THE *PRESTIGE* IN THE COURTS

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1 Facts and Court Proceedings

On 16 March 1978 the *Amoco-Cadiz* sank off the coastline of northwest France, spilling 230,000 tons of oil and causing one of the biggest environmental disasters up to that time. The European Council, pushed by public opinion, requested proposals from the European Commission dealing with control and reduction of oil pollution. But despite an initial common resolve in the face of the disaster, the Member States backed away from taking effective measures on a European scale, which was much more difficult at that time because of the need for unanimity. It was necessary to wait until the nineties for the Council to adopt, by a qualified majority, the four main elements of an authentic European common maritime safety policy: Council Directive 95/21/EC[1]; Council Directive 94/57/EC[2]; Council Directive 93/75/EEC[3] and Council Regulation (EC) No 2978/94[4]. In spite of all these rules, on 12 December 1999 off the coast of Brittany in northwest France, the *Erika* sank and spilled more than 10,000 tonnes of its cargo. The Commission therefore proposed new measures intended to change the basis of the oil maritime transport trade in Europe. These measures were adopted on 21 March and 6 December 2000 and are known as the Erika I and II packages respectively.[5]

However, all these rules could not prevent what happened in the third week of November 2002 near the coast of Galicia in northwest Spain. A 26 year old, 42,820 gross tonnes oil tanker, ironically called *Prestige*, was at that time 30 miles off Cape Finisterre (Galicia, Spain) in the course of a voyage from Ventspils (Latvia) to Singapore. The vessel was Liberian, registered in the Bahamas, managed in Greece and chartered by a company in Switzerland on behalf of a Russian oil trader, and she had docked during the preceding five years

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[1] Of 19 June 1995, concerning the enforcement, in respect of shipping using Community ports and sailing in waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (Port State control) *OJ* L 157, 7 July 1995, Directive as last amended by Commission Directive 1999/97/EC, *OJ* L 331, 23 December 1999. It established a system of Port State control of shipping in the European Community based on uniform inspection and detention procedures.

[2] Of 22 November 1994, on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, *OJ* L 319, 12 December 1994, Directive as amended by Commission Directive 97/58/EC, *OJ* L 274, 7.10.1997, p. 8. It established a system of Community-wide recognition of organisations that, in compliance with the international conventions, may be authorised to various extents to inspect ships and issue the relevant safety certificates on behalf of Member Status.

[3] Of 13 September 1993, concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods *OJ* L 247, 5 October 1993, Directive as last amended by Commission Directive 98/74/EC, *OJ* L 276, 13.10.1998, p. 7. It introduced a system whereby the competent authorities receive information regarding ships bound for or leaving a Community port and carrying dangerous or polluting goods, and regarding incidents at sea. That Directive required the Commission to produce new proposals for the introduction of a fuller reporting system for the Community, possibly covering ships transiting along the coasts of Member Status.

[4] Of 21 November 1994, on the implementation of IMO Resolution A.747(18) on the application of tonnage measurement of ballast spaces in segregated ballast oil tankers, *OJ* L 319, 12 December 1994.

[5] The Erika I and II packages deal with five main issues: (a) ship inspection and survey organisations: on 19 December 2001 Directive 2001/105/EC of the European Parliament and of the Council was adopted amending Council Directive 94/57/EC (*OJ* L 19, 22 of January 2002), as since the adoption of Directive 94/57/EC some developments had occurred in the relevant legislation at Community and international level requiring that further amendments be made. (b) control of ships into Community ports: Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001 amended the Council Directive 95/21/EC, considering that some ships posed a manifest risk to maritime safety and the marine environment because of their poor condition, flag and history and they should therefore be refused access to Community ports, some guidelines must be established setting out the applicable procedures (*OJ* L 19, 22 of January 2002). (c) phasing out the single hull tankers: Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers repealed Council Regulation (EC) No 2978/94, to establish an accelerated phasing-in scheme for the application of the double hull or equivalent design requirements of the MARPOL 73/78 Convention to single hull oil tankers (*OJ* L 64, 7 of March 2002). (d) a community vessel traffic monitoring and information system: Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system repealed Council Directive 93/75/EEC, with a view to enhancing the safety and efficiency of maritime traffic, improving the response of authorities to incidents, accidents or potentially dangerous situations at sea, including search and rescue operations, and contributing to a better prevention and detection of pollution by ships (*OJ* L 208, 5 of August 2002). (e) establishment of the European Maritime Safety Agency (EMSA) and the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS): Regulation (EC) No 1406/2002 of 27 June 2002 established the European Maritime Safety Agency and Regulation (EC) No 2099/2002 of the European Parliament and of the Council established the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) and also amended the Regulations on maritime safety and the prevention of pollution from ships (*OJ* L 208, 5 August 2002 and *OJ* L 324, 29 November 2002 respectively).

in many European ports.[6] She had also been inspected four times in the United States without being detained, and was surveyed in Dubai on 2002 under the auspices of the American Bureau of Shipping (ABS), a ship classification society that has been sued in New York by the Spanish Government. On 14 November 2002 she suffered structural damage in heavy seas for reasons that still remain uncertain and drifted to within five miles of the Galician coast, where she began listing and leaking her heavy fuel oil cargo. It was not until 19 November that she broke up and sank, 280 km from Vigo (Spain), releasing an estimated 25,000 tons of its cargo, which continued to leak from the wreck, at a declining rate, over subsequent days. In all, a total of more than 60,000 tons was lost. Requests by the salvors for permission to bring the ship to a place of refuge were refused by the Spanish authorities, who ordered her to be towed away from the coast. The western coast of Galicia (a region with an important fishing industry) was heavily contaminated and the oil eventually moved into the Bay of Biscay, affecting the northern coast of Spain and southwest France, as well as the north Portuguese coast.[7]

Clean-up operations were therefore carried out at sea and onshore in Spain and in France and also undertaken at sea off Portugal. As a consequence of the incident, one of the aggrieved parties took criminal action in the Criminal Court of Corcubión (Galicia, Spain), and was immediately followed by others, among them the Spanish Government on its own behalf and on behalf of regional and local authorities as well as on behalf of 971 other claimants or groups of claimants. The French Government and 224 other claimants initiated legal action against the shipowner, the London Club and the 1992 Fund in 15 courts in France seeking compensation totalling some €130 million, including €67.7 million claimed by the Government.[8] The Portuguese State took legal action in the Maritime Court in Lisbon against the shipowner, the London Club and the 1992 Fund, claiming compensation of €4.3 million.[9] Finally, the Spanish State undertook legal action against ABS in the Federal Court of First Instance in New York claiming 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 also been negligent in granting classification. Spain therefore requested compensation for all damage caused by the incident, estimated initially to exceed US$700 million and later calculated to exceed US$1,000 million. In view of all these proceedings on foot, before analysing the liability question, it is necessary to consider first the legal framework and the international jurisdiction problems.

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[6] Including Cork, Dunkirk, Kalamata, Rotterdam (where it was inspected by government agencies in September 1999) and Wilhelmshaven, as well as Algeciras and Las Palmas in Spain (where it was declared seaworthy!), Latvia and Singapore. See C Tannock, 'Written Question to the European Commission: The Sinking of the Prestige and the inspection of ships', 29 November 2002, P-3484/02.

[7] Nevertheless, all these rules have been or are on the way to being amended because of the *Prestige* incident and also following the recommendations of the third package of legislative measures on maritime safety in the European Union of 23 November 2005 [COM(2005) 585 final - SEC(2005) 1496], designed to improve safety at sea by improving on the Erika I and II packages, while at the same time trying to strengthen the competitiveness of European flags. To achieve these aims it seems necessary therefore to amend the main instruments of European maritime safety policy. There is currently a proposal for a Directive of the European Parliament and of the Council on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations of 23 November 2005 [COM(2005) 587 final 2005/0237 (COD)]. There have also been three new important mechanisms developed to improve this area of safety policy in the EC: the first one is Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 (*OJ* L 129, 29 April 2004) on enhancing ship and port facility security. The second of these new regulations is Directive 2005/65/EC of the European Parliament and of the Council of 26 October 2006 on enhancing port security (*OJ* L 310, 25 November 2005), ensuring that security measures taken pursuant to Regulation (EC) No 725/2004 benefit from enhanced security in the areas of port activity. And the third instrument is the proposal for a Directive of the European Parliament and of the Council on Port State control of 23 November 2005 [COM(2005) 588 final. 2005/0238 (COD)], with the aim of recasting the Directive 95/21/EC on Port State control. There is also currently a new Commission Regulation (EC) No 2172/2004 of 17 December 2004 amending Regulation (EC) No 417/2002 (*OJ* L 371, 18 December 2004) and also a new amendment proposal of 27 March 2006 [COM(2006)111 final – 2006/0046(COD)]. A proposal for a Directive of the European Parliament and the Council of 23 November 2005 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system has been introduced, too [COM(2005) 589 final - 2005/0239 (COD)]. Finally, on 22 July 2003 Regulation (EC) No 1644/2003 of the European Parliament and of the Council amended Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency (*OJ* L 245, 29 September 2003) to make Regulation (EC) 1049/2001 applicable to the European Maritime Safety Agency and it was also amended on 31 March 2004 by Regulation (EC) No 724/2004 of the European Parliament and of the Council (*OJ* L 129, 29 April 2004). Commission Regulation (EC) No 415/2004 of 5 March 2004 amended Regulation (EC) No 2099/2002 of the European Parliament and of the Council establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) (*OJ* L 68, 6 March 2004).

[8] In March 2003 two oyster farmers unions and one association brought an action against the shipowner, the London Club, the owner of the cargo/charterer of the vessel, the Spanish State, the American Bureau of Shipping (ABS), the classification society of the *Prestige* and Bureau Veritas, the previous classification society that had certified the *Prestige* before ABS. In June 2006 the Fund was joined in the proceedings as a defendant.

[9] In December 2003 the Portuguese Government submitted a claim for €3.3 million in respect of the costs incurred in clean-up and preventive measures. A meeting was held in July 2004 between representatives of the 1992 Fund and representatives of the Government departments involved. In February 2005, the Portuguese Government provided the 1992 Fund with additional documentation in support of its claim. The additional documentation included a supplementary claim for €1 million, also in respect of clean-up and preventive measures. The claims were finally assessed at €2.2 million. The Portuguese Government accepted this assessment and in August 2006 the 1992 Fund made a payment of €328 488, corresponding to 15% of the final assessment.

2 International Jurisdictional Questions

As this case involves links with several different jurisdictions, the first question to consider is that of international jurisdiction. To answer that question, it is necessary to note that a criminal act can also affect private interests, so that two kinds of liabilities may arise from the same act, criminal and civil, the former governed by criminal law, the latter by private law. However, under Spanish law civil liability arising out of a criminal act must be determined following a specific procedure: the victim may combine the civil action with the criminal one, but he also has the option of dropping the civil action or of waiting until the criminal procedure finishes to begin with the civil one.[10] That is the reason why the Criminal Court of Corcubion (Spain) is examining both criminal and civil liability in the same proceedings. In relation to criminal actions, the Spanish courts' jurisdiction is established by Spanish law: the Spanish courts have jurisdiction to hear cases involving criminal acts "committed on Spanish territory or on board Spanish ships or planes". The main problem posed in this article is to define where a criminal act is considered to be "committed" when the place of the act is different to the place where injury is sustained, as in this case. The main stream of Spanish legal writing prefers the so called "ubiquity theory". According to this theory, a criminal act is considered to have been committed both in the place where the actions happened and also where the damages were sustained. Therefore the Spanish courts have jurisdiction in both cases. So, while the territorial sea is considered a part of the States' territory[11] and while the damages were sustained along the Spanish coastline, it does not matter if the EEZ is or is not considered part of the Spanish territory, because in application of the ubiquity theory the Spanish courts have jurisdiction to hear the criminal case.

It is also necessary to know if the Spanish courts have jurisdiction to hear the civil proceedings related to the criminal ones. The rule to consider here is article IX of CLC92:[12] "where an incident has caused pollution damage in the territory, including the territorial sea or an area referred to in Article II, of one or more Contracting States or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea or area, actions for compensation may only be brought in the Courts of any such Contracting State or States." Several questions arise out of this article. First, that the IMO committee decided, from among the different interpretations of the *loci delicti* principle, to confer jurisdiction on the courts of the place where the damages are sustained. It was probably the right decision considering the characteristics of this kind of accident, in which the place where the acts are committed may be located in the EEZ or even further offshore, where no jurisdiction can be established, so that choosing that place as a link to confer international jurisdiction would lead to more problems than solutions. The above mentioned ubiquity theory also does not accord with the exclusive jurisdiction established in this article, as we will shortly see. Secondly, related to this, it is necessary to establish if absolute jurisdiction exists (that is, for all the issues that can arise) or if jurisdiction should be distributed among the courts of the different places of damage (that is, solely for the actions for damages sustained in each territory). The second option seems the more reasonable interpretation of this article, because when the Convention establishes an absolute jurisdiction it does it in an explicit way.[13] In fact, that was what happened here if we take into account the different proceedings commenced in Spain, France and Portugal.[14] This reading also follows the decisions of the European Court of Justice on this subject.[15]

Different from its absolute or distributive character is the question of exclusive jurisdiction, that is, if the court foreseen by the Convention is the only one with jurisdiction or whether, on the contrary, actions may be brought before other courts such as, for example, the one of the domicile of the defendant. This is clearly solved with the expression "actions (…) may *only* be brought" (*emphasis added*) in article IX CLC92, which means that no other court can hear those actions. If we consider that the shipowner always has the possibility of claiming no liability, with this provision it is easier to avoid the temptation of "forum shopping" in two senses. First, because under the scope of the Convention any other court different from that foreseen in

[10] See article 111 Spanish Criminal Procedure Act.
[11] At the present time all States claim to exercise sovereignty, subject to treaty obligations and rules of general international law, over the territorial sea. See I Brownlie, *Principles of Public International Law* (5 Ed, 1998), 177.
[12] About CLC92, see below part 3. Article 71 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters establishes that it "shall not affect any conventions to which the Member States are parties and which *in relation to particular matters*, govern jurisdiction or the recognition or enforcement of judgments" (*emphasis added*).
[13] See article IX.3 CLC92: "after the fund has been constituted in accordance with Article V the Courts of the State in which the fund is constituted shall be exclusively competent *to determine all matters* relating to the apportionment and distribution of the fund" (emphasis added).
[14] Although, in May 2006 the French Justice Ministry decided to move the case from France to the Spanish Court in Corcubion, after two years of negotiations pursued by Eurojust, the European unit to reinforce the fight against serious crime.
[15] *Fiona Shevill, Ixora Trading Inc., Chequepoint Sàrl, Chequepoint Int Ltd v Presse Alliance SA* C-68/93, *OJ* C 087 8 April 1995

article IX must dismiss the action. And secondly, because if the shipowner intends to obtain such a declaration from another "friendlier" court in a State outside of the Convention, that decision will not be recognised and/or enforced in any Member State as article X provides.[16] This exclusive nature of the jurisdiction is also established in article IX.3[17]for the Courts of the State in which the fund in accordance with Article V has been constituted, and in addition it also better guarantees the limited liability of the shipowner.

Finally, in the process undertaken in the United States, ABS counterclaimed, seeking and order that the Spanish State indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgement against it in relation to the *Prestige* incident.[18] ABS also claimed that, since the United States was not a Member State of the CLC and since the pollution damage had occurred in Spain, the United States courts were not competent to hear the case. In September 2006 the Spanish State requested that the ABS counterclaim be dismissed on the grounds of the court's lack of jurisdiction in the matter. Both questions should be decided following the United States rules on international jurisdiction. But, since the Spanish State has sued ABS in its own domestic court, only one reason could justify the dismissal of that action, that is, the impossibility of applying United States domestic law (as the United States is not a Member State of CLC) linked with the refusal to apply any other foreign domestic law (for example, Spanish law). With respect to the counterclaim made by ABS, this being one defendant's action, possessing competence in the main proceedings does not necessarily mean also being competent with regard to the counterclaim. Since in this case the counterclaim was not brought before a court in the domicile of the defendant (Spain) it would be necessary to find a provision in the United States legal system allowing the joinder of causes (as happens, for example, in Europe with article 6.3 of Regulation 44/2001) or, alternatively, to consider the counterclaim as an independent proceedings to establish whether or not the United States court lacks of jurisdiction. But if the United States court declares its competence to hear of the counterclaim using criteria considered too open under Spanish law, and subsequently condemns Span, that decision would not be recognised and enforced in Spain.

3 Liability and Compensation

The *Prestige* has been just one more of a large line of such accidents, as we have noted already. The *Torrey Canyon* disaster in 1967 led to an intensification of IMO's technical work on the prevention of pollution and was also the catalyst for work on liability and compensation. An *ad hoc* Legal Committee was established to deal with the legal issues raised, such as who is to be held responsible for damage caused by oil pollution, the basis for determining liability and the level of compensation for damage. A major pollution disaster like the *Prestige* involves third parties and the damage caused can be enormous. It was important to establish a system which enables liability to be determined and ensures that any compensation due is paid. In 1969, a conference convened by IMO adopted a convention dealing with the civil liability of the ship or cargo owner for damage suffered as a result of a pollution casualty. The purpose of the International Convention on Civil Liability for Oil Pollution Damage (1969 CLC) was to ensure that adequate compensation was paid to victims and that liability was placed on the shipowner. But some delegates to the 1969 Conference felt that the liability limits established were too low, and that the compensation made available in some cases might therefore prove to be inadequate. As a result, another conference was convened by IMO in 1971, which resulted in the adoption of a convention establishing the International Fund for Compensation for Oil Pollution Damage. The Convention came into force in 1978 and the Fund has its headquarters in London. Unlike the CLC, which focused on the onus of the shipowner, the Fund was made up of contributions from oil importers. The idea was that if an accident at sea resulted in pollution damage which exceeded the compensation available under the Civil Liability Convention, the Fund would be available to pay an additional amount, while the burden of compensation would be spread between shipowner and cargo interests.

[16] 1. Any judgment given by a Court with jurisdiction in accordance with Article IX, which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any Contracting State, except: (a) where the judgment was obtained by fraud; or (b) where the defendant was not given reasonable notice and a fair opportunity to present his case. 2. A judgment recognised under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in the State have been complied with. The formalities shall not permit the merits of the case to be re-opened.

[17] See above footnote 133.

[18] The New York Court dismissed the counterclaim by ABS on the grounds that the Spanish State was entitled to sovereign immunity but ABS appealed and in July 2006 the New York Court confirmed its decision on the Spanish State's entitlement to sovereign immunity, but granted ABS permission to resubmit its counterclaim on different grounds. In July 2006 ABS resubmitted its counterclaim seeking that ABS be indemnified by the Spanish State in the event any third party obtained a judgment against ABS as a result of the incident.

But nowadays both the Civil Liability and the Fund Conventions have been amended by the Protocols of 1992 known as the 1992 CLC and the 1992 Fund Convention respectively[19]. The CLC 69 and 71 Fund Convention applied to damage occurring in the territorial sea of State Parties but the Protocols of 1992 extend the scope to cover damage occurring in the EEZ and entirely supersede the original parent treaties increasing the limits of compensation. The IMO Legal Committee, at its 82nd session in 2000, also considered a request to increase the limitation amounts set out in the 1992 CLC and the compensation limits set out in the 1992 Fund Convention and it finally adopted two resolutions amending the 1992 Protocols by increasing the limits in each of them by 50% (entering into force on 1 November 2003). Furthermore, in May 2003 a Conference of Parties to the 1992 Fund Convention adopted a Protocol establishing an International Oil Pollution Compensation Supplementary Fund, open only to the Contracting States to the 1992 Fund Convention, to ensure that victims of oil pollution damage are compensated in full for their loss or damage and alleviating the difficulties faced by victims in cases where there is a risk that the amount of compensation available under the 1992 Liability and 1992 Fund Conventions will be insufficient to pay established claims in full.[20]

The 1992 CLC and the 1992 Fund Convention govern the civil liability and compensation arising from the *Prestige* accident.[21] The 1992 CLC governs the liability of shipowners for oil pollution damage and applies to oil pollution damage resulting from spills of persistent oil from tankers, covering pollution damage suffered in the territory, territorial sea or exclusive economic zone (EEZ) or equivalent area of a State Party to the Convention.[22] "Pollution damage" is defined as loss or damage caused by contamination and in the case of environmental damage compensation is restricted to costs actually incurred or to be incurred for reasonable measures to reinstate the contaminated environment. The notion of pollution damage includes measures, wherever taken, to prevent or minimise pollution damage in the territory, territorial sea or EEZ or equivalent area of a State Party to the Convention ('preventive measures').[23] Expenses incurred in taking preventive measures are recoverable even when no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.[24] The CLC covers spills of cargo and/or bunker oil from laden, and in some cases unladen, sea-going vessels constructed or adapted to carry oil in bulk as cargo (but not to dry cargo ships, and damages caused by non-persistent oil are not covered).[25]

The 1992 CLC lays down the principle of strict liability of the shipowner and creates a system of compulsory liability insurance. The shipowner is liable also in the absence of fault and is exempt from liability only if he proves that the accident (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.[26] The shipowner is normally entitled to limit his liability to an amount which is linked to the tonnage of his ship,[27] but if it is proven that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly

[19] Both entered into force on 30 May 1996. As at 1 December 2006, 115 States had ratified the 1992 CLC and 99 States had ratified the 1992 Fund Convention. Due to a number of denunciations of the 1971 Fund Convention, this Convention ceased to be in force on 24 May 2002. A large number of States have also denounced the 1969 CLC, but it is still in force.

[20] This "third tier" Fund increases the amount of compensation in States that ratify it to about US$1,079 million (including the amounts paid under the 1992 CLC and Fund Convention) and entered into force on 3 March 2005, three months after it had been ratified by eight states with a combined total of more than 450 million tons of contributing oil in a calendar year. The Supplementary Fund will be financed by contributions payable by oil receivers in the States which opt to ratify it. However, for the purpose of contributions it will be considered that there is a minimum aggregate quantity of 1 million tons of contributing oil received in each Member State.

[21] See above footnote 125. As the criminal liability is still being decided, it does not seem ethical to write about it in this paper, particularly because it depends mainly on discussion about evidences still *sub iudice* in the criminal proceedings being held in Corcubión (Spain).

[22] See article II 1992 CLC. The flag State of the tanker and the nationality of the shipowner are irrelevant for determining the scope of application.

[23] See article I.6 1992 CLC.

[24] See article I.7 and article II 1992 CLC.

[25] See article I.1 and 5 1992 CLC.

[26] See article III.2. And article III.3 also establishes that "if the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person".

[27] See article V.1. The unit of account is the Special Drawing Right (SDR) as defined by the International Monetary Fund, converted here into US dollars at the rate of exchange applicable on 1 December 2006, that is 1 SDR = US$1.510850. The limits were increased on 1 November 2003 and are applied to incidents occurring on or after that date: (a) for a ship not exceeding 5 000 units of gross tonnage, 4 510 000 SDR (US$7 million); (b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 4 510 000 SDR (US$7 million) plus 631 SDR (US$953) for each additional unit of tonnage; and (c) for a ship of 140 000 units of tonnage or over, 89 770 000 SDR (US$136 million). As at 18/9/2007, the SDR rate quoted by the Reserve Bank of Australia was A$1.00 = 0.5387 SDR.

and with knowledge that such damage would probably result, he is deprived of that right.[28] Apparently, claims for pollution damage should be made only against the registered owner of the tanker concerned[29] (although this does not preclude victims from claiming compensation outside the Convention from persons other than the owner). But claims against the persons listed in article III.4[30] are excluded "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 damage would probably result."[31] The owner is entitled to take recourse action against third parties in accordance with national law.[32] Besides, the owner of a tanker carrying more than 2,000 tonnes of persistent oil as cargo is obliged to maintain insurance to cover his liability under the CLC.[33] Tankers must carry a certificate on board attesting the insurance coverage. When entering or leaving a port or terminal installation of a Member State, such a certificate is required also for ships flying the flag of a non-Member State. Claims over pollution may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage.[34]

The 1992 Fund[35] pays compensation to those suffering oil pollution damage in a State Party to the 1992 Fund Convention who do not obtain full compensation under CLC92[36] when (a) the shipowner is exempt from liability under the CLC92 because he can invoke one of the exemptions under that Convention; or (b) the shipowner is financially incapable of meeting his obligations under the CLC92 in full and his insurance is insufficient to satisfy the claims for compensation for pollution damage; or (c) the damage exceeds the shipowner's liability under the CLC 92.[37] The 1992 Fund does not pay compensation if (a) the damage occurs in a State which is not a Member of the 1992 Fund; or (b) the pollution damage results from an act of war or is caused by a spill from a warship; or (c) the claimant cannot prove that the damage resulted from an incident involving one or more ships.[38] The maximum amount payable by the 1992 Fund in respect of an incident occurring before 1 November 2003 was 135 million SDR (US$200 million), including the sum actually paid by the shipowner (or his insurer) under the CLC 92 but that limit was increased to 203 million SDR (US$307 million) on 1 November 2003.[39] It applies exclusively to pollution damage (in the territory, including territorial sea, and EEZ of Contracting States) and to preventative measures wherever taken to minimise damages.[40]

The 1992 Fund is financed by contributions levied on any body who has received in one calendar year more than 150,000 tonnes of crude oil and heavy fuel oil (contributing oil) in a State Party to the 1992 CLC, based upon reports of oil receipts in respect of individual contributors. Only bodies having received more than 150,000 tonnes of contributing oil in the relevant year should be reported (except in the case of associated bodies such as subsidiaries and commonly controlled entities).[41] Oil is counted for contribution purposes each

[28] See article V.2 1992 CLC.

[29] Art V. 5 1992 CLC also establishes a right of subrogation for certain payments of compensations made before the fund is distributed, although paragraph 6 extends this right to anyone "in respect of any amount of compensation for pollution damage which he may have paid but only to the extent that such subrogation is permitted under the applicable national law". That is important in the *Prestige* case, as in September 2005 the largest group of victims in the fisheries, shellfish harvesting and fish-farming sector advised the Instructing Magistrate in Corcubión that the group members had signed settlement agreements with the Spanish State, and that in accordance with those agreements, any action or compensation to which these victims could be entitled, as a result of the *Prestige* incident, against the Spanish State as well as against the 1992 Fund, were withdrawn. The withdrawal affected some 13,700 persons, covering approximately 75% of the fisheries sector affected by the *Prestige* incident. A number of other claimants who have settled with the Spanish Government under Royal Decrees have withdrawn their claims from the court proceedings and it is expected that more claimants will withdraw their court actions for the same reason. The Spanish State can therefore now use the right of subrogation foreseen in article 6 1992 CLC, as it is permitted by Spanish law.

[30] (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; (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship; (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority; (e) any person taking preventive measures;(f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e).

[31] The Court of Corcubion (Spain) has not yet decided about the direct civil liability of the owner of the cargo, Crown Resources (nowadays, ERC Trading). The Solicitor-General (*Abogado del Estado*) claims that this company should be sued, because the damages were caused by its acts or omissions (*La Voz de Galicia*, 11/11/2006 www.lavozdegalicia.com).

[32] See article III.5.

[33] See article VIII.1

[34] See article VII.

[35] The 1992 Fund has an Assembly, which is composed of representatives of all Member States. The Assembly is the supreme organ governing the 1992 Fund, and holds regular sessions once a year. The Assembly elects an Executive Committee comprising 15 Member States. The main function of this Committee is to approve settlements of claims (see articles 16- 20 and 28-34 of the 1992 Fund Convention).

[36] In order to become Parties to the 1992 Fund Convention, States must also become Parties to the CLC 92.

[37] See article 4.1 of 1992 Fund Convention.

[38] See article 4.2 of 1992 Fund Convention.

[39] See above footnote 126.

[40] See article 3 of 1992 Fund Convention.

[41] See article 10 of 1992 Fund Convention.

time it is received at a port or terminal installation in a Member State after carriage by sea, the place of loading being irrelevant. Every year Member States are required to communicate to the 1992 Fund the name and address of any person in that State who is liable to contribute, as well as the quantity of contributing oil received by any such body and this applies whether the receiver of oil is a Government authority, a State-owned company or a private company.[42] Annual contributions are levied by the 1992 Fund to meet the anticipated payments of compensation and administrative expenses during the coming year and the amount levied is decided each year by the Assembly.[43] The Director issues an invoice to each contributor, following the decision taken by the Assembly to levy annual contributions which are payable by the individual contributors directly to the 1992 Fund.[44] A State is not responsible for the payment of contributions levied on contributors in that State, unless it has voluntarily accepted such responsibility.[45]

To ease the burden on oil receivers, a voluntary agreement has been reached amongst owners of small tankers indemnified through members of the International Group of P&I Clubs (a group of 13 mutual insurers that between them provide liability insurance for about 98% of the world's tanker tonnage) to introduce the Small Tanker Oil Pollution Indemnification Agreement (STOPIA 2006). Under the terms of STOPIA 2006 the liability in respect of incidents involving tankers up to 29,548 GT is increased to 20 million SDR (about $29 million). STOPIA 2006 will apply to incidents involving participating tankers in all 1992 Fund Member States. A second agreement known as the Tanker Oil Pollution Indemnification Agreement (TOPIA 2006) provides for indemnification of the Supplementary Fund for 50% of the amounts paid in compensation by that Fund in respect of incidents involving tankers entered in one of the P&I Clubs which are members of the International Group. The 1992 Fund and the Supplementary Fund will, in respect of incidents covered by STOPIA 2006 and TOPIA 2006, continue to be liable to compensate claimants in accordance with the 1992 Fund Convention and the Supplementary Fund Protocol respectively. The Funds will then be indemnified by the shipowner in accordance with STOPIA 2006 and TOPIA 2006. STOPIA 2006 and TOPIA 2006 also provide that a review should be carried out after 10 years of the experience of pollution damage claims during the period 2006-2016, and thereafter at five-year intervals. Both agreements entered into force on 20 February 2006.

[42] See article 15 of 1992 Fund Convention.
[43] See article 12.1 of 1992 Fund Convention.
[44] A system of deferred invoicing exists whereby the Assembly fixes the total amount to be levied in contributions for a given calendar year, but decides that only a specific lower total amount should be invoiced for payment by 1 March in the following year, the remaining amount, or a part thereof, to be invoiced later in the year if it should prove to be necessary.
[45] See article 14.1 of 1992 Fund Convention.