meaning of the 1996 HNS Convention and any amendment or Protocol thereto (Art. 7(b)).

When the HNS Convention has entered into force, shipowners may in some cases have to constitute two or even three limitation funds. A ship involved in an

[117] Art. 42 of the HNS Convention (supersession clause); cf. Art. 30.4(b) of the Vienna Convention on the Law of Treaties.

[118] See also Martínez Gutiérrez (n. 57) at 188–90.

explosion may have to constitute one limitation fund under the HNS Convention for loss of life, personal injury and damage to property, and one such fund under the LLMC for damage falling outside the HNS Convention. Should the ship be an oil tanker, the shipowner may have to constitute a third limitation fund for pollution damage falling within the Civil Liability Convention.

9.4.9 Channelling of liability

The provisions on channelling of liability to the registered owner in the HNS Convention are identical to those in the 1992 Civil Liability Convention (Section 9.2.9).

9.4.10 Compulsory insurance

The owner of a ship actually carrying hazardous substances will be obliged to maintain insurance (or other financial security) to cover his liabilities under the Convention. There is no exception from this obligation for small ships. The provisions in the HNS Convention on insurance, including the possibility for claimants to bring compensation claims directly against the insurer, and on issuance of insurance certificate (Art. 12) are the same as those in the 1992 Civil Liability Convention (Section 9.2.10).

As regards the problems that have arisen in respect of insurance cover relating to certain acts of terrorism and piracy, reference is made to what is stated above in respect of the Civil Liability Conventions (Section 9.2.10). During the preparations for the entry into force of the 2010 HNS Convention, the question has arisen as to whether the P&I Clubs would be prepared to issue certificates under the HNS Convention covering acts of terrorism. As at 1 September 2015 the P&I Clubs have not given any undertaking that they will do so.

Ships carrying hazardous substances which hold a certificate issued under the 1969 and/or the 1992 Civil Liability Convention will also be required to hold a certificate issued under the HNS Convention as well as a certificate issued under the Bunkers Convention.

With regard to the difficulties for States when issuing insurance certificates under the HNS Convention to assess the solvency of certain insurers which do not belong to the International Group of P&I Clubs, reference is made to the discussion of this issue in relation to the Bunkers Convention (Section 9.3.7).

9.4.11 The HNS Fund's obligations

The HNS Fund shall pay compensation to those suffering damage covered by the HNS Convention who do not obtain full compensation from the shipowner and his insurer in the following cases (Art. 14.1):

(a) no liability arises for the shipowner under the HNS Convention; or
(b) the shipowner is financially incapable of meeting his obligations under the HNS Convention in full and his insurance does not cover or is insufficient to satisfy the compensation claims; or
(c) the damage exceeds the shipowner's liability as limited under the HNS Convention.

As mentioned above (Section 9.4.8), the shipowner could in certain circumstances be entitled to limit his liability under international conventions dealing with global limitation of maritime claims which provide for limits that are significantly lower that those provided for in the HNS Convention. The HNS Fund will, however, only pay compensation in excess of the limitation amount that would have applied to the ship in question under the HNS Convention (Art. 14.1(c)), and there would therefore in such cases be a 'gap' in the compensation.[119]

The HNS Fund will provide additional compensation up to a maximum of 250 million SDR ($346 million), including any amount paid by the shipowner and his insurer (Art.14.5).

If the total amount of the established compensation claims exceeds the amount available for compensation, all claims will be reduced proportionally. As is the case for the shipowner's liability, claims in respect of personal injury and death will, however, have priority over other claims up to two-thirds of the maximum amount payable by the HNS Fund (Art. 14.6).

As mentioned above (Section 9.4.4), a State may declare that the HNS Convention does not apply to certain small ships engaged in domestic voyages. The HNS Fund is not liable to pay compensation for damage caused by substances carried by a ship excluded from the application of the Convention in the territory, territorial sea and exclusive economic zone of a State having made such a declaration (Art. 5.6).

9.4.12 Defences available to the HNS Fund

As is the case in respect of the IOPC Funds, the HNS Fund is exempt from liability only if the damage resulted from an act of war, hostilities, civil war or insurrection or was caused by a spill from a warship or other ship owned or operated by a State and used, at the time of the incident, only on government non-commercial service (Art. 14.3(a)) (cf. Section 9.2.12).

With regard to incidents caused by hazardous substances the source of which has not been established, the HNS Fund is not liable to pay compensation if the claimant cannot prove that there *is a reasonable probability that the damage resulted from*

[119] Under the 1971 and 1992 Fund Conventions the respective Fund fills the corresponding 'gap' (Art. 4.1(c)) (see Section 9.2.11).

an incident involving one or more ships as defined in the Convention, ie a seagoing vessel or seaborne craft (Art. 14.3(b)). This provision in the HNS Convention appears to be more favourable to claimants than the corresponding provision in the 1992 Fund Convention (Art. 4.2(b)) which requires that the claimant *proves that the damage resulted from* an incident involving one or more ships as defined in the Convention, that is, in general terms a laden tanker (see Section 9.2.12). If, for example, a container holding hazardous substances that has been washed ashore breaks and causes damage, it should be sufficient for the claimant to show that there is a reasonable probability that the container had been lost from a ship for the HNS Convention to apply.

The provisions in the HNS Convention relating to the right of the HNS Fund to invoke as a defence contributory negligence on the part of the claimant are identical to those in the Fund Convention (Art. 14.4) (cf. Section 9.2.12).

9.4.13 Recourse and subrogation

The provisions on recourse and subrogation in the HNS Convention (Art. 7.6 and Art. 41) are identical to those in the Civil Liability Convention (see Section 9.2.17).

9.4.14 Time bar

The provisions on time bar in the HNS Convention (Art. 37) are similar (but not identical) to those in the Civil Liability and Fund Conventions.

Rights to compensation under the HNS Convention from the shipowner and his insurer shall be extinguished unless legal action is brought within three years from the date when the person suffering the damage knew or ought reasonably to have known of the damage and the identity of the owner. Right to compensation from the HNS Fund shall be extinguished unless legal action is brought within three years from the date when that person knew or ought reasonably to have known of the damage. In no case shall an action be brought more than ten years from the date of the incident.

As regards the interpretation of the time bar provisions, and in particular the expression *shall be extinguished*, reference is made to Section 9.2.18.

9.4.15 Jurisdiction and enforcement of judgments

The provisions on jurisdiction and enforcement of judgments in the HNS Convention (Arts 38–40) are to a large extent the same as those in the 1992 Civil Liability and Fund Conventions (cf. Section 9.2.19).[120]

[120] With respect to the possible conflict with EU Regulation No 44/2001 see Jacobsson, 'EU legislation' (n. 89) at 70.

9.4.16 The HNS Fund

9.4.16.1 Structure

The HNS Fund will operate in a similar way to the International Oil Pollution Compensation Funds (IOPC Funds) and will be governed by an Assembly composed of representatives of the Governments of all its Member States (Arts 25–8).

The HNS Fund will be administered by a Secretariat headed by a Director (Arts 29–31). Given the similarities between the HNS Fund and the IOPC Funds, it is likely that these Funds will have a joint Secretariat.

There will be some important differences in the way the HNS Fund will operate compared to the IOPC Funds. The IOPC Funds only deal with claims for pollution damage whereas the HNS Fund will have to deal with a wider range of potential claims, for example, for death and personal injury. Furthermore, the system of contributions to the HNS Fund (Arts 16–23) is much more complex than that for contributions to the IOPC Funds.

9.4.16.2 Financing of the HNS Fund

The HNS Fund will be financed by contributions paid by receivers of hazardous substances that have been transported by sea to the ports and terminals of Member States.

The HNS Fund will have up to four accounts: separate accounts for oil, LNG and LPG and a general account for bulk solids and other hazardous substances. However, until the quantities of hazardous substances received in all States Parties reach certain thresholds, operation of the relevant separate account will be postponed and the account will form a new sector within the general account.

Contributions by individual receivers to the separate accounts will be in proportion to the quantities of hazardous substances received, provided that the quantities are above certain thresholds.

The special accounts will only meet claims resulting from incidents involving the respective cargoes, that is, there will be no cross-subsidization.

9.4.16.3 Concept of receiver

The basic concept is the same as under the 1992 Fund Convention, that is, that contributions are payable by the physical receiver of the contributing cargo discharged in the ports and terminals of a State party. However, if at the time of receipt the person who physically receives the cargo acts as an agent for another person who is subject to the jurisdiction of any State party, then the principal shall be deemed to be the receiver, provided the agent discloses the principal to the HNS Fund (Art. 1.4(a)). If the principal is not subject to the jurisdiction of a State party, the agent remains the receiver for the purpose of the Convention. The concept of

agency is not defined in the Convention and will therefore be determined by the law of the State concerned.

In addition, a State may apply its own definition of the term 'receiver', namely the person in the State party who, in accordance with the national law of that State party, is deemed to be the receiver of contributing cargo discharged in the ports and terminals of a State Party. A State using its own definition of receiver must, however, ensure that the total contributing cargo received according to such national law is substantially the same as that which would have been received if the definition laid down in the Convention had been applied (Art. 1.4(b)).[121] This option is not available as regards contributing oil as defined in the 1992 Fund Convention or in respect of LNG.

With respect to crude and heavy fuel oil, that is, oils that fall within the concept of contributing oil as defined in the 1992 Fund Convention, the provisions on contributions in the HNS Convention (Art. 19.1(a)) are the same as those in the 1992 Convention.

As regards LNG, under the original text of the HNS Convention the contributions are payable not by the receiver but by the person who immediately prior to its discharge held title to the LNG cargo (Art. 19.1(b)). However, pursuant to the Convention as amended by the 2010 Protocol, the person liable for contributions will also as regards LNG cargos be the receiver, except that by agreement between the titleholder and the receiver the titleholder will be liable, provided that if the titleholder defaults on the contribution payments the receiver will be liable (Art. 19.1bis).

9.4.16.4 Packaged goods

One of the main difficulties in implementing the 1996 HNS Convention had been how to organize the system for reporting hazardous substances carried in packaged form. For this reason the 2010 Diplomatic Conference decided that packaged hazardous substances will under the 2010 Protocol be excluded from the contribution system to the HNS Fund (Art. 1.10 as amended), but incidents involving packaged goods will still be covered by the HNS Fund to ensure that victims will be protected in case of a major incident.

In order to maintain the concept of shared liability between the shipping industry and the cargo interests, the Diplomatic Conference decided, as mentioned in Section 9.4.8, that the limitation amounts for ships carrying hazardous substances in

[121] In view of the significant complications that would arise if States were to use this option, a Correspondence Group established by the IMO Legal Committee to monitor the implementation of the HNS Convention has strongly recommended States not do so (IMO document LEG 87/11, paras 16 and 18).

packaged form should under the 2010 HNS Convention be increased by 15 per cent in comparison with the original Convention.

9.4.16.5 Non-submission of reports on contributing cargoes

The 2010 Protocol contains a provision to the effect that the HNS Fund will not pay any compensation for damage in a State in respect of a particular incident until that State has fulfilled its obligation to submit reports on contributing cargoes for all years prior to that incident. This sanction will, however, not apply to claims for compensation for personal injury and death (Art. 21bis. 2–5).[122]

9.4.17 Entry into force conditions

The entry into force conditions for the 2010 Protocol are identical to those for the 1996 HNS Convention. The 2010 Protocol, and consequently the 2010 HNS Convention, will enter into force eighteen months after ratification by at least twelve States, subject to the following conditions:

(a) in the previous calendar year a total of at least 40 million tonnes of cargoes other than oil, LNG and LPG liable to contribute to the general account was received in States that have ratified the Convention, and
(b) four of the States each have ships with a total tonnage of at least 2 million units of gross tonnage.

As at 31 December 2015 no State had ratified the 2010 Protocol.

9.4.18 Preparations for the entry into force of the 2010 HNS Convention

As requested by the 2010 Diplomatic Conference, the IOPC Funds' Secretariat is carrying out the administrative tasks necessary for setting up the HNS Fund.[123]

The IMO Legal Committee has approved a consolidated text of the 2010 HNS Convention, which had been prepared in consultation with the IOPC Funds' Secretariat and is available on the IMO and HNS websites.[124]

A consolidated list of substances to be covered by the 2010 Protocol has been prepared by the IOPC Funds' Secretariat in cooperation with IMO and this list is available in digital form on the above-mentioned websites.[125] The IOPC Funds' Secretariat has also developed software to assist States and potential contributors to

[122] See Jacobssson, 'The HNS Convention' (n. 50) at 51–2.
[123] With respect to the preparations for the entry into force see Jacobsson, 'The HNS Convention' (n. 50) at 54.
[124] <http://www.imo.org> and <http://www.hnsconvention.org>.
[125] The list of substances is accessible through a search engine called 'the HNS Finder', providing the user with an indication of whether the substance in question is included in the list and therefore covered for the purpose of compensation, under which category it is falling (bulk liquids, LNG etc), and whether it is subject to contributions to the HNS Fund.

fulfil their reporting requirements, the Contributing Cargo Calculator, which is available on these websites.

9.4.19 Prospects for entry into force of the 2010 Protocol

It appears that the 2010 Protocol provides appropriate solutions to the problems identified as obstacles to ratification of the 1996 HNS Convention. The question is, however, whether there is a sufficient political will to proceed to ratification of the 2010 Protocol by a sufficient number of States to bring it into force within a reasonable period of time.[126]

[126] See Jacobsson, 'The HNS Convention' (n. 50) at 55–7.