

# Compensation Issues under the Bunkers Convention

Dr. Ling Zhu

Department of Logistics, the Hong Kong Polytechnic University,  
Hong Kong  
[lgtlzhu@polyu.edu.hk](mailto:lgtlzhu@polyu.edu.hk)

## Abstract

*Oil tankers are not the only vessels that cause oil pollution damage at sea. Numerous spills at sea have been of heavy fuel oil from non-tankers. The international system of civil liability and compensation established after the Torrey Canyon incident covers only oil pollution damage caused by oil tankers. There was thus a need to bring the law on marine oil pollution up-to-date by extending liability and compensation to all sea-going vessels. In March 2001, the Bunkers Convention was adopted at a Diplomatic Conference at the IMO; it has not yet come into force. This paper focuses on the discussion of compensation issues under the Bunkers Convention. It analyses the relevant provisions, the impacts of components such as compulsory insurance on the availability of compensation under the Bunkers Convention. Suggestions on other compensation sources are also given in this paper.*

## Keywords

The Bunkers Convention; compensation; Article 7(8); adequacy.

## 1. Introduction

In March 2001, the International Maritime Organization (IMO) adopted a new convention - "International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001" (the Bunkers Convention). The adoption of this Convention has satisfied the need to address liability and compensation issues arising from the spills of bunker oil from ships and, once ratified, it will fill the liability gap left by the earlier civil liability conventions. The Bunkers Convention has not yet come into force; it will come into force after eighteen States, including five States each with ships not less than 1 million gross tonnage, have ratified it.<sup>1</sup>

The Bunkers Convention underlines the importance of the payment of adequate, prompt and effective compensation for the damage caused by pollution resulting from the escape or discharge of bunker oil from

ships. This paper, as its title indicates, mainly discusses the compensation issues under the Bunkers Convention.

## 2. Compensation from the Liable Party

### 2.1 Liability and the Liability Party

The liability party classically serves as the initial source of compensation. In order for the pollution victim to identify the liable person, the Bunkers Convention attributes liability to the shipowner, a term which includes the "registered owner, bareboat charterer, manager and the operator of the ship".<sup>2</sup> Meanwhile, where more than one person is liable for pollution damage, their liability shall be joint and several.<sup>3</sup> With the said provisions, two crucial points were acknowledged, viz: first, increasing the number of liable persons in the definition of "shipowner" might expand the recovery of compensation for pollution victims; secondly, care must be taken to ensure that no overlapping insurance would be taken out by the liable persons.<sup>4</sup> Evidently, liability for pollution damage is not imposed on the cargo-owner under the Bunkers Convention.

Liability under the Bunkers Convention is by nature a strict liability; i.e. if a causal link can be established between the oil-spill incident and pollution damage, the shipowner shall be liable for pollution damage, regardless of whether the pollution was caused by the negligence or other known or unknown reasons. However, it is not an absolute liability; the shipowner can be exonerated from liability when the situation falls within the exceptions in the Bunkers Convention.<sup>5</sup>

### 2.2 Compensation from the Registered Owner and its Insurance Provider

Under the Bunkers Convention, the registered owner shall take out insurance or choose to establish other types of financial security to meet pollution victims'

<sup>1</sup> The Bunkers Convention, Art. 14(1).

<sup>2</sup> The Bunkers Convention, Art. 1(3).

<sup>3</sup> The Bunkers Convention, Art. 3(2).

<sup>4</sup> See IMO LEG 80/4/1: it is also recorded that P&I Clubs have difficulties in providing cover for a vessel where the liability is jointly and severally held by all the persons defined as owner, especially if the Club does not know all those persons.

<sup>5</sup> The Bunkers Convention, Art. 3(3), Art. 3(4).

claims.<sup>6</sup> In addition, a certificate issued by the relevant authority must be carried on board. This certificate attests that insurance or some other financial security for pollution liability is in place.<sup>7</sup> Insurance is probably the most common source of compensation for pollution damage.

As an integral part of the compulsory insurance regime under the Bunkers Convention, claims for compensation for pollution damage are entitled to be brought directly by third parties against the insurer or other party named in the certificate as the guarantor.<sup>8</sup> In other words, the liability insurer, mainly the shipowners' P&I Clubs,<sup>9</sup> in the light of the direct action provision of the Bunkers Convention, is liable for the registered owner's liability for pollution damage.

The financial standing of providers of insurance or other financial security is of great concern for pollution victims as it is relevant for any claim for payment for damages in the case that the shipowner and his liability insurer are the sole source of compensation.<sup>10</sup> It is important to ensure that the provider of insurance or financial security has a sound financial standing and thus ensure its capacity to pay compensation once the incident occurs. The Bunkers Convention notices this and it provides, in Article 7(8), that:

*“Nothing in this Convention shall be construed as preventing a State Party from relying on information obtained from other States or the Organisation or other international organisations relating to the financial standing of providers of insurance or financial security for the purposes of this Convention. In such cases, the State Party relying on such information is not relieved of its responsibility as a State issuing the certificate required by paragraph 2.”*<sup>11</sup>

It is important to note that no similar provisions exist in the earlier civil liability conventions for oil pollution damage. The term of “financial standing” is not defined in the Bunkers Convention; however, it may follow from Article 7(9) that the insurer or guarantor shall be “financially capable of meeting the obligations imposed by this Convention”.<sup>12</sup> In brief, the insurer or the guarantor shall be solvent and maintain his financial capacity to pay claims at the time when the certificate is issued by an appropriate authority, or arguably during the period of validity of the certificate.<sup>13</sup> By virtue of Article 7(8), a State Party will rely on the relevant informa-

tion regarding the financial standing of providers of insurance or financial security available from other States or the relevant organization. In addition, a State Party, having issued a certificate in accordance with the information from the other State, may still have to be responsible if it turns out that the insurer in question is not financially capable in the end.

### 3. Compensation and its Adequacy

The risk of bunker-oil spill may be very high. It is estimated that on average the amount of fuel in bunkers carried by non-tankers is around 14 million tons at any given time – compared with approximately 130 million tons of oil carried as cargo on the world's seas. Some bulk carriers and container ships carry more oil as bunker fuel than tankers carry as cargo.<sup>14</sup> It can thus be reasonably assumed that if a very large container ship lost her entire bunker load, the resultant pollution damage would, in qualitative terms, equate to the loss of a fair sized tanker, subsequently involving a large compensation payment. For instance, The *Pallas* incident in Germany showed that tremendous damage might be caused by a limited amount of fuel oil leaking from a cargo vessel.<sup>15</sup> This leads to the following examination of the effectiveness of the current liability and insurance arrangement as a means of guaranteeing compensation under the Bunkers Convention.

#### 3.1 Compensation from Other Jointly Liable Persons

At the time when the bunkers convention was conceived and debated, some attention was focused on sharing the burden of liability where it could be shared. Therefore, the definition of “shipowner” in the Bunkers Convention is broad, and all persons involved are accordingly liable for pollution damage.<sup>16</sup> And, as mentioned, this position is fairly intensified by the “joint and several liability” provision, which provides that where more than one person is liable for pollution damage, their liability shall be joint and several.<sup>17</sup> This “joint and several liability” provision reflects a strong desire of the Bunkers Convention to collect any possible source of compensation for pollution victims. However, compensation from the liable persons other than the registered owner is not guaranteed, since other persons are not required to take out insurance or arrange other financial security to guarantee their liability. Maintaining liability insurance or other financial security is optional for those parties. Therefore, the claimants may not receive compensation from those persons if they are insolvent in the absence of insurance. Even if they take out insurance, it might still be an inadequate guarantee in the case of these persons being underinsured.

#### 3.2 Strict Liability and the Limitation

Over the years, the rule of strict liability under the earlier international civil liability conventions has shown

<sup>6</sup> The Bunkers Convention, Art. 7(1).

<sup>7</sup> The Bunkers Convention, Art. 7(2).

<sup>8</sup> The Bunkers Convention, Art. 7(10).

<sup>9</sup> The International Group of P&I Clubs, through providing P&I insurance, cover over 90% of the world ocean-going vessels by tonnage.

<sup>10</sup> No other supplementary or complementary second-tier compensation source is available under the bunker-oil liability and compensation system.

<sup>11</sup> The Bunkers Convention, Art.7(8).

<sup>12</sup> The Bunkers Convention, Art.7(9).

<sup>13</sup> The insurer must have sound financial standing at the time of issuing the certificate, and this author also believes that it is necessary for the insurer to be able financially to meet the economic consequences of pollution during the period of validity of the certificate.

<sup>14</sup> IMO Legal Committee: LEG 75/5/1.

<sup>15</sup> <[http://www.ramsar.org/w.n.waddensee\\_spill\\_bkgd.htm](http://www.ramsar.org/w.n.waddensee_spill_bkgd.htm)> (visited 7 April, 2007).

<sup>16</sup> The Bunkers Convention, Art. 1(3).

<sup>17</sup> The Bunkers Convention, Art. 3(2).

its efficiency and allows different categories of victims to claim for compensation. However, as far as the desired purpose of ensuring compensation is concerned, there are limits under the Bunkers Convention: first, the types of pollution damage are specifically defined.<sup>18</sup> Any victim will not be compensated unless he suffers any pollution damage as defined in the Bunkers Convention. The “pollution damage” is defined in Article 1(9) to mean:

“(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken, and  
(b) the cost of preventive measures and further loss or damage caused by preventive measures.”

In addition, pollution damage, for instance, caused by any natural phenomenon of an exceptional, inevitable and irresistible character cannot be compensated.<sup>19</sup>

Secondly, if strict liability is to ensure compensation for pollution victims, it is relevant to ask: against whom may the victims file a claim if the shipowner is insolvent after an incident in the absence of the established financial security? A strict liability rule in such an unfortunate case would be pointless. The requirement of compulsory insurance to some extent relieves the hardness of such a situation. But, in addition, as one author notes, “strict liability by itself also suffers from a very serious limitation which afflicts any system of compensation which is based on the law of torts: the system is effective only as long as the defendant or his insurer or guarantor is willing or can be forced to pay.”<sup>20</sup> In other words, strict liability imposed on the shipowner is useless unless he is capable of paying compensation or taking out liability insurance to cover his liability and the insurance provider agrees to pay compensation if the liability can be established.

Thirdly, under the general fault regime of tort law, no limitation applies and the victim is entitled to full compensation.<sup>21</sup> By contrast, under the Bunkers Convention, liability in most cases will be limited as the extent of limitation relies on “any applicable national or international regime.”<sup>22</sup> Most countries have adopted the similar rules as that are in the international limitation regime.<sup>23</sup> There are some countries which may have no limitation rules in place. The alleged compensating benefit is thus in question in that liability will be uncer-

tain and be limited in most cases.

### 3.3 Financial Standing of the Insurance Provider

As seen from the above discussions, the Bunkers Convention contains provisions with respect to compulsory insurance in order to ensure the financial standing of the insurance provider and the compensation source for pollution victims. It is, however, clear that many aspects regarding the financial standing of providers of insurance or financial security are not mentioned or are uncertain under the Bunkers Convention. This is due to the following reasons: first, the Bunkers Convention shall not specify the source or types of insurance, since, for instance, this may come into conflict with WTO regulations and European competition law.<sup>24</sup> Secondly, it would be inconsistent with practice if the Bunkers Convention virtually laid down the standards of financial standing of the insurer. The reason derives from the nature of insurance practice. The insurance company is routinely supervised by the regulatory authority of its principal place of business. In addition, its financial standing is regulated by national law. For instance, in Germany, the supervision of insurance companies is regulated by federal law and state (“Länder”) law.<sup>25</sup>

It is a fact that a vessel can be insured in different countries in today’s globalised shipping industry. Most of the ships are insured by P&I Clubs with a good reputation; however, some of them may obtain insurance from a P&I Club outside the International Group of P&I Clubs or from a commercial insurer.<sup>26</sup> It may happen, in practice, that substandard insurers issue worthless insurance policies to substandard shipowners.<sup>27</sup> Therefore, it would be more secure if the financial standing of the providers were expressly required under the Bunkers Convention. When insurance or other financial security is presented with a request to the appropriate authority of a State Party to issue the insurance certificate, it might be necessary not only to ascertain the monetary amount of security as required under

<sup>24</sup> Gyselen, Luc, “P&I insurance: the European commission’s decision concerning the agreements of the International Group of P&I Clubs”, In: Huybrechts, Marc/Hooydonk, Eric Van/Dieryck, Christian (eds.), *Marine Insurance at the turn of the Millennium* (1999), Volume 1, pp. 181-202.

<sup>25</sup> Gabriel, Moss (ed.), *Cross-frontier Insolvency of Insurance Companies* (2001), p.249.

<sup>26</sup> Gyselen, Luc, *supra*, note 24, p.182: “The remaining tonnage is either not insured at all or is insured by small independent P&I mutuals or commercial insurers operating in ‘niche’ segments of the P&I market (e. g. covering relatively low risks such as dry cargo, coastal or fishing vessels). Some Lloyd’s syndicates have recently entered the market...” However, they (commercial insurers) could - and to some extent do - offer P&I insurance (see recently AXA), but they face a couple of important barriers of entry to the P&I markets. A supplier of P&I insurance requires specific technical expertise to assess the risks involved, a large network of agents to handle the claims and above all, in the light of the frequency and intensity of the claims, a minimum scale to ensure that the claims to be covered follow a predictable pattern.

<sup>27</sup> Bennett, Paul, Mutual Risk, P&I Insurance Clubs and Maritime Safety and Environmental Performance, *Marine Policy* 25 (2001), pp.13-21, at 19.

<sup>18</sup> The Bunkers Convention, Art.1(9).

<sup>19</sup> The 1969 CLC, Art. III (2).

<sup>20</sup> Gauci, Gotthard, *Oil Pollution at Sea: Civil Liability and Compensation for Damage* (1997), p.20.

<sup>21</sup> Faure, Michael (ed.), *Deterrence, Insurability, and Compensation in Environmental Liability: Future Developments in the European Union* (2003), p.30.

<sup>22</sup> The Bunkers Convention, Art. 6.

<sup>23</sup> Here refers to the Convention on Limitation of Liability for Maritime Claims, 1976 and its 1996 Protocol.

the Bunkers Convention,<sup>28</sup> but also to evaluate and anticipate the possible financial standing of the providers at the time or even during the period of validity of the certificate. However, the provisions in the Bunkers Convention concerning the latter are weak. Nevertheless, the name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established are required to be entered in the certificate in any case.<sup>29</sup> It is most likely that a State Party will rely on any information from other States where the providers have their principal place of business before issuing the certificate, but it is not certain to what extent a State Party has access to such kind of information. This will be more uncertain if the insurance company is not in a State Party to the Bunkers Convention.<sup>30</sup>

It might also be necessary to highlight that the providers of insurance or other financial security shall be capable of meeting their financial obligation for the purposes of the Bunkers Convention at the time of the incident. This also applies to P&I Clubs. As a general matter, a P&I Club is solvent as long as it still has solvent members. The Club may, however, also go bankrupt. The Deifovos case in Norway partly illustrated this possibility. The said incident took place on 25 January 1981. The costs of the whole pollution damage were US\$2,811,000, with a limitation amount of US\$1,520,000. The owners and the P&I Club were at the time believed to be of poor financial standing, and the claimant was advised at the time that the P&I Club had not properly reinsured. This claim was financially abandoned.<sup>31</sup>

#### 4. Suggestions

One objective of the Bunkers Convention is to preclude situations where compensation might be unavailable or not adequately available from the liable person or his liability insurer. The desire to have adequate compensation would thus prompt further considerations to suggest other sources of compensation. Apart from the examination of the possibility of compensation from other jointly liable persons, this may also include the suggestion of the viability of the Clubs to increase its coverage limit for oil-pollution risk, the compensation from the cargo interests, and time or voyage charterer's liability.

##### 4.1 To Ensure Greater Certainty of Compensation Amount

As seen in section 3.1, it would be more secure for eligible claimants if all parties involved could provide some form of financial security for compensation.

<sup>28</sup> The Bunkers Convention, Art. 7(2).

<sup>29</sup> The Bunkers Convention, Art. 7(2).

<sup>30</sup> The Bunkers Convention, Art. 7(9): "...A state Party may at any time request consultation with the issuing or certifying State should it believe that the insurer or guarantor named in the insurance certificate is not financially capable of meeting the obligations imposed by this Convention." However, it may happen that the insurer or guarantor named in the insurance certificate does not belong to the issuing or certifying State.

<sup>31</sup> See IMO LEG 75/5/1.

#### (1) Bareboat Charterer and the Insurance of the Bareboat Charterer

By virtue of the "joint and several liability" provision in The Bunkers Convention, where pollution damage exceeds the limitation applicable to the registered owner or where the registered owner fails to respond to the damage, pollution victims may look to other liable persons such as the bareboat charterer for the recovery of any shortfall.<sup>32</sup>

The reason for holding the bareboat charterer liable is based on the characteristic of the bareboat charterer. In practice, the bareboat charterer steps into the shoes of the shipowner and the operator and assumes control over the management and operation of the vessel. The bareboat charterer is responsible for the ship. For instance, if the ship is involved in a collision, the charterer must answer to the owner for any damage incurred.<sup>33</sup> It is, therefore, natural that the bareboat charterer shall be exposed to liability for oil pollution. Under general maritime law, the bareboat charterer, as owner *pro hac vice*, is subject to personal liability for pollution damage sustained as a result of the fault or neglect of the vessel's crew.<sup>34</sup>

The owner of the ship usually seeks to require the charterers to arrange and pay for suitable insurance as agreed and specified in the bareboat charter party.<sup>35</sup> In most circumstances, the protection and indemnity risks are therefore required to be insured at the expense of the bareboat charterer. For instance, Clause 13 of the Bimco Barecon 89 Form, which is used for bareboat chartering in practice,<sup>36</sup> reads:

"Insurance, repairs and classification:

(b) During the Charter period the Vessel shall be kept insured by the Charterers at their expense against Protection and Indemnity risks in such form as the Owners shall in writing approve which approval shall not be unreasonably withheld. If the Charterers fail to arrange and keep any of the insurance provided for under the provisions of sub-clause (b) in the manner described therein, the Owners shall notify the Charterers whereupon the Charterers shall rectify the position within seven running days, failing which the Owners shall have the right to withdraw the Vessel from the service of the Charterers without prejudice to any claim the Owners may otherwise have against the Charterers."

<sup>32</sup> The Bunkers Convention, Art. 1(3), Art.3(1).

<sup>33</sup> Gold, Edgar/Chircop, Aldo/Kindred, Hugh, *Canadian Maritime Law* (2003), p. 380.

<sup>34</sup> Anderson, Charles B./DelaRue, Colin, M., 'Liability of Charterers and Cargo Owners for Pollution from Ships', 26 *Tul. Mar. L. J.*, pp. 1-60, at 9.

<sup>35</sup> Davis, Mark, *Bareboat Charter* (2000), p. 65.

<sup>36</sup> In 1989, the Documentary Committee of BIMCO (the Baltic and International Maritime Council) amalgamated the two forms in producing the Barecon 89 form, for use for bareboat chartering. Since its introduction, the Barecon 89 form has replaced its predecessors in popularity and is used for the majority of operating charters. Barecon 89 is reprinted in: Davis, Mark, *ibid.*, pp. 191-203.

Accordingly, although the bareboat charterer is not required to take out insurance under the Bunkers Convention, he will possibly be required to take out insurance under the charter party. Moreover, it is common for the liabilities of owners and charterers of demise-chartered ships to be jointly insured under the same P&I cover in practice.<sup>37</sup> In other words, both charterers and owners may join a P&I Club under a “family arrangement”, whereby both shipowners and charterers enter the same Club as co-assured parties and members.<sup>38</sup>

It is true that the owner of the demise-chartered vessel remains in need of liability insurance, particularly in respect of those claims for which he is still liable as a shipowner. However, in most cases of demise or bareboat chartering, protection and indemnity insurance is to be taken out by the bareboat charterer. Therefore, it would be much more practical if the Bunkers Convention could provide that:

*“The registered owner or the bareboat charterer, when chartering the vessel on bareboat terms, of a ship having a gross tonnage greater than 1,000 registered in a State Party shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the liability of the registered owner or bareboat charterer for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime...”*<sup>39</sup>

Under this provision, the obligation of the bareboat charterer to take out insurance would be clear for the purpose of bunker-oil pollution liability.

## (2) Operator and Manager

The definition of “operator” is not given in the Bunkers Convention. The term “operator” does not belong to the field of maritime law.<sup>40</sup> In relation to oil pollution, this term first appeared in the discussion of the 1969 CLC. Although liability imposed on the operator was not adopted in the CLCs, reference to the discussions of this term under the 1969 CLC is still worthwhile. The operator was defined in the draft article of the 1969 CLC to mean the person who uses the ship in his own name and mans, equips and supplies it.<sup>41</sup> In any event, the scope of “operator” is subject to judicial determination on a case-by-case basis.<sup>42</sup> The owner of the ship might be the operator himself. However, this is not always the case. It was, however, additionally pointed out that the owner of a ship shall be presumed to be its operator and shall

<sup>37</sup> Anderson, Charles B./DelaRue, Colin, M., *supra*, note 34, at 9, F.N. 40.

<sup>38</sup> Hazelwood, Steven J., *P&I Clubs: Law and Practice* (2000), p. 99.

<sup>39</sup> This is based on the Bunkers Convention, Art. 7(1).

<sup>40</sup> See the Official Records of the International Legal Conference on Marine Pollution Damage, 1969 (O.R.1969 CLC), p. 445.

<sup>41</sup> O.R. 1969 CLC, p. 443.

<sup>42</sup> Chen, Xia, *Limitation of Liability for Maritime Claims* (2001), p. 8.

be liable as such unless he can prove that some other person was the operator.<sup>43</sup>

The manager of the ship is also required to take on liability as a consequence of becoming one party in the “shipowner” definition of the Bunkers Convention. The ship manager is regarded as the agent of the owner.<sup>44</sup> He usually takes over from the owner all the main tasks that an owner undertakes, except the commercial operation of the ship, and is responsible in practice for the seaworthiness of the ship, the competence of the crew and the safety of the ship’s operations.<sup>45</sup> He is involved in various types of management services which cover all aspects of daily vessel operation comprising technical management. Additionally, due to similar interests and purposes, the manager is often named as the co-assured with the owner in the owner’s hull and P&I insurance policies. In these cases, the manager enjoys the benefit of being co-assured, since the insurer for a claim may not sue him in subrogation. However, the manager’s negligence can also lead to the loss of the owner’s insurance.<sup>46</sup>

Apparently, operators or managers are those who are directly connected with the operation or management of the vessel. The operator and manager shall be the persons liable for pollution, which is in order to avoid the injustice of asking the registered owner to be liable in the case where he is not at fault. Meanwhile, this can also increase claimants’ opportunities for recovery. However, it is wise that the Bunkers Convention does not impose compulsory insurance or other financial security obligation on them. The reason has already been given in the discussion of the 1969 CLC, since “placing liability on the operator might place greater administrative burdens on the State issuing a certificate in case of voyage charterers and time charterers (on a short-term basis), since certificates would have to be reissued on a frequent basis.”<sup>47</sup> The same reason applies to the manager.

The operator and manager can, nevertheless, voluntarily take out insurance to protect their financial interests. In practice, for instance, the International Transport Intermediaries Club (ITIC), which provides professional indemnity insurance for ship agents and shipbrokers also covers risks for claims by third parties against the manager, when the owner’s indemnity is inoperative or the owners have gone into liquidation.<sup>48</sup>

## 4.2 The Willingness of P&I Clubs to Increase their Coverage Limit

As the liability insurance taken out by the registered owner will be the only guaranteed source of compensation for pollution victims and the shipowners P&I Clubs will be the main liability insurer, it is of relevant interest to ask how willing the Club would be to increase its coverage limit for the oil-pollution risk to its maximum possible extent.

<sup>43</sup> *Ibid.*

<sup>44</sup> Willingale, Malcolm, *Ship Management* (1998), p. 136.

<sup>45</sup> Willingale, Malcolm, *ibid.*, p. 131.

<sup>46</sup> More read Willingale, Malcolm, *ibid.*

<sup>47</sup> O.R.1969 CLC, p. 457.

<sup>48</sup> Willingale, Malcolm, *supra*, note 44, p. 124, p. 131.

The limitation that applies to liability of the shipowner is laid out in the Bunkers Convention by reference to “any applicable national or international regime”.<sup>49</sup> Due to the uncertain nature of this provision, the shipowner may be subject to unlimited liability if the national legislation in a contracting State requires it.<sup>50</sup> The shipowner may thus hope his liability insurer offers as high an insurance coverage as possible for the bunker-oil pollution liability.

The Club’s ability to provide insurance cover depends largely on its ability to purchase reinsurance from the commercial insurance market. Most of this is purchased from Lloyd’s. In effect, the International Group has recently increased reinsurance protection for oil pollution from US\$500 million to US\$1,000 million.<sup>51</sup> The Clubs are exposed to each accident or occurrence in respect of each ship entered by or on behalf of an owner for US\$1,000 million (US\$1 billion), but no more than this amount. Oil-pollution risks under P&I insurance have been limited since 1970. The limitation was imposed mainly due to the concern about the possibly disastrous consequence of an oil-spill incident. The limitation of liability established by the Clubs is not necessarily a disadvantage per se; however, if there is only liability insurance available for compensation, such as under the Bunkers Convention, the limitation itself will be very disadvantageous to pollution victims.

When selling insurance for tanker-oil pollution liability, a P&I Club has to take into account the fact that the number of tanker owners who may incur catastrophic liabilities only represents a portion of the members in the Club; if the limitation is set too high, it may be difficult to balance the interests between the tanker-owner members and non-tanker-owner members of the Club. Therefore, there is a need for a strict limitation on tanker liability insurance. However, if almost all members of the Club are required to take out insurance for similar bunker-oil spill liability, it would be possible for the Club to think about providing a more favourable limit in this respect.

### 4.3 Liability of being a Time or Voyage Charterer

Charterers of any type were considered as the liable persons during the discussion of a bunkers convention.<sup>52</sup> However, voyage charterers or time charterers are not chosen as the liable persons under the Convention.

In contrast to the charter party by demise, voyage and time charters are simply different approaches to contracting for the shipowner’s provision of the services

of the ship.<sup>53</sup> Generally speaking, a voyage charter party is a contract whereby the shipowner agrees to accept the cargo for a voyage or more designated voyages for a consideration called “freight” between two named ports. Comparatively, a time charter party is defined “not by a geographic voyage but by a period of time”.<sup>54</sup> Under a time charter party, the shipowner contracts to hire out the vessel at the disposal of the charterer for a period of time as agreed for a consideration called “hire”. Apparently, under voyage and time charter parties, although the charterers have a right against the owner to have their goods carried on the vessel, the ownership and possession of the ship remain with the owners through the master and crew, who remain as their servants.<sup>55</sup>

Article 3(6) provides that nothing in the Convention shall prejudice the owner’s right of recourse against the party at fault. This right exists, however, independently of the Bunkers Convention.<sup>56</sup> The phrase “the party” can include the time or voyage charterers. Therefore, in an incident such as a bunker-oil spill, the shipowners shall have the primary responsibility for payment of compensation; it does not, however, prevent him from claiming against the charterer afterwards. It often happens that after a spill the owners investigate if there was a causal link between the spill and breach of the charter party. In practice, one of the greatest risks to the charterers of incurring liability to indemnify the shipowner for pollution has arisen under the safe port or berth warranty contained in most standard forms of charter party.<sup>57</sup>

At the same time, it is also important to know that nothing in the Convention is construed as preventing victims from claiming against the charterers in tort on a national level.

### 4.4 The Compensation Paid by the Cargo Interests

Among those, the compensation paid by the cargo interests might be the most controversial one as it seems to be unfair to impose liability merely on the registered owner of the vessel.

Under the Bunkers Convention, liability is not imposed on the cargo interests as it believes that the bunker oil pollution is a danger inherent in the carriage and the cargo interests usually have no operational control over the vessel. Nevertheless, the fact that it is suggested that cargo interests are liable for compensation is due to the following: first, pollution victims need to be adequately compensated; secondly, cargo interests represent one of the main beneficiaries of the carriage of goods by sea, and so they should also assume the eco-

<sup>49</sup> The Bunkers Convention, Art.6.

<sup>50</sup> Tsimplis, Michael N., ‘The Bunker Pollution Convention 2001: Completing and Harmonizing the Liability Regime for Oil pollution from Ships?’ 1 *Lloyd’s Mar. & Com. L.Q.* (2005), pp. 83-100, at 83.

<sup>51</sup> See:

<http://www.ukpandi.com/ukpandi/Infopool.nsf/HTML/E8EBE7157D236C5080256DB30055E4BD?>> (visited 23 November 2005).

<sup>52</sup> See IMO LEG 78/WP.3. The discussion of the options for the definition of the concept of shipowner shows that the charterer was chosen as the liable person without further qualification.

<sup>53</sup> Gold, Edgar/Chircop, Aldo/Kindred, Hugh, *supra*, note 33, p. 379.

<sup>54</sup> Baughen, Simon, *Shipping Law* (2001), p. 172.

<sup>55</sup> Davis, Mark, *supra*, note 35, p. 2. However there is a trend that the court is asked to look into the circumstance where the oil spill actually happened. The charterer might in some particular case interfere with the operation of the ship or the charterer had actually exercised operational control over the vessel.

<sup>56</sup> The Bunkers Convention, Art. 3(6).

<sup>57</sup> Anderson, Charles B./DeLaRue, Colin, M., *supra*, note 34, p. 29.

conomic consequence of oil-pollution damage. Thirdly, compensation from cargo interests can relieve the shipowners of any additional financial burden imposed on them.

We might require cargo interests to either take out liability insurance or establish a fund. Since varied cargo interests may be involved in the carriage of goods by sea, it would be impossible to allocate this requirement to all relevant cargo interests. Therefore, one particular party should be selected from the cargo interests and he would be required to maintain insurance or other financial security according to the relevant provision.<sup>58</sup> We might impose the task of identifying this person on the shipowner, since he could be deemed to be the party to have constant contacts with the cargo interests. If the shipowner failed to identify the liable person from the cargo interests, the shipowner would have to stand in the shoes of this liable person whom he failed to identify.<sup>59</sup> To establish a fund would be an alternative means to inviting cargo interests to share the financial burden in bunker-oil spill incidents. The manner of handling a claim under this desired fund may be designed to be similar to what is in the IOPC Fund.<sup>60</sup> However, the question is: who should be the contributors to this desired fund? In effect, in both cases, feasibility would be hindered by the difficulty in identifying the liable person to contribute.

Cargo interests can involve any person who has an interest in the cargo that is shipped. Except the carrier,<sup>61</sup> it may include the shipper, the consignee and the owner for the time being of the cargo and also other types of ocean transport intermediary.<sup>62</sup> To consider imposing liability on cargo interests, it might only be plausible to impose liability on a particular type of cargo interests who could be most easily identifiable.

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<sup>58</sup> The Bunkers Convention, Art. 7(1).

<sup>59</sup> This idea follows the Irish proposal in the discussion of the 1969 CLC, see IMCO, O.R., 1969, pp. 446-452.

<sup>60</sup> The IOPC Fund stands for "International Oil Pollution Compensation Fund", which is regulated under the Fund Convention.

<sup>61</sup> See Hague Rules 1924, reprinted in: *Lloyd's Shipping Law Library: The Ratification of Maritime Conventions* (2004), Vol.3, II 5.10, Art. 1(a), "'Carrier' includes the owner of the vessel or the charterer who enters into a contract of carriage with a shipper." Hamburg Rules 1978 also has the definition, reprinted in: *Lloyd's Shipping Law Library: The Ratification of Maritime Conventions* (2004), Vol.3, II.5.220, "Carrier" refers to "any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper."

<sup>62</sup> A term used in the United States includes both the NVOCC and the ocean freight forwarder. The former denotes the "Non-Vessel-Operating Common Carrier", which means a common carrier that does not operate the vessel by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier. The "freight forwarder" is a bit complicated. At times, the freight forwarder acts as a principal contractor in respect of the shipper and bears the responsibilities of a common carrier. At other times, the freight forwarder acts merely as an agent of the shipper, with the obligation to exercise reasonable care and skill. The definitions are from *Tetley's Glossary of Maritime Law*, available at: <http://www.mcgill.ca/maritimelaw/glossaries/maritime/> (visited 24 June 2007).

For instance, the contributions made to the IOPC Fund are clearly from oil importers.<sup>63</sup> However, since different types of cargo are involved, it would not be feasible to follow the same approach as in the IOPC Fund for bunker oil pollution liability. There are millions of importers or exporters of different types of cargo every day, so it would be difficult to require either the importer or the exporter to contribute to and set up a compensation fund, because huge bureaucratic machinery would be needed in the Member States. To sum up, the intention to impose a compensation obligation on cargo interests will be hampered by the practical problem of identifying contributors among those cargo interests.

## 5. Conclusions

Under the Bunkers Convention, the liability insurance of the registered owner is the main source of compensation. The availability of compensation from the bareboat charterer, the operator or manager has the risk of uncertainty. The eligible claimants have no guarantee that they will successfully obtain compensation from persons other than the registered owner. Moreover, the financial standing of the insurer or financial guarantor of the registered owner involves doubts in practice. Therefore, the compensation amount presented by the Bunkers Convention is uncertain and its adequacy is also questionable.

It remains to be seen whether the compensation amount under the Bunkers Convention, once ratified, is adequate in reality. On the other hand, it is true that the development of the CLCs shows that the compensation amount for tanker-oil pollution damage has also been amended a number of times in order to increase and satisfy the adequate amount of compensation.<sup>64</sup> However, it cannot be denied that the victims' position will certainly be improved once the Bunkers Convention enters into force.

Fortunately, to date no disastrous bunker-oil spill incident has been recorded and thus it is not easy to estimate the extent and scope of pollution damage which may be caused by any disastrous bunker-oil spill incident. Any precautionary measures in this respect, including adequate compensation, are nevertheless needed. Compensation from other sources is thus suggested in this paper. They are intended to compensate eligible pollution victims at least in cases where: first, the liability insurance taken out by the registered owner is not available; and secondly, the shipowner is insolvent or is not identified or where no liability on his side arises. In these cases, the claimants should also be given a right of direct action against the proposed supplementary compensation sources. However, no supplementary compensation source appeared with the advent of the Bunkers Convention.

## 6. Acknowledgments

The idea of this paper derives from the research results

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<sup>63</sup> The Fund Convention, Art.10(1).

<sup>64</sup> CLCs stands for the earlier international civil liability conventions for tanker oil pollution damage.

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