A LEGAL ANALYSIS OF POLLUTION DAMAGE CLAIMS IN THE CASE OF POLLUTION BY OIL AND BUNKER OIL: UNDERSTANDING THE INTERNATIONAL REGULATORY FRAMEWORK AND THE SPECIFICS OF THE CROATIAN LEGAL SYSTEM

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This paper analyses the international legal framework regarding oil pollution damage, as defined in the 1992 CLC, and bunker oil pollution damage, as defined in the Bunkers Convention. The analysis is founded on "similarities and differences" between the regimes, with special focus on the corresponding limitation of liability schemes, where a clear division is made between, on the one hand, the independent limitation of the liability system of oil pollution damage, and, on the other hand, the general limitation of the liability system of bunker oil pollution. The Republic of Croatia is a State Party to all the relevant international instruments in this regard. Nevertheless, the paper explains the peculiarities that must be acknowledged and respected if a claim is to be made specifically in Croatia. Above all, the paper provides insight into the "real world", with one chapter dedicated exclusively to case analyses.

Keywords: *CLC; Bunkers Convention; oil; bunker oil; limitation of liability; LLMC; IOPC Funds; case analysis.*

Table of Abbreviations:

ART – Article

BIMCO – Baltic and International Maritime Council

CLC – Civil Liability Convention

COA – Civil Obligations Act

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CPA – Civil Procedure Act
EU – European Union
FOB – Free on Board
GT – Gross Tonnage
HNS – Hazardous and Noxious Substances
IMF – International Monetary Fund
IMO – International Maritime Organization
LLMC – Limitation of Liability for Maritime Claims
LTD – Limited Liability
MARPOL – International Convention for the Prevention of Pollution from Ships
MLAS – Maritime Law Association of Slovenia
MT – Metric Ton
NO – Number
IOPC – International Oil Pollution Compensation
PARAS – Paragraphs
P&I – Protection and Indemnity Insurance
REACH – Registration, Evaluation, Authorisation and Restriction of Chemicals
REF NO – Reference Number
SDR – Special Drawing Rights
SFRY – Socialist Federal Republic of Yugoslavia
STOPIA – Small Tanker Oil Pollution Indemnification Agreement
TOPIA – Tanker Oil Pollution Indemnification Agreement
UNTS – United Nations Treaty Series
VOL – Volume
WMU – World Maritime University

1. INTRODUCTION

The goal of this paper is to present how to claim damage under both the International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended by the 1992 Protocol (1992 CLC) and the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention), taking into account the international instruments with which they necessarily

correspond, both in the international arena and specifically under the system of the Republic of Croatia.

This paper includes both theoretical and practical approaches to this topic. Accordingly, Chapter 2 provides a brief overview of essential international instruments, while Chapter 3 and Chapter 4 elaborate on their crucial provisions and will thus give an adequate legal framework under which actors can function and "fight" for their rights inside this legal area. Chapter 5 consists of case analyses with the aim of presenting how positive legal provisions from Chapters 3 and 4 are applied in practice, how parties to the dispute use and manipulate them, and how courts treat those provisions in different legal scenarios. Before drawing conclusions in Chapter 7, Chapter 6 elaborates on the peculiarities regarding the legal system of the Republic of Croatia.

It is crucial to highlight here briefly that the 1992 CLC, together with the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, as amended by the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (1992 Fund Convention) and the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (2003 Fund Convention), represent the "new CLC regime". The 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 CLC) and the repealed[1] 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention) constitute the "old regime".[2] The "new regime" is the subject of this paper.

2. OVERVIEW OF INTERNATIONAL INSTRUMENTS

Pollution damage caused by the escape or discharge of oil from a ship is governed by an international regime developed under the auspices of the International Maritime Organization (IMO). The legal framework for the regime was

[1] IMO, Status of IMO Treaties: Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions, 20 November 2024, p. 305, https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%202024.pdf (accessed 22 May 2024).

[2] Ćorić, D., Međunarodni sustav odgovornosti za onečišćenje mora uljem – najnovije izmjene, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 27 (2006), no. 2, p. 889, https://hrcak.srce.hr/file/39820 (accessed 23 May 2024).

originally the 1969 CLC, which was amended by the 1992 Protocol[3] adopted in London on 27 November 1992[4] and came into force on 30 May 1996.[5] Currently, the 1992 Protocol has 146 Contracting States. The Republic of Croatia acceded to the 1992 Protocol on 12 January 1998, with the Protocol entering into force regarding the Republic of Croatia on 12 January 1999.[6]

The 1992 Fund Convention and the 2003 Fund Convention complement this 1992 CLC principal convention, but only regarding compensation issues. Those three international agreements create an independent limitation of liability regime for pollution damages caused by "oil" spills.[7] The 1992 Fund Convention was adopted and came into force on the same date as the 1992 CLC and has 121 Contracting States. The Republic of Croatia deposited an instrument of accession on 12 January 1998, while the convention entered into force regarding the Republic of Croatia on 12 January 1999.[8] The 2003 Fund Convention currently has 32 Contracting States and entered into force internationally on 3 March 2005. For the Republic of Croatia, it entered into force on 17 May 2006, after Croatia had deposited the instrument of accession on 17 February 2006.[9]

In March 2001, the IMO adopted a new convention, the Bunkers Convention. This convention has satisfied the need to address liability and compensation issues arising from ship spills of bunker oil.[10] The Bunkers Convention entered into force internationally on 21 November 2008.[11] At the moment, there are 107 Contracting States to the Bunkers Convention. The Republic of Croatia deposited an instrument of accession on 15 December 2006, and the convention entered into force for it on 21 November 2008.[12]

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3 IOPC Funds, Liability and Compensation for Oil Pollution Damage: Texts of the 1992 Civil Liability Convention, the 1992 Fund Convention and the Supplementary Fund Protocol, 2018, p. 5, https://iopcfunds.org/wp-content/uploads/2018/12/WEB-IOPC-Text-of-Conventions-ENGLISH.pdf (accessed 22 May 2024).

4 IMO, Status of IMO Treaties…, p. 286.

5 IOPC Funds, Liability and Compensation for Oil Pollution Damage…, *op. cit.*, p. 5.

6 IMO, Status of IMO Treaties…, pp. 287-289.

7 IOPC Funds, Liability and Compensation for Oil Pollution Damage…, *op. cit.*, p. 5.

8 IMO, Status of IMO Treaties…, pp. 319, 321.

9 IMO, Status of IMO Treaties…, pp. 331, 333.

10 Zhu, L., Compensation Issues under the Bunkers Convention, *WMU Journal of Maritime Affairs*, vol. 7 (2008), p. 303.

11 Martínez Gutiérrez, N. A., The Bunkers Convention and the Shipowner's Right to Limit Liability, *Journal of Maritime Law & Commerce*, vol. 43 (2012), no. 2, p. 237.

12 IMO, Status of IMO Treaties…, pp. 530, 532.

Unlike the independent limitation liability regime that exists regarding pollution damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, its bunker oil counterpart does not recognise such an independent regime. Article 6 of the Bunkers Convention provides that nothing shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.[13]

This topic will be elaborated later in the paper. In this part, it is only important to present an overview of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims (the 1996 LLMC), since the convention in question is the globally accepted international agreement that regulates the limitation of liability for maritime claims and since it is expressly mentioned in Art. 6 of the Bunkers Convention as one of the possible agreements to apply in this regard. The Convention on Limitation of Liability for Maritime Claims, 1976, entered into force internationally on 1 December 1986 and has 56 Contracting States. The Republic of Croatia deposited its Instrument of Accession on 2 March 1993, while the 1976 LLMC entered into force regarding Croatia on 1 June 1993.[14]

The Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976 (the 1996 LLMC Protocol) came into force internationally on 13 May 2004 and has 64 Contracting States. The Republic of Croatia deposited an Instrument of Accession on 15 May 2006, while the Protocol entered into force for it on 13 August 2006. Additionally, the Republic of Croatia accompanied the mentioned Instrument of Accession with the Reservation to the Protocol, whose effects will be elaborated in detail in Chapter 6.[15]

To conclude, the 1992 CLC and Bunkers Convention are core conventions that give key information regarding the legal field in question. Limitations of liability issues regarding "oil spills" are supplemented by the 1992 Fund Convention and the 2003 Fund Convention, while "bunker oil spills" recognise no special limitation of liability regime, depending thus on the applicable national or international regime, such as the 1996 LLMC.

[13] Martínez Gutiérrez, N. A., The Bunkers Convention…, *op. cit.*, p. 247.

[14] IMO, Status of IMO Treaties…, pp. 399-401.

[15] IMO, Status of IMO Treaties…, pp. 412-415.

3. THE 1992 CLC AND BUNKERS CONVENTION: ESSENTIAL PROVISIONS

Both the 1992 CLC and the Bunkers Convention are exhaustive conventions. Essential provisions are those that are relevant and important for the objective of this paper. The intention is not just to enumerate and paraphrase all the conventions' applicable provisions but to highlight only those that create a legal framework in which actions claiming pollution damage are to be conducted.

Article 1 of both the 1992 CLC and the Bunkers Convention defines the basic terms of each convention. Discussion on this topic cannot start without properly defining the ship, shipowner, (bunker) oil, and pollution damage. Understanding these expressions represents the first step in approaching the topic of this paper and they indeed form part of the essential provisions of both conventions.[16]

The latter category also includes provisions that fall under the following legal areas: the scope of the application of each convention, exclusions, the liability of the shipowner, limitation of liability, jurisdiction, recognition and enforcement, compulsory insurance or financial security, and the limits (extinguishing of rights).

3.1. The 1992 CLC and Bunkers Convention: Essential Equivalencies

The first essential equivalence between these conventions is their definition of the term "pollution damage" as the last of the four introductory expressions, as they were referred to in section 3. Both conventions define pollution damage as loss or damage caused outside the ship by contamination resulting from the escape or discharge of (bunker) oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment is limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken. Both conventions stipulate that the costs of preventive measures and further loss or damage caused by preventive measures also fall under the definition of pollution damage.[17]

[16] International Convention on Civil Liability for Oil Pollution Damage, 1969 (adopted 29 November 1969, entered into force 19 June 1975), 973 UNTS 3, as amended by the Protocol of 1992 to the International Convention on Civil Liability for Oil Pollution Damage, 1969 (adopted 27 November 1992, entered into force 30 May 1996), 1956 UNTS 255, (CLC) Art. I(1)(1),(3),(5) and (6) and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (adopted 23 March 2001, entered into force 21 November 2008), 2304 UNTS 192, (Bunkers Convention) Art. 1(1)(1),(3),(4),(5) and (9).

[17] CLC Art. I(1)(6) and Bunkers Convention Art. 1(1)(9).

Since preventive measures form a pivotal part of the latter definition, both conventions expressly define them, and both identically. That being said, "preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimise pollution damage. The mentioned "incident" is also directly and consonantly described in both conventions as 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.[18]

Both conventions apply to the pollution damage caused in the territory, including the territorial sea and the exclusive economic zone of State Parties. If a certain State Party has not established such a zone, these two conventions apply to the area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. On the other hand, both conventions apply to preventive measures wherever they occur.[19]

So-called "exclusions" belong to both the "equivalencies" and "differences" categories. Neither the 1992 CLC nor the Bunkers Convention applies to warships or other ships owned or operated by a State if those ships are being used only on government non-commercial service. However, if the ships are owned by the State Party but are used for commercial purposes, the situation changes, and a specific State becomes a possible defendant in a pollution damage dispute, with an obligatory waiver of all defences based on its status as a sovereign State.[20]

The shipowner's liability also deserves a place in both this and the following section of this paper. Both conventions take a "strict liability" approach, meaning that the shipowner will be deemed responsible for pollution damage irrespective of his guilt. The responsible shipowner is the one who had that status at the time of the incident, or, if the incident consists of a series of occurrences, at the time of the first such occurrence.[21]

Another feature these conventions have in common is what they prescribe as exonerating reasons for the shipowner. Hence, both the 1992 CLC and the Bunkers Convention state that no liability for pollution damage attaches to the shipowner if the shipowner proves that the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional,

[18] CLC Art. I(1)(7) and Bunkers Convention Art. 1(1)(7).

[19] CLC Art. II and Bunkers Convention Art. 2.

[20] CLC Art. XI and Bunkers Convention Art. 4(2) and (4).

[21] CLC Art. III(1) and Bunkers Convention Art. 3(1).

inevitable and irresistible character; or that the damage was wholly caused by an act or omission committed with the intent to cause damage by a third party; or that the damage was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function. Both conventions add that if the shipowner proves that the pollution damage resulted wholly or partially either from an act or omission committed with 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 to such person.[22] Here, it is essential to highlight that because of the strict liability approach that both conventions take, the shipowner carries the burden to prove the existence of any of these exonerating reasons.

Both conventions take the same perspective when discussing incidents involving two or more ships, stating that the shipowners of all the ships concerned, unless exonerated, are jointly and severally liable for all such damage that is not reasonably separable.[23]

Jurisdiction is another common feature of these two conventions. They both proclaim that actions for compensation can be initiated before the courts of the Contracting State or States on whose territory the incident occurred or where the prevention measures were taken, with the territory of the States including their territorial sea and all the area referred to previously when elaborating the scope of application of these conventions.[24] However, establishing the limitation fund under the 1992 CLC can affect questions of jurisdiction. The latter are elaborated in section 4.1.1.

Both conventions stipulate that a judgment given by a court with jurisdiction set in accordance with justly reasoned jurisdiction provisions, in the case where that judgment is enforceable in the State of origin where it is no longer subject to ordinary forms of review, must be recognised by any Contracting State. The latter will not apply if the judgment in the State of origin was obtained by fraud or if the defendant was not given reasonable notice and fair opportunity to present the case.[25]

Insurance or other financial security follows the path of exclusions and the responsibility of the shipowner, and simultaneously represents both the common

[22] CLC Art. III(2) and (3) and Bunkers Convention Art. 3(3) and (4).

[23] CLC Art. IV and Bunkers Convention Art. 5.

[24] CLC Art. IX(1) and (2) and Bunkers Convention Art. 9(1) and (2).

[25] CLC Art. X(1) and Bunkers Convention Art. 10(1).

features and the means of differentiation of these conventions. Both the owner, under the 1992 CLC terminology, and the registered owner, under the Bunkers Convention terminology, are required, under certain conditions, to maintain insurance or other financial security. The mentioned conditions, as well as the amounts of such insurance, will be elaborated in the next section since they differ depending on which of the two conventions is to be applied. A claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the (registered) owner's liability for pollution damage. In such a case, the defendant may, even if the (registered) owner is not entitled to limit his liability, avail himself of the limits of liability in accordance with Chapter 4 of this paper.[26]

The time limits, a crucial aspect that must be respected when claiming oil and bunker oil pollution damage, do not differ in these two conventions. Both stipulate that compensation action must be brought within three years from the date when the damage occurred and, parallel to this, that action may not be brought after six years from the date of the incident. In the case of an incident that consists of a series of occurrences, both conventions unilaterally say that a six-year period must run from the date of the first such occurrence.[27]

3.2. The 1992 CLC and the Bunkers Convention: Essential Differences

Regarding the definition of ship, both conventions state that ship means any sea-going vessel and seaborne craft of any type whatsoever.[28] The 1992 CLC, on the other hand, stipulates that in order to fall into the category of ship, a sea-going vessel and seaborne craft of any type must be constructed or adapted for the carriage of oil in bulk as cargo, provided that the ship capable of carrying oil and other cargoes is 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 aboard.[29] In other words, the 1992 CLC covers only tankers.[30]

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[26] CLC Art. VII(1) and (8) and Bunkers Convention Art. 7(1)(10).

[27] CLC Art. VIII and Bunkers Convention Art. 8.

[28] CLC Art. I(1) and Bunkers Convention Art. 1(1).

[29] CLC Art. I(1).

[30] Martínez Gutiérrez, N. A., *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes*, Routledge, London, 2011, p. 160.

The 1992 CLC defines "oil" as any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship.[31] The Bunkers Convention defines "bunker oil" as 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.[32] It is important to note that the 1992 CLC relates only to persistent hydrocarbon mineral oils, while the Bunkers Convention covers spills of persistent and non-persistent hydrocarbon mineral oils and thus goes beyond the scope of application of the 1992 CLC.[33] Consequently, and also because the 1992 CLC also encompasses oil that is carried in the ship's bunkers and that is intended for the operation or propulsion of the ship, persistent hydrocarbon mineral oils can fall under both the 1992 CLC and Bunkers Convention. In these situations, the definition of ship will decide which of the two is to be applied. Considering the definition of ship in both conventions, it is clear that if a ship falls under the definition provided in the 1992 CLC, that same ship automatically falls under the definition in the Bunkers Convention since the latter definition is much broader and encompasses the 1992 CLC definition. Therefore, it is worth highlighting that the 1992 CLC is primarily applied as implied in Art. 4(1) of the Bunkers Convention. The Bunkers Convention, in the case where oil comes as defined under both conventions, applies if the ship does not fall under the 1992 CLC definition but falls under the Bunkers Convention.

When it comes to the definition of the owner of the ship, these conventions take a different approach. The 1992 CLC defines owner as the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company that is registered as the ship's operator in that State, owner means such a company.[34] The Bunkers Convention, on the other hand, includes a definition of the term "registered owner" that is identical to the definition of owner in the 1992 CLC,[35] and the term "shipowner"

31 CLC Art. I(1)(5).

32 Bunkers Convention Art. 1(1)(5).

33 Martínez Gutiérrez, N. A., The Bunkers Convention 2001: Challenges for Its Implementation, *"EU Maritime Policy and the (Northern) Adriatic": Foreword to the Round Table, Maritime Law Association of Slovenia (MLAS)*, Portorož, Slovenia, 20 May 2011, p. 9, https://www.dpps-mlas.si/wp-content/uploads/2011/07/The-Bunkers-Convention-2001_-Challenges-for-its-Implementation-_Dr.-Norman-A.-Martinez-Gutierrez.pdf (accessed 23 May 2024).

34 CLC Art. I(1)(3).

35 Bunkers Convention Art. 1(1)(4).

means the owner, including the registered owner, bareboat charterer, manager and operator of the ship.[36]

Even though both conventions take a "strict liability" approach to the liability of the shipowner, the different approaches taken by these conventions when defining the shipowner make some differences in the sense of persons potentially liable. It is clear that under the Bunkers Convention, the shipowner includes not only the owner of the ship but also the bareboat charterer, the manager, and the operator of the ship, and thus the Bunkers Convention extends the 1992 CLC list of persons potentially liable,[37] with the latter targeting only the true owner without the possibility of holding liable any other person although they might exercise control over the true owner.[38] The wide definition of shipowner in the Bunkers Convention is a very interesting development. It is most likely that the term open to the widest interpretation is "operator", which can include mortgagees in possession and salvors. The possibility that a salvor might be deemed an operator may support the view that the provisions of the Bunkers Convention constitute a disincentive to salvors. This problem is compounded by the fact that the Bunkers Convention does not contain the equivalent of Art. III(4) of the 1992 CLC which largely grants immunity from liability for pollution damage to salvors and other personnel enumerated therein.[39] The absence of channelling provisions in the Bunkers Convention makes it possible for claims to be pursued independently of the convention against parties other than the shipowner.[40] This issue of lack of immunity for salvors and other personnel under the Bunkers Convention was addressed and resolved by the IMO Resolution on Protection for persons taking measures to prevent or minimise the effects of oil pollution. The IMO Resolution on Protection urges States, when implementing the Bunkers Convention, to consider the need to introduce legal provisions for the protection of persons taking measures to prevent or minimise the effects of bunker oil pollution.[41]

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36 Bunkers Convention Art. 1(1)(3).

37 CLC Art. III(1) and Bunkers Convention Art. 3(1).

38 Hui, W., *Civil Liability for Marine Oil Pollution Damage: A Comparative and Economic Study of the International, US and Chinese Compensation Regime*, Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2011, p. 249.

39 Gauci, G. M., The Changing Parameters of Compensation for Ship-Source Pollution Damage, *Id-Dritt Law Journal*, vol. 18 (2002), p. 113, https://www.um.edu.mt/library/oar/bitstream/123456789/65298/1/The_changing_parameters_of_compensation_for_Ship-Source_pollution_damage.pdf (accessed 23 May 2024).

40 Soyer, B.; Tettenborn, A. (eds.), *Pollution at Sea: Law and Liability*, Informa Law, London, 2012, p. 14.

41 IMO, Resolution LEG/CONF.12/9 adopted on 27 March 2001, Resolution on Protection for Persons Taking Measures to Prevent or Minimize the Effects of Oil Pollution.

Because of the possibility of having different personnel liable under the category of shipowner, the Bunkers Convention, unlike the 1992 CLC where the definition of shipowner is restrictive and limited, proclaims in its Art. 3(2) that when more than one of those possible liable persons are liable, their liability is joint and several.[42] Irrespective of the mentioned differences, both conventions recognise the shipowner's right of recourse, which may exist independently of these conventions towards any person.[43]

Exclusions must find their place in this part of the paper as well, mostly because of two additional provisions included in the Bunkers Convention. The first excludes the application of the convention to pollution damage covered by the 1992 CLC. The second proclaims that the State Party may decide to apply the convention to warships or other ships owned or operated by the State if those ships are being used only on government non-commercial service.[44]

This sequence of the paper must cover the differences between the 1992 CLC and the Bunkers Convention regarding insurance or other financial security. Under the 1992 CLC, the owner of the ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo falls under an insurance obligation. As far as the Bunkers Convention is concerned, for the registered shipowner's insurance obligation to arise, the first condition is the same as in the 1992 CLC, while the second condition is that the ship must have a gross tonnage greater than 1,000. Amounts of such insurance are fixed as equal to the limitation of liability sums. It has already been mentioned that the 1992 CLC recognises an independent limitation of liability regime, while the Bunkers Convention, in this sense, depends on the law of the State where the incident happened. However, the latter convention sets an insurance restriction by providing that no matter which law is applied regarding the limitation of liability sums, the insurance amount must not exceed the amount calculated in accordance with the 1996 LLMC. Since the next chapter is fully devoted to the limitation of liability, it is worth highlighting that these sums and amounts will be made concrete in that part of the paper.[45]

[42] Bunkers Convention Art. 3(2).

[43] Soyer, B.; Tettenborn, A. (eds.), *Pollution at Sea…, op. cit.*, pp. 13, 14.

[44] Bunkers Convention Art. 4(1)(3).

[45] CLC Art. VII(1) and Bunkers Convention Art. 7(1).

4. LIMITATION OF THE SHIPOWNER'S LIABILITY

Shipowners are generally entitled to limit their liability in respect of claims arising from damage caused by their ships. This means that if a ship is involved in an incident that causes damage to persons, property, or the environment, there is a limit on the maximum amount of compensation that a court can order the shipowner to pay.

The rationale for allowing shipowners to limit their liability in respect of ship-sourced damage is to encourage shipping and trade. It allows shipowners to escape unlimited liability, which can put them out of business or stifle investment in maritime commerce and shipbuilding. This involves balancing the competing objectives of compensating anybody who suffers loss or damage caused by shipowners while ensuring that shipping remains a profitable venture.[46]

4.1. Independent Limitation of Liability Regime for Pollution Damage under the 1992 CLC

The independent limitation of liability regime means that in the event of pollution damage, as defined in the 1992 CLC, the shipowner can limit his liability in accordance with a special limitation of liability regime that applies only to that damage.

4.1.1. The First Layer of Responsibility: The Shipowner

The first layer of responsibility derives from the 1992 CLC which holds the shipowner responsible for oil pollution damage and allows the shipowner to limit his liability in accordance with Art. V.

Since all three layers of responsibility rely on "units of account" as a measuring unit and "units of tonnage" as a vessel reference, it is of prime importance to explain these terms adequately.

The "unit of account" is the Special Drawing Right (SDR) as defined by the International Monetary Fund (IMF). In order to determine the exact amount of money in question, the "units of account" are converted into national currency on the basis of the value of that currency by reference to the SDR on the date of

[46] Australian Government, Department of Infrastructure, Transport, Regional Development, Communications and the Arts, Principles of Liability Limitation, https://www.infrastructure.gov.au/infrastructure-transport-vehicles/maritime/maritime-business/maritime-liability-insurance/principles-liability-limitation (accessed 23 May 2024).

the constitution of the fund. The value of the national currency, in terms of the SDR of a Contracting State which is a member of the IMF, is calculated in accordance with the method of valuation applied by the IMF.[47] The SDR currency value can be found on the official website of the IMF.[48] The value of the national currency, in terms of the SDR of a Contracting State which is not a member of the IMF, is calculated in a manner determined by that State.[49] Article V(9)(b)(c) further prescribes the possibilities and obligations of States that are not parties to the IMF. Since the IMF has 190 State Parties, it is unnecessary to elaborate in more detail about that small category of States that are not parties to the IMF.[50]

"Units of tonnage" are regarded as gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.[51]

The 1992 CLC entitles the shipowner to limit his liability in respect of any incident to an aggregate amount of 4,510,000 units of account if a ship does not exceed 5,000 units of tonnage. On the other hand, if a ship exceeds 5,000 units of tonnage, the shipowner acquires the right to limit his liability for an additional 631 units for each additional unit of tonnage. Still, the aggregate amount of the shipowner's limitation of liability will not, in any case, exceed 89,770,000 units of account.[52]

In order to use the privilege of limitation of liability, the shipowner must constitute a fund for the total sum representing the limit of his liability with the court or other competent authority of any one of the Contracting States in which the oil pollution action is brought in accordance with Art. IX of the 1992 CLC or, if no action is brought, with any court or other competent authority in any one of the Contracting States in which an action can be brought under Art. IX.[53] The fund is distributed among the claimants in proportion to the amounts of their established claims.[54] Moreover, after the fund is established, no person having a claim for pollution damage arising from the incident regarding which the fund

47 CLC Art. V(9)(a).

48 Ćorić, D., Međunarodni sustav odgovornosti…, *op. cit.*, p. 889.

49 CLC Art. V(9)(a).

50 International Monetary Fund, List of Members, Last Updated: August 30, 2023, https://www.imf.org/external/np/sec/memdir/memdate.htm (accessed 23 May 2024).

51 CLC Art. V(10).

52 CLC Art. V(1)(a).

53 CLC Art. V(3).

54 CLC Art. V(4).

was established will be entitled to exercise any right against any other assets of the owner.[55] In practice, the latter means that victims can only sue the fund for their claims after it was established, meaning also that their claims are limited to the jurisdiction of the court where the fund was established. After the fund is established, the court or other competent authority of any Contracting State must order the release of any ship or other property belonging to the owner which has been arrested in respect of a claim for pollution damage arising out of that incident, and will similarly release any bail or other security furnished to avoid such arrest.[56] The foregoing applies only if the claimant has access to the court administering the fund and if the fund is actually available in respect of his claim.[57]

It has already been elaborated that under the 1992 CLC shipowners are obliged to maintain insurance or other financial security. In this part of the paper, it is important to highlight that the insurer or other person providing financial security is entitled to constitute a fund under the same conditions and having the same effect as if the shipowner constituted it. This right belongs to those persons even if the shipowner is not entitled to limit his liability, such as in cases where the pollution damage resulted from the shipowner's personal act or omission committed with the intent to cause such damage or recklessly, and with the knowledge that such damage would probably result. If the fund is established in the latter circumstances, its constitution does not prejudice the right of any claimant against the owner.[58] In enumerated cases in which the shipowner does not have the right to limit his liability, it is important to highlight that under the 1992 CLC the mentioned "act or omission" must be a personal "act or omission" made by the shipowner. The 1992 CLC puts the burden of proof on the claimant to prove the existence of such excluding reasons.[59]

4.1.2. The Second Layer of Responsibility: The 1992 International Oil Pollution Compensation Fund (the 1992 Fund)

How can victims of oil pollution damage be afforded additional and full compensation without imposing an additional financial burden on shipowners?

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55 CLC Art. VI(1)(a).

56 CLC Art. VI(1)(b).

57 CLC Art. VI(2).

58 CLC Art. V(11).

59 Hui, W., *Civil Liability for Marine Oil Pollution Damage…, op. cit.*, p. 249.

The 1992 Fund Convention enables exactly that. It recognises the need for more generous compensation for casualties in oil pollution cases than that provided by the 1992 CLC and acknowledges that shipowners should not be encumbered thereby.[60]

The 1992 Fund Convention established the 1992 Fund. The main goal of the 1992 Fund is to compensate for pollution damage when no liability arises under the 1992 CLC, when the shipowner and his financial guarantor are insolvent, and when the compensation under the 1992 CLC is insufficient. However, the 1992 Fund incurs no liability if the pollution damage resulted from an act of war or by oil which has escaped or has been discharged from a warship or other State ship used only on government non-commercial service, or if the claimant cannot prove that the damage resulted from an incident involving one or more ships.[61]

The aggregate amount of compensation payable by the 1992 Fund is limited so that the total sum of that amount and the amount actually paid under the 1992 CLC does not exceed 203,000,000 units of account. The same "units of account" limitation applies in the case of pollution damage resulting from a natural phenomenon of an exceptional, inevitable and irresistible character, the only difference being that the entire burden of that amount is on the 1992 Fund since under those circumstances the shipowner is exonerated from pollution damage responsibility. The 1992 Fund Convention proclaims that the sum of 203,000,000 units of account is to be substituted with the sum of 300,740,000 units of account with respect to any incident occurring during any period when there are three Parties to the 1992 Fund Convention in respect of which the combined relevant quantity of crude or fuel oil received by persons in the territories of those Parties, during the preceding calendar year, equalled or exceeded 600 million tons.[62] The term "relevant" is a key term in the previous sentence since not every quantity of crude or fuel oil will be taken into account, but only the relevant quantities determined in Art. 10 of the 1992 Fund Convention, which are also the subject of the following paragraph of this paper. The limitation of liability amounts, as presented here, are a consequence of the increase in the limitation of liability introduced by IMO Legal Committee Resolution LEG.2(82). The amendments entered into force on 1 November 2003.[63] Consequently, for all incidents that

[60] Protocol of 1992 to amend the International Convention on Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (adopted 27 November 1992, entered into force 30 May 1996), 1953 UNTS 330, (1992 Fund Convention) preamble.

[61] Hui, W., *Civil Liability for Marine Oil Pollution Damage…, op. cit.*, p. 288.

[62] 1992 Fund Convention Art. 4(4)(a),(b) and (c).

[63] IMO, Status of IMO Treaties…, p. 328.

occurred before 1 November 2003, the figures 203,000,000 and 300,740,000 are substituted by the figures 135,000,000 and 200,000,000, respectively.[64]

The necessary finance to perform its task is acquired by the 1992 Fund through annual contributions paid in respect of each Contracting State to the 1992 Fund Convention by any person who, in the calendar year, has received total quantities that exceed 150,000 tons of crude oil or fuel oil, which are carried by sea to the ports or terminal installations in the territory of that State.[65] In a situation where the quantity of crude oil or fuel oil has been carried by sea to the port or terminal installation of a non-Contracting State but subsequently discharged in any installations situated in the territory of the Contracting State, that crude or fuel oil, but only on first receipt in a Contracting State after its discharge in the non-Contracting State, will also be calculated and taken into account when considering which person, and in respect of which Contracting State, is liable to pay contributions.[66]

Units of account are treated and converted equally as described in section 4.1.1 since that explanation is based on the 1992 CLC, which obliges all State Parties to the 1992 Fund Convention as well. This is confirmed in Art. 28(4) of the 1992 Fund Convention, which states that the 1992 Fund Convention may be ratified, accepted, approved or acceded to only by States which have ratified, accepted, approved or acceded to the 1992 CLC.[67] The only deviation from the reference in the previous chapter is that the relevant day for converting SDRs to the national currency is not the date on which the fund was established but the date of the decision of the Assembly of the 1992 Fund as to the first date of compensation payment.[68]

If there is no existing legal procedure initiated under the 1992 CLC, any action against the 1992 Fund may only be brought before a court that would have been competent under Art. IX of the 1992 CLC.[69] On the other hand, where an action for compensation for pollution damage has already been brought before a court competent under Art. IX of the 1992 CLC, such a court will have

[64] IMO, Resolution LEG.2(82) adopted on 18 October 2000, Amendments of the limits of compensation in the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

[65] Ćorić, D., Međunarodni sustav odgovornosti…, *op. cit.*, p. 896.

[66] 1992 Fund Convention Arts. 1(3), 10(1)(b).

[67] 1992 Fund Convention Art. 28(4).

[68] 1992 Fund Convention Art. 4(4)(e).

[69] 1992 Fund Convention Art. 7(1).

exclusive jurisdictional competence over any action against the 1992 Fund as well. However, if the court with exclusive competence is located in a country that is not a State Party to the 1992 Fund Convention, any action against the 1992 Fund must be brought either before a court of the State where the 1992 Fund has its headquarters or before any court that would have jurisdiction under Art. IX of the 1992 CLC.[70] Any judgment given against the 1992 Fund by a competent court will, when it has become enforceable in the State of origin, be recognised and enforceable in each Contracting State on the same conditions as are prescribed in Art X of the 1992 CLC.[71]

4.1.3. Third Layer of Responsibility: The 2003 Oil Pollution Compensation Supplementary Fund (the 2003 Supplementary Fund)

The third layer of responsibility derives from the 2003 Fund Convention. It was adopted on the basis that the maximum compensation afforded by the 1992 Fund Convention might be insufficient to meet compensation needs in certain circumstances and the belief that establishing a supplementary scheme should provide and ensure full satisfaction of the oil pollution victim under all conditions. The 2003 Fund Convention established the 2003 Supplementary Fund, whose aim is to provide compensation when the Assembly of the 1992 Fund has considered that the total amount of the established claims exceeds, or there is a risk of it exceeding, the aggregate amount of compensation available under the 1992 Fund Convention. In those cases, the Assembly of the 1992 Fund Convention will provisionally or finally decide that payments will only be made for a proportion of any established claim. Consequently, the Assembly will then decide whether and to what extent the 2003 Supplementary Fund will pay any established claim that is not paid either under the 1992 CLC or the 1992 Fund Convention.[72] Here, it is worth noting that a claim, in order to be settled by the 2003 Supplementary Fund, must already be established, meaning either recognised by the 1992 Fund or by the court's decision binding upon the 1992 Fund.[73] In that sense, any claim made against the 1992 Fund will be regarded as a claim

[70] 1992 Fund Convention Art. 7(3).

[71] 1992 Fund Convention Art. 8.

[72] Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (adopted 16 May 2003, entered into force 3 March 2005), 3432 UNTS, (2003 Fund Convention) Art. 5.

[73] 2003 Fund Convention Art. 1(1)(8).

made by the same claimant against the 2003 Supplementary Fund.[74] Everything mentioned here does not mean that, in practice, the procedures against the 2003 Supplementary Fund cannot or will not be initiated. Of course, the procedures will not be initiated for the establishment of the claim because the claim, as stated above, must already be established. Nevertheless, the procedure can, for example, be initiated for the compensation of the established claim if the 2003 Supplementary Fund, in the claimant's opinion, unduly refuses to make that payment. Initiating procedures against the 2003 Supplementary Fund must follow the provisions of Art. 7 of the 2003 Fund Convention. If these provisions are followed, any judgment given against the Supplementary Fund brought in the State of origin must, if it becomes enforceable in that State, be recognised and enforceable in each Contracting State on the same conditions as prescribed in Art. X of the 1992 CLC.

The aggregate amount of compensation payable by the Supplementary Fund is limited so that the total sum of that amount, together with the amount of compensation actually paid under the 1992 CLC and the 1992 Fund Convention, does not exceed 750 million units of account.[75] Just as the 1992 Fund Convention does not allow a State to become a Party to it without being Party to the 1992 CLC, the same goes for the 2003 Fund Convention that makes it a condition for any State to become a Party to it to be a Party to the 1992 Fund Convention.[76] Consequently, units of account, in the sense of the 2003 Fund Convention, are treated and converted equally as described in section 4.1.1. In terms of the 2003 Fund Convention, the relevant date for the conversion of the SDRs to the national currency is the date determined by the Assembly of the 1992 Fund Convention for the conversion of the maximum amount payable under the 1992 Fund Convention.[77] Basically, the relevant date will be the one under Art. 4(4)(e) of the 1992 Fund Convention. The 2003 Supplementary Fund achieves the necessary financial resources on the same principle as the 1992 Fund.

4.1.4. STOPIA 2006 and TOPIA 2006

The Small Tanker Oil Pollution Indemnification Agreement 2006 (as amended 2017) (STOPIA) and the Tanker Oil Pollution Indemnification Agreement 2006 (as amended 2017) (TOPIA) are two voluntary agreements between shipowners

[74] 2003 Fund Convention Art. 6(2).

[75] 2003 Fund Convention Art. 4(2)(a).

[76] 2003 Fund Convention Art. 19(3).

[77] 2003 Fund Convention Art. 4(2)(b).

whose ships are insured by the P&I Clubs that are members of the International Group of P&I Associations (International Group), for the purpose of allowing the equitable sharing of the burden of compensation between shipowners and the 1992 Fund and the 2003 Supplementary Fund. Under STOPIA 2006, the liable shipowner is obliged to indemnify the 1992 Fund for the difference between the vessel's limit of liability under the 1992 CLC and SDR 20,000,000.[78] Under TOPIA 2006, the liable shipowner indemnifies the Supplementary Fund for 50% of the compensation the fund has paid.[79] The P&I Clubs are not parties to the agreement, but their amended rules cover responsibility for the payment of compensation according to the agreements.[80] The STOPIA and TOPIA regimes only apply to "relevant ships". STOPIA 2006 provides that every ship will be considered a "relevant ship" if the ship is: (i) 29,548 tons or less; (ii) insured by one of the International Group Clubs; and (iii) reinsured through the pooling arrangements of the International Group.[81] When it comes to the latter, it is important to say that although the International Group Clubs compete with each other for business, it is to the benefit of all shipowners insured by International Group Clubs to pool their larger risks. Pooling is regulated by the annually renewed Pooling Agreement, which defines the risks that can be pooled, those risks which are excluded from cover, and how covered losses are to be shared between the participating Clubs.[82] The definition of "relevant" ship under STOPIA 2006 makes it clear that STOPIA 2006 will be contracted only between owners of small tankers (i.e., 29,548 GT or less).[83] TOPIA 2006 provides that all ships will be considered a "relevant ship" if they are: (i) entered in one of the International Group Clubs; and (ii) reinsured through the pooling arrangements of the International Group.[84]

78 Hui, W., *Civil Liability for Marine Oil Pollution Damage…*, *op. cit*., p. 184.

79 IOPC Funds, STOPIA 2006 and TOPIA 2006, Review of Agreements, Submitted by the International Group of P&I Associations, https://static.igpandi.org/igpi_website/media/article_attachments/92aes10-13_sfaes2-7.pdf (accessed 24 May 2024).

80 Ćorić, D., Međunarodni sustav odgovornosti…, *op. cit*., p. 902.

81 IOPC Funds, STOPIA 2006 and TOPIA 2006 (fn. 79).

82 International Group of P&I Clubs, Group Agreements, https://www.igpandi.org/article/group-agreements/ (accessed 24 May 2024).

83 IOPC Funds, STOPIA and TOPIA, https://iopcfunds.org/about-us/legal-framework/stopia-and-topia/ (accessed 24 May 2024).

84 IOPC Funds, STOPIA 2006 and TOPIA 2006 (fn. 79).

4.2. General Liability Regime Applied to the Bunkers Convention Pollution Damage

Unlike the 1992 CLC oil pollution damage, which are covered by an independent limitation of liability regime, the limitation of liability regime of the Bunkers Convention oil pollution damage depends on the law of the State where the incident occurred.

Article 6 of the Bunkers Convention prescribes: "Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended".[85]

This provision alone does not create a uniform international regime since the shipowner's liability for bunker oil pollution damage will be determined by the law of the State where the pollution occurs, and States have different rules on the subject. With this in mind, the 2001 Diplomatic Conference adopted a resolution which urges all States to become Parties to the 1996 LLMC.[86] Consequently, in response to the mentioned resolution, as well as its 64 Contracting States, the 1996 LLMC will be presented in this section of the paper as representative of one of the possible limitations of liability regimes for bunker oil pollution damage.

Whilst it is clear that pollution damage within the meaning of the 1992 CLC is excluded from the application of the 1996 LLMC, it is still possible to wonder whether this exclusion encompasses bunker oil pollution damage claims. In this respect, it must be stated that a detailed study of the *travaux préparatoires* of the 1996 LLMC shows that no other pollution damage claims were excluded by Art. 3. In fact, reference may be made to BIMCO's assertion that: "It was clearly the intention of the [IMO] Legal Committee that the right to limit liability should apply to all claims for pollution damage other than those covered by the 1969 International Convention on Civil Liability for Oil Pollution Damage".[87] The latter includes, following the wording of Art. 3(b) of the 1996 LLMC, any amendment or Protocol to the 1969 International Convention on Civil Liability for Oil Pollution Damage as well.

After identifying the negative fact that the 1996 LLMC does not exclude its application to the Bunkers Convention oil pollution damage, it is important to

[85] Bunkers Convention Art. 6.

[86] Martínez Gutiérrez, N. A., The Bunkers Convention…, *op. cit*., p. 247.

[87] *Ibid*., p. 248.

determine the positive fact, i.e. which of its provisions represent the legal basis for the application of the 1996 LLMC Protocol to bunker oil pollution damage.

The introductory thesis is that Art. 2 of the 1996 LLMC does not directly list bunker oil pollution claims as one of the types of claims subject to the Protocol. Nevertheless, if a claim relates to damage to property and consequential loss caused by a bunker oil pollution incident, such a claim would fall under Art. 2(1)(a). The wording of Art. 2(1)(a) suggests that "consequential loss" relates only to consequential loss suffered by the persons who suffered damage to property. On the other hand, in "APL Sydney", Finkelstein rejected the claimants' contention that the term "consequential loss" refers exclusively to consequential loss suffered by a person resulting from the "concrete loss" suffered by the same person. In light of this decision, and bearing in mind that the object and purpose of the 1996 LLMC is to protect shipowners and their servants, it would seem reasonable to argue that claims for pure economic loss should also be accepted as falling under Art. 2(1)(a).[88]

Article 2(1)(c) covers all losses that result from infringement of rights other than contractual rights that occur in direct connection with the operation of the ship or salvage operations. The general phrasing of this provision offers room for its wide application to include claims for pure non-contractual economic loss caused by bunker oil spills.[89]

Finally, Art. 2(1)(d) and (f) cover claims regarding preventive measures, with Art. 2(1)(d) explicitly covering claims in respect of the raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, and Art. 2(1)(f) the claims of a person, other than the person liable, regarding all other possible measures taken to avert or minimise loss for which the person liable may limit his liability, including the further loss caused by such measures.[90]

Irrespective of all these statements supporting the idea that bunker oil pollution damage is covered by the 1996 LLMC, one fact undoubtedly supports that idea beyond any doubt. Namely, the IMO's Legal Committee, at its 99th session, adopted Resolution LEG.5(99) to increase the general limits of liability under the 1996 LLMC.91 Australia and co-sponsoring countries submitted a proposal to

88 *Ibid*., p. 249.

89 *Ibid*., pp. 249, 250.

90 *Ibid*., p. 250.

91 IMO, Legal Committee, Report of the Legal Committee on the work of its ninety-ninth session, LEG 99/14, 24 April 2012, Annex 2.

make these amendments. Australia's delegation drew particular attention to the "Pacific Adventurer" case where the liability limits, as calculated under the 1996 LLMC for a bunker fuel oil spill, fell significantly short of the cost of responding to the incident. The co-sponsors affirmed that it is necessary to ensure that the limits available under the 1996 LLMC reflect the increasing cost of bunker oil spills.[92] The IMO's Legal Committee adopted the mentioned resolution while taking into account, among other factors enumerated in Art. 8(5) of the 1996 LLMC Protocol, the compensation issues related to bunker oil pollution.[93] Since these issues were one of the factors considered for the amendments, it is clearly beyond doubt that bunker oil pollution damage is covered by the 1996 LLMC.

Although the 1996 LLMC covers bunker oil pollution damage, it recognises exclusions by stating that "a person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with the knowledge that such loss would probably result".[94]

Regarding liability limits, it has already been mentioned that the IMO's Legal Committee adopted a resolution to amend the general liability limits under the 1996 LLMC. These amendments entered into force on 8 June 2015. The amended limit of liability for claims for loss of life or personal injury for a ship not exceeding a 2,000 gross tonnage is SDR 3.02 million. For larger ships, to determine the limits of liability for loss of life or personal injury, an additional SDR 1,208 is added for each ton from 2,001 to 30,000 tons, SDR 906 is added for each ton from 30,001 to 70,000 tons, and a further SDR 604 for each ton in excess of 70,000 tons. The amended limit of liability for "any other claims" (property claims) for ships not exceeding a 2,000 gross tonnage is SDR 1.51 million. For larger ships, the same technique as just mentioned will be applied, with the figures 1,208, 906 and 604 being replaced with half of their amount, i.e. the figures 604, 453 and 302.[95]

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92 IMO, Legal Committee, Report of the Legal Committee on the work of its ninety-ninth session, Consideration of a Proposal to amend the limits of liability of the Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 96), in accordance with Article 8 of LLMC 96, LEG 99/4, 11 October 2011, paras. 2, 5.

93 IMO, Legal Committee (fn. 91), paras. 4.1-4.17.

94 Convention on Limitation of Liability for Maritime Claims, 1976 (adopted 19 November 1976, entered into force 1 December 1986) 1456 UNTS 221, as amended by the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 (adopted 2 May 1996, entered into force 13 May 2004), 2004 UNTS 456, (1996 LLMC) Art. 4.

95 IMO, Increased Limits of Liability for Maritime Claims Enter into Force under 1996 LLMC Protocol, 8 June 2015, https://www.imo.org/en/MediaCentre/PressBriefings/Pages/24-LLMC-limits.aspx (accessed 24 May 2024).

The 1996 LLMC also prescribes that if the amount of limitation of liability is insufficient to pay the claims for loss of life or personal injury, the amount calculated for "any other claims" (property claims) will be available for payment of the unpaid balance of "loss of life or personal injury" claims, and that such an unpaid balance will rank rateably with property claims.[96] In the latter situation, claims for loss of life or personal injury acquire the status of property claims and are literally treated as such. Here, it is absolutely crucial to highlight that property claims do not need to exist for this benefit to be used. An additional amount, in accordance with the property claims limitations, can always be calculated and added to the loss of life or personal injury limitations for the purpose of complete or more complete satisfaction of the latter claims. The 1996 LLMC allows a State Party to provide in its national law that certain property claims, i.e. claims for damage to harbour works, basins and waterways and aids to navigation, will have priority over other property claims.[97]

General rankings of the claims prioritise the satisfaction of the claims for loss of life or personal injury. Property claims are next in line for satisfaction, but in the case of still unpaid claims for loss of life or personal injury, the latter claims acquire the status of "property claims" and are ranked rateably with them. If the State Party uses the previously mentioned opportunity and gives priority to certain "property claims", it will change the "property claims" rankings and give priority to those claims that the State Party prioritises, even when loss of life or personal injury claims fall into that category because when they do they acquire the status of "property claims" and cannot use the priority of "loss of life or personal injury claims".[98]

The 1996 LLMC, when referring to concrete figures in the context of limitation of liability, uses the phrase "in respect of claims arising on any distinct occasion".[99] This phrase means that limitation figures provided in the 1996 LLMC can be applied for each distinct occasion that causes damage that is subject to the limitation of liability, and these limitation figures, or the fund if established, on each distinct occasion cover all persons that have the right to invoke them.[100]

The "unit of account" is the SDR as defined by the IMF, and its calculation to the relevant currency has already been described in section 4.1.1 of this paper.

96 1996 LLMC Art. 6(2).

97 Martínez Gutiérrez, N. A., *Limitation of Liability…, op. cit.*, pp. 80-84.

98 *Ibid*.

99 1996 LLMC Art. 6(1).

100 1996 LLMC Arts. 11(3) and 9(1).

When it comes to the SDR in the context of the 1996 LLMC, the only essential difference is that the amount of SDR will be converted into the national currency of the State in which limitation is sought, according to the value of that currency at the date of the establishment of the limitation fund, when payment is made, or when security is given which under the law of that State is equivalent to such payment.[101] When compared to its 1992 CLC counterpart, it is clear that the 1996 LLMC does not relate the value of the national currency only to the date of the constitution of the fund. This is because under the 1996 LLMC the constitution of the fund is not necessary to invoke a limitation of liability institute, as it derives from its Arts. 10 and 11. The ship's tonnage measurement is identical under both the 1996 LLMC and the 1992 CLC.

5. PRACTICAL APPLICATION: CASE ANALYSIS

5.1. Bow Jubail

On 23 June 2018, the oil and chemical tanker Bow Jubail (23,196 GT) collided with a jetty owned by LBC Tank Terminals in Rotterdam, the Netherlands. As a consequence of the collision, a leak occurred in the area of the starboard bunker tank, resulting in an oil spill into the harbour. At the time of the incident, the Bow Jubail was in ballast. However, on the voyage prior to the incident, from Houston to Rotterdam via Antwerp, the Bow Jubail carried "oil" as referred to in the 1992 CLC. The oil spilled was bunker oil.[102]

Section 3.2 of this paper highlighted that the Bunkers Convention does not apply to pollution damage covered by the 1992 CLC. Both the 1992 CLC and the Bunkers Convention make the terms "ship" and "oil" key elements of their definition of pollution damage. Since the oil in question satisfies both conventions, it is clear that the distinctive element in this case is the definition of ship. So, if the ship in question falls under the 1992 CLC definition of ship, then the 1992 CLC applies. If that is not the case, the Bunkers Convention applies since it contains a much broader definition of ship that surely covers the ship in question. Because of the three corresponding layers of responsibility, applying the 1992 CLC would be a more beneficial option for the claimants. Therefore, since the ship in question is capable of carrying oil (oil as defined by the 1992 CLC) and other cargoes and since the ship at the time of the incident was not actually carrying

[101] 1996 LLMC Art. 8(1).

[102] IOPC Funds, Incident Report: Bow Jubail, https://iopcfunds.org/incidents/incident-map#7285-23-June-2018 (accessed 24 May 2024).

oil but was rather in ballast, the defendant (the shipowner) must prove that there were no residues of previous oil cargoes on board to prove that the Bunkers Convention should be applied. Of course, the Netherlands, as the competent jurisdiction, is a Party to all relevant international instruments.[103]

The shipowner applied before the Rotterdam District Court to limit its liability in accordance with the 1996 LLMC. In response to a court request, the shipowner submitted a technical report concluding that no oil cargoes and/or their residues, persistent or non-persistent, remained on board the vessel prior to and at the time of the incident. The shipowner added that the ship, by being "oil-free" according to MARPOL, which is documented in the Oil Record Book, is also free of residues as defined in Art. I(1) of the 1992 CLC. The court assumed that the Bow Jubail qualified as a ship as defined in the 1992 CLC and decided not to grant the shipowner leave to limit its liability under the Bunkers Convention.[104]

Both the Court of Appeal in The Hague and the Supreme Court of the Netherlands upheld the Rotterdam District Court decisions. The Court of Appeal considered that there is no generally accepted standard procedure to determine when a ship, which can serve both as an oil tanker under the 1992 CLC and as a chemical tanker under the Bunkers Convention, ceases to be a ship under the 1992 CLC and further instructed that the Parties to the 1992 Fund Convention should consider creating such a procedure. When dismissing the appeal, the Supreme Court merely noted that it had not been necessary for the court to answer any questions that were important for the unity or development of the law.[105]

After submitting an application to limit their liability in June 2023 without including statutory interest and the court rejecting such an application, in November 2023 the shipowner and the Gard P&I Club again submitted an application to limit their liability under the 1992 CLC in the Rotterdam District Court, this time including both the amount under the 1992 CLC and statutory interest.[106]

Legal actions have been brought by several claimants before the District Court in Rotterdam against the shipowner and its insurer. It is important not to forget Art. VI(8) of the 1992 CLC that states that any claim for compensation for pollution damage may be brought directly against the insurer or other persons

[103] *Ibid*.

[104] *Ibid*.

[105] *Ibid*.

[106] *Ibid*.

providing financial security for the owner's liability for pollution damage. The paragraphs below give an overview of the claims submitted in court.[107]

The Government of the Netherlands is claiming EUR 5,187,721 for the costs incurred in the clean-up operations and treatment of wildlife affected by the spill. The owner of the jetty with which the Bow Jubail collided is claiming compensation for damage to the jetty following the collision and also for loss of trading. Following the latter, it is worth noticing that damages relating to the collision itself are not being claimed on the basis of the 1992 CLC or from the 1992 Fund, although damages that relate to the subsequent oil spill are. The total amount claimed is EUR 1,436,751. A refinery located in the Port of Rotterdam has brought an action claiming compensation for losses related to the inaccessibility of its refinery and the pollution of its loading and unloading facilities for ships. The refinery has also claimed for temporary adjustments made to its operations, allegedly due to the pollution, totalling EUR 5,623,256. A number of shipping companies have brought separate actions claiming costs incurred in hull cleaning, loss of income, demurrage fees and other costs, totalling EUR 5,816,265.[108]

The Government of the Netherlands' clean-up operations and treatment of wildlife costs fall under the 1992 CLC's costs of reasonable measures of reinstatement actually undertaken or to be undertaken. The jetty owner's loss of trading costs, the refinery's losses related to the inaccessibility of its refinery, to pollution of its loading and unloading facilities for ships, to temporary adjustments made to its operations, and shipping companies' losses of income and demurrage fees all fall under the 1992 CLC's loss of profit.[109]

To conclude, the Supreme Court decided that the 1992 CLC and accompanying Fund Convention apply to this incident. Bow Jubail is insured with Gard P&I (Bermuda) Ltd, which is a member of the International Group of P&I Associations, meaning that the shipowner of Bow Jubail is a Party to the STOPIA 2006. The limitation amount applicable to the Bow Jubail under the 1992 CLC is SDR 15,991,676. Since the total pollution damage is likely to exceed the limit that would apply to the ship under the 1992 CLC, the 1992 Fund Convention is likely to be applied. In accordance with the STOPIA 2006, the shipowner will be obliged to indemnify the 1992 Fund for the difference between SDR 20,000,000 and SDR 15,991,676.[110] It is expected that the claims arising from this incident

[107] *Ibid*.

[108] *Ibid*.

[109] *Ibid*.

[110] *Ibid*.

will exceed the STOPIA 2006 limit as well. This means that the 1992 Fund will be reimbursed by the shipowner for the mentioned difference, but every amount above SDR 20,000,000 will be covered solely by the 1992 Fund unless the amount reaches the height of the 2003 Supplementary Fund, which is rather unlikely in this case.[111]

5.2. Agia Zoni II

On 10 September 2017, the Greek-flagged tanker Agia Zoni II sank while anchored at Piraeus port. The vessel was carrying 2,200 mt of fuel oil and 370 mt of gas oil. Some 500 mt of oil leaked. After the incident, the vessel's insurance company submitted a declaration of limitation of liability in accordance with Art. 7 of the 1992 CLC, and a limitation fund was constituted. In 2021, the claimant initiated civil proceedings against the 1992 Fund without first submitting its claims to the limitation fund. The claimant was a beachfront company which claimed business suspension costs, clean-up costs, rent reductions, and loss of profits,[112] which are all costs claimable under the 1992 CLC and consequently under the 1992 Fund Convention as well. The Multimember Court of First Instance of Piraeus, Shipping Division, decided that after the constitution of the limitation fund, the claimant had no right to initiate any claim directly against the 1992 Fund, and the fact that it chose not to participate in the collective compensation proceedings against the limitation fund did not constitute a legal basis for the relevant civil action. The claimant appealed to the Three Member Court of Appeal of Piraeus.[113]

The claimant firstly argued that from the constitution of the limitation fund and the table of beneficiaries, it was proven that the shipowner was not economically able to meet its obligations and that, for that reason, the 1992 Fund had already paid the claimant EUR 135,964,47. The claimant continued by stating that the three and six-year limitation periods would run out before the completion of proceedings before the liquidator in respect of the limitation fund constituted by the shipowner. The claimant added that the appealed decision contains contradictory reasoning by saying that the 1992 Fund was not liable for the compensation in circumstances in which the 1992 Fund expressly admitted its liability. The claimant pointed out that the 1992 Fund's purpose is to act

[111] *Ibid*.

[112] National University of Singapore, Centre for Maritime Law, Faculty of Law, Decision 330/2023, https://cmlcmidatabase.org/decision-3302023 (accessed 24 May 2024).

[113] *Ibid*.

in a manner complementary to the 1992 CLC and that it is exempted from the obligation to compensate only in the limited cases provided for in Art. 4(2) of the 1992 Fund Convention. The claimant even stated that in circumstances like this, the 1992 Fund should make the payment and acquire the right to reimburse its payment against the Fund constituted under the 1992 CLC. In the end, the claimant expressed its disagreement with the interpretation of the court of first instance that the 1992 Fund's liability arises only once the shipowner's liability is exhausted and that, even if the shipowner's liability is exhausted, the claimant has no right to claim against the 1992 Fund because it chose not to participate in the collective proceedings against the limitation fund.[114]

The claimant's appeal was dismissed. The Court of Appeal held that Art. 4 of the 1992 Fund Convention provides that additional compensation is paid by the 1992 Fund only when claimants do not receive full compensation from the fund constituted under the 1992 CLC and that the same Art. 4 gives practical examples of this lack of capability of the 1992 CLC Fund. Since the 1992 Fund is only an additional fund, the Court of Appeal concluded that after the constitution of a limitation fund under the 1992 CLC, the claimant should have first submitted its claim for it to be examined by the liquidator and included in the table of claims, and only after that may further compensation claims be made against the additional compensation of the 1992 Fund.[115]

5.3. The Volgoneft 139

On 11 November 2007, the Russian-registered tanker Volgoneft 139 (3,463 GT, built in 1978) broke in two in the Kerch Strait, linking the Sea of Azov and the Black Sea between the Russian Federation and Ukraine. The tanker was at anchor when it was caught in a severe storm and heavy seas. The tanker was loaded with 4,077 tons of heavy fuel oil. It is understood that between 1,200 and 2,000 tons of fuel oil were spilled.[116] Some 250 kilometres of shoreline, both in the Russian Federation and in Ukraine, are understood to have been affected by the oil.[117]

The Volgoneft 139 was insured by *Ingosstrakh* (Russian Federation) for SDR 3 million, i.e. the minimum limit of liability under the 1992 CLC prior to November 2003. The minimum limit under the 1992 CLC after November 2003, however, is

[114] *Ibid*.

[115] *Ibid*.

[116] IOPC Funds, Incident Report: Volgoneft 139, https://iopcfunds.org/incidents/incident-map#6675-11-November-2007 (accessed 24 May 2024).

[117] *Ibid*.

SDR 4.51 million. There is, therefore, an "insurance gap" of some SDR 1.51 million. In February 2008, the Arbitration Court of Saint Petersburg and Leningrad Region issued a ruling declaring that the limitation fund had been constituted by means of a letter of guarantee for SDR 3 million (RUB 116.3 million). Consequently, the court decided that the shipowner/*Ingosstrakh* should pay the awarded amounts up to SDR 3 million and that the 1992 Fund should pay all amounts above SDR 3 million.

On 28 February 2008, after the provision of a guarantee from the shipowner's insurer, *OSAO Ingosstrakh*, a liability limitation fund of RUB 116,280,000 was constituted for the satisfaction of any claims against *OAO Voljskoie Neftenalivnoie Parochodstvo* (the shipowner).[118]

There were three different issues for the court to examine. First, the claim of the *Rosprirodnadzor*, which was composed of actual expenses from the incident in the sum of RUB 753,332.22, and additional damages to the environment calculated according to the Metodika (a statutory method of estimating the extent of direct damage, loss of profits, and consequential losses) in the sum of RUB 6,048,658,106. The second issue was the insurer's argument of the characterisation of the natural phenomenon, which led to the vessel breaking in half, as being of an exceptional, inevitable, and irresistible character.[119] If this argument were to be accepted by the court, the shipowner and its insurer would be exonerated from liability, and the 1992 Fund would have to pay compensation to the victims of the spill from the outset in accordance with Art. 4(1) of the 1992 Fund Convention.[120] The third issue was the suggestion by the 1992 Fund to increase the sum of the CLC fund from SDR 3,000,000 to SDR 4,510,000.[121]

Regarding the first issue, the court declined to satisfy the additional damages claimed by the *Rosprirodnadzor*, elaborating that the claimed additional damages do not represent loss of profit, reasonable measures of reinstatement, costs of preventive measures, or damage caused by preventive measures. The court stated that the enumerated damages are only damages that are claimable under the 1992 CLC, as proclaimed in Art. I(6), and that the claimed additional

[118] National University of Singapore, Centre for Maritime Law, Faculty of Law, The Volgoneft 139, https://cmlcmidatabase.org/volgoneft-139 (accessed 24 May 2024).

[119] *Ibid*.

[120] IOPC Funds, Incident Report: Volgoneft 139 (fn. 116).

[121] National University of Singapore, Centre for Maritime Law, Faculty of Law, The Volgoneft 139 (fn. 118).

damages represent neither of those.[122] *Rosprirodnadzor* did not appeal and the judgment became final.[123]

Regarding the second issue, the court refused the insurer's argument primarily on the basis of Art. III(2) of the 1992 CLC, saying that the natural phenomenon that causes damage, to exonerate the shipowner from liability, must be understood as a natural phenomenon which had never happened before or had not been recorded in the specific region, or if it had been recorded, occurred a significant time ago, and its reoccurrence could not reasonably be expected. The court concluded that the insurer did not present proof that the damage was the consequence of a natural phenomenon which was neither exceptional in its character nor inevitable nor irresistible. The evidence indicated that there was a warning to the ship regarding the weather forecast, and the master, trusting his experience, did not take all the necessary measures to avoid the shipwreck. In addition, a report provided by the 1992 Fund showed that similar winds had previously been observed in the area in question. The court thus considered that the bad weather was not an exceptional phenomenon.[124] *Ingosstrakh* did not appeal and the judgment became final.[125]

Regarding the third issue, it is primarily important to highlight that the court decided that the shipowner's limit should be SDR 3 million since that was the limit of liability under the 1992 CLC at the time of the incident, as published by the *Russian Official Gazette*. Since the 1992 CLC limit applicable at the time of the incident was SDR 4.51 million, the judgment left an "insurance gap" of some SDR 1.51 million. After this Decision on limitation of liability in 2008, in 2012 the court decided that the shipowner/*Ingosstrakh* should pay the awarded amounts up to SDR 3 million and that the 1992 Fund should pay all amounts above SDR 3 million, putting thus the entire burden of the "insurance gap" on the 1992 Fund. The 1992 Fund appealed against the 2012 judgment by the court, but the judgment was confirmed by the Court of Appeal in September 2012 and the Court of Cassation in January 2013. The 1992 Fund requested leave to appeal to the Supreme Court.

The Supreme Court stated that when rendering their judgments the lower courts had not taken into account the amendments to the liability limits under the

[122] *Ibid*.

[123] IOPC Funds, Incident Report: Volgoneft 139 (fn. 116).

[124] National University of Singapore, Centre for Maritime Law, Faculty of Law, The Volgoneft 139 (fn. 118).

[125] IOPC Funds, Incident Report: Volgoneft 139 (fn. 116).

1992 CLC that had been introduced through a resolution adopted by the Legal Committee of IMO in October 2000, which had entered into force in November 2003. The Supreme Court added that the lower courts had not taken into account that in accordance with the Vienna Convention on the Law of Treaties,[126] a treaty enters into force in the order and on the date provided in the treaty itself and that the Vienna Convention also provides that a treaty is amended by agreement of the participants. The Supreme Court further elaborated that international practice in similar cases established that a company (unlike a physical person) could not justify the performance of actions in violation of any rules of law by referring to the fact that these rules had not been officially published in the State. The Supreme Court highlighted that the lower courts had not investigated the question whether the shipowner or the insurance company knew or should have known about the increase of the liability limits. Therefore, the Supreme Court concluded that the lower courts imposed an unjustifiable additional financial burden on the 1992 Fund and its contributors by way of the difference between SDR 4.51 million and SDR 3 million and returned the compensation case to the Arbitration Court of Saint Petersburg and Leningrad Region for reconsideration. The latter decided in 2014 that the "insurance gap" of SDR 1.51 million should be deducted pro rata from the amount previously awarded to all claimants. The shipowner appealed against the judgment, but the appeal was rejected by the Court of Appeal and the judgment became final.[127]

One can easily question why the court would, in these circumstances and for these legal reasons, take SDR 1.51 million from the claimants and not increase the shipowner's limitation of liability. Here, it must be noted that the 1992 Fund appealed the 2012 compensation judgment and not the limitation of liability decision. The Supreme Court first, and the Arbitration Court after, realised that it was not legally correct to put the burden of SDR 1.51 million on the 1992 Fund for all the reasons mentioned above when referring to the Supreme Court's interpretation of this case. Since, in the compensation procedure, the Arbitration Court could not change the limitation of liability amounts, in order to right the wrong, the Arbitration Court cancelled the burden that was put on the 1992 Fund and consequently deducted on a pro-rata basis the amount previously awarded to all claimants for those SDR 1.51 million.

[126] Vienna Convention on the Law of Treaties, 1155 UNTS 331, signed 23 May 1969, entered into force 27 January 1980.

[127] IOPC Funds, Incident Report: Volgoneft 139 (fn. 116).

Another interesting detail arose in this case. Namely, the 2012, and consequently the 2014, judgment only directly orders the shipowner to pay, and the shipowner is bankrupt. Under these circumstances, the insurer is denying payment, arguing that it is not strictly required to pay and that doing so would be illegal. One of the claimants, the Salvage Company, brought a separate action against *Ingosstrakh*, claiming, under the guarantee issued by *Ingosstrakh*, the amount of compensation awarded to the claimant from the shipowner by the 2012 judgment. The claimant was successful in obtaining a final judgment against *Ingosstrakh*, and the claimant obtained an Enforcement Certificate against *Ingosstrakh*.[128]

5.4. The Fidelity

On 22 June 2018, the Lebanese-flagged ship Fidelity caused significant sea pollution in Raška Bay, in Croatia. The ship was at a port berth and in the process of bunkering when about 3,800 tons of medium-heavy fuel was spilt.[129]

The Fidelity is a livestock carrier that was at a port berth in Raška Bay to load livestock to be carried to the port of Derince in the Republic of Turkey and to fuel with bunker oil for its operation.[130]

As mentioned in section 3.1, the 1992 CLC and the Bunkers Convention define pollution damage equally. Article 2 of both conventions uses the term "pollution damage" to decide which to apply. The "pollution damage" definition further points out the decisive value of the terms "ship" and "(bunker) oil". Since the Fidelity is exclusively a livestock carrier (cargo vessel),[131] it is clear that it cannot fall under the 1992 CLC definition of ship but rather under the broader Bunkers Convention definition. Hence, there is no need even to try to prove if the concrete oil is persistent or not, i.e. whether it falls under the more specific and precise definition of oil under the 1992 CLC. The oil spilt was Residual Marine

[128] *Ibid*.

[129] Ćorić, D.; Tuhtan Grgić, I.; Stanković, G., Naknada ekološke štete u slučaju onečišćenja mora s brodova – hrvatski pravni okvir, *Poredbeno pomorsko pravo = Comparative Maritime Law*, vol. 61 (2022), no. 176, p. 96.

[130] Air, Maritime and Railway Traffic Accidents Investigation Agency (AIN), Maritime Accident Investigation Department, Final Report on Very Serious Marine Casualty of the m/v "Fidelity", Bay of Raša, 22 June 2018, CLASS: 342-27/18-01/40 REF. NO.: 699-05/3-20-175, Zagreb, 3 April 2020, pp. 8, 16, https://ain.hr/wp-content/uploads/2022/12/342-27_18-01_40_final_report.pdf (accessed 24 May 2024).

[131] *Ibid*., p. 8.

Fuel,[132] also called bunker fuel,[133] which surely falls under the broad "bunker oil" definition under the Bunkers Convention. Consequently, the Bunkers Convention is the one to apply in this case, given of course that the pollution damage was caused inside the territorial sea of the Republic of Croatia,[134] a State Party to the Bunkers Convention.

The shipowner chose one of the concessionaires to carry out the economic activities of fuel delivery to vessels in the harbour area of the Port of Rijeka to deliver and supply Fidelity with bunker fuel. The concessionaire hired a subcontractor company to conduct the bunkering.

After the incident, the Fidelity was arrested until the costs of removing the harmful substances from the maritime property and other damage caused by pollution caused by the oil spill into the sea were paid or until a satisfactory guarantee was provided to cover the damages. Not long after the arrest, the shipowner's liability insurer issued a guarantee (letter of undertaking) in which it undertook to compensate for all the damage that resulted from pollution to the amount of the shipowner's limitation of liability, which was SDR 3,560,580 or, adequately converted into USD on 22 June 2018, amounting to USD 5,024,156,41. As elaborated in section 4.2, the 1996 LLMC's limitation of liability regime applies to the damage that falls under the Bunkers Convention. Considering that the Fidelity's gross tonnage is 5,395, and applying Art. 6(1)(b) of the 1996 LLMC to that gross tonnage, it is easy to calculate the shipowner's maximum liability. After providing such a guarantee and paying, per the Side Agreement to the Letter of Undertaking, the first USD 1,500,000 to different casualties, the Fidelity was released. The liability insurer continued making payments. Overall, based on the already mentioned Side Agreement to the Letter of Undertaking and based on the Release and Final Settlement Agreement, the liability insurer paid USD 3,370,500 to different injured parties, and all the parties were considered satisfied. Since the liability insurer covered all the damages, what is the basis for court proceedings in this case?

[132] *Ibid*., p. 32.

[133] TotalEnergies Marine Fuels, Fuel Oil, Residual; Low Sulfur Fuel Oil (UN 3082), Safety Data Sheet according to Regulation (EC) No. 1907/2006 (REACH) with its amendment Regulation (EU) 2020/878 (12 December 2022), p. 1, https://dxm.content-center.totalenergies.com/api/wedia/dam/variation/xysh7dg731ta74ommgb4kmcfmr/original (accessed 25 May 2024).

[134] Air, Maritime and Railway Traffic Accidents Investigation Agency (AIN), Maritime Accident Investigation Department, Final Report on Very Serious Marine Casualty of the m/v "Fidelity", *op. cit*., p. 10.

Article 3(6) of the Bunkers Convention states: "Nothing in this Convention shall prejudice any right of recourse of the shipowner which exists independently of this Convention".[135] The plaintiff, the liability insurer, recalled Art. 723(1) of the Maritime Code[136] that prescribes: "By paying insurance benefits, all the rights of the insured towards third parties caused in connection with the damage for which compensation has been paid, are transferred to the insurer, but at most up to the amount paid by the insurer". Because of the quoted provision, the plaintiff claims that it is now in the position of the shipowner and that it can, based on Art. 3(6) of the Bunkers Convention, demand recourse from the concessionaire and subcontractor.

Article 1045(1) of the Civil Obligations Act (COA) states: "Whoever causes damage to another is obliged to compensate for it unless he proves that the damage was caused without any fault on his part".[137] Article 1049 COA regulates that the fault exists when the perpetrator caused the damage intentionally or through carelessness.[138] Article 1045(2) COA establishes that ordinary carelessness is presumed,[139] and Art. 1046 that damage is the reduction of one's property (ordinary damage), preventing its increase (lost benefit), and injury to personality rights (non-property damage).[140]

Therefore, in this proceeding, the plaintiff seeks to prove that the oil spillage and pollution arose because of the concessionaire's and the subcontractor's actions and, consequently, wishes to oblige them to compensate the plaintiff for the amount it paid to the casualties of the oil pollution in question. The defendants will seek to defend themselves from those accusations.

The plaintiff's introductory statement was that the spillage occurred during the bunkering and not afterwards. With this statement, the plaintiff introduced the defendants to the story because if the spillage occurred while the bunkering was being conducted, then the concessionaire and the subcontractor can be guilty of the spillage. If the spillage occurred after bunkering, proving that their actions led to it would be more difficult. The plaintiff continued by saying that

135 Bunkers Convention Art. 3(6).

136 Maritime Code, *Narodne novine (Official Gazette)*, no. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015, 17/2019, (Maritime Code 2019) Art. 723(1).

137 Civil Obligations Act, *Narodne novine (Official Gazette)*, no. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 145/2023, 155/2023, (COA 2023) Art. 1045(1).

138 COA 2023 Art. 1049.

139 COA 2023 Art. 1045(2).

140 COA 2023 Art. 1046.

the subcontractor did not have a concession to carry out the economic activity in question but that this right belongs exclusively to the concessionaire (first defendant). The plaintiff further stated that the subcontractor (second defendant) did not have professional or trained workers to carry out the bunkering adequately and that the subcontractor made some procedural errors during loading. The plaintiff proposed two witnesses regarding the circumstances of the causation of the oil pollution, the harbour captain and the navigation safety inspector. The plaintiff also nominated the Maritime Faculty as an expert witness regarding the same circumstances. The plaintiff also recalled the Report of the harbour master's office on the conducted administrative investigation of the maritime accident (Report), and specifically two points of that Report. The first point states that according to the Concession Contract, the first defendant did not have the right to transfer the concession rights to the third party without the consent of the Port Authority of Rijeka. The second point states that the drivers of tanker numbers 4 and 5, i.e. the person responsible for handling the portable transhipment pump, did not inform the ship's crew about embarking before the start and thus did not take measures to prevent environmental pollution as prescribed by Art. 112 of the Ordinance on the handling of hazardous substances, conditions and performance of transportation in maritime transport, loading and unloading of dangerous substances, bulk and other cargo in ports, and the method of preventing the spread of expired oils.[141]

In their response to the plaintiff's arguments, the defendants first mentioned that the bunkering contract had an "FOB (free on board)" Incoterms clause contracted, which means that the buyer accepts the title of the goods at the shipment point and assumes all risk once the seller ships the product. In favour of this argument, the defendants delivered the Bunker Delivery Receipts to the court as the buyer's confirmation that the bunker oil in question was delivered to the buyer. It is worth highlighting here that two of the five Bunker Delivery Receipts are not signed by the buyer. The defendants proposed the competent Ministry to deliver an opinion on whether the concessionaire may hire a subcontractor to carry out economic activity in the area where the concessionaire has a concession and not the subcontractor. The Ministry concluded that the concessionaire could supply ships with fuel from the tanks of external collaborators who perform the same

[141] Ordinance on Handling Dangerous Goods, the Conditions and Method of Transport in Maritime Traffic, Loading and Unloading of Dangerous Goods, Bulk and other Cargo in Ports and the Method of Preventing the Spreading of Oil Spills in Ports, *Narodne novine (Official Gazette)*, no. 51/2005, 127/2010, 34/2013, 56/2013, 88/2013, 79/2015, 53/2016, 41/2017, 23/2020, 128/2020, (Ordinance 2020) Art. 112.

activity in the name of and on the concessionaire's account without concluding a sub-concession agreement. The defendants recalled the same report as the plaintiff. The defendants highlighted the entire list of the ship master's wrongdoings in connection with the incident in question, indicating thus that it is not the defendants' fault that this incident occurred but that of the ship's crew.

The defendants delivered to the court the findings and opinion of an expert engaged in a parallel criminal proceeding concerning the same incident. In his report, the expert explicitly concluded that the cause of the maritime accident was the negligence of the ship's master and his crew. The defendants added that the plaintiff did not prove that the oil pollution damage occurred to the amount that the plaintiff paid to the casualties. The defendants claim that this is only the amount the victims and the plaintiff had agreed on. The defendants believe that, even if the defendants did cause the oil pollution, the plaintiff should prove the real damage and not demand the amount that it had settled for with the casualties.

This case is still ongoing. The purpose of examining this case is not to try to predict the outcome. The purpose is to adequately put the Bunkers Convention into the context of the circumstances of the case, which is done in the introduction to the case analysis, and to show how the appliance of the Bunkers Convention can lead to the complete and decisive application of national law, which is Croatian law in this instance. Consequently, this case can serve as a sound introduction to the following chapter, which deals with the peculiarities of Croatia's legal system.

6. PECULIARITIES IN THE REPUBLIC OF CROATIA

The Republic of Croatia is a State Party to all the relevant international instruments analysed in Chapter 2. As mentioned in the same chapter, the Republic of Croatia accompanied the Instrument of Accession to the 1996 LLMC Protocol with a Reservation. In the Reservation, Croatia reserved the right to exclude the application of Art. 2(1)(d) and (e) of the 1996 LLMC and to exclude claims for damage within the meaning of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention), or of any amendment or protocol thereto.[142] Part of the Reservation relating to Art. 2(1)(e) of the 1996 LLMC and the HNS Convention is unrelated to the topic of this paper.

[142] IMO, Status of IMO Treaties…, p. 415.

Section 4.2 already explained that the 1996 LLMC covers bunker oil pollution damage. In the same section, it is also stated that Art. 2(1)(d) and (f) cover claims regarding preventive measures. Under these circumstances, does the "wreck removal" reservation, a reservation regarding Art. 2(1)(d) of the 1996 LLMC, carry with it a reservation to "bunker oil damage" claims? The answer to this question is "no" because all claims for bunker oil pollution damage should be covered under Art. 2(1)(a),(c) and (e) of the 1996 LLMC. Irrespective of the possible non-application of Art. 2(1)(d) of the 1996 LLMC, Art. 2(1)(e) still covers all bunker oil pollution claims under Art. 2(1)(d) of the 1996 LLMC.[143]

Croatia took advantage of Art. 10(1) of the 1996 LLMC and prescribed that the utilisation of the privilege of limitation of liability under the 1996 LLMC is conditioned by the obligatory establishment of a fund.[144]

Croatia acted upon the IMO's Resolution on Protection and, in implementing the Bunkers Convention, protected persons taking measures to prevent or minimise the effects of oil pollution. Article 823.b(5) of the Maritime Code prescribes: "With the exception from paragraph 6, claims for compensation for pollution damage, whether based on this Code or not, cannot be filed against persons who take protective measures as well as a person in their service, unless it is proven that the damage occurred as a result of their personal actions or omissions, done either intending to cause damage or recklessly knowing that damage is likely to occur".[145] Paragraph 6 states that not a single provision of this Code affects the shipowner's right to recourse.[146]

Since Croatia is a State Party to all the relevant international instruments in this legal area, all further peculiarities will fall under the domain of procedural matters. This paper highlights only the crucial procedural specifics of the Croatian legal system regarding the international element of possible (bunker) oil pollution claims. In Croatia, the international treaties that have been concluded and confirmed in accordance with the Constitution and published and which are in force form part of the internal legal order of the Republic of Croatia and by their legal force are above the law.[147] This means that international instruments that regulate (bunker) oil pollution can be directly applied before Croatian courts.

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143 Martínez Gutiérrez, N. A., *Limitation of Liability…, op. cit*., p. 193.

144 Maritime Code 2019 Art. 395(1).

145 Maritime Code 2019 Art. 823.b(5).

146 Maritime Code 2019 Art. 823.b(6).

147 Constitution of the Republic of Croatia, *Narodne novine (Official Gazette)*, no. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014, (Constitution 2014) Art. 134.

Nevertheless, Croatia adequately implemented the 1996 LLMC, the 1992 CLC, and the Bunkers Convention into its Maritime Code.

Under Croatia's legal system, commercial courts are competent to deal with (bunker) oil pollution damage claims. Article 34.b(1)(6) of the Civil Procedure Act states that commercial courts are competent to adjudicate in disputes relating to ships and navigation at sea and inland waters and in disputes to which navigational law applies (navigational disputes).[148] Even if it is debatable whether a certain (bunker) oil pollution damage claim falls under the mentioned provision, it is important to highlight that almost every (bunker) oil pollution claim will fall under Art. 34.b(1)(1) of the Civil Procedure Act that prescribes the competence of commercial courts in disputes between legal entities, in disputes between legal entities and natural persons performing a registered activity if it is a dispute related to their activity, as well as between natural persons performing a registered activity if it is a dispute related to their activity, unless it is a question of disputes in which, according to the Civil Procedure Act, municipal courts always adjudicate (Art. 34(1)), or unless the competence of another court is established by another law. The latter is not the case with (bunker) oil pollution damage.[149] Therefore, the commercial court's competence is undeniable.

Regarding local jurisdiction, it is worth mentioning that general rules say that the court in whose territory the defendant has a place of residence is competent for the trial.[150] If the defendant does not have residence in the Republic of Croatia, the competent court is the one in whose territory the defendant has temporary residence.[151] If neither the residence nor the temporary residence of the defendant is located in Croatia, the court with local jurisdiction is the court on whose territory it is assumed that the defendant will stay for a longer period of time.[152] Regarding legal entities, the court in whose territory their registered seat is located represents the court that has local jurisdiction.[153]

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148 Civil Procedure Act, *Službeni list SFRJ (Official Gazette of the SFRY)*, no. 4/1977, 36/1977, 36/1980, 6/1980, 69/1982, 43/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990, 35/1991, *Narodne novine (Official Gazette)*, no. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, 155/2023, (CPA 2023) Art. 34.b(1)(6).

149 CPA 2023 Art. 34.b(1)(1).

150 CPA 2023 Arts. 46(1) and 47(1).

151 CPA 2023 Art. 47(2).

152 CPA 2023 Art. 47(3).

153 CPA 2023 Art. 48(1).

Besides what is mentioned in the previous paragraph, when it comes to (bunker) oil pollution damage, the court in whose territory the harmful act was committed or the court in whose territory the harmful consequence occurred also acquires local jurisdiction. Therefore, regarding the local jurisdiction, the plaintiff can choose any of the courts indicated in this and the previous paragraph.[154]

It has already been elaborated that, in the legal system of the Republic of Croatia, the shipowner must constitute a fund, regardless of which limitation of liability system the shipowner seeks to invoke, the 1992 CLC or the 1996 LLMC. The non-litigation limitation of the shipowner's liability procedure is carried out by a single judge of the competent court.[155] The competent court is one determined by the Civil Procedure Act,[156] and following the previously quoted Art. 34.b(1)(6) of the Civil Procedure Act, the commercial court appears as the competent one.[157]

In Croatia, litigation proceedings are conducted in the Croatian language and using the Latin script if no other language or script has been introduced by law for use in certain courts.[158] This means that all submissions and evidence can only be used before Croatian courts if they are in Croatian or translated by an authorised court interpreter into Croatian.[159] If a party to a dispute submits a submission in a foreign language, the court will order the party to correct or supplement the submission in accordance with the given instructions (translated into the Croatian language) within eight days.[160] If a party submits an adequately corrected or supplemented submission within the given deadline, it will be considered that it was submitted to the court on the day it was submitted for the first time.[161] If the submission is not returned to the court within a certain period or corrected in accordance with the court's instruction, it will be considered withdrawn. It will be rejected if it is returned within the deadline but without correction or addition.[162]

Foreign parties and other participants in the proceedings have the right to use their own language when participating in hearings and when taking other

154 CPA 2023 Art. 52(1).

155 Maritime Code 2019 Art. 401(1).

156 Maritime Code 2019 Art. 401(2).

157 CPA 2023 Art. 34.b(1)(6).

158 CPA 2023 Art. 6.

159 Rulebook on Permanent Court Interpreters, *Narodne novine (Official Gazette)*, no. 88/2008, 119/2008, 28/2013, 21/2022, (Rulebook 2022) Art. 19(1) and CPA 2023 Art. 104.

160 CPA 2023 Art. 109(1)(2).

161 CPA 2023 Art. 109(3).

162 CPA 2023 Art. 109(4).

procedural actions orally before the court. Moreover, they will be provided with an oral translation into their language of what is presented at the hearing and an oral translation of the documents that are used as evidence at the hearing.[163] Nevertheless, the costs of these translations are borne by those foreign parties and other participants.[164]

Regarding the delivery of the evidence, it is only crucial for the parties to satisfy the general procedural deadline for the delivery of the evidence. Under the Civil Procedure Act,[165] the parties are obliged to present all facts on which they base their claims and all evidence necessary to prove the presented facts in the lawsuit and the response to the lawsuit, and at the latest at the preliminary hearing. During the main hearing, the parties may present new facts and propose new evidence only if they were not able to present or propose them with no fault on their part before the conclusion of the preliminary proceedings.[166]

A plaintiff who is not a citizen of the Republic of Croatia or any other Member State of the European Union or a contracting State of the Treaty on the European Economic Area or another international agreement that regulates exemption from the insurance of the costs of the procedure, and has a place of residence or headquarters in a State that is not a Member State of the European Union or a contracting State of the Treaty on the European Economic Area, is obliged, at the defendant's proposal, to deposit the insurance of litigation costs, unless the decisions of the courts of the Republic of Croatia on costs are recognised in the country where the plaintiff has his residence or headquarters. In the Decision approving the request for insurance of litigation costs, the court determines the amount of insurance and the period in which the insurance must be provided. If the plaintiff does not prove within a deadline that he has provided insurance for litigation costs, it will be considered that the lawsuit has been withdrawn.

7. CONCLUSION

The 1992 CLC and Bunkers Convention are core conventions in this legal area. They both cover "pollution damage", with the terms "ship" and "(bunker) oil" having a decisive role in explaining which specific pollution damage each covers and, consequently, which is to be applied in a concrete, real-life scenario.

163 CPA 2023 Art. 102(1).

164 CPA 2023 Art. 102(4).

165 CPA 2023 Art. 7(1).

166 CPA 2023 Art. 299(1) and (2).

This paper has shown that the Bunkers Convention was drafted on the model of the 1992 CLC. Both conventions put the burden of proof on the shipowners to prove they are not liable for certain oil pollution. The 1992 CLC is very specific and almost regularly exposes only the real owner of the ship. The only exception is the exposure of the company that is registered as the operator of a State's ship. With its "channelling" provisions, the 1992 CLC further strengthens its exclusivity regarding the persons potentially liable and leaves no space for claiming against anyone on any grounds but against the shipowner on the basis of the 1992 CLC. The Bunkers Convention, with its broad definition of shipowner, has exposed multiple persons to this "strict liability" approach. The lack of "channelling" provisions and exposure of anyone to a lawsuit independently of the convention only increases uncertainty in the already uncertain regulation of this matter. The IMO Resolution on Protection intervenes by urging States, when implementing the Bunkers Convention, to consider the need to introduce legal provisions for the protection of persons taking measures to prevent or minimise the effects of bunker oil pollution.

One more crucial takeaway from this paper is that the shipowner can limit his liability for the 1992 CLC's oil pollution damage in accordance with the specific independent limitation of the liability regime that applies exclusively and only to it. The mentioned regime consists of the 1992 CLC itself, as well as the 1992 Fund Convention and the 2003 Fund Convention. The Bunker Convention's pollution damage recognises no independent limitation of liability regimes. It rather depends on the law of the State where the incident occurred, which in many cases will be the 1996 LLMC, whose application to the Bunker Convention's pollution damage, irrespective of the absence of any direct provision related to this, has been clearly elaborated in this paper.

The cases in Chapter 5 have shown how positive legal provisions in this legal area function in practice, with Fidelity showcasing how one international Bunkers Convention case can lead to the full application of national law.

The Republic of Croatia is a Contracting Party to all the relevant international legal instruments in this field and, hence, the peculiarities of the Croatian legal system in the sense of possible international (bunker) oil pollution claims mostly regard procedural matters. Nevertheless, Croatia did accompany the Instrument of Accession to the 1996 LLMC Protocol with a Reservation that, due to the legal meaning of Art. 2(e) of the 1996 LLMC, does not affect the Bunker Convention's relation with the 1996 LLMC. Furthermore, in the Republic of Croatia, the establishment of a fund is obligatory not only for utilising the 1992 CLC independent limitation of liability regime but also for invoking the 1996 LLMC

regime. Not just that, but Croatia also acted upon the IMO's Resolution on Protection and confronted the Bunker Convention's uncertain "shipowner" term by "saving" from potential responsibility persons taking measures to prevent or minimise the effects of oil pollution.

To conclude, pollution damage under the Bunkers Convention and the 1992 CLC is a well-regulated international legal area that gathers other "limitation of liability" instruments to form effective and complete legal unity. The Republic of Croatia successfully follows this unity and, in doing so, contributes to fulfilling international maritime unification goals.

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Sažetak:

PRAVNA ANALIZA ZAHTJEVA ZA NAKNADU ŠTETE U SLUČAJU ONEČIŠĆENJA ULJEM I POGONSKIM ULJEM – RAZUMIJEVANJE MEĐUNARODNOG REGULATORNOG OKVIRA I SPECIFIČNOSTI HRVATSKOG PRAVNOG SUSTAVA

Ovaj rad analizira međunarodni pravni okvir onečišćenja uljem kako je regulirano Međunarodnom konvencijom o građanskoj odgovornosti za štetu zbog onečišćenja uljem iz 1992. (engl. International Convention on Civil Liability for Oil Pollution Damage – CLC*) i onečišćenja pogonskim uljem kako je regulirano Međunarodnom konvencijom o građanskoj odgovornosti za štetu zbog onečišćenja pogonskim uljem (engl.* International Convention on Civil Liability for Bunker Oil Pollution Damage – BUNKER*). Analiza je utemeljena na načelu sličnosti i razlika između navedena dva režima, a osobita je pažnja posvećena odgovarajućim mehanizmima ograničenja odgovornosti brodovlasnika, pri čemu je napravljena jasna distinkcija između neovisnog i specifičnog sustava ograničenja odgovornosti brodovlasnika u slučaju onečišćenja uljem te općenitog sustava ograničenja odgovornosti brodovlasnika koji se primjenjuje u slučaju onečišćenja pogonskim uljem. Republika Hrvatska je strana svih relevantnih međunarodnih instrumenata u ovom području, no ipak se u ovom radu ističu sve specifičnosti hrvatskog pravnog sustava koje moraju biti prepoznate i praktično primijenjene u slučaju zahtijevanja naknade navedenih šteta u Republici Hrvatskoj. Osim toga, ovaj rad omogućuje i uvid u »stvarni svijet« s obzirom na to da je jedno cijelo poglavlje posvećeno isključivo analizi slučajeva iz prakse.*

Ključne riječi: *CLC; Bunker konvencija; ulje; pogonsko ulje; ograničenje odgovornosti; LLMC; IOPC Fondovi; sudska praksa.*