



International Oil Pollution
Compensation Funds

Agenda Item 4	IOPC/APR17/4/6	
Date	30 March 2017	
Original	English	
1992 Fund Assembly	92AES21	●
1992 Fund Executive Committee	92EC68	
Supplementary Fund Assembly	SAES5	●

COMPENSATION MATTERS—CONSISTENT APPLICATION OF THE 1992 CONVENTIONS

**Submitted by the International Chamber of Shipping (ICS) and the
International Group of P&I Associations (International Group)**

Summary:	This document refers to concerns expressed by delegations at the April and October 2016 meetings of the Funds, that courts in Member States were taking decisions inconsistent with the Civil Liability and Fund Conventions, notably with respect to the limitation and channelling provisions of the 1992 Civil Liability Convention (1992 CLC). This document reviews the background to these provisions, and various problems involved in the approach to them which has sometimes been taken. Reference is made to the views expressed that further efforts could be made to develop a better understanding of the CLC/Fund system, as well as other possible options such as measures to increase the number of ratifications of the Supplementary Fund Protocol.
Action to be taken:	<p><u>1992 Fund Assembly and Supplementary Fund Assembly</u></p> <p>Consider whether it is appropriate to undertake further study of these issues and possible measures to address them.</p>

1 Introduction

- 1.1 The co-sponsors refer to the discussions at the April 2016 and October 2016 meetings of the Funds where concerns were expressed that courts in Member States were taking decisions that were not consistent with how the 1992 Civil Liability and Fund Conventions were intended to apply, notably with respect to the 'limitation' and 'channelling' provisions of the 1992 Civil Liability Convention (1992 CLC) (see documents [IOPC/APR16/9/1](#), paragraphs 3.2.24–3.2.42 and [IOPC/OCT16/11/1](#), paragraphs 3.2.20–3.2.34).
- 1.2 Such decisions may have implications for the long-term health of the international liability and compensation regime, which for the past 40 years has operated with great success. In order for it to continue to be effective it must be applied in a uniform, consistent manner and beneficiaries and contributors must be treated consistently in all Member States. The co-sponsors support the suggestion made by Member States and supported by several delegations at the April 2016 meeting to consider making further efforts to develop a better understanding in their own jurisdictions of how the provisions should be interpreted and applied ([IOPC/APR16/9/1](#), paragraphs 3.2.30–3.2.32).

- 1.3 Since the meeting of the governing bodies in October 2016, the co-sponsors have investigated the matter closely and invite the 1992 Fund Assembly and Supplementary Fund Assembly to undertake further study with regard to possible measures that could be taken both to promote the uniform interpretation and application of the 1992 Civil Liability and Fund Conventions by courts in all Member States, and to increase the number of States Parties to the Supplementary Fund Protocol.
- 1.4 By way of preliminary note, in commenting on the decisions of national courts below, the co-sponsors fully recognise and respect the decision-making authority of those courts. The co-sponsors also stress that the rule of law is of paramount importance and none of the comments which they make are intended to derogate from this in any way. These comments are intended simply to provide information and to make observations on potential implications which Member States may wish to consider.
- 1.5 To assist the discussion, the co-sponsors set out below a brief overview of the fundamental principles underpinning the 1992 CLC/Fund international liability and compensation regime and a summary of the issues that have given rise to the most recent discussions. A more detailed note is contained in Annex I of this document.
- 1.6 There is no doubt that the international liability and compensation regime for oil pollution damage from tankers has been a success story. Since the establishment of the original Fund almost 40 years ago, the IOPC Funds have been involved in nearly 150 incidents of varying sizes and, in the great majority of cases, all claims have been settled out of court. It is important to note that the shipowner alone meets the great majority of claims (some 95% historically) without any need for recourse to the IOPC Funds.
- 1.7 This success is due to the radical measures introduced in the international regime which, at the time, were a major departure from the law and practice in most jurisdictions regarding the shipowner's liability for oil pollution damage. These measures and the principles underpinning the international system were adopted to give effect to the aim of the system to ensure prompt compensation of claimants without the need for legal wrangling.

2 Fundamental principles underpinning the international liability and compensation regime

- 2.1 The measures in the 1992 CLC designed to expedite the establishment of liability and payment of valid claims include: strict liability on the part of the shipowner; all liability channelled to the shipowner irrespective of which party is actually at fault; compulsory insurance of the shipowner, backed by a State certificate verifying the insurance cover without which the ship cannot trade (effectively a 'passport to trade'); a right for claims to be brought directly against the insurer; and, as the quid pro quo for acceptance of strict liability, the right to limit liability, which is meant to be virtually unbreakable for the shipowner and unbreakable for the insurer. Upsetting this long-established balance risks undermining the basis on which the CLC is designed to operate.
- 2.2 The 1992 CLC/Fund regime is based on the principle of shared liability between the shipping industry and the oil industry for the costs of compensation. Shared liability, in a balanced manner, ensures that financial compensation is available to claimants in major incidents at a high level that would be otherwise impossible to provide. The primary (and the large) part of the liability is borne by the shipowner under the 1992 CLC and then, on the rare occasions that valid claims exceed the shipowner's liability, additional compensation is provided by the IOPC Fund financed by contributions from oil receivers in Fund Member States. A third tier of compensation is also available to claimants in States that are Members of the Supplementary Fund. In order to address concerns about the possible impact of the third tier on the principle of shared liability, shipowners have agreed to effectively fund 50% of any payments made under the Supplementary Fund Protocol via the voluntary Tanker Oil Pollution Indemnification Agreement 2006 (TOPIA 2006).

3 Importance of uniform application of the CLC/Fund regime

3.1 In view of the international nature of the regime, it was recognised that there should not be a difference in the interpretation and application of the Conventions in States Parties. The preamble to the 1992 CLC and the 1992 Fund Convention expressly states:

‘Desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases’;

3.2 This intention was reinforced in 2003 in Resolution No. 8 of the 1992 Fund adopted in May 2003 (Resolution on the interpretation and application of the 1992 CLC and 1992 Fund Convention), which is reproduced at Annex II of this document. It confirms the importance of implementing and applying the regime uniformly in all States Parties for its proper and equitable functioning and to ensure that claimants are given equal treatment as regards compensation. The Resolution also draws attention to the numerous decisions of the governing bodies of the Funds on the interpretation of the Conventions and emphasises the importance of due consideration to these decisions by national courts.

3.3 Uniform application provides the necessary high level of certainty to shipowners and other commercial parties to allow them to structure their activities in compliance with the international regime. This extends to their contracts of carriage and to risk assessment and transfer, i.e. their insurance arrangements. Shipowners’ insurers in turn are able to provide the necessary insurance coverage in compliance with the governance rules regarding financial security and viability, secure in the knowledge of the limits of liability that they may be required to pay. This greatly reduces the risk of volatility in the insurance marketplace and ensures that market capacity will endure.

3.4 Inconsistent application of the Conventions in States Parties may arise for different reasons, and different considerations may be involved in any attempt to address them. By way of example, with regard to the channelling and limitation provisions, causes of inconsistency include differences between national courts as to how they apply the legal tests specified by the Convention and different interpretations given to the word ‘recklessly’. Whilst such decisions are entirely within the competence of the national courts, this does not prevent the Funds’ governing bodies from considering whether there are any measures they can undertake to promote a consistent interpretation. The uniform interpretation and application of the 1992 CLC and Fund Conventions is, after all, of fundamental importance for the proper functioning of the international regime and equal treatment of claimants in all States Parties.

3.5 Despite, however, the recognised importance of uniform interpretation and application, recent court decisions in Fund Member States have been the subject of considerable discussion within the 1992 Fund governing bodies, and the maritime industry at large. Most recently in the *Prestige* case, the Spanish Supreme Court—overturning an acquittal decision of the trial court—held that the master was guilty of the crime of reckless damage to the environment and that as a result the master and shipowner were not entitled to limit their liability under the CLC. The shipowner’s insurer, the London P&I Club, was also held directly liable above the CLC limit for up to US\$1 billion (the limit of cover provided by International Group clubs for oil pollution damage), irrespective of Article VII(8) of the 1992 CLC, which expressly provides that the insurer may avail himself of the limits of liability prescribed in Article V(1), even if the owner is not entitled to limit his liability according to Article V(2).

3.6 Any subsequent decision to bring claims against the shipowner and the insurer for amounts in excess of the CLC limit of liability could have consequences for shipowners and their insurers, and the system as a whole that will need serious consideration.

- 3.7 As a further recent example, in 2012 the French Supreme Court decided in the *Erika* case that certain defendants were not entitled to benefit from the protection of the channelling provisions of the CLC and were criminally liable for causing pollution. Wide-ranging civil damages, including pure environmental damage, were awarded, which were unlikely to have been admissible under the CLC/Fund. Following that decision, legislation has been adopted in France that would seem to introduce unlimited liability for pure environmental damage into French law.
- 3.8 As was noted at the meetings of the Funds' governing bodies in 2016, while these decisions might appear to affect only shipowners, their insurers, and other interests connected with the ship, in reality they have implications which could be detrimental to the whole system of compensation established by the 1992 Conventions (see documents [IOPC/APR16/9/1](#), paragraphs 3.2.30–3.2.32 and [IOPC/OCT16/11/1](#), paragraph 3.2.22). The 1992 CLC is complex and the important principles in it are designed to operate together as a coherent whole—the strict liability, channelling, the compulsory insurance and the right of direct action come coupled with the virtually unbreakable right to limit liability for the shipowner and an unbreakable limit for the insurer. It will be readily seen that if such decisions are reproduced in other cases, the risks to the international system will become ever more real.
- 3.9 There is also a risk that that national laws and decisions by national courts that differ in scope from the international regime but which cover the same incident will result in a parallel compensation regime operating in that State Party. According to international treaty law, national law which is different to or in conflict with international treaty obligations of a State Party should be resolved in favour of the international law but the resultant confusion and uncertainty that would arise by reason of the conflict would be highly undesirable for claimants seeking clarity and prompt compensation in the aftermath of an incident of pollution from a ship.

4 Possible future work

4.1 The co-sponsors invite Member States to consider the issues raised in this paper and to consider whether further study by the 1992 Fund and Supplementary Fund governing bodies is appropriate. The co-sponsors believe that any such future work could include:

- (a) The development of a common understanding of the application of the Conventions, which addresses the matters raised in this paper and other matters that may be raised.

If a consistent approach to the application of the Conventions is to be promoted by the 1992 Fund, and the co-sponsors can see no sound reason why such an approach should not be taken, such a common understanding could be adopted by the Funds' governing bodies.

- (b) Understanding whether any obstacles exist to further ratifications of the Supplementary Fund Protocol and whether any measures can be undertaken to increase the number of ratifications.

The issues raised in this paper have typically arisen in cases where there have been concerns as to whether the available compensation would be sufficient for established claims to be paid in full. The risk of these problems is greatly reduced where a State is a State Party to the Supplementary Fund Protocol.

The co-sponsors believe that this should be given further consideration since the Supplementary Fund Protocol was adopted after the *Erika* and *Prestige* incidents to address the real concerns that the 1992 CLC/Fund limits might be insufficient to cover all valid claims arising out of a major tanker incident. The Supplementary Fund provides compensation over and above that available under the 1992 CLC/Fund regime up to a maximum total amount of SDR 750 million (over US\$1billion).

(c) Understanding whether any obstacles exist to:

- (i) ratification of the 1992 Fund Convention in States currently party only to the 1992 CLC; and
- (ii) ratification of the 1992 CLC in States currently party only to the 1969 CLC.

In this regard it is noted that some 1992 CLC States have still not ratified the 1992 Fund Convention—therefore placing sole liability on the shipowner—and that 34 States remain parties to the 1969 CLC.

5 Action to be taken

1992 Fund Assembly and Supplementary Fund Assembly

The 1992 Fund Assembly and Supplementary Fund Assembly are invited to consider whether it is appropriate to undertake further study of these issues and possible measures to address them.

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ANNEX I

1 Limitation provisions of the 1992 CLC

- 1.1 The owner is entitled to limit his liability under the 1992 CLC (Article V(1)) unless:
- ‘... it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.’ (Article V(2)).
- 1.2 The owner’s insurer is entitled to rely upon the limit of liability irrespective of a finding ‘recklessness’ with material knowledge:
- ‘Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner’s liability for pollution damage. In such case the defendant may, even if the owner is not entitled to limit his liability according to Article V, paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1....’ (Article VII(8)).
- 1.3 The test of conduct required to ‘break’ the shipowner’s limit of liability is the same as that provided for in the 1976 London Convention on Limitation of Liability for Maritime Claims (LLMC). In both instruments it replaced the test of ‘actual fault or privity’ in earlier regimes—the 1957 Brussels Limitation Convention and the 1969 CLC. The previous test was found unsatisfactory as it led more readily than expected to litigation and denial of limitation. The revised test, which has often been described as making limitation virtually unbreakable, and which has therefore rarely been broken, has been accompanied by much higher financial limits, and by procedures for these to be increased when appropriate by tacit acceptance.
- 1.4 As a result of these arrangements shipowners are strictly liable to pay compensation up to the CLC limit even where the damage occurred without any fault on their part, or of their employees or agents. The same arrangements also limit the liability of shipowners for pollution under the 1992 CLC, even where the damage is attributable to their fault—unless their conduct falls within the test described in Article V(2).
- 1.5 The second tier of compensation under the 1992 Fund Convention is designed (as stated in the Preamble) to ensure that adequate compensation is available, and that the costs of oil pollution from tankers is borne by both the shipping industry and by oil cargo interests. In Fund Member States the effect of the CLC limit is not to deprive claimants of full compensation but to activate the second tier of compensation under the Fund Convention and thereby allocate the costs of compensation between shipping interests and oil receivers contributing to the Fund.
- 1.6 If there are grounds for disputing the shipowner’s right of limitation, in practice, the only party affected will be the Fund, which is entitled to challenge limitation and, if successful, to seek recovery from shipowners of the compensation it has paid. If such a challenge is made by claimants, any recovery from the shipowner above the CLC limit reduces to the same extent the liability of the Fund in accordance with Article 4(4)(a) of the 1992 Fund Convention. Therefore, in Fund Member States claimants derive no financial gain from ‘breaking’ limitation unless the established losses exceed the maximum compensation amount, and recoveries exceeding that amount are made from the shipowner.
- 1.7 Attempts to make such recoveries typically involve contentious and lengthy litigation over the shipowner’s right of limitation as well as direct claims to obtain recovery from his insurer above the CLC limit, under laws outside the scope of the Convention. Such litigation seems to not take account of the possibility that if the facts justify denial of the shipowner’s limitation under the 1992 CLC

they are likely also to preclude recovery under normal terms of P&I insurance. This is because the test to break the shipowner's right to limit liability in Article V(2) of the 1992 CLC is very close to the conduct set out in the shipowner's P&I policy, which would entitle the shipowner's insurer to deny insurance cover (the 'wilful misconduct' Rule, as referred to in Article VII(8) of the 1992 CLC).

- 1.8 Furthermore, and very significantly, the current limit of P&I cover for oil pollution (US\$1 billion) is lower than the compensation available under the Supplementary Fund Protocol. Consequently it is hard to see that litigation of this kind is likely to yield any advantage to claimants in Supplementary Fund Member States.

2 Channelling provisions of the 1992 CLC

2.1 Channelling of liability—claims against the shipowner

- 2.1.1 The 1992 CLC provides in Article III(4) that:

'No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention.'

- 2.1.2 This provision is designed to ensure that all claims against the shipowner for pollution damage from a ship are dealt with exclusively in accordance with the Convention.

2.2 Channelling of liability—claims against other parties

- 2.2.1 Article III(4) of the 1992 CLC provides also that no claim for compensation for pollution damage 'under this Convention or otherwise' may be made against any of various stipulated parties, unless the damage resulted from personal conduct on their part of the same kind as that required to deny the owner limitation.

- 2.2.2 It may be recalled that the equivalent provision in the 1969 CLC excluded only claims against the servants or agents of the owner (whose immunity was absolute). The main object of this immunity was to avoid liability being incurred by parties to whom the owner would normally be contractually bound to pay an indemnity, in addition to his own liability under the Convention.

- 2.2.3 In the 1992 Conventions the immunity was extended to other parties particularly in light of the *Amoco Cadiz* incident (France, 1978), which occurred seven months before entry into force of the 1971 Fund Convention, and which led to litigation in Chicago against various defendants as well as the owner. These included the managers and operators of the ship. The litigation involved many issues—including disputes both as to whether the incident resulted from any fault on the part of these parties and as to whether they were to be considered 'servants or agents' of the shipowner. The case is a valuable reminder of the perils for the claimant in terms of delay and effective compensation in proceeding against parties outside the international system, not least since the litigation took nearly 14 years to resolve.

- 2.2.4 The revised channelling provisions of the 1992 CLC expressed the intention of States Parties to exclude similar claims in cases governed by the Convention, partly to avoid circumvention of the shipowner's limit, and partly to enable available insurance capacity to be directed into funding higher limits.

3 Relationship between the international conventions and national laws

- 3.1 As noted above, Article III(4) of the 1992 CLC provides for the exclusive jurisdiction of the Convention for claims against the shipowner. There have been cases however where national and regional laws have been agreed also dealing with liability for pollution to the marine environment

from ships. The European Union Environmental Liability Directive (Directive 2004/35EC is one such example of regional law, and a recent example of national law is the environmental legislation in France, enacted in August 2016 (*Réparation du Préjudice Écologique* (Articles 1246–1252 of the French Civil Code)).

- 3.2 It will be seen that these provisions, if not prefaced with an appropriate exemption for incidents falling within the scope of the international regime, would raise issues of validity under international treaty law. If such exemptions are not expressly included, it could give rise to undesirable confusion and uncertainty as to which law will apply in the event of an incident of pollution from a ship, ultimately delaying the provision of compensation.

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ANNEX II

Resolution N°8 on the interpretation and application of the 1992 Civil liability Convention and the 1992 Fund Convention (May 2003)

THE ADMINISTRATIVE COUNCIL, ACTING ON BEHALF OF THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND, 1992, SET UP UNDER THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1992 (1992 Fund Convention)

NOTING that the States Parties to the 1992 Fund Convention are also parties to the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 Civil Liability Convention),

RECALLING that the 1992 Conventions were adopted in order to create uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

CONSIDERING that it is crucial for the proper and equitable functioning of the regime established by these Conventions that they are implemented and applied uniformly in all States Parties,

CONVINCED of the importance that claimants for oil pollution damage are given equal treatment as regards compensation in all States Parties,

MINDFUL that, under Article 235, paragraph 3, of the United Nations Convention on the Law of the Sea 1982, States shall cooperate in the implementation of existing international law and the further development of international law relating to the liability for and assessment of damage caused by pollution of the marine environment,

RECOGNISING that, under Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties 1969, for the purpose of the interpretation of treaties there shall be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,

DRAWING ATTENTION to the fact that the Assembly, the Executive Committee and the Administrative Council of the International Oil Pollution Compensation Fund 1992 (1992 Fund) and the governing bodies of its predecessor, the International Oil Pollution Compensation Fund 1971 (1971 Fund), composed of representatives of Governments of the States Parties to the respective Conventions, have taken a number of important decisions on the interpretation of the 1992 Conventions and the preceding 1969 and 1971 Conventions and their application, which are published in the Records of Decisions of the sessions of these bodies^{<1>}, for the purpose of ensuring equal treatment of all those who claim compensation for oil pollution damage in States Parties,

EMPHASISING that it is vital that these decisions are given due consideration when the national courts in the States Parties take decisions on the interpretation and application of the 1992 Conventions,

CONSIDERS that the courts of the States Parties to the 1992 Conventions should take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions.

<1> IOPC Funds' website: www.iopcfund.org