



## Letting tragedy lead the way for change

Kjetil Eivindstad looks at P&I clubs' response to changes in maritime liability

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Ship disasters often lead to new legislation. The Titanic in 1912 resulted in the International Convention for Safety of Life at Sea (Solas) and the existing compensation regime regarding oil pollution from tankers was a direct result of the Torrey Canyon disaster in March 1967.

During the 1990s major shipping disasters such as the Scandinavian Star, the Estonia and the Erika have given rise to public concern and triggered the review of existing compensation regimes.

Four categories of liability are in focus. These are liability for oil pollution damage (CLC/Fund); liability for damage to property or persons caused by the carriage of hazardous and noxious substances (HNS) by sea; liability for injury to or loss of life of passengers (the Athens Convention); and, finally, liability for wreck removal.

### Oil pollution damage

The limitation figures in the CLC and Fund Conventions will be increased by 50% with effect from November 2003. Furthermore, it has been suggested that a third tier of compensation, in excess of the fund limit, financed by cargo receivers should be established for the purpose of meeting the need for additional compensation in high-cost areas.

In order to maintain the 50/50 cost split between the ship and the cargo in relation to oil pollution, the clubs have consented to increase the minimum limit under CLC to SDR20m (currently \$26.4m) when the third tier is implemented.

The CLC/Fund regime covers only pollution from tankers. This has been a concern for many coastal states as the potential for pollution from bunker oil has increased as a result of the increasing amounts of bunkers carried by large ships. As a result IMO has recently completed the new Bunker Convention. The regime, which has not yet entered into force, is a freestanding instrument, but is modelled on the CLC insofar as liability and insurance requirements are concerned.

### Damage caused by the carriage of hazardous and noxious substances (HNS) by sea

Liability for damage caused by the carriage of hazardous and noxious substances other than oil is not covered by any international regime currently in force. However, the HNS Convention, modelled on the CLC/Fund regime, was concluded in 1996.

Besides strict liability and compulsory insurance, the convention follows the two-tier principle insofar as a fund financed by cargo receivers will become available if and when the first level covered by the shipowners is either unavailable or insufficient to meet damage claims.

### Passengers

In the aftermath of the Scandinavian Star and the Estonia incidents the main topics have been the limitation figures, compulsory insurance and the basis for the carrier's liability. The key elements of the proposed new regime, which are included in a draft Protocol of 2002 to amend the Athens Convention, include, inter alia, strict liability on the part of the shipowner (carrier) for claims arising out of so-called shipping incidents up to a certain ceiling calculated as a per capita limit. The carrier will also be required to maintain liability insurance covering the carrier's liability up to a certain level.

### Wreck removal

There is currently no international convention governing wreck removal. The issue is, however, under study and a draft convention is presently being discussed by IMO's legal committee. The draft convention is designed to create an international regime governing removal of wrecks located in the exclusive economic zone beyond the territorial sea of a state. Besides strict liability on the part of the shipowner, a compulsory insurance regime modelled on the CLC has also been suggested in relation to wreck removal.

### The P&I clubs' response

The maritime underwriting community plays an important role in the development of maritime liability regimes. Without the participation and commitment of underwriters the compensation regimes will not function in practice. Against that background it is instructive to see how the P&I clubs have responded to each of the regime changes outlined above.

### Oil pollution damage

The clubs have warned against changes being made with regard to the main features of the CLC/Fund regime making it less "user-friendly". The main purpose of the regime is to facilitate compensations being paid to the victims of an oil pollution incident in an efficient manner; it is not designed as a means of penalising owners or operators of substandard vessels. The clubs have, however, supported the idea of establishing an optional third-tier of compensation financed by

cargo receivers in order to meet the need for higher levels of compensation in high-cost areas. They have also endorsed the increase of the minimum limit for the shipowner's liability under the CLC to SDR20m per event when the third tier is implemented in order to avoid a shift in the financial burden. Regarding the Bunker Convention, the clubs have focused on the enormous bureaucracy required to administer a compulsory insurance scheme involving all merchant vessels of 1,000 gt or more. The negligible extra benefit to the third party claimants of having a right to bring claims directly against the insurer does not justify the considerable extra costs of administration.

#### HNS Convention

The clubs have supported the initiative to create a uniform regime governing the liability for damage caused by the carriage of HNS cargoes by sea, modelled on the CLC and the Fund Conventions where the cargo owners contribute.

#### Passengers

Key elements of the new regime such as the strict liability limit, the compulsory insurance limit, and the overall limit of the carrier's liability have been subject to much debate in the past. The clubs have argued that mutual insurance requires a certain degree of uniformity as to the liabilities and losses to be covered. If limitation figures amounting to three times the maximum under any other comparable limitation regime become the result, the passenger risk may cease to meet the minimum requirement as to uniformity required to fall within the P&I cover.

Such figures, combined with compulsory insurance provisions, could in practice mean that the passenger risk would occupy a disproportionate part of the financial resources of the clubs and their reinsurers. If that were so, the insurance services offered the owners in relation to other categories of claims might suffer.

#### Wreck removal

The clubs question the need for a new convention and in particular the need for introducing compulsory insurance requirements modelled on the CLC regime.

Again, it has been pointed out that the bureaucracy required to administer such an insurance scheme would be out of proportion to the practical benefits.

Maritime law is in the melting pot. New regimes have been, or are in the process of being, developed covering a wide range of liabilities.

In order to ensure that victims of maritime incidents will be compensated, all of the new schemes seem to be modelled on the CLC insofar as strict liability and compulsory insurance requirements are concerned.

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foreningen Gard and the marine and energy insurance activities of If P&C Insurance Ltd. Key areas of maritime liability are liability for cruiseship passengers (above left), oil pollution (above right) and wreck removal (below).

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