

## **Gard News – Draft**

**(presentation by Kim Jefferies at Propeller Club - Geneva 22 May 2003)**

### **Ship Source Pollution: Are charterers or traders liable?**

When a tanker spills oil, it is front-page news. In all parts of the world, at least the vessel owner will be held liable for cleaning up the spill and paying compensation to the victims. But what about the vessel charterer or the oil trader that owns the cargo in transit? Is there liability exposure for these entities as well? The answer depends of course upon the facts of the particular incident and where it occurred as liability depends upon the legal regime determining the issue. The following discussion examines potential liability under two principal regimes, one applicable in the United States and the other applicable in Europe.

### **How is Oil Pollution Liability Determined?**

#### ***The American Perspective-***

In the 1980, the U.S. was a prime mover behind the development of the 1992 protocols to the Civil Liability Convention and the IOPC Fund Convention and argued strongly for higher limits of liability. The U.S. was ready to ratify the protocols and join the international regime when the Exxon Valdez fouled Alaska waters in March of 1989. The resulting public outcry doomed ratification of the conventions. The environmental movement was opposed to anything less than strict and unlimited liability for ship source oil pollution. Further, the United States is a federal system made up of individual states with legislative authority within state boundaries. The coastal states feared that entry into an international agreement would pre-empt states rights to enact legislation with respect to oil pollution from vessels. The demands of politicians and public resulted in enactment of the Oil Pollution Act of 1990 (OPA 90). This is a federal statute, applicable nation wide and within the U.S. exclusive economic zone but it does not pre-empt states from also enacting pollution legislation.

OPA 90 is intended to be a comprehensive approach from prevention, contingency planning to cure. The provisions apply to spills or threats of spills from tank and non-tank vessels as well as facilities into the navigable waters of the United States. OPA 90 defines the “responsible party” as the owner, operator or demise charterer of the vessel. More than one responsible party may be identified for a single incident, and in that case each will be jointly and severally liable. Joint liability means shared liability while several liability means the last solvent entity standing pays all. It is clear that a cargo owner will not be considered a responsible party under OPA 90 but it is unsettled whether a “charterer” can be considered an “operator.” There are defences to liability. It is however, the responsible party’s burden to prove that the spill and the resulting damage were caused solely by an act of God, an act of war or an act or omission of a third-party. An example of a situation which could have been successfully defended would be the LIMBURG case if the terrorist attack had occurred in the United States.

In the event of a spill the responsible party will be liable for removal costs, damages to natural resources, damage to property, economic loss, loss of subsistence use of natural resources and additional costs of public services. There is a limitation of liability figured for tank vessels by multiplying the gross tonnage times USD 1,200 and for non-tank vessels gross tonnage times USD 600. OPA 90 requires the vessels to carry aboard a Certificate of Financial Responsibility (COFR) to meet the amount of the limitation for the particular vessel. The right to limit is lost if the spill is a proximate result of violation of a safety, construction or operating regulation, gross negligence or wilful misconduct or the vessel fails to report the incident or the responsible party fails to cooperate with the authorities. The Oil Spill Liability Trust Fund, funded by a 5 cent/bbl tax on oil imports provides compensation beyond that available from the responsible party or when no responsible party is identified (so-called mystery spills). The OSLTF is administered by the National Pollution Funds Center, an arm of the U.S. Coast Guard. The OSLTF has no set limit.

In addition to civil damages, OPA 90 also contains provisions for criminal fines. Corporate fines of up to USD 500,000 and for individuals, fines up to USD 250,000 and up to 5 years imprisonment. Fines may also be levied by individual states.

### ***The Challenge of Federalism***

The United States is made up of fifty individual states with their own legislatures and judicial systems. International Conventions to which the U.S. is a signatory pre-empt state law. The national legislature, the U.S. Congress, may also pre-empt the ability of states to make law in certain fields, for example the military. The Congress chose not to make OPA 90 pre-emptive. Thus, with respect to pollution legislation even pollution from ships, the states may pass and enforce their own requirements that apply within their borders. Looking just at coastal states, there are at least four that include cargo owners as potentially liable parties for oil spills. These are Alaska, Washington and Oregon in the Pacific Northwest and Maryland on the Eastern Seaboard. Many more states use inspecific references to “any person” in their pollution legislation – Alabama, Connecticut, Georgia, Louisiana, New Hampshire, New Jersey, North Carolina, South Carolina, Texas and Virginia. Of the remaining coastal states, California, New York and Florida name liable parties in similar terms to OPA 90.

In reality, a lot more oil enters U.S. navigable waters as run-off from automobiles than as the result of spills. Unfortunately, pollution from ships is an easy target for state politicians anxious to be seen as active by their constituents. The unfortunate challenge of federalism is increased uncertainly for those who move oil cargos by ship to or from the United States. For the most part, the response to major oil spills in the United States is coordinated by one of the P & I Clubs, as they cover the owner’s liability for accidental spills for 90 percent of the world’s fleet. In a major spill in the United States it is likely victims will pursue the charterer as well as the owner for compensation and in some locations, the cargo owner may be named as well.

### ***The European Perspective-***

Virtually all of Europe is within the 92 CLC and Fund conventions. The convention deals with liability and funding of spill response and compensation only and does not address prevention, contingency planning or criminal responsibility. The CLC channels strict liability for tanker spills to the registered owner and expressly exempts the charterer owner from civil liability. The CLC is silent, however, with respect to the “cargo owner.” The limitation applies in the absence of gross negligence. Vessels are required to have liability insurance. The CLC certificates evidencing insurance are issued by the P & I Clubs and there is direct action against the insurer in the event of a spill.

The Fund convention complements the CLC Convention and picks up compensation payments where the CLC leaves off. The Fund is collected from companies importing crude oil or heavy fuel oil by sea transport. Increases to the CLC and Fund came into effect in November 2003. In May of 2003, the IMO adopted a “third tier” further increasing the limits available (see accompanying article).

### **Comparing the limitations OPA 90 – CLC**

The CLC limitation is determined by tonnage and is stated in Special Drawing Rights (SDR) that fluctuate against currencies. The limitation amounts now in force are shown below.

(insert Graph)

To take an example of the two limitations imagine a tanker of 50,000 gross tons. The OPA 90 limitation would be 50,000 multiplied by USD 1,200 or USD 60 Million. The CLC limit would be 32.85 Million SDR or about USD 46 Million at an exchange rate of 1.4 dollars per SDR.

### **Are the Charterer and Cargo Owner “off the hook” in Europe?**

Given the CLC channelling of liability coupled with the IOPC Fund supported by the oil receivers, it would be tempting to say that charterers and cargo owners have no liability exposure for ship source pollution events in European waters. In the instance where the cargo owner has no other connection with the ship, it is unlikely that it could be held liable for oil pollution in Europe because the cargo owner generally has neither operational responsibility nor ability to control the choice of vessel. But as mentioned above, there is no exemption from liability in the convention so no absolute defence under the CLC regime. Charterers on the other hand, while exempt under the CLC, face liability in recourse vis-à-vis the registered owner in the event that pollution is caused by an unsafe berth.

Further, the CLC deals only with civil liability. The CLC does not prevent European states from alleging criminal liability and fines in major pollution events. The ERIKA and PRESTIGE spills are subject to the CLC, but that has not stopped governments and claimants from pursuing the charterers in both instances. Assuming ultimately the charterers prove themselves free from liability as contemplated by the CLC regime, they may still face staggering legal fees and defence expenses.

### **The Comprehensive Charterers Cover – The benefits of a Specialist Insurer**

Gard Services is the market leader with respect to a comprehensive cover for charterers that includes cover for pollution liability as charterer and can include cargo owner's pollution liability, also for non-chartered vessels. This product was developed by Gard and has been offered since 1989. The product is designed to be tailored to the particular needs of the insured and can be written for cover of up to USD 700 Million. The cover includes charterer's liability for damage to hull, one of the principal liability exposures for charterers under unsafe berth clauses.

A key benefit of insuring with Gard is the claims service that goes hand in hand with the cover. Gard's claims staff is experienced with major pollution events and has at its disposal the network of international experts necessary to respond to the member's liability exposure in any jurisdiction.