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**THE INTERNATIONAL CONVENTION ON
LIABILITY FOR BUNKER OIL POLLUTION
DAMAGE
(BUNKERS CONVENTION)**

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Introduction

The International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention), which was adopted in 2001, entered into force on 21 November 2008. As at 1 July 2019, 93 States had ratified the Convention.

The Bunkers Convention applies to spills of bunkers from ships not covered by the International Convention on Civil Liability for Oil Pollution Damage 1992 (1992 Civil Liability Convention), i.e. ships other than oil tankers. In general the Bunkers Convention is very similar to the 1992 Civil Liability Convention, and many of the provisions in the two Conventions are practically identical. Like the 1992 Civil Liability Convention, the Bunkers Convention provides for strict liability and compulsory insurance, and contains provisions on jurisdiction and enforcement of judgements. However, there are also very important differences between the Conventions.

It should be noted that 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 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention).

Scope of application

The Bunkers Convention applies to pollution damage caused by spills of bunker oil in the territory, including the territorial sea, of a State party to the Convention and in the exclusive economic zone or equivalent area of a State party, and to reasonable measures to prevent and minimise pollution damage (preventive measures) wherever taken. The geographical scope of application is identical to that of the 1992 Civil Liability 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. The criterion for determining whether oil on board a ship falls within this definition is therefore its intended use.

The concept of 'ship' is defined in the Bunkers Convention as any seagoing vessel or seaborne craft of any type whatsoever. This definition in principle also covers oil tankers.

The definition of 'pollution damage' in the Bunkers Convention is practically identical to that in the 1992 Civil Liability Convention. 'Pollution damage' means loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship. As regards damage to the environment there is a proviso that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measure to reinstate the environment actually undertaken or to be undertaken.

The concept of pollution damage includes the cost of 'preventive measures', i.e. reasonable measures taken after an incident to prevent or minimise pollution damage, as well as loss or damage caused by preventive measures. "Incident" means 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. Expenses incurred for preventive measures are

therefore recoverable even when no spill occurred, provided there was a grave and imminent threat of pollution damage.

However, 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. 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 persistent oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of a cargo of persistent oil on board.

The 1992 Civil Liability Convention applies therefore 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 residues of a cargo of persistent oil on board.

Shipowner's liability

Whereas the 1992 Civil Liability Convention imposes liability on the registered owner, the Bunkers Convention imposes liability on “the owner, including the registered owner, bareboat charterer, manager and operator of the ship”. All these persons may be held jointly and severally liable under the Bunkers Convention.

The Bunkers 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.

The owner – as defined - has under the Bunkers Convention strict liability for pollution damage caused by oil spilled from the ship as a result of an incident. The owner is exempt from liability under the Bunkers Convention in the same circumstances as under the 1992 Civil Liability Convention, namely 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, 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.

No claims for compensation may be made against the shipowner – as defined – otherwise than in accordance with the Bunkers Convention.

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 for example that members of the crew, pilots, salvors and persons taking measures to prevent or minimise pollution damage are not protected against compensation claims.

It has been suggested that this could act as a disincentive for salvage operations and preventive measures. States are free, however, to introduce channelling in their national legislation. 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 persons taking preventive measures (which would normally include salvors). Some States parties have introduced immunity for these persons in their national law.

Limitation of liability

The Bunkers Convention does not provide for a special regime as regards limitation of liability, but the issue of limitation is to be resolved pursuant to the national or international regime, if any, which applies in the States concerned in respect of limitation of liability for maritime claims in general. The most likely international regime to be applied is the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC), as amended by the 1996 Protocol thereto.¹

This 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; if that State does not provide in its national law for limitation of liability for maritime claims, the liability under the Bunkers Convention will be unlimited. 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, e.g. 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.

Compulsory insurance

The Bunkers Convention provides for a system of compulsory liability insurance which shall cover the liabilities under the Convention. The insurance requirement under the Bunkers Convention only applies to ships having a gross tonnage over 1 000. States are also given the possibility to exempt from the insurance obligation vessels engaged purely on domestic voyages.

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.

The obligation to maintain insurance rests only on the registered owner of the ship.

As is the case under the Civil Liability Convention, the victims may pursuant to the Bunkers Convention bring action directly against the insurer. If such an action is brought the insurer may not invoke defences that he would have been entitled to invoke in proceedings brought by the shipowner against him.

¹ 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 amendment entered into force on 8 June 2015.

Ships must carry a certificate on board attesting the insurance coverage. Certificates shall be issued by the Flag State, provided it is a party to the Bunkers Convention; 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.

The certification of insurance in respect of oil tankers under the 1992 Civil Liability Convention has not given rise to any difficulties to Flag States, but in that case certificates are required worldwide for some 4 000 tankers. The world's non-tanker fleet is far larger (some 40 000 ships), and the issuance of certificates under the Bunkers Convention imposes a much greater administrative burden on Flag States.

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.

Under the Bunkers Convention States are entitled to delegate the issuance of certificates of insurance to an organisation or institution fulfilling certain requirements.

In November 2011 the Assembly of IMO adopted a Resolution in which States parties to the Bunkers Convention are recommended to require that ships flying their flag or entering or leaving their ports should hold an insurance certificate as required by the Bunkers Convention even when the ship already holds a certificate issued under the Civil Liability Convention. That means that oil tankers will be obliged to hold certificates under both Conventions.

The IMO Assembly has further adopted a Resolution on the issuing of insurance certificates under that Bunkers Convention for bareboat chartered ships. In the Resolution, it is recommended that all States parties should recognise that certificates for ships under bareboat charter should be issued by the Flag State, if that State is a party to the Convention.

Time bar

Rights to compensation under the Bunkers Convention are extinguished unless legal action is brought within three years from the date when the damage occurred and in any event within six years from the date of the incident which caused the damage.

Jurisdiction and enforcement of judgments

The provisions on jurisdiction and enforcement of judgements are identical to those in the 1992 Civil Liability Convention.

The courts of the State party or States parties to the Bunkers Convention where the pollution damage was caused or where preventive measures were taken have exclusive jurisdiction over actions for compensation against the shipowner (as defined) and his insurer. As a result, if an incident causes pollution damage in more than one State party the courts in all affected States have jurisdiction.

A final judgment by a court competent under the Bunkers Convention which is enforceable in the State where the judgment is rendered and is no longer subject to ordinary forms of review shall be recognised and enforceable in the other States parties without the merits of the case being reopened. This does not apply where the judgement was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present his case.

References

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