MÅNS JACOBSSON

FIVE SPEECHES ON CIVIL LIABILITY FOR MARINE POLLUTION

2013 – 2017

STUDIO LEGALE LAURO SLL

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STUDIO LEGALE LAURO SLL

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Francesco S. Lauro
Editor's note

In October 2013, at the fourth edition of 'Shipping and the Law', the annual Naples gathering of the international shipping community organized by Studio Legale Lauro, Måns Jacobson took over the torch as the conference legal key note speaker from Francesco Berlingieri, who had performed the role with such distinction at the first three Shipping and the Law conferences from 2010 to 2012.

Just a month ago I suggested to Måns that Studio Legale Lauro could publish a short book containing the five key note speeches he gave from 2013 to 2017 and I take this opportunity to thank him for having accepted that suggestion and for carrying out in such a short time the editing necessary to make the texts suitable for publication, based on his speaking notes and audio-video recordings of the original speeches.

As the title suggests, '*Five Speeches on Civil Liability for Marine Pollution*' is not just an anthology assembling individual speeches. In fact, a common topic features in four of the speeches, i.e. compensation for damage arising from oil spills, whilst the same dilemma recurs in all five speeches: the problematic relationship between international uniform regimes based on

international conventions – such as the 1992 Civil Liability and Fund Conventions or the United Nations Convention on the Law of the Sea (Unclos) – and the domestic laws of states parties in the often uneven interpretation by national courts. This dilemma is well expressed by the leading question which constitutes the title of the third speech: *To what extent do international treaties result in the uniformity of maritime law?*

As emerges not only from his third speech published here, but also from the other four, Måns is a strong supporter of international uniformity of maritime law. Despite his zeal for this, however, he never loses sight of the general context in which the forces governing the physics of international and national legislations are deployed and how court decisions arise. This balanced and pragmatic attitude reflects the multiple roles he covered in his brilliant career, as Swedish judge and senior Ministry of Justice official as well as over twenty years as Iopc Funds Director, and as an academic.

Thanks to such experience Måns displays a fair degree of leniency with the consciousness of the problems which national courts may have in the interpretation and application of maritime law treaties: *Judges are also human beings* – he says – *and they are as a result of their training strongly influenced by the legal traditions and the legal interpretation technique prevailing in their respective country*. Such consciousness also extends to some factual often recurring elements: *The courts may sometimes be influenced by political considerations, and the public anger that often arises after a major shipping incident may influence the court*. At the same time his longstanding experience and the deep understanding of the function of law causes him to note that *law is not – and should not be – static, but must develop to take into account changes in society, and in economic, social and political priorities, so as to ensure that the law meets the requirements of society in a rapidly changing world*. It is therefore *necessary from time to time to amend treaties or adopt new ones, even though these changes may result in less, rather than more, uniformity of maritime law since that might lead to having in force two or more treaties dealing with the same subject matter.*

Måns does not refrain from expressing his views on the steps which could be taken to obtain more uniformity in maritime law which, in any event, is characterized by a higher degree of uniformity than *most other fields of law*. As regards States Members of the European Union he points out that treaties to which the EU is a party *take precedence over other EU legislation as well as over domestic legislation in these States* and in this way assigns to the European Court of Justice the competence of treaty interpretation, which could promote uniformity as between these States, as well as putting ourselves in a wider 'de iure condendo' realm. Probably the best solution, from a 'de iure condendo' perspective, might in his view lay in conferring jurisdiction for disputes on the interpretation of the maritime law treaties on an international court or tribunal, as in the case of the competence given by Unclos in certain matters to the United Nations Tribunal on the Law of the Sea. However, Måns' awareness of the political international context unfortunately does not leave great room to hope that any major improvement will be achieved in the foreseeable future since *we are not, as in most areas of human life, living in the perfect world.*

Four of the five speeches appear to focus on tanker oil spills compensation by commenting on national court decisions, which sometimes vary among different jurisdictions. They involve notorious cases such as the *Erika* in France, which is dealt with in the

first speech, and the *Prestige* which relates mainly to Spain, but also to the United Kingdom, United States, Portugal, France and the European Court of Human Rights jurisdictions, which is dealt with in the second and fourth speeches. In the background glimpses the far cry of some other incidents such as the *Patmos*, *Agip Abruzzo* and *Haven* in Italy, the *Aegean Sea* in Spain and the *Braer* in the United Kingdom, as well as the *Hebei Spirit* in the Republic of Korea.

One of the main problems dealt with in the *Erika* by the French courts, as reported in Måns' first speech, is the application of the so called 'channelling of liability' which under the 1992 Civil Liability Convention places the liability on the registered owner of the vessel and prohibits in principle compensation claims against several groups of persons listed in the relevant provision under letters a) to f). The approach of the French Court of Cassation, which considered the vessel's classification society to be included under letter b), embraces an interpretation of that channelling provision which, according to Måns, may be wider than that intended by the Diplomatic Conference which gave birth to the 1992 Civil Liability Convention even though, as a matter of fact, the Court of Cassation removed any protection given by the Convention, finding that the classification society as well as the representative of the shipowner, the president of the management company and the charterer had been guilty of recklessness as defined in the Convention. These findings, even though based on specific facts, in Måns' view may constitute precedents weakening a protection which had been considered, perhaps with an excessive optimism, as more or less 'unbreakable'.

Another result of the *Erika* French Court of Appeal and the subsequent Court of Cassation judgements was to introduce the right of compensation for pure

environmental damage in favour of local and regional authorities and associations for environmental protection. Even though the judgements did not violate the Civil Liability Convention since they were against defendants to which that convention did not apply, Måns considers the decision unfortunate from the perspective of international uniformity, since it introduced a concept, which was later codified by the French legislator in 2016, different from that of the regime of compensation under the international conventions.

The second and the fourth speeches, which deal with the worldwide development of the *Prestige* case, see our author navigating as a contemporary Odysseus through procellous seas and often conflicting winds blown by major and minor gods, such as the decisions by Spanish criminal courts at different levels and the Constitutional Court, the American Civil Court of first instance and Court of Appeals, the French first instance court and Court of Appeal, the Portuguese Maritime Court in Lisbon, by an arbitration tribunal in London (on the interpretation of the London P&I Club's Rules 'pay to be paid' provision) and subsequently by the High Court of Justice, and by the European Court of Human Rights as regards the criminal proceedings against the Master in Spain. In such a crowded judicial Olympus the role of Zeus is performed by the Spanish Supreme Court, which Måns however does not refrain from criticising, as the moderns often do with the jealous mythologic gods. From Måns' international uniformity of maritime law perspective, the Court in fact did not respect the 1992 Civil Liability Convention as regards the insurer's right to limit and the exclusion of moral damage from compensation, whilst the prison sentence on the Master did not, in his view, respect the United Nations Convention on the Law of the Sea.

In the fifth speech, the last of this book, the author addresses a problem which regards not only claims for compensation arising from oil spills falling under the 1992 Civil Liability and Fund Conventions but, in a wider scenario, is generally debated for tortious claims of many types in any jurisdiction; are pure economic loss compensation claims admissible? Obviously, Måns answer as to the interpretation of the Civil Liability and Fund Conventions reflects the necessarily cautious uniform approach of the Assemblies of the Funds, but also reports in real time his successor's, as Director, proposals which were submitted in October 2017, simultaneously with the eighth edition of Shipping and the Law, to open the door for qualified claims by employees who lost their jobs due to the economic impact of the pollution. Måns' approach is to be open to change. In his view the Funds' criteria for admissibility of compensation claims should be reviewed from time to time, in the light of experience gained from dealing with various tanker oil spills since, as he says, *law is not static, not cast in stone* and *that applies to international treaties as well as to national legislation.*

Thimio E. Mitropoulos KCMG*

Foreword

It is with great pleasure that I respond to Francesco Lauro's invitation to me to write a few words as foreword to Måns Jacobsson's elegant publication of five lectures he delivered, between 2013 and 2017, on the occasion of the much acclaimed Conferences on Shipping and the Law the former organises in his native Napoli.

Francesco spares no effort to ensure the success of those meetings. The speakers (politicians, academics, shipowners, economists, experts on a variety of shipping disciplines, Navy and Coast Guard officers…) he assembles year on year are of the highest calibre while the venues of the conferences rank among the most precious jewels of fine architecture and exquisite interior decoration Napoli can exhibit. The hospitality is of a high level and the programme devised every time so rich and exciting that it leaves no spare room for boredom and inaction. With attention to every detail, Francesco and his staff are ideal hosts and the participants' time in Naples an experience to cherish.

Among his star speakers, Måns Jacobsson stands out and excels. No wonder he is unfailingly entrusted with keynote speeches. Invariably his themes focus

* *Secretary-General Emeritus, International Maritime Organization*

on maritime issues, which have come to prominence because of their impact on safety at sea and, in particular, on the marine environment. In composing, analysing and wrapping them, he draws upon his vast experience as a lawyer and his exemplary service of the shipping industry as Director of the International Oil Pollution Compensation (IOPC) Funds for many years. It was during that time that I met him and was, from Day One, captured by the clarity of his legal mind, his professionalism, his ability to express his views with sincerity and in an articulate, straightforward and courageous manner and, more importantly, by his integrity, friendly attitude and impeccable manners. A true gentleman indeed, an invaluable servant of shipping!

Francesco's idea to publish Måns' lectures is brilliant and I am confident the readers will enjoy and benefit from them. The cases Måns analyses will enrich their knowledge and help them understand complex issues thanks to the simple manner with which Måns tackles them – proof of how well and deeply he knows the subject he deals with.

Well done, Francesco! Well done, Måns!

Five Speeches on Civil Liability for Marine Pollution

4th Conference
Shipping and the Law
2013

The French Court of Cassation and the 'Erika'. Some civil liability issues

Santa Chiara Monastery
3rd October

INTRODUCTION

On 12 December 1999, the Maltese-registered tanker *Erika* broke in two and sank in the Bay of Biscay off the coast of Brittany in France. Some 400 kilometres of coastline were affected by the spilt oil, necessitating extensive clean-up operations and having considerable impact on businesses in the fisheries and tourism sectors.

CLAIMS UNDER THE INTERNATIONAL COMPENSATION REGIME

The international liability and compensation regime established by the 1992 Civil Liability and Fund Conventions applied to the incident.

Some 7100 claims for compensation were submitted under that regime. The claims were handled jointly by the International Oil Pollution Compensation Fund 1992 (1992 Fund) and the shipowner's liability insurer, the Steamship Mutual Underwriting Association. The great majority of these claims were settled out of court.

A number of claims which had been rejected, wholly or partly, by the 1992 Fund and the shipowner/insurer, were however pursued in the French civil and commercial courts.

criminal proceedings in France

Criminal proceedings were brought in the Criminal Court of first instance in Paris against a number of parties.

A number of claimants, including the French Government and several regional and local authorities, joined the criminal proceedings, claiming compensation totaling € 400 million.

After appeals against the judgment by the Court of first instance to the Criminal Court of Appeal in Paris and further appeals against the latter Court's judgment, the Court of Cassation rendered its judgment on 23 September 2012[1].

The Court of Cassation held the following parties criminally liable for the offense of causing oil pollution, all other defendants having been acquitted already by the Court of first instance:

– the representative of the registered shipowner
– the president of the management company
– the classification society (Rina)
– Total Sa

I will not discuss the questions relating to criminal liabilities.

[1] For a detailed analysis of these judgments reference is made to Måns Jacobsson, The French Court of Cassation and the *Erika* case, some issues relating civil liability, *Journal of International Maritime Law* 2014, p. 18-29.

civil liabilities

The Court of Cassation, agreeing with the Court of first instance and the Court of Appeal, held the four criminally liable parties also civilly liable, jointly and severally, for the oil pollution resulting from the *Erika* incident.

As regards the civil liabilities, in addition to ruling on individual compensation claims, the Court of Cassation addressed some issues of principle, namely whether the French courts had jurisdiction in respect of this incident and whether Rina was entitled to immunity of jurisdiction.

These issues fall outside the scope of my presentation which will focus on two issues, namely channelling of liability and environmental damage.

channelling of liability

Under the 1992 Civil Liability Convention the liability is channelled to the registered owner of the ship involved. No claims for compensation for pollution damage may be brought against the shipowner otherwise than in accordance with the Convention. In the criminal proceedings there were no compensation claims against the shipowner as such, since the company owning the ship had not been prosecuted in the criminal proceedings but only the main shareholder.

The 1992 Civil Liability Convention further prohibits compensation claims against the following persons, whether the claims are made under the Convention or otherwise:

a. the servants or agents of the shipowner or the members of the crew,

b. the pilot or any other person who, without being a member of the crew, performs services for the ship,

c. any charterer (including a bareboat charterer), manager or operator of the ship,

d. any person who performs salvage operations with the consent of the shipowner or on the instructions of a competent public authority,

e. any person taking reasonable measures to prevent or minimize pollution damage ("preventive measures"),

f. all servants or agents of the persons referred to in (c), (d) and (e).

The prohibition to bring claims against these persons does not apply, however, if the pollution damage resulted from the personal act or omission of the person concerned, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The Court of Cassation considered that the representative of the registered shipowner and the president of the management company were agents of the shipowner and the operator of the *Erika*, respectively, and consequently in principle fell within the scope of the channelling provisions (subparagraphs (a) and (f)). The position taken by the Court of Cassation in respect of these defendants should not give rise to concerns.

The Court of Cassation further considered that Total SA was covered in principle by the channelling provisions (subparagraph (c)). Different views have been expressed as to whether the position taken by the Court of Cassation is correct, since the charter party had in fact been entered into by Total Transport Corporation and not by Total SA.

The Court of Appeal had considered Total SA as *de facto* charterer, the charterer being a subsidiary. The Court of Cassation did not subscribe to that line of reasoning, but seems to have not attributed legal personality to Total Transport Corporation.

However, the question as to whether classification societies are covered by the channelling provisions, i.e. whether they fall under the expression "any other person who performs services for the ship" (subparagraph (b)) is of greater interest.

The Criminal Court of first instance had considered that classification societies were not entitled to protection under that provision, since the expression only covered those who, without being members of the crew, performed services for the ship and participated directly in the maritime operation of the ship ("*personnes qui, sans être membres de l'équipage, s'aquittent de prestations pour le navire en participant directement à l'opération maritime*"). The Court of Appeal had taken the view that Rina, in issuing statutory and safety certificates for the *Erika*, had acted as an agent of the flag State (Malta) and could not be considered as a person who performed services for the ship. It could not therefore benefit from the channelling provisions.

The Court of Cassation held, however, without giving any reasons, that classification societies may in principle benefit from the protection under the channelling provisions.

It could be questioned, however, whether the Diplomatic Conference that adopted this provision had intended that it should be given such a wide interpretation as that adopted by the Court of Cassation. Would the interpretation adopted by the Court of Cassation result in that channelling provision covering any person having a contractual relationship with the shipowner? Would under the Court of Cassation's

interpretation that provision cover builders of the ship or ship repairers in respect of defects which cause or contribute to an oil pollution incident?

The Diplomatic Conference was of course aware of the very far-reaching channelling provisions in the conventions relating to civil liability in nuclear law which totally channel the liability to the operator of the nuclear installation and exclude liability for any other person, including those in contractual relationship with the operator, for example a provider of defective parts to the installation. In my opinion, the Conference was not prepared to go that far and include such a complete channelling in the Civil Liability Convention.

It has been suggested that if the channelling provision in question (subparagraph (b)) was intended to cover any other person without any limitation, the words "without being a member of the crew" were superfluous and that the enumeration of a number of categories in the other subparagraphs would not have been necessary. It has also been argued that the words "performs services for the ship" indicate that the provision was only intended to apply to those rendering services relating to the operation of the ship.

After having held that all four defendants were in principle covered by the channelling provisions, the Court of Cassation decided, however, that in the *Erika* case none of these parties was entitled to benefit from the protection under those provisions, since they had been guilty of recklessness as defined by the 1992 Civil Liability Convention, i.e. that the pollution damage had resulted from their personal act or omission committed recklessly and with knowledge that such damage would probably result.

The Court of Cassation considered that the four parties had been reckless in the following manner.

– The recklessness of the representative of the shipowner and the president of the management company consisted in lack of proper maintenance, leading to general corrosion of the ship.

– Rina was found guilty of imprudence in renewing the *Erika*'s classification certificate on the basis of an inspection that fell below the standards of the profession.

– Total SA was found guilty of imprudence when carrying out its vetting operations prior to the chartering of the *Erika*.

In the light of the Court of Cassation's judgment, the protection of the charterer and the other parties included in the list in Article III.4 against claims for pollution damage may not be as strong as had previously been thought.

The test for deciding whether or not the persons enumerated in the channelling provisions in the 1992 Civil Liability Convention are protected by these provisions is identical to the test in the 1992 Civil Liability Convention and 1976 Convention on Limitation of Liability for Maritime Claims for determining whether the shipowner is entitled to benefit from limitation of liability, That test, which replaced the old test of "fault or privity" of the shipowner in the 1957 Convention relating to the Limitation of Liability for Owners of Sea-Going Ships and the 1969 Civil Liability Convention, had been thought making the right to limitation of liability more or less "unbreakable". This new test has been introduced in all other maritime conventions containing provisions relating to limitation of liability adopted after 1976.

Concern has been expressed in the shipping and insurance industries as to the consequences for the system of limitation of liability in maritime

law if courts in other jurisdictions were to follow the approach taken by the French Court of Cassation in respect of the charterer (Total SA) in the *Erika* case. It has been argued that it was too strict to consider that the deficient vetting procedures amounted to the *personal* act or omission of Total SA, i.e. of the *alter ego* of the company, committed with knowledge that pollution damage would probably result.

It should be emphasized that the 1992 Civil Liability Convention governs only the liability of the registered shipowner (and his insurer). The liability for pollution damage resulting from a tanker oil spill of any party other than the shipowner (and his insurer) is governed by the applicable national law, except as regards parties that may in the particular case benefit from the protection of the channelling provisions. If that protection is lost for a particular party included in that list, also the liability of that party is to be decided pursuant to the applicable national law. Having held that the four parties referred to above could not in the *Erika* case benefit from the protection of the channelling provisions, the Court of Cassation applied French domestic law to their civil liability for the pollution damage.

Environmental damage

"Pollution damage" is defined in the 1992 Civil Liability Convention (art. I.6(a)) as loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur. The definition contains, however, a proviso to the effect that compensation for impairment of the environment other than loss of profit from such impairment

shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. This definition is by reference included in the 1992 Fund Convention.

Claims for damage to the marine environment *per se* are therefore not admissible under the 1992 Conventions. The proviso also excludes claims for damage calculated on the basis of theoretical models or of a punitive character. Only claims for the economic consequences of damage to the environment qualify for compensation, for instance losses suffered by fishermen or businesses in the tourism industry resulting from such damage and claims for reasonable costs of reinstatement of the polluted environment.

The insertion of this proviso in the 1992 Civil Liability Convention, and by reference in the 1992 Fund Convention, had the purpose to avoid the difficulties that had arisen under the 1969 Civil Liability Convention and 1971 Fund Convention (the predecessors of the 1992 Conventions) as a result of national courts in some States parties to the 1969 and 1971 Conventions awarding compensation for non-economic damage to the environment.

In the *Erika* case, the Criminal Court of first instance had held that the regime established by the 1992 Conventions did not deprive civil parties of their right to obtain compensation for their damage in the criminal courts. The Court recognized the right to compensation for damage to the environment for local communities with special powers for the protection, management and conservation of a territory, but considered that only the *départements* had such a competence. It also recognized the right of an individual environmental protection organisation to claim compensation, not only for moral damage caused to the collective interest which was its purpose

to defend, but also for damage to the environment that affected the collective interests which it had a statutory duty to defend. The amounts awarded by the court for environmental damage were however quite modest, totaling some € 1.3 million.

Whereas the Court of first instance had recognized only a fairly limited right to compensation for damage to the environment per se, the judgement by the Court of Appeal represented a significant extension of that right. The Court of Appeal proclaimed the existence of a right to compensation through monetary equivalents for ecological damage to resources which do not have a market value. The Court thus accepted not only material damages (such as clean-up, restoration measures and property damage) and economic losses but also moral damage resulting from the pollution, including loss of enjoyment, damage to reputation and brand image and moral damage arising from damage to the natural heritage. The Court of Appeal also confirmed the right of compensation for moral damage granted by the Court of first instance to a number of local authorities and accepted in addition claims for moral damage from other civil parties.

The Court of Appeal had thus awarded compensation in respect of pure ecological damage defined by the Court as 'all non-negligible damage to the natural environment, notably the air, the atmosphere, water, the soil, land, countryside, natural sites, the biodiversity and interaction between these elements, which has no repercussions on specific human interest but affect a legitimate public interest.

Without giving any further reasons, the Court of Cassation endorsed the Court of Appeal's position on this point to award proper compensation to make good environmental damage, consisting of direct or indirect damage to the environment arising from the criminal

offences in question. The Court of Cassation thus approved the principle under French law of the right to compensation for pure environmental damage.

It appears that the Court of Appeal, and the Court of Cassation, held that it was sufficient for the pollution to touch the territory of a local authority for it becoming entitled to compensation for direct and indirect damage caused. The judgments by these Courts have consequently given regional and local authorities whose territories were touched by the pollution and associations for protection of the environment right to compensation for pure ecological damage as well as for moral damage (which includes loss of enjoyment), loss of image and damage to reputation.

The Court of Cassation also endorsed the position taken by the Court of Appeal which gave the right to claim compensation for environmental damage to persons having been entrusted with the task of maintaining and improving the environment, i.e. local and regional authorities which under French law had the mission to protect the environment as well as associations for the protection of the environment[2].

The Court of Cassation confirmed the method used by the Court of Appeal for assessing the quantum of the damage, which resulted in compensation for environmental damage totaling € 38.4 million, ranging from € 100 000 to € 500 000 for the local authorities and from € 1 million to € 3 million for the regional authorities. It should be noted that the damage for which compensation was awarded was not documented, that there was no proof of any damage in addition to that already covered by other types of claim (such as costs of clean-up operations and economic losses

[2]The position taken by the Court of Cassation relating to pure ecological damage was codified in 2016 by amendments to the Civil Code (art. 1246-1252).

in the fisheries and tourism industries) and that the damage could not be quantified except by using, as the Court of Appeal did, a theoretical model.

As already mentioned, the 1992 Civil Liability Convention only governs the liability of the registered shipowner. The liability of all other parties is to be determined pursuant to the applicable national law, except if the person in question is entitled to benefit from the protection of the channelling provisions in the Convention. The judgments by the Court of Appeal and Court of Cassation were rendered against four defendants other than the registered owner, who were deemed not to be entitled to benefit from the channelling provisions, and their liability was based on French domestic law. Although these Courts awarded compensation for heads of damage that are not admissible under the 1992 Civil Liability Convention, this did not contravene the Convention, since the liability was not based on the Convention.

As did the Court of first instance and the Court of Appeal, the Court of Cassation emphasized that it was applying French law and not the 1992 Civil Liability and Fund Conventions. The Court of Cassation emphasized that since the 1992 Fund had not taken part in the criminal proceedings, it would not be bound by any judgment or decision in the proceedings.

Concluding observations

The position taken by the Court of Cassation on the issues I have discussed is important not only from the point of view of French domestic law but also in relation to the international regime established by the 1992 Civil Liability and Fund Conventions.

With regard to the issue of channelling of liability, the Court of Cassation's interpretation that classification societies fall within the concept of persons performing services for the ship and are therefore in principle entitled to benefit from the protection of the channelling provisions is in my opinion open to argument. The Court's interpretation may nevertheless carry a certain weight in other jurisdictions.

The Court of Cassation's decision that none of the four parties which in principle fell under the channelling provisions was in the *Erika* case entitled to benefit from the protection pursuant to those provisions is also important. The Court considered that the behavior of these parties was such that the pollution damage resulted from their personal act or omission committed recklessly and with knowledge that such damage would probably result. In the light of this judgment, the protection of the charterer and the other parties included in the list of those who in principle are protected against claims for pollution damage may not be as strong as had previously been thought.

The interpretation of this test by the Court of Cassation may also have an impact on the interpretation of the identical test in a number of maritime conventions for determining whether the shipowner should be deprived of his right to limitation of liability.

As regards damage to the environment, by endorsing the position taken by the Court of Appeal the Court of Cassation has significantly expanded the right under French law to compensation for pure environmental damage, i.e. non-economic damage to the environment. The concept of pure environmental damage did not exist in French law at the time of the *Erika* incident and such damage had generally been

assimilated to moral damage ('prejudice morale'). Consequently, the Court of Cassation has created a new category of claims for environmental damage in oil pollution cases under French law.

The ruling of the Court of Cassation in the *Erika* case on the admissibility of claims for pure environmental damage was from a formal point of view limited to imposing liability for such damage on the basis of French domestic law on certain defendants whose liability was not governed by the 1992 Civil Liability Convention. The judgment does not therefore violate that Convention. In my view the approach taken by the Court of Cassation is nevertheless unfortunate from the perspective of international uniformity, because the Court applied a concept as to the types of damage compensable in cases of tanker oil spills which is different from the concept in the international conventions. Such an approach could in fact lead to the creation of parallel systems of compensation for such oil spills.

The governing bodies of the International Oil Pollution Compensation Funds, composed of representatives of the Governments of Member States, have repeatedly emphasized the importance of a uniform application of the Civil Liability and Fund Conventions and the importance of national courts in States parties giving due consideration to the decisions of the Funds on such matters.

It should be noted that as regards implementation of international treaties, France has a monist system under which a treaty ratified by France and published in the *Journal Officiel* becomes an integral part of French law. Under the French Constitution such a treaty has a rank higher than normal domestic legislation.

When the 1992 Fund during the period 2001-2005 examined whether the 1992 Conventions

should be revised, one of the issues considered was whether to amend the Conventions to the effect that compensation for damage to the marine environment should no longer be limited to loss of profit and to make it possible to assess the damage by theoretical models. The 1992 Fund Assembly found, however, that for several reasons there was not sufficient support by the States parties for a revision of the Conventions.

But law is not static but must develop to take into account of changes in political, social and economic priorities. That applies to international treaties as well as to national legislation. The international regime based on the 1992 Civil Liability and Fund Conventions will most likely be revised at some point in the future. It is practically certain that in the context of such a revision the issue of compensation for environmental damage will be considered. The question will then be whether the States parties would be prepared to amend the definition of 'pollution damage' so as to include non-economic damage resulting from oil pollution of the environment, for instance in the form of violation of collective interests.

5th Conference
Shipping and the Law
2014

The 'Prestige' incident. Some important court judgments

Complesso Monumentale Donnaregina
8th October

INTRODUCTION

The *Prestige* incident is of great interest to lawyers and others in the shipping industry in several respects. One interesting aspect is that the incident gave rise to litigation in five national jurisdictions, namely Spain, France, Portugal, the United States and the United Kingdom, as well as before the European Court of Human Rights in Strasbourg (France).

The facts of the case are well known. On 13 October 2002 the Bahamas registered tanker *Prestige*, en route from Ventspils in Latvia to Singapore, suffered structural damage in heavy seas some 30 kilometres off Galicia (Spain). On 19 November the vessel broke in two and sank some 260 kilometres west of Vigo (Spain), the bow section to a depth of 3 500 metres and the stern section to a depth of 3 830 metres.

The ship was carrying a cargo of 77 000 tonnes of heavy fuel oil. It is estimated that approximately 63 000 tonnes of heavy fuel oil were spilled. The cargo remaining in the wreck was removed in 2004 by a Spanish oil company under contract with the Spanish Government.

The coast of Galicia was heavily impacted by the released oil, and the oil also affected the north cost of Spain and France. Traces of *Prestige* oil were detected in the United Kingdom (the Channel Islands, the Isle of Wight and Kent). Major clean-up operations were carried out at sea and on shore in Spain. Significant clean-up operations were also undertaken in France. Clean-up operations at sea were carried out in Portuguese waters.

Investigations into the cause of the incident were carried out by administrative authorities in the Bahamans, Spain and France.

The *Prestige* was entered in the London Steam-Ship Owners' Mutual Insurance Association Limited (the London Club).

The international compensation regime

At the time of the incident, all the States affected by the oil spill (Spain, France, Portugal and the United Kingdom) were parties to the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention. The international regime established by these Convention applied therefore to the incident.

The 1992 Civil Liability Convention governs the liability of shipowners for oil pollution damage caused by tanker oil spills. The Convention lays down the principle of strict liability and creates a system of compulsory liability insurance. Shipowners are normally entitled to limit their liability to an amount linked to the tonnage of the ship, in the case of the *Prestige* amounting to € 22 777 986.

In order for the shipowner to be able to benefit from the right of limitation of liability under the 1992 Civil Liability Convention, he or his insurer must

establish a limitation fund by depositing the limitation amount with the competent court or provide a security for that amount acceptable to the court. In May 2003 the London Club deposited the limitation amount with the Criminal Court in Corcubiòn in Spain for the purpose of establishing the limitation fund.

The 1992 Fund Convention establishes a system for compensating victims through an international fund, the International Oil Pollution Compensation Fund 1992 (1992 Fund), when the compensation payable under the 1992 Civil Liability Convention is insufficient. The maximum amount of compensation available under the 1992 Civil Liability and Fund Conventions was at the time of the *Prestige* incident 135 million Special Drawing Rights (SDR) for any given incident (including the amount paid by the shipowner/insurer), which in the case of the *Prestige* incident corresponds to € 171 520 703.

The total compensation claims greatly exceeded the amount available under the 1992 Civil Liability and Fund Conventions.

If the *Prestige* incident had occurred some years later, the amount available for compensation would have been significantly higher. Firstly, the maximum amount payable under the 1992 Civil Liability and Fund Conventions was increased with effect from 2003 by 50.73% to 203 million SDR (€ 260 million). In addition, in 2005 a Protocol to the 1992 Fund Convention entered into force, resulting in the establishment of a Supplementary Fund which would make available additional funds for compensation of pollution damage in States parties to the Protocol. The total amount payable under the 1992 Conventions and the Supplementary Fund Protocol is 750 million SDR (€ 950 million).

COURT PROCEEDINGS

Civil proceedings in Portugal

The Portuguese Government had submitted a claim to the 1992 Fund and the London Club totaling € 4.3 million in respect of the costs incurred for clean-up and preventive measures and brought legal action in the Maritime Court in Lisbon. The claim was settled out of court, and the legal action was withdrawn in December 2006.

Civil proceedings in France

Some 200 claimants, including the French Government, brought legal actions in 16 courts in France under the 1992 Civil Liability and Fund Conventions against the shipowner, the London Club and the 1992 Fund.

These actions are of the type normally pursued under the 1992 Conventions and do not present any matters of particular interest for the purpose of this presentation.

Criminal proceedings in Spain

In July 2010, i.e. nearly eight years after the incident, criminal proceedings were brought in the Criminal Court (Audiencia Provincial) in La Coruña against four persons, namely the master, the chief officer and the chief engineer of the *Prestige* and the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain. Since the chief officer could not be located, the proceedings against him were discontinued.

Under Spanish law, civil claims may be submitted in criminal proceedings. The criminal court will decide not only on criminal liability but also on civil liability derived from the criminal offence.

Some 2500 claimants joined in the criminal proceedings, including the Spanish and French Governments. The total amount claimed in the criminal proceedings in Spain is some € 2300 million. As regards the compensation claims the defendants included the shipowner, the London Club and the 1992 Fund.

The trial before the Criminal Court (Audiencia Provincial) in La Coruña lasted 10 months, and the judgment was rendered in November 2013, i.e. 11 years after the incident.

In its judgment the Criminal Court found that the master, the chief engineer and the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain were not criminally liable for damage to the environment.

The Criminal Court concluded that the structural failure that resulted in the break-up of the vessel was due to the defective maintenance of the vessel. It held, however, that the master and the crew were not and could not be aware of the structural condition of the vessel, as it was not visible and all of the vessel's documents and certificates had been provided. In addition, the Court considered that there was no evidence of risky navigation.

As for the civil servant the Court held that his decision, although arguable, was technically informed, professional and reasonable.

The master was found guilty of disobeying the Spanish authorities during the crisis and was sentenced to nine months in prison.

With respect to the civil claims arising out of the incident, a Spanish criminal court can only declare civil liability if the damage for which compensation is sought was caused by a criminal offence. Since in the *Prestige* case the Criminal Court held that the only

criminal offence was the disobedience of the master which was not the cause of the damage, the Court could not rule on any civil liability relating to the damage.

The public prosecutor and a number of civil parties, including the Spanish and French Governments, have appealed against the judgement to the Spanish Supreme Court of Cassation which has not yet rendered its judgment[1].

Actions by Spain and France against the London Club

Action had been brought in Spain by the Spanish and French Governments and a number of other parties against the shipowner and the London Club under the Spanish Criminal Code (which provides for right of direct action against the insurer in certain circumstances) and the 1992 Civil Liability Convention. The Club acknowledged its liability under the Convention which provides for direct action but only up to the limitation amount applicable to the vessel in question, in the case of the *Prestige* € 22 777 986. The Club stated that this amount had already been paid through the deposit of the limitation fund in court in May 2003.

As regards claims over and above that amount (non-CLC claims), the London Club maintained that the civil claimants were bound by the terms of the contract of insurance between the shipowner and the Club which includes the Club Rules. Under these Rules the claimants were bound to bring their non-CLC claims in arbitration in London, and they were also bound by the English law clause in the Rules. It should be pointed out that the P&I insurance is not a

[1] The Supreme Court of Cassation rendered its judgment in January 2016. In that judgment the Court held that the master was guilty of crime against the environment and gave him a two-year prison sentence; see keynote speech at the 7th Conference Shipping and the Law held in 2016.

normal liability insurance but an indemnity insurance. This means that the Club is under these Rules only indemnifying the shipowner for the amounts which he has paid in compensation to third parties. The Club maintained that the claimants were bound by any contractual defences available to the Club under the "pay to be paid clause" in the Rules and that, upon a proper interpretation of that clause, in the absence of any payments by the shipowner to claimants, the Club had no liability.

The London Club played no part in the criminal proceedings in Spain.

Since a number of parties appealed against the Criminal Court's judgement, also the issues relating to the civil liabilities of inter alia the master and the London Club have been brought before the Supreme Court of Cassation[2].

The London Club commenced arbitration proceedings in London seeking a declaration that it had no non-CLC liability to the Spanish and French States.

Neither Spain nor France participated in the arbitration proceedings.

In awards rendered in February 2013 as regards Spain and in July 2013 as regards France the Arbitration Tribunal held that Spain and France were

[2] In its judgment rendered in January 2016, i.e. after the judgments were rendered by the Courts in the United Kingdom, the Supreme Court of Cassation held in respect of the civil liabilities mainly as follows. The master was held liable for the damages arising from his criminal act. The shipowner was held subsidiarily liable without the right to limit his liability. Applying Spanish domestic law (criminal law, insurance law, maritime transport law and procedural law), the Court held the London Club liable up to the amount of the ship's insurance policy, which for oil pollution was US $1000 million. After the Supreme Court of Cassation having made some statements as regards the criteria for the admissibility of compensation claims, the case was sent to the Civil Court in La Coruña for proceedings to quantify the losses. These proceedings commenced in May 2016.

bound by the arbitration clause in the Club's Rules to refer the civil claims brought in Spain to arbitration in London, that actual payment of the full amount of any insured liability by the owner or manager of the ship was a condition precedent to any direct liability of the Club to Spain and France, respectively, pursuant to "the pay to be paid clause" in the Club Rules. The Court ruled that, accordingly, in the absence of such prior payment the Club was not liable to Spain/France in respect of such claims.

The London Club sought permission by the High Court of Justice in London, pursuant to the United Kingdom Arbitration Act, to enforce the two awards and have judgments rendered in accordance with the awards.

Spain and France resisted the application as a matter of jurisdiction, on the grounds that they had state immunity, and as a matter of discretion. They also challenged the substantive jurisdiction of the Tribunal on the grounds that they were not bound by the arbitration agreement as their direct action rights were in essence independent rights under Spanish law rather than contractual rights, and that the subject matter could not be subject of arbitration. In addition, they argued that the Court should in any event use its discretion not to grant the Club's application.

In a judgment rendered in 2013 the High Court of Justice did not accept any of the arguments submitted by France and Spain. In summary, the Court found that – although the claims had been submitted in connection with criminal proceedings – the proper characterization of the claims was contractual and that the claims were arbitrable. It held that the Court had jurisdiction because state immunity had been lost as a result of the States having agreed in writing through the Club Rules to arbitrate. For these reasons the

Court, exercising its discretion, granted the London Club's application to enforce the two arbitration awards and to have judgements entered in accordance with the awards.

Spain and France have appealed against the High Court's judgment[3].

Proceedings before the European Court of Human Rights

On 13 November 2002 the master of the *Prestige* was arrested. An investigating judge remanded the master in custody and set a bail at € 3 million. The master requested his release and, in the alternative, a reduction of bail to € 60 000 to reflect his personal situation, in particular his advanced age of 67 years. That request was rejected by another investigating judge, who stated that the seriousness of the offence of which the master stood accused justified his continued pre-trial detention. The judge considered that the master's appearance at trial was vital in order to establish the sequence of events following the leak of the vessel and stated that the seriousness of the offence and the public outcry caused by the marine pollution justified the high level of the bail. Appeals against by the master were dismissed by the Court of Appeal in La Coruña and the Constitutional Court.

On 6 February 2003 the London Club lodged a bank guarantee for € 3 million for the bail as a one-off, spontaneous humanitarian gesture. On 7 February the judge ordered the applicant's provisional release after 83 days in custody, subject to the conditions that he should remain in Spain, surrender his passport to the court and report every day to the Spanish police. In March 2005 the Spanish authorities authorized the

[3]The appeals by Spain and France were dismissed by the Court of Appeal in April 2015.

master's return to his home country (Greece) where he had to report every two weeks at a police station.

The master brought a case against Spain before the European Court of Human Rights under Article 34 of Convention for the Protection of Human Rights and Fundamental Freedoms (the Human Rights Convention). In his action the master alleged, in particular, that the sum set for bail (€ 3 million) had been excessive and disproportionate and had been fixed without his personal circumstances (profession, income, assets, previous honourable life, family situation and age) being taken in consideration and that there had been a breach of Article 5.3 of the Convention.

Articled 5.3 reads in relevant parts:

"Everyone arrested or detained in accordance with the provisions of paragraph (c) of this Article shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The case was first considered by a Chamber of the Court (composed of seven judges) which in January 2009 decided unanimously that there had been no breach of the Article 5.3. The Chamber took the view that the seriousness of the environmental disaster and of the offence in question made it reasonable for the national court to ensure that the master would appear for trial by fixing a high level of bail. It considered that the amount of the bail had been proportionate and that the master's personal circumstances had been sufficiently taken into account, and in particular his status as an employee of the shipowner, who had taken out insurance to cover this type of risk.

At the master's request the case was referred to the Court's Grand Chamber, which is composed of 17 judges.

In his submission before the Grand Chamber the master argued that it was unacceptable, in determining the amount of bail to be imposed on the employee of the shipowner, to take into account public anger and indignation towards shipping companies, before it had even been established who was responsible for the disaster. He drew attention to the fact that the Club Rules obliged the Club to put up security if an insured vessel was detained but not if a crew member was arrested. He pointed out that he had not taken out any personal insurance with the London Club which had no obligations towards him.

In a judgement rendered by the Grand Chamber in September 2010 the Court held, with the ten votes to seven, that there had been no breach of Article 5.3 of the Human Rights Convention. The reasons given by the Grand Chamber can be summarized as follows.

The Grand Chamber stated that the amount of bail had to be assessed principally by reference to the accused and his assets, but that in view of the particular context of the case and the disastrous environmental and economic consequences, the authorities had been justified in taking into account the seriousness of the offences in question and the amount of the loss imputed to the master. It noted that the Spanish authorities had also considered the impact of the disaster on public opinion and the master's professional environment, namely the maritime transportation of petrochemicals. Given the exceptional nature of the master's case the Grand Chamber considered it hardly surprising that the judicial authorities had adjusted the amount of the bail in line with the level of liability incurred, so as to ensure that those responsible had no incentive to evade justice and forfeit the security.

The Grand Chamber stated that the very fact that the payment had been made by the shipowner's

insurer appeared to confirm that the Spanish courts, when they referred to the master's "professional environment", had been correct in finding – implicitly – that a relationship existed between the master and the persons who were to provide the security. It considered that the Spanish courts had taken sufficient account of the master's personal situation, and in particular his status as an employee of the shipowner, his professional relationship with the persons who were to provide the security, his nationality and place of permanent residence as well as his lack of ties in Spain and his age.

Seven of the judges of the Grand Chamber issued a joint very strongly worded dissenting opinion. They considered that the approach of the Spanish courts in fixing the master's bail was not compatible with the principles established by European Court of Human Rights under Article 5.3, the fundamental purpose of which is to ensure that no one is arbitrarily deprived of his liberty.

In the view of the dissenting judges, the disastrous environmental and economic consequences of the oil spill and the public outcry were not factors which of themselves were regarded as requiring the continued detention of the master. It was pointed out that the overriding objective was to secure the master's presence at the trial. They considered that the sum could not accordingly be fixed by reference to the amount of any loss which might eventually be imputable to the accused or his employers but must be assessed principally by reference to him, his assets and his relationship with those persons, if any, who offer themselves as sureties to guarantee his appearance. Where no such sureties were offered, it was in their view the accused and his assets which must be the principal reference point for the setting of bail. They expressed the view that

other factors must be taken into account, including the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he was being prosecuted. In their view his personal circumstances had not been sufficiently taken into account.

The dissenting judges noted that the sum of € 3 million self-evidently bore no relation to the master's personal assets and that there was no suggestion that the master could find sureties to meet such a sum. It was in their view a clear breach of the master's rights under Article 5.3 to fix bail at a level far beyond his means by reference to the strength of the public outcry over the damage caused by his acts or omissions, which rendered illusory his ability to secure his release.

It is interesting to note that the Chamber that first considered the case had been unanimous in holding that that there had been no breach of the Human Rights Convention, whereas in the Grand Chamber – the majority of which agreed that there had been no such breach – a significant minority of the judges took the view that there had been a breach of the Convention.

Liability of the classification society

PROCEEDINGS IN THE UNITED STATES. The Spanish State took legal action against the classification society of the *Prestige*, the American Bureau of Shipping (ABS), before the Federal Court of first instance in New York requesting compensation for all damages resulting from the incident. Spain maintained that ABS had been negligent in the inspection of the *Prestige* and had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel, and had been negligent in granting classification. ABS denied these allegations, arguing that if Spain had suffered

damage it was caused in whole or in part by its own negligence. ABS made a counterclaim and requested that Spain should be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgment against it in relation to the incident.

After several judgments by the Court of first instance and the Court of Appeals for the second circuit, the Court of Appeals finally dismissed the claim by Spain. The Court of Appeals held that Spain had not produced sufficient evidence to establish that ABS had acted in a reckless manner.

proceedings in France. In April 2010, the French Government brought legal action in the Court of first instance (Tribunal de grande instance) in Bordeaux against three companies in the group of ABS, arguing that the defendants had failed to detect an extensive structural fault when it was their duty to verify the conformity of the ship to current navigational security regulations, and had allowed the issuance of the flag registration certificate without having established that the ship complied with these regulations.

The defendants opposed this action invoking the defence of sovereign immunity, since they had acted on behalf of the flag state issuing statutory certificates. In this regard the French Government argued, *inter alia*, that the faults committed by the defendants related to their activity of classification which is a private activity that does not entail sovereign immunity.

In a judgment rendered in March 2014 the Court of first instance held that ABS was entitled to sovereign immunity and that the French Government's claim should consequently be rejected. The Court considered that the activities of classification and the activities delegated by the flag state relating to the

monitoring and certification of ships were in reality the same activity or at least closely related activities since they both derived from the state's power to monitor the ships to assure safety at sea. In the Court's view it could be considered, therefore, that ABS had acted under the orders or on behalf of the flag state and that it had performed actions of public authorities or in the interest of a public service by issuing statutory certificates that could not be issued until classification visits had been carried out. The Court held, therefore, that ABS had fulfilled all the requisites to benefit from sovereign immunity.

The French Government has appealed against the judgement[4].

It should be recalled that the issue of whether classification societies are entitled to sovereign immunity was also addressed in the criminal proceedings in France in the *Erika* case on the grounds that the society concerned had performed services by delegation from the flag state. The Court of Appeal in Paris held that a classification society could as a matter of principle benefit from such immunity, but that the society in question had renounced immunity by participating in the criminal proceedings without invoking such right. In a judgement rendered in September 2012, the French Court of Cassation avoided, however, ruling on this issue and merely

[4] In a judgement rendered in March 2017 the Court of Appeal in Bordeaux held that ABS could not benefit from sovereign immunity. The Court referred to the fact that ABS was a private company and that the litigation related to possible liability incurred during its participation in transport operations by a commercial ship. The Court pointed out that France did not rely upon faults committed by ABS in its activity of statutory certification on behalf of the Bahamas State, but instead argued that the negligent manner in which ABS performed its obligations in the technical visits and periodic inspections carried out in the context of its classification activity, which were related to a private agreement between ABS and the owner of the *Prestige*, contributed to the incident.

stated that the fact that the classification society in question had taken an active part in the preliminary steps in the criminal proceedings was not compatible with any intention to invoke sovereign immunity and unequivocally amounted to a waiver of any right to such immunity.

Concluding observations

As regards the criminal liabilities arising out of the *Prestige* incident, the judgment of the Criminal Court was not rendered until eleven years after the incident, and it will take some further years until the Supreme Court of Cassation will render its judgement[5]. It will therefore have taken more than 14 years before the accused will have their possible criminal liabilities decided. This can hardly be considered fulfilling the requirement in the Human Rights Convention (art. 6.1) that everybody having a criminal charge against him is entitled to a fair hearing within a reasonable time. The *Prestige* case has also illustrated the problem relating to fair treatment of seafarers which is of great concern to the international shipping community.

With respect to civil liability, the claimants in Spain have not yet, 12 years after the *Prestige* incident, had any court decision on their compensation claims. It is likely that it will take some further years before these claims will be resolved in the Spanish courts. This shows in my view that dealing with issues of civil liability in criminal proceedings is not a very efficient way for victims to be compensated.

[5] As mentioned above, the Spanish Supreme Court of Cassation rendered its judgment in January 2016.

It is in my opinion more advantageous for the victims of tanker oil pollution incidents to claim compensation in civil proceedings under the 1992 Civil Liability and Fund Conventions. In such civil proceedings there is no need to establish who is to blame for the oil spill, and the obligation of the shipowner and the 1992 Fund to pay compensation under the Conventions is independent of fault, whereas in criminal proceedings compensation can only be awarded if the damage has been caused by a criminal offence. In France a number of claimants have pursued their claims arising from the *Erika* and *Prestige* cases under the 1992 Conventions in the civil and commercial courts, and these courts have dealt with the cases reasonably promptly. That option was not available to Spanish claimants in the *Prestige* case, however, since under Spanish law once criminal proceedings have been brought, any civil proceedings based on largely the same facts will have to be stayed until a final judgement has been rendered in the criminal proceedings.

In the light of the experience gained from several major oil pollution incidents, it is suggested the international community should consider whether better and more expedient procedures could be developed to deal with criminal and civil liabilities in major oil pollution cases so as to ensure that legal proceedings are completed within a reasonable period of time.

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To what extent do international treaties result in the uniformity of maritime law?

Pio Monte della Misericordia
15th / 16th October

INTRODUCTION

Over the years a large number of international conventions and other treaties have been developed in the field of maritime law. This is perhaps not surprising since shipping is a global trade, and uniform international rules are important for all stakeholders in this field.

The first Conventions were adopted already in 1910, dealing with collision between vessels and salvage, respectively. Two important treaties were adopted in 1924, a convention on limitation of liability and the Hague Rules on the carriage of goods. After the second world war there has been a proliferation of maritime treaties, especially after the establishment of the International Maritime Organization (IMO), dealing with a multitude of subjects: carriage of passengers, limitation of liability, salvage, maritime mortgages and liens, liability and compensation for oil pollution, SOLAS, MARPOL 1973/78 and most recently the Nairobi Wreck Removal Convention, to mention just a few.

UNCITRAL has brought about the Hamburg Rules and the Rotterdam Rules. The International Labour

Organization (ILO) adopted in 2006 the Maritime Labour Convention. The European Union has also in recent years legislated in this field. It is important not forget the most overarching treaty, the United Nations Convention on the Law of the Sea (UNCLOS) which contains important public law provisions relating to shipping.

The main purpose of treaties is to create an international uniformity of law in the relevant field. In view of the multitude of conventions and other treaty instruments, one could expect that there would be a high degree of uniformity relating to shipping. Let us see whether this is really the case. Let us also examine the factors that may be obstacles to the achievement of uniformity[1].

It must be recognized that a number of treaties do not enter into force, or if they do are ratified by only a limited number of States, or without important States becoming parties. It is obvious that such treaties will not contribute, at least not significantly, to the harmonization of maritime law.

Another problem is that conventions often leave some important questions open. These issues will have to be dealt with in the domestic law of the States parties, which may lead to divergences between the legislation of these States.

implementation of treaties

To contribute to international harmonization it is not sufficient that a treaty is adopted and enters

[1]For a detailed analysis of the issues addressed in this key-note speech reference is made to Måns Jacobsson, To what extent do international treaties result in the uniformity of maritime law?, *Journal of International Maritime Law* 2016 p. 94-110.

into force for a reasonable number of States. The treaty must also be implemented properly into the domestic law of the States parties so that it can be applied by courts and other authorities. Defective implementation of the treaty into national law could be a serious obstacle to the correct application.

There are two main methods for implementation of international treaties into domestic law, the monist system and the dualist system.

Under the monist approach, a treaty that has been ratified by the State concerned and published in the Official Gazette applies directly as national law. This is for instance the case in States of the continental legal tradition, such as Belgium, France, Greece, the Netherlands, Poland, Spain, Switzerland and Turkey, as well as the Russian Federation and many States in Latin America and North Africa. A prerequisite for this approach to be used is, however, that the treaty is sufficiently precise for the courts to apply it, that is to say self-executing. Also, when the monist approach is used it is often necessary to adopt supplementary provisions dealing for instance with administrative and procedural matters.

In order for a treaty to become part of the national law in States using the dualist approach, it has to be implemented through a national statute which reflects the content of the provisions of the Convention. This method is used in many States whose legal system is based on the common law tradition, for instance Australia, Canada, Ghana, India, Malaysia, Nigeria, Singapore and the United Kingdom, as well as by Germany, Israel, Italy, Japan, Malta, the People's Republic of China, the Republic of Korea and the Nordic countries. The implementing legislation is normally drafted in accordance with the national legislative tradition of the country concerned, and this may unintentionally

lead to substantive differences between the provisions of the Convention and the corresponding provisions in the implementing legislation. In some States belonging to this group the courts may be reluctant to examine the provisions of the Convention for the purpose of interpreting the national statute, and even more reluctant to use as a source of interpretation the preparatory works (*travaux préparatoires*) which led to the adoption of the Convention.

Under both the monist and the dualist approach problems do arise where the provisions of the treaty or of the implementing legislation conflict with other national statutes and the conflict has not been properly addressed in the implementation process. In some States using the monist approach conflicts between domestic law and a treaty are resolved by a provision in the constitution to the effect that the treaty has a higher constitutional rank than and prevails over national statutes. This is the case in for instance Argentina, France, Greece, the Netherlands and Poland. Although the treaty should take precedence, courts may in such a case have the tendency to apply the normal domestic law instead.

Application of treaties by national courts and other public authorities

A significant difficulty is due to the fact that the application and interpretation of maritime law treaties are the responsibility of national courts and other national authorities. The crucial question is whether national courts apply conventions correctly. There are several difficulties in this regard.

Judges are also human beings, and they are as a result of their training strongly influenced by the

legal traditions and the legal interpretation technique prevailing in their respective country. A judge confronted with a difficult shipping case may never before in his career have dealt with international conventions, and he may be tempted to apply familiar domestic provisions in adjacent fields rather that the – in his view – strange provisions in the treaty or implementing national statute. In many States, such as Italy and my own country (Sweden), the official language of the country is not in most cases an authentic text of the Convention, and if the translation of the convention into the national language is inaccurate, this may cause difficulties in the interpretation of the convention. Conventions relating to shipping have traditionally to a large extent been drafted in the Anglo-Saxon style, which may not – even after translation, if required – be easily understood by a judge trained in the continental law tradition.

In addition, the courts may disregard the international context of the convention and interpret and apply its provisions as if the convention was a normal domestic statute. And let us be honest! The court may sometimes be influenced by political considerations, and the public anger that often arises after a major shipping incident may influence the court.

It should be recognized that some treaties are not of a very high quality. They may have been rushed through, perhaps for political reasons. In addition, some treaties may have been developed without proper consultation with important stakeholders. In such cases it is more difficult for States to implement the provisions and for courts and other national authorities to apply them correctly.

In my own special field, that relating to the conventions on liability and compensation for

pollution damage caused by tanker oil spills, there are a number of cases where national courts have misinterpreted or plainly ignored the provisions of the applicable conventions, and the same occurs in respect of other treaty instruments. Lack of respect of governments and national courts for provisions on shipping matters in Unclos could also be mentioned.

would the development of more treaties contribute to unification?

When experience shows that the intended uniformity has not been achieved in a particular field, it is often suggested that a new treaty should be elaborated or an existing treaty revised. In my view, this is not normally the right approach. Through the various organisations that I have mentioned treaties have been adopted covering all major aspects of shipping. As regards Imo, the Assembly has repeatedly emphasized that new conventions or amendments to existing conventions should be developed only if there is a clear and well-documented compelling need.

It would have a much greater impact if existing international treaties were actually ratified and implemented by a sufficiently large number of important States so that they could have the desired effect to harmonize maritime law. The various stakeholders in the private sector could make valuable contributions to this end by making representations to their respective governments insisting on the importance of ratification of certain treaties. Efforts in this direction are actually being made by Comité Maritime International (Cmi) in cooperation with

the International Chamber of Shipping and the International Shipping Federation.

It must be remembered, however, that law is not – and should not be – static, but must develop to take into account changes in society and in economic, social and political priorities, so as to ensure that the law meets the requirements of society in a rapidly changing world. This applies equally to treaties and to domestic law.

For this reason, it will be necessary from time to time to amend treaties or adopt new ones, also in the field of shipping. The result may however be less, rather than more, uniformity of maritime law. As some States ratify the new or amended treaty and others do not, there will be two or more treaties dealing with the same subject matter. Reference could be made to the international carriage of goods, which is covered by the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, and perhaps in a few years' time also by the Rotterdam Rules.

This difficulty has been at least partly overcome as regards some conventions adopted under the auspices of Imo by the introduction of a simplified method for amendment of treaties, known as the tacit acceptance procedure. Under this procedure amendments are adopted by qualified majority by a competent Imo Committee, and if the adopted amendment is not opposed by a certain number of States within a specified period of time, it enters into force for all States parties, also for those that have opposed it. This procedure has been used for amendments of a technical nature, for instance amendments to Solas and Marpol 73/78, as well as for increases of limitation amounts in conventions on liability and compensation.

Other ways to promote the unification of maritime law

An intergovernmental organisation could contribute to the uniformity of maritime law in other ways than the development of new or amended treaties, for instance by examining difficult questions of interpretation of conventions, or by addressing issues that have arisen after the adoption of the convention. An example is the work by Imo on the issuance of certificates of insurance for bareboat chartered vessels. Another example, again referring to Imo, is the elaboration of a proposed reservation to the 2002 Athens Convention on the carriage of passengers by sea relating to the difficulties for shipowners to obtain insurance covering acts of terrorism.

An organisation could also develop soft law in the form of guidelines. Imo has carried out important work of this type, for instance the adoption of Guidelines on places of refuge and Guidelines on fair treatment of seafarers.

There may be other ways to promote the uniformity of maritime law. Training of staff in ministries dealing with implementation of treaties may contribute to better quality of the implementing legislation and increase the awareness that the relationship between a treaty and other domestic statues must be carefully examined in the implementation process. Judges who deal with cases having international aspects should be given enhanced training in treaty law and the interpretation of international conventions. Better training of practising lawyers dealing with treaty law in matters relating to shipping would also be beneficial.

Technical assistance should be given to developing countries so as to enable them to build up the necessary

expertise among judges, ministry officials, other civil servants dealing with shipping matters and practising lawyers. The training given by institutions such as the World Maritime University (Wmu) in Malmö (Sweden) and the Imo International Maritime Law Institute (Imli) in Malta has proved extremely valuable in this regard.

Supervision by international bodies could also assist in improving the situation, although this procedure is often opposed on the grounds that it would constitute an infringement of national sovereignty.

The Imo Audit Scheme, which originally was voluntary but will become mandatory for all Imo Member States from 1 January 2016, will include an examination of how a number of Imo treaty instruments (e.g. Solas, Marpol 73/78, the International Safety Management (Ism) Code and the Casualty Investigation Code) have been implemented by the States parties, and it is expected that the audit will in the future be extended to cover also other treaty instruments. This should hopefully in the medium and long term contribute to a higher degree of uniformity in the implementation and application of the conventions and codes covered by the Imo Audit.

The International Oil Pollution Compensation Funds that administer the compensation regime relating to oil pollution from tankers established by the Fund Conventions have through their decisions on the interpretation of the relevant treaties, in particular as regards the concept of pollution damage, greatly contributed to a relatively high degree of uniform application of these treaties

the EU involvement in shipping law

Reference should also be made to the role of the EU which in recent years has taken an increased interest in shipping matters.

International treaties are traditionally agreements between states, and as the EU is not a state, it is not normally able to become party to treaties. This applies also to treaties in the field of maritime law. Some treaties contain however provisions allowing 'integration organisations' such as the EU to become parties. As for conventions dealing with shipping matters, such clauses are contained in Unclos, the Rotterdam Rules and the 2002 Protocol to the Athens Convention relating to the carriage by sea of passengers and their luggage. Unclos and the Protocol to the Athens Convention have in fact been ratified by the EU, and that Protocol has been implemented into EU law by Regulation.

Experience shows that there may arise conflicts between international conventions ratified by EU Member States and EU law if the EU is not party to the treaty in question. Pursuant to the jurisprudence of the European Court of Justice, the EU is not bound by a treaty to which it is not a party simply because all EU Member States are party to the treaty.

If, however, the EU is party to a treaty, the treaty becomes an integral part of EU law and takes precedence over other EU legislation as well as over domestic legislation in EU Member States. The European Court of Justice would in such a case have competence to rule on questions of interpretation of the treaty, which could result in an increased uniformity of interpretation in the EU Member States.

concluding observations

Notwithstanding the concerns I have expressed, it must be recognised that there is a higher degree of international uniformity in maritime law than in most other fields of law. However, much remains to be done to achieve the desired result. The question is how the situation could be improved.

The only way to ensure a high degree of uniformity in the interpretation and application of maritime law conventions would be, in my view, to confer jurisdiction in respect of disputes under these treaties, at least as regards matters of principle, on an international court or tribunal. It seems clear, however, that there is not any significant political will to go down this road, except as has been done in certain particular fields, for instance the competence conferred pursuant to Unclos on the United Nations Tribunal on the Law of the Sea.

Consequently, when it comes to the uniformity of maritime law, we are not, as in most areas of human life, living in the perfect world. We have to accept the reality that uniformity in maritime law falls short of what most stakeholders would prefer and that it is unlikely that there will be any major improvements in the foreseeable future.

7th Conference
Shipping and the Law
2016

The judgment of the Spanish Supreme Court of Cassation in the 'Prestige' case – Does the judgment respect international treaties?

Università Suor Orsola Benincasa
25th / 26th October

INTRODUCTION

The *Prestige* incident, which occurred off the Spanish Atlantic coast in 2002, had given rise to litigation in five national jurisdictions (Spain, France, Portugal, United Kingdom and the United States) as well as before the European Court of Human Rights. Of particular interest from a treaty law point of view is the judgment rendered in January 2016 by the Spanish Supreme Court of Cassation that has given rise to a lively discussion on a number of important questions of law and procedure. It has been suggested that the judgment on several points does not respect international treaties to which the Kingdom of Spain is a party.

My presentation will be limited to a discussion of the treaty law issues. I will not deal in any detail with issues that are not governed by international treaties and therefore fall entirely under Spanish domestic law.

Since the *Prestige* incident occurred when I was Director of the International Oil Pollution Compensation Funds (IOPC Funds) and that consequently I was involved in the handling of compensation claims arising

from the incident, I should emphasize from the outset that the views expressed in my presentation do not in any way reflect the position of the Iopc Funds on these issues, nor that of the present Director, but represent purely my personal opinion.

The incident

On 13 November 2002 the oil tanker *Prestige* suffered structural damage in heavy whether, broke in two and sank at a depth of some 3 800 metres approximately 260 kilometres west of Vigo in Spain. The ship was carrying some 77 000 tonnes of heavy fuel oil. It is estimated that approximately 63 000 tonnes of heavy fuel oil were spilled.

The spilt oil had a significant impact on fisheries, mariculture and tourism businesses in Spain and France and extensive clean-up operations were carried out in both countries. Clean-operations at sea were also carried out in Portugal.

The cargo remaining in the wreck was removed in 2004 by a Spanish oil company under contract with the Spanish Government.

Applicable conventions

The 1992 Civil Liability Convention and the 1992 Fund Convention applied to this incident.

Claims for compensation

A very large number of compensation claims for pollution damage in Spain and France were submitted

to the International Oil Pollution Compensation Fund 1992 (the 1992 Fund) and the shipowner's P&I insurer, the London Steam-Ship Owners' Mutual Insurance Association Ltd (the London Club), including claims by the Spanish and French Governments, and one claim, that of the Portuguese Government, for pollution damage in Portugal. The total amount of the claims exceeds by far the amount of compensation available under the 1992 Conventions, € 171 million.

Many of the claims have been agreed, whereas many others have been brought before the courts in Spain and France.

Criminal proceedings in Spain

After lengthy investigations into the cause of the incident in the Spanish criminal courts, prosecution was brought in the Criminal Court in La Coruña against the master and the chief engineer of the *Prestige* and against the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain.

Under Spanish law, civil claims may be submitted in criminal proceedings. The criminal court will decide not only on criminal liability but also on civil liability derived from the criminal offence.

Some 2 500 claimants brought civil claims in the criminal proceedings, including the Spanish and French Governments.

The London Club did not participate in the proceedings in the Criminal Court nor in the Supreme Court, arguing that it had fulfilled its obligations under the 1992 Civil Liability Convention by depositing the limitation amount applicable to the vessel (€ 22 777 986) with the competent Spanish

court in 2003 and that the compensation claims against it should be referred to arbitration in London.

The 1992 Fund was a party to the criminal proceedings as party with strict liability under the 1992 Fund Convention. The Fund participated in the proceedings in the Criminal Court and the Supreme Court, defending the application of the 1992 Conventions.

Judgment by the Criminal Court

The Criminal Court rendered its judgment in November 2013.

The Court found that the master and the chief engineer were not criminally liable for damage to the environment. The Criminal Court concluded:

– the structural failure that resulted in the break-up of the vessel was due to the defective maintenance of the vessel;

– the master and the crew were not and could not be aware of the structural condition of the vessel, as it was not visible and all of the vessel's documents and certificates had been provided;

– there was no evidence of risky navigation.

The master was convicted of disobeying the Spanish authorities during the crisis and was sentenced to nine months in prison.

The civil servant was also acquitted. The Court held that the decision not to allow the ship into a place of refuge, although arguable, was technically informed, professional and reasonable.

As regards the damage arising out of the incident, a Spanish criminal court can only declare civil liability if the damage had been caused by a criminal offence.

Since in the *Prestige* case the Criminal Court held that the only criminal offence was the disobedience of the master which was not the cause of the damage to the environment, the Court could not rule on any civil liability relating to that damage.

Judgment by the Supreme Court of Cassation

The public prosecutor and a number of civil parties, including the Spanish and French Governments, appealed against the judgment to the Supreme Court of Cassation.

Criminal liability

In its judgment rendered in January 2016 the Supreme Court confirmed the acquittal of the chief engineer of the *Prestige* and of the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain.

The Supreme Court set aside the judgment of the Criminal Court against the master and held that he was guilty of crime against the environment. The Court considered that

– as the person responsible for the safe navigation of the ship, including the prevention of pollution, the master was responsible for the adequacy of the equipment of the ship and for undertaking the necessary repairs;

– the master had breached his duty of care, with recklessness in relation to the importance of the affected natural resources, and the foreseeability of the risk of pollution; and the master's disobedience of the Spanish authorities increased the risk of an oil spill.

The master was given a two-year prison sentence. Given the time he has already spent in custody and his age, it is very unlikely that he will have to serve any part of it.

The master has lodged a request for permission to appeal to the Constitutional Court, arguing that the Supreme Court had exceeded its powers by substituting its own interpretation of the evidence for that of the Criminal Court, without re-hearing his testimony. Depending on the outcome of this appeal, the master may bring the matter before the European Court of Human Rights[1].

Since issues relating to the master's criminal liability do not fall under the 1992 Conventions I will not discuss them further, except as to whether the judgment is in breach of the United Nations Convention on the Law of the Sea (Unclos).

Civil liability

Civil liability of the master. The Supreme Court found the master liable for damages arising from the criminal offence. The Court considered that the liability should be established under civil law and that compensation was governed by the 1992 Civil Liability and Fund Conventions.

The Supreme Court noted the provisions on channelling of liability in the 1992 Civil Liability Convention. Under these provisions, in principle, no claims for compensation for pollution damage may be brought against the master, whether under the Convention or otherwise. The Supreme Court held, however, that pursuant to the Convention the master could not benefit from the protection of these

[1] The master's request for permission to appeal to the Constitutional Court was denied. It is not known whether he will pursue the matter before the European Court of Human Rights.

provisions, since the damage was a consequence of his recklessness, with the knowledge that the damage could occur.

Since it is for national courts to assess whether the master has acted in such a manner that he is not entitled to benefit from the protection of the channelling provisions in the 1992 Civil Liability Convention, the Supreme Court could not be considered having breached the Convention in this regard.

Civil liability of the shipowner. The Supreme Court held that the shipowner had subsidiary civil liability, since he was considered responsible for the lack of proper maintenance of the ship and that the fault that caused the fracture of the ship was due to structural failure known to the shipowner.

Under the 1992 Civil Liability Convention the shipowner would normally be entitled to limit his liability to an amount related to the tonnage of the vessel. In the *Prestige* case, the limitation amount was € 22 777 986. The Convention provides, however, that the shipowner is deprived of the right of limitation of liability if 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.

The Supreme Court held that the shipowner was not entitled to limit his liability as a result of his recklessness, since he had sent the ship on a voyage knowing that it had important structural deficiencies and with knowledge that the damage would probably occur.

It is for the national courts to assess whether the shipowner has acted in a manner that under the 1992 Civil Liability Convention deprives him of the right

to limitation. For this reason, the Supreme Court acted within the parameters of the Convention in this regard.

Liability of the insurer. In order for the shipowner to be able to benefit from the right of limitation of liability under the 1992 Civil Liability Convention, he must establish a limitation fund by depositing the limitation amount with the competent court or provide a security for that amount acceptable to the court. The insurer is entitled to constitute a limitation fund on the same conditions and with the same effect as if it were constituted by the owner. As already mentioned, the London Club deposited the limitation amount with the Criminal Court in Corcubiòn in May 2003.

Under the 1992 Civil Liability Convention the shipowner's insurer may avail himself of the right to limitation of liability, even if the owner is not entitled to do so.

The Supreme Court noted that the Civil Liability Convention did not envisage any exception to the insurer's right to limitation but considered that the insurer must request the right to limit his liability. However, according to the Court, by its voluntary absence from the proceedings and not raising any objection to its obligation to indemnify the victims, it fell on the insurer to bear the consequences of this lack of procedural diligence. The Court stated that Spanish criminal law expressly provided that the liability of the insurer was up to the limit of its insurance policy and that Spanish maritime transport law provided for right of direct action against the insurer.

Notwithstanding the provisions in the Convention, the Spanish Supreme Court, applying Spanish domestic law (criminal law, insurance law, maritime

transport law and procedural law), held the insurer liable up to the amount of the ship's insurance policy, which for oil pollution was US $ 1 000 million.

The judgment has on this point been strongly criticized by the organisations representing shipping and insurance interests.

When the judgment of the Supreme Court was discussed at the October 2016 session of the 1992 Fund Executive Committee, the Spanish delegation expressed the view that the insurer must not only fulfill his obligations under the Civil Liability Convention but also the requirements in the procedural rules of the applicable national law, namely to participate in the legal proceedings in Spain. One delegation expressed the view that the Club's non-participation in the legal proceedings in Spain was against the spirit of the Civil Liability Convention.

As regards the question of whether the London Club had requested the right of limitation, at the October 2016 session the International Group of P&I Clubs pointed out that when the London Club made the deposit of the limitation fund with the Spanish court in 2003, it had stated that the deposit had been made to constitute the limitation fund on behalf of both the shipowner and the London Club and that the Court had formally accepted the deposit.

When analyzing the Supreme Court's judgment, it is important to distinguish between, on the one hand, the compulsory insurance under the Civil Liability Convention up to the limitation amount of the ship, and on the other hand the voluntary insurance over and above that amount. The compulsory insurance up to the limitation amount is governed by the Convention and is covered by the right of direct action against the insurer provided for in the Convention. The voluntary insurance over and

above that amount is not governed by the Convention but by the insurance policy. The policy does not give the right of direct action for claims over and above the limitation amount and contains the "pay to be paid clause". It also provides through the Club Rules that claimants are bound to bring such claims in arbitration in London and also bound by the English law clause in the Club Rules.

In my view the Supreme Court's judgment is in contravention of the 1992 Civil Liability Convention by not respecting the insurer's right to limitation of liability.

In 2012 the London Club brought arbitration proceedings in London against the Spanish and French States seeking a negative declaratory relief in respect of any non-Convention liability to Spain and France. Neither Spain nor France participated in the arbitration proceedings.

In 2013 an Arbitration Tribunal considered that when a third party makes a claim under an insurance policy containing an arbitration clause, he becomes a party to the arbitration agreement. Consequently, the Spanish and French States were bound by the arbitration clause in the Club Rules to refer civil claims brought by them over and above the limitation amount to arbitration in London. The Tribunal held that under the "pay to be paid clause" in the Club Rules, the Club was only obliged to indemnify the shipowner for compensation amounts he had paid, and since no such payments had been made, the Club was not liable to pay Spain and France in respect of their claims.

The London Club made an application to the High Court in London to enforce the arbitration awards and have judgments entered in accordance with these awards. Spain and France opposed the

application and participated in the proceedings in the High Court. In October 2013 the High Court granted the Club's application.

Appeals by Spain and France against the High Court's judgment were dismissed by the Court of Appeal in April 2015.

The judgments by the English Courts were not taken into account by Spanish Supreme Court.

In view of the judgment by the Court of Appeal in London, it is unlikely that the Spanish Supreme Court's judgment can be enforced in the United Kingdom.

Civil liability of the 1992 Fund. The Supreme Court held the 1992 Fund had civil liability within the limits provided in the 1992 Fund Convention.

Admissible damages. The 1992 Conventions apply to pollution damage. Pursuant to the Conventions compensation for impairment of the environment (other than loss of profit from such impairment) is limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. This proviso was included in the Civil Liability and Fund Conventions when they were revised in 1992 to make it clear that damage to the environment per se, i.e. ecological damage, and other damage of a non-economic nature (for instance moral damage) do not qualify for compensation under the 1992 Conventions.

The Supreme Court ruled, however, that compensation for damages not exactly contemplated in the 1992 Conventions would not necessarily be excluded. The Court stated that when quantification of the damage was carried out, the court would not be constrained by the 1992 Fund's admissibility criteria as laid down in its Claims Manual, although these

criteria could be taken into consideration by the court as guidance when deciding on the corresponding compensation.

The Supreme Court recognized the possibility of compensation being awarded for moral damage, including not only the sense of fear, anger and frustration that may have affected many of the Spanish and French citizens but also the mark that may have been left by the notion that catastrophes similar to the *Prestige* could affect the citizens at any time. The amount awarded for moral damage could not, however, exceed 30% of the assessed material damages.

It is submitted that the judgment, by recognizing types of damage which are clearly not admissible under the 1992 Conventions, such as moral damage, is not respecting the Conventions. It should be noted that the governing bodies of the 1992 Fund, composed of representatives of the Governments of the States parties to the Conventions, including representatives of the Spanish Government, have over the years repeatedly emphasized that these types of damages are not admissible for compensation.

Quantification of damage

Quantification of the damages was not made in the judgment by the Supreme Court. Following that judgment the case was sent to the Civil Court in La Coruña for proceedings to quantify the losses, and these proceedings commenced in May 2016.

Application of UNCLOS

The United Nations Convention on the Law of the Sea (Unclos) provides that only monetary penalties may be imposed with respect to violations of national laws and regulations for the prevention and control of pollution of the marine environment committed

by foreign vessels beyond the territorial sea. The same applies where the violations are committed by foreign vessels in the territorial sea, except in case of a willful and serious act of pollution.

These restrictions were not, in my opinion, respected by the Spanish Supreme Court in the *Prestige* case. The master was given a two-year prison sentence by the Court which held that the master was guilty of crime against the environment and that he had breached his duty of care, with recklessness in relation to the importance of the affected natural resources and the foreseeability of the risk. There was no finding that he had committed a willful act of pollution.

concluding observations

As I have already said, in my opinion the Spanish Supreme Court has on several points not respected the treaties to which Spain is a party, namely:

– The Court did not respect the insurer's right to limitation of liability under the 1992 Civil Liability Convention.

– The Court held that types of damages not admissible under the 1992 Conventions, particular moral damage, could qualify for compensation.

– The Court did not respect the restrictions in Unclos by imposing a prison sentence on the master.

The non-respect of the 1992 Conventions is obviously detrimental to the operation of the international compensation regime created by these Conventions. The States parties to these Conventions, including Spain, have through the governing bodies of the Iopc Funds, composed of representatives of the

Governments of States parties, expressed the opinion that a uniform interpretation of the Conventions is essential for the proper functioning of that regime.

At the meetings of the Fund's governing bodies in April and October 2016 a number of delegations expressed their concern as regards certain aspects of the Supreme Court's judgment, in particular that the Court did not respect the insurers' right to limitation of liability.

The outcome of the criminal proceedings in Spain shows, in my view, that dealing with issues of civil liability in criminal proceedings is not an efficient way for victims of oil pollution incidents to be compensated. Fourteen years have passed since the *Prestige* incident, and the civil parties in the criminal proceedings in Spain have still not obtained a judgment on their compensation claims.

I suggest that it is more advantageous for victims to claim compensation in civil proceedings under the 1992 Conventions. In such proceedings there is no need to establish who is to blame for the oil spill, since the obligation of the shipowner and the 1992 Fund to pay compensation under the Conventions is independent of fault, whereas in criminal proceedings compensation can only be awarded if the damage has been caused by a criminal offence.

In the *Prestige* case civil proceedings under the 1992 Conventions could, however, not have been pursued in Spain. Under Spanish law, once criminal proceedings have been brought, any civil proceedings based on largely the same facts will have to be stayed until a final judgment has been rendered in the criminal proceedings. In France, on the other hand, a number of claimants have pursued their claims arising from the *Prestige* case under the 1992 Conventions in the civil courts, and judgments have been rendered

reasonably promptly. This was also the case in the *Erika* incident that occurred in France in 1999.

As already mentioned, the civil proceedings to quantify the losses in respect of the claims brought in the criminal proceedings in Spain commenced in May 2016, and it may take several years before these proceedings will have been brought to an end.

8th Conference
Shipping and the Law
2017

Compensation for pure economic loss in relation to tanker oil spills

The Royal Palace of Naples
12th / 13th October

INTRODUCTION

A tanker oil spill may result in various types of pollution damage: property damage. costs of clean-up operations at sea and on shore, economic losses suffered by individuals and businesses, and damage to the environment. My presentation will focus on the legal issues that relate to economic losses.

Why are these issues important? As we all know, a major oil spill causes anger, desperation and frustration in the areas affected by the spill, in particular among individuals and small businesses in the fishery and tourism sectors, as well as strong reactions from politicians and criticism in the media directed at the shipping industry as a whole. An efficient system of compensation of those suffering economic losses is crucial, and it may also to some extent reduce the bad reputation of the shipping industry very often caused by oil spills.

Issues of liability and compensation for pollution damage caused by tanker oil spills are governed by two international treaties adopted under the auspices of the International Maritime Organization (IMO), the

1992 Civil Liability Convention (CLC) and the 1992 Fund Convention. They replaced earlier Conventions with the same names of 1969 and 1971.

Under the Civil Liability Convention the shipowner has strict liability for pollution damage caused by oil from his ship, but is normally entitled to limit his liability to an amount based on the tonnage of the ship. The shipowner is obliged to have insurance covering that liability. Insurance for oil pollution is normally placed with mutual insurers known as Protection and Indemnity Associations (P&I Clubs), in most cases with one of the thirteen Clubs belonging to the International Group of such associations.

If the amount available for payment of compensation under the Civil Liability Convention is insufficient to compensate all established claims in full, further compensation is made available under the 1992 Fund Convention from the International Oil Pollution Compensation Fund 1992 (1992 Fund) and previously from its predecessor the 1971 Fund. A Protocol adopted in 2003 established a Supplementary Fund which makes more money available for pollution damage in the States parties to the Protocol. The Funds are intergovernmental organisations, and their governing bodies are composed of representatives of governments of the States parties to the respective treaty instruments.

Claims under the Civil Liability and Fund Conventions are dealt with jointly by the Funds and the P&I Club concerned.

Consequential economic loss and pure economic loss

There are basically two types of economic losses, consequential economic loss and pure economic loss.

Persons whose property has been contaminated by oil may suffer loss of earnings, for instance, a fisherman who is unable to fish while his contaminated fishing gear is being cleaned or replaced. Such losses are normally referred to as consequential economic loss.

Consequential economic losses qualify for compensation in most jurisdictions, and such losses have always been accepted as admissible in principle under the Civil Liability and Fund Conventions.

Persons whose property has not been contaminated can also suffer losses. A fisherman whose gear did not get polluted may have had to abstain from fishing for a period of time to avoid having his nets polluted. A hotel or a restaurant whose premises are located on or close to a public beach may suffer losses because the number of guests decreases during the period of the contamination of the beach. Such losses are, at least in common law jurisdictions, referred to as pure economic loss.

In most common law jurisdictions the courts have been very reluctant to accept compensation claims for pure economic loss, recognizing the far-reaching consequences if such losses were considered in principle as admissible for compensation.

The position consistently taken by the courts in the United Kingdom is that claims for pure economic loss are not admissible. Some other common law jurisdictions, for instance India and Nigeria, follow that approach. This is also the general principle applied in the United States, except as regards oil pollution damage falling under the Oil Pollution Act 1990 (OPA-90), where this principle has been abandoned. Some common law countries, for example Australia, Canada and New Zealand, have in recent years taken a less strict approach than the British Courts in this regard.

In countries outside the common law system the legal situation is unclear. In some of these countries pure economic is not considered as a separate type of damage. In these countries the courts may apply the criterion of foreseeability and remoteness or require that there is a direct link of causation between the damage and the defendant's action, and that the damage is certain and quantifiable in economic terms. This is the case in States whose legal systems are based on the principles in the French Civil Code, e.g. France, Belgium, Greece, Italy, the Netherlands and Spain and countries in Latin America, as well as in Denmark, Norway, the People's Republic of China, Japan and the Republic of Korea.

Under German law pure economic loss does not normally qualify for compensation, but is admissible if caused by an act in contravention of a law the purpose of which is to protect the interest that has been damaged, or caused intentionally by an immoral act. Pursuant to Swedish law claims for pure economic loss are in principle admissible only if caused by a criminal offence, and the position under Finnish law is similar to that in Sweden. It appears that under Turkish law pure economic loss does not qualify for compensation.

The concept of pollution damage

The 1971 Fund was confronted with the issue of the admissibility of claims for pure economic loss already in 1980 in the context of the *Tanio* incident in France. A major challenge was for the 1971 Fund to deal with the *Haven* incident in Italy in 1991 that caused pollution on the Italian coast from Genoa to the French border and beyond as far as to Toulon in France. The incident gave rise to some 1000

pure economic loss claims from fishermen, hotels, restaurants, shopkeepers and operators of beach facilities (banji).

In view of the difference in approach between the common law and the civil law systems, the problem for the 1971 Fund was to reach agreement between Member States on how to deal with such claims, A paramount consideration was that the Fund had to treat pure economic loss claimants in the same way in all Member States.

During the early days of the operations of the 1971 Fund (the predecessor of the 1992 Fund) important questions of admissibility of claims were addressed as and when they arose. Against the background of several important tanker oil spills, in particular the *Patmos*, *Agip Abruzzo* and *Haven* incidents in Italy, the *Aegean Sea* incident in Spain and the *Braer* incident in the United Kingdom, the 1971 Fund's governing bodies decided that it was time to take a more systematic approach to the Fund's policy in this regard. After a thorough analysis of the issues involved, the 1971 Fund Assembly adopted in 1994 criteria for the admissibility of claims. Of particular importance were the criteria relating to pure economic loss.

The Civil Liability and Fund Conventions do not explicitly indicate whether pure economic loss qualifies for compensation. The relevant provisions in these Conventions defining pollution damage as 'loss or damage caused outside the ship by contamination' have however been consistently interpreted by the governing bodies of the Funds to cover in principle both consequential and pure economic loss, and these bodies have developed certain criteria for the admissibility of claims for such losses. The main criterion is that there must be a sufficiently close link of causation between the contamination and the loss.

A claim is not admissible just because an oil spill has occurred. The starting point is the pollution and not the incident.

It should be pointed out that the criteria adopted by the Funds are not binding on national courts. If an out-of-court settlement cannot be reached with a particular claimant, it is the competent national court in the State where the pollution damage occurred that has the final say as regards the interpretation of the Conventions.

Detailed criteria for admissibility of pure economic loss claims

When considering whether the criterion of a sufficiently close link of causation is fulfilled, the Funds take in account the following elements:

– the geographic proximity between the claimant's business activity and the contaminated area;

– the degree to which a claimant's business is economically dependent on an affected resource;

– the extent to which a claimant has alternative sources of supply or business opportunities;

– the extent to which a claimant's activity forms an integral part of the economic activity of the area affected by the oil spill.

When these criteria were adopted, it was considered essential that they should allow some flexibility, enabling the Funds to take into account new situations and new types of claim.

After 1994 the Funds have dealt with tens of thousands of claims relating to pure economic loss. As a result the Funds have developed and refined the admissibility criteria. However, the criteria adopted in

1994, i.e. more than 20 years ago, and the principles underlying these criteria, still form the basis of Fund policy[1].

An oil spill may affect directly or indirectly a large number of businesses in various ways, for example in the fishery and tourism industries.

In the fisheries sector an oil spill may affect not only the fishermen in the polluted area but also businesses like fish processing plants and fish sales companies that depend on the supply of fish or shellfish originating from that area. Such businesses may suffer losses if they are deprived of their normal supply. When deciding whether the causation requirement is fulfilled, consideration is given to the distance between the location of the business concerned and the polluted area, the degree to which that business is economically dependent on the polluted resource, whether the business is able to get its supply from other sources, and the extent to which the business forms an integral part of the economic activity of the affected area.

As for the tourism sector, the owner of a hotel located on or close to a polluted public beach may suffer losses as a result of a reduction in the number of guests staying at the hotel or eating in the hotel restaurant. This may in turn result in a decrease in the number of sheets, table cloths and napkins being sent to the local laundry, which will suffer a reduction in its business. The hotel restaurant may buy less meat from the local shop, that will buy less meat from the wholesaler who will buy less meat from the slaughterhouse that will buy fewer cows from the farmers, and these businesses

[1] For details of the IOPC Funds' policy as regards the admissibility of claims for pure economic loss see Claims Manual issued by the International Oil Pollution Compensation Fund 1992, October 2016 edition, sections 3.3, 3.4 and 3.5.

could all argue that they have suffered economic loss as a result of the oil pollution. The question is whether all these 'secondary claimants' should be entitled to compensation for their losses.

As regards claims in the tourism sector, the Funds make a distinction between two categories of claimants. The first category includes claimants who sell goods or services directly to tourists (for example the owners of hotels, campsites, bars and restaurants) and whose businesses are directly affected by an oil spill. The second category comprises businesses that provide goods or services to other businesses but not directly to tourists (for instance wholesalers, manufacturers of souvenirs and postcards and hotel launderers).

The Funds have considered that as regards the second category of claimants there is not a sufficiently close link of causation between the contamination and any losses suffered by the claimants. Claims in this category in the tourism sector will therefore not normally qualify for compensation. In the overwhelming number of the cases where such claims that were rejected by the Funds have been pursued in court, the courts have agreed with the position taken by the Funds in this regard.

A difficulty in the assessment of claims in the tourism and fishery sectors is that there are great variations in the economic results in these sectors from one year to another for a number of reasons other than the impact of an oil pollution incident.

The definition of pollution damage in the Conventions includes reasonable measures to prevent or minimize pollution damage. It is likely that when the Conventions were drafted, the intention was that this provision would cover measures to prevent physical pollution, namely pollution of the coastline and of property.

The Funds have decided, however, that also measures to counteract the negative impact of an oil pollution incident on the local economy may qualify for compensation, that is to say measures to prevent or minimize pure economic loss. The 1971 Fund has for example following the *Braer* incident accepted a claim from organisations representing the salmon farming industry on Shetland for costs incurred for marketing activities at a major fish fair in Japan, the most important market for these salmon farmers.

Claims by employees

A contentious issue is how to deal with claims by employees in the tourism and fishing sectors who have suffered losses as a result of having been made redundant or placed on part time work in connection with an oil spill. The Funds' policy, adopted in the early 1990s, is that the employees' losses are normally considered being a further step removed from the oil pollution and therefore do not qualify for compensation. The position taken by the Funds in this regard has been criticized.

In early 2017 the Korean Supreme Court has in three cases rendered judgments in favour of employees having suffered losses of the kinds just mentioned. In view of these judgments the issue was discussed by the 1992 Fund Assembly in April 2017. The majority of delegations agreed with the Funds' Director that the existing policy of the Funds on this issue should be reviewed, and the Assembly instructed the Director to carry out such a review.

In a document to be considered by the Assemblies of the 1992 Fund and the Supplementary Fund in October 2017 the Director has proposed that the Funds'

policy should be amended and that employee claims should be admissible under the following conditions:

– The claimant must be employed at the time of the incident, and not have only a mere 'expectation of employment'.

– The employer's business must have been affected by the pollution.

– The employee must have tried to mitigate his losses by finding alternative similar employment in the same geographic area.

– The time for which compensation is to be paid to the employee cannot exceed the time for which compensation is paid to the employer.

– Any social security payment received by the employee should be deducted from the compensation payment in order to avoid double compensation.

It is likely that the proposed criteria will be refined in the light of the discussion in the Assemblies. It may not be easy to develop criteria which provide clarity as regards the Funds' policy and at the same time allow a certain degree of flexibility in the assessment of individual claims of various types in this category[2].

A change of Fund policy as proposed could have a very significant impact on the international compensation regime. For instance, a major oil pollution incident at the beginning of the tourist season affecting an area in Italy dependent on beach tourism, for instance the Italian Riviera, could result in tens of thousands of employees at hotels, restaurants and other beach-related businesses being laid off

[2] In late October 2017 the Assemblies decided to amend the current policy regarding the admissibility of claims for compensation made by employees for losses of the types referred to above, and instructed the Director to submit a document providing refined assessment criteria at the next session of the Assemblies.

for a considerable period of time, which could lead to compensation claims totaling very high amounts. Since there is under the Conventions only a specific amount available for compensation, accepting claims from employees in such cases could result in other claimants not getting full compensation.

Concluding observations

It is in fact an extraordinary achievement that such a large number of States with different legal traditions and on different levels of economic development have been able to agree on the criteria for admissibility of pure economic claims. It is also remarkable that, on the basis of these criteria, the Funds have been able to reach out-of-court settlements in respect of the overwhelming majority of such claims.

Although national courts, being the final arbiters in respect of the interpretation of the Civil Liability and Fund Conventions, have sometimes not accepted the Funds' interpretation of the Conventions or the Funds' application of these criteria in individual cases, national courts have largely accepted the position taken by the Funds. For instance, in the *Erika* and *Hebei Spirit* cases in France and the Republic of Korea, respectively, where a large number of pure economic loss claims that had been rejected by the 1992 Fund were pursued in the national courts, the courts held in practically all cases that the claims did not fulfill the causation requirement and agreed with the Fund that the claims should be rejected

But law is not static, not cast in stone. That applies to international treaties as well as to national legislation. It is important, therefore, that the criteria adopted by the Funds for admissibility of claims, including those

relating to pure economic loss, are reviewed from time to time in the light of experience gained from the handling of compensation claims arising out of various tanker oil spills. It is also important, however, that there is a consistency over time in the application of the Conventions. It will be interesting to see what will be the result of the ongoing reconsideration as regards losses suffered by employees.

Author's biography

Måns Jacobsson was from 1985 to 2006 Director and Chief Executive Officer of the International Oil Pollution Compensation Funds (IOPC Funds). Since his retirement from the IOPC Funds at the end of 2006 he is working as academic lecturer and as a consultant in maritime and environmental matters.

After studies at Princeton University in the United States, Måns Jacobsson studied law at Lund University in Sweden, graduating in 1964.

Måns Jacobsson served as a judge at district court and appellate court level in Sweden 1964-1970. He worked as legal advisor in the Department for International Civil Law of the Swedish Ministry of Justice 1970-1981 and was Head of that Department 1982-1984. He held the post of President of Division of the Stockholm Court of Appeal 1985-2006.

Måns Jacobsson is a member of the Board of Governors of the World Maritime University (WMU). He is Visiting Professor at the WMU and the Maritime Universities in Dalian and Shanghai (People's Republic of China) and Honorary Professor at the University of Nottingham (United Kingdom). He is a Visiting Fellow at the IMO International Maritime

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He was member of the Executive Council of Comité Maritime International (CMI) 2007-2014. He is an Honorary Member of the French and Italian Maritime Law Associations

Måns Jacobsson has published two books and numerous articles in various fields of law, such as maritime law, torts, patent law, nuclear law and treaty law.

In 2007 the University of Southampton conferred upon him the Degree of Doctor of Laws *Honoris Causa*. In 2010 he was awarded the King of Sweden's Gold Medal for significant achievements in the field of maritime law and shipping.

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