3. ARTICLES AND PAPERS

A. ASPECTS OF OIL POLLUTION

By S. W. HETHERINGTON

At the Ninth Annual General Meeting and Conference of The MLAANZ in Singapore in July 1982, Brian Brooke-Smith presented a paper on oil pollution with particular emphasis on the International Convention on Civil Liability for Oil Pollution Damage signed in Brussels in 1969. We publish here Stuart Hetherington's commentary on that paper. Mr Hetherington has added to his commentary, a note on recent developments.

The first comment which should be made about the Convention on Civil Liability for Oil Pollution Damage (1969) ("C.L.C.") is that it does not cover a number of areas. For instance, it does not cover:

1. Oil escaping from river and lake vessels, off-shore and land installations or pipelines;
2. Oil escaping from dry cargo ships and tankers not carrying oil in bulk as cargo;
3. Damage caused by non-persistent oils;
4. Damage suffered by installations outside the territorial sea or territory of a party of the C.L.C. and all damage suffered on the territory or territorial sea of a non-party to the C.L.C.;
5. Damage caused by oil spilling into the sea and then catching fire;
6. Claims against salvors and bareboat charterers.

In the United Kingdom salvors and bareboat charterers have been granted complete immunity in certain circumstances by sections 3 and 7 of the Merchant Shipping (Oil Pollution) Act 1971 (U.K.). In particular, it must be established that the owner has been found entitled to limit his liability and has paid the limitation sum into court before the immunity applies. Similar legislation exists in Norway and Denmark. The Inter-Governmental Maritime Consultative Organisation (I.M.C.O. or I.M.O. as it now wishes to be known) is currently examining aspects of the C.L.C. and the 1971 Convention on the Establishment of an International Fund for Oil Pollution Damage ("the Fund Convention") for possible revision. It is to some of those aspects to which I refer in these comments. In December 1981 an informal working group met to consider the revision of the C.L.C. and the Fund Convention and in March 1982 the I.M.O. Legal Committee met to consider the report of the working group. The comments made here are largely taken from the reports of those two meetings.

LIMITATION: ARTICLE V OF THE C.L.C.

It has been said that the Limitation Convention 1976 provision dealing with "actual fault or privity" might be adopted at a future

convention. It would appear that that is quite likely provided, however, that the limitation amounts laid down in any revised civil liability convention would be very much higher than those contained in the present text. This is because the provisions in the Limitation Convention are very much narrower in scope than the limitation provision in the current C.L.C. There seems little doubt that there will be an extension of the limitation amounts. The "Amoco Cadiz" allegedly cost more than twice the amount available under the C.L.C. and Fund Convention.

LIABILITY: ARTICLE III OF THE C.L.C.

There has also been some discussion at I.M.O. as to whether or not the provisions of Article III Paragraph 2 should be retained as some consider, rightly, that those provisions are incompatible with a regime based on strict liability. The contrary view is that the exoneration from liability contained in Article III Paragraph 2 was introduced into the C.L.C. at the 1969 diplomatic conference as a compromise and its deletion now would constitute a major change in the liability regime.

Channelling of Liability

There is much to be said for channelling liability to the shipowner. This would make it uncessary for anyone other than the shipowner to have insurance for pollution damage. It would enable the C.L.C. and Fund Convention to constitute a comprehensive, simple and all inclusive scheme for compensation for pollution damage and would prevent claims being made outside the Conventions. This is considered to be particularly necessary in respect of bareboat charterers. It is noteworthy that the Tanker Owners' Voluntary Agreement Concerning Liability for Oil Pollution (1969) ("Tovalop") covers the bareboat charterer by providing that he shall be deemed to be the owner. Once again, those not necessarily in favour of a channelling regime would no doubt be happier if the limitation amounts were revised to a sufficiently high level. However, it does not appear that the C.L.C. will be amended along those lines, at least not for the present, since there seems to be a view that it is preferable to make the owner liable rather than the bareboat charterer. However, it should be noted that the draft Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea contains a provision making the bareboat charterer liable instead of the registered owner — one view says this Convention and the C.L.C. and Fund Convention should be consistent.

DEFINITION OF "PREVENTIVE MEASURES": ARTICLE I OF THE C.L.C.

It is strongly arguable that, under the 1969 C.L.C. definition of pollution damage, costs incurred in preventive measures are not recoverable where no spill eventuates. It should be noted that Tovalop allows a person who takes reasonable preventive measures whilst no oil has yet been spilled to recover his costs in many situations, whether he be the tanker owner or the potential victim. There seems to be general agreement that the regime of compensation under the C.L.C. and Fund Convention should cover actions of this kind and it seems likely that the definition in Article I will be amended. One suggestion is to define "incident" as including "any occurrence or series of occurrences having the same origin, which causes pollution damage or *creates a [grave and imminent] [serious] threat of causing damage*"[1] (emphasis added). In addition, it has been suggested that the definition of "preventive measures" be widened, so that any such measures "wherever" taken will be compensable. (The relevance of this will become apparent later.)

It is noteworthy that under the Australian legislation giving effect to the C.L.C., to which I will refer briefly towards the end of this paper, provision has been made for claims to be heard in the Supreme Courts of the States for compensation in respect of incidents that have caused pollution damage in Australia or in relation to which measures have been taken to prevent or minimise pollution damage in Australia.

DAMAGE CAUSED BY OIL ESCAPING FROM UNLADEN TANKERS

Consideration is being given to increasing the extent of the C.L.C. which presently, as mentioned earlier, does not cover spills from a tanker in ballast whereas Tovalop does cover such spills. There seems to be a general consensus that such liabilities should be covered. This would require amendment to the definition of "ship" contained in Article I of the C.L.C. Some consideration is also being given to covering the escape of oil from vessels other than tankers but it seems that such an extension does not have wide support.

Damage caused by non-persistent oils, which is not currently covered by the C.L.C., is also under review. There is a strong divergence of views as to whether or not the C.L.C. should include pollution damage caused by non-persistent oils. Those favouring coverage by the C.L.C. of damage caused by non-persistent oils say that, being toxic, such oils cause considerable damage to marine life, although they do not normally involve expensive clean-up measures. Those not in favour consider that the damage caused by non-persistent oils is not very considerable and, furthermore, it is clear that an extension of the Convention to cover such oils would raise a number of serious problems. One would be that it would increase substantially the number of contributors to the Fund and, thus, lead to greater difficulties in collecting contributions to the Fund. It would also cause great diffi-

[1] Provisional Memorandum by the Comité Maritime International, Revision of the International Convention on Civil Liability for Oil Pollution Damage (1969) and the 1971 Convention on the Establishment of an International Fund for Oil Pollution Damage, C.L.C./Fund-15 IX-82, 2.

culties to governments of contracting states in establishing receipts of such cargoes and for the Fund in policing the reports made to the Fund by governments.

EXTENSION OF THE GEOGRAPHICAL SCOPE OF THE APPLICATION OF THE CONVENTIONS

As mentioned earlier, at present the C.L.C. is restricted to pollution damage caused inside the territorial seas of contracting states. There is considerable support for an extension of this concept, particularly in view of the claims made by countries to exclusive economic zones beyond the bounds of their territorial seas. However, in view of the suggested expansion of the definition of "preventive measures" referred to earlier, it seems unlikely that there would be sufficient support for an extension of the liability regime to areas beyond the territorial seas except in relation to preventive measures.

DEFINITION OF "POLLUTION DAMAGE": ARTICLE I OF THE C.L.C.

From a philosophical point of view this is perhaps the most contentious issue in respect of the C.L.C. and Fund Convention. The Union of Soviet Socialist Republics applies a formula which is used to calculate "environmental damage" in assessing "pollution damage". The U.S.S.R. is not unique in seeking compensation for environmental damage and it is instructive to consider a recent case in the United States of America.

The "Zoe Colocotroni"[2]

This case has been settled recently, having been remitted back to the United States District Court for the District of Puerto Rico for reassessment of the question of damages. In its concluding remarks the Court of Appeals made the following observations: "The parties in this law suit, and we ourselves, have ventured far into unchartered waters. We do not think plaintiffs could reasonably have been expected to anticipate where this journey would take us".[3]

The facts of the case were that the S.S. "Zoe Coloctroni" ran aground on a reef three and a half miles off the south coast of Puerto Rico. To refloat the vessel the Captain ordered the dumping of more than 5,000 tons of crude oil into the surrounding waters. An oil slick, four miles long and one tenth of a mile wide, floated towards the coast and went ashore at an isolated peninsula. The shipowner and its P. & I. Club were sued by the Environmental Quality Board for the damage done to the environment.

At first instance, the Court had heard a considerable volume of evidence as to the chemistry of the oil and the damage which it had

[2] *Commonwealth of Puerto Rico* v. *The S.S. "Zoe Colocotroni"* 1981 A.M.C. 2185.

[3] Note 2 *supra*, 2221.

caused to the environment. The District Court Judge had found that there was a decline in excess of four and a half million organisms per acre as a direct result of the oil spill and that in excess of ninety two million marine animals were killed. He also found that there was a ready market with reference to biological supply laboratories and the lowest possible replacement cost was six cents (U.S.) per animal. Thus, damages were allowed to the plaintiff of five and a half million U.S. dollars for replacement costs of the West Mangrove area. In addition, it was found that the sediments in and around the West Mangrove area continued to be impregnated with oil and, although the District Court Judge found that there was substantial scientific evidence to the effect that much of the undesirable effects of the oil in the sediments would be corrected in time by the weathering processes of nature, he allowed a sum of U.S.D. 559,500 for the replanting of the area.

On appeal the defendant shipowner argued that the District Court had erred in failing to apply the common law "dimunition in value" rule in calculating damages; that is, it said that the Court should have applied the test of ascertaining the difference in the commercial or market value of the property damaged before and after the event causing injury. At first sight the submission would seem to have much to recommend it, particularly when it is noted that the Environmental Quality Board had conceded repeatedly that the land had no significant commercial or market value. However, the Court of Appeals rejected that submission as the legislation which had set up the Environmental Quality Board had given to the Board the power to bring civil actions for damages "to recover the total value of the damages caused to the environment and/or natural resources".[4] The Court of Appeals found support for the view that the damages should not be restricted to the diminution in value in other federal legislation. For instance, the Clean Water Act Amendments of 1977 which permitted the federal government and the states to recover "costs or expenses incurred . . . in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance".[5] Similarly, the Outer Continental Shelf Lands Act Amendments of 1978 provided that the Government could recover damages for economic loss arising out of an oil spill, including "injury to, or destruction of, natural resources"[6] and "loss of use of natural resources".[7]

The Appeal Court held that the fact that the Commonwealth did not intend and perhaps was unable to exploit the life forms which had been damaged and the coastal areas which supported them for commercial purposes should not prevent a damages remedy in the face of

[4] 12 L.P.R.A., sec. 1131(29).

[5] 33 U.S. Code, sec. 1321(f)(4).

[6] 43 U.S. Code, sec. 1831(a)(2)(c).

[7] 43 U.S. Code, sec. 1831(a)(2)(d).

the clearly stated legislative intent to compensate for "the total value of the damages caused to the environment and/or natural resources".[8] However, the Court of Appeals did not find the method of calculation of damages by the District Court acceptable either. It said, in particular, that there was a strong emphasis in congressional oil pollution enactments on the concept of restoration. Therefore, the matter was referred back to the District Court for reassessment of damages and the Court gave some guidance as to the matters which should be taken into account in assessing damages in a case such as this.

The Appellate Court also accepted that there may be circumstances where direct restoration of the affected area is either physically impossible or so disproportionately expensive that it would not be reasonable to undertake such a remedy. It was perhaps, these comments which enabled a settlement to be effected prior to any re-hearing in the District Court. The Court suggested that the legislative history of the Clean Water Act Amendments suggested as one possibility "the reasonable cost of acquiring resources to offset the loss".[9]

C.L.C. Definition of "Pollution Damage"

It can be seen from the foregoing discussion of the decision in the *"Zoe Colocotroni"* that the U.S.S.R. is not the only country which seeks to make claims for damage to the environment in circumstances in which there has been no economic loss suffered by the claimant. Observers at I.M.O. representing the oil industry, not unnaturally have adhered consistently to the view that the definition of "pollution damage" should only refer to physical damage and recognisable economic loss. That is clearly inconsistent with the U.S. legislation and it might be expected that other countries will adopt such legislation. The general view at I.M.O. seems to be that it would be very difficult to elaborate a more precise definition of "pollution damage" that would generally be acceptable and, therefore, it is better to leave this question to national legislation and national courts.

Thus, it might be expected that many more courts around the world will be venturing far into the unchartered waters to which the Appeal Court in the *"Zoe Colocotroni"* referred.

THE AUSTRALIAN POSITION: THE PROTECTION OF THE SEA LEGISLATIVE PACKAGE

On 14 April 1981 six Commonwealth statutes received Royal Assent. The statute which is of most importance for present purposes is the Protection of the Sea (Civil Liability) Act 1981 (Cth) which draws together both the C.L.C. and the 1976 Protocol. That piece of legislation apparently has posed some technical difficulties insofar as the preparation of regulations is concerned. It is understood from the

[8] Note 4 *supra*.
[9] 33 U.S. Code, sec. 1321(f)(5).

Department of Transport that the P. & I. Clubs (Blue Card) system of insurance generally will be used although provision for shipowners to use other forms of guarantee subject to ministerial approval will be provided.

It is also understood that the instruments which will formally notify the I.M.O. of Australian acceptance of the C.L.C. and the 1976 Protocol are being drafted by the Department of Foreign Affairs. Those instruments will be lodged together with a declaration stating that Australia disagrees with reservations made by the U.S.S.R. and the German Democratic Republic concerning the status of government owned ships.

Insofar as the Fund Convention is concerned it is understood that the Government has referred that question to the Marine and Ports Council of Australia. No decision has been taken on whether a recommendation should be made concerning acceptance by Australia of that Convention. Accordingly, if it is decided to accept the Convention, legislative and administrative requirements would indicate that Australian membership would not be achieved in the forseeable future.

The legislative package also contains the Protection of the Sea (Discharge of Oil from Ships) Act 1981 (Cth), the Protection of the Sea (Shipping Levy) Act 1981 (Cth) and the Protection of the Sea (Shipping Levy Collection) Act 1981 (Cth). All that is is necessary to say in respect of the Protection of the Sea (Discharge of Oil from Ships) Act 1981 (Cth), which commenced on 1 October 1982, is that that Act repealed the Pollution of the Sea by Oil Act 1960 (Cth) which had originally given effect to the International Convention for the Prevention of Pollution of the Sea by Oil 1954. The new Act contains, in its schedules, the 1954 Convention and the 1962, 1969 and 1971 Amendments to the International Convention for the Prevention of Pollution of the Sea by Oil 1954 as well as the 1954 Convention itself. (The 1971 Amendments concern protection of the Great Barrier Reef, tank arrangements and limitation of tank size.)

The Protection of the Sea (Powers of Intervention) Act 1981 (Cth) has also been completed as have the instruments required to be lodged with the I.M.O. As this legislation is connected with the Protection of the Sea (Civil Liability) Act 1981 (Cth) it is expected they will be timed to come into force simultaneously. The Protection of the Sea (Powers of Intervention) Act 1981 (Cth) implements the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and the Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil 1973. The provisions which previously had been included in Part VIIA of the Navigation Act 1912 (Cth) are now contained in this Act.

Instruments accepting the 1971 Amendments to the International

Convention for the Prevention of Pollution of the Sea by Oil 1954 were lodged with the I.M.O. on 13 November 1981. The Navigation (Protection of the Sea) Amendment Act 1981 (Cth), which will give effect to those amendments, will be proclaimed when the 1971 Amendments come into force internationally.

THE POSITION UPDATED

Since Brian Brooke-Smith gave his paper on oil pollution at the 1982 Singapore Conference and I gave the commentary published above, the Comité Maritime International ("C.M.I.") has prepared a position paper for submission to the Legal Committee of the I.M.O.[10] Readers might be interested to know that the following submissions have, inter alia, been made by C.M.I.

Definition of "Preventive Measures"

It has been submitted that the definition of "incident" be amended, adding the words "or creates a grave and imminent threat of causing such damage". C.M.I. decided against using the word "serious" and against widening the definition so as to permit recovery for measures "wherever" taken.

Definition of "Pollution Damage"

C.M.I. has submitted that the definition be amended so as to add the words "proven economic loss actually sustained as a direct result of impairment of the environment". The following comments are made in the position paper concerning that amendment:

> The intended result of these suggested revisions is to limit the geographical area for which damage claims can be asserted while adding the broad possibility of asserting claims under the Convention for the cost of preventing impairment of the environment wherever taken, but to exclude purely speculative claims by use of the words "proven economic loss actually sustained as a direct result of" with respect to such claims.

It would seem that C.M.I. had very much in mind the case of the *"Zoe Colocotroni"* to which I referred and other such cases. C.M.I. has also suggested that the definition of "preventive measures" be widened so that any measures "wherever taken" will be compensable.

Channelling of Liability

C.M.I. has suggested that this article be revised to read as follows:

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

(a) the servants or agents of the owner 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;

[10] Dated 26 January 1983.

(c) any operator or manager, any charterer, howsoever described including any bareboat charterer;

(d) any person performing salvage operations with the consent of the owner;

(e) any person performing salvage operations on the instructions of a competent public authority;

(f) any person taking preventive measures;

(g) all servants or agents or persons mentioned in sub-paragraphs (c), (d), (e) and (f),

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage or recklessly and with knowledge that such loss would probably result.

It will be seen from the above that C.M.I. is in favour of channelling liability so that only the owner can be held liable since it is the owner who is best placed to arrange adequate insurance cover and to maintain the necessary certificates required under the Convention to establish that the vessel is adequately covered by insurance in respect of oil pollution damage.