OIL SPILL CLAIMS – HOW TO MAKE AND RESIST THEM

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Introduction and Abstract

Oil spill claims are amongst the largest claims that may be made, and they also amount to some of the larger "insurance" claims in the world. For this reason maritime lawyers should make a particular study of how they should be handled, whether acting for a client making a claim or for a client who is scrutinising, and possibly resisting, a claim.

Oil spills from tankers and those from other ships should be distinguished. Those from tankers, for Australian and New Zealand (NZ) and for other countries that are members of the CLC[1] and the *Fund Convention*,[2] can only be made within the constraints of those conventions and the domestic legislation that gives effect to them. Claims for oil spills from ships other than tankers, or in relation to ships and countries that are not within the CLC and the *Fund Convention*, need to be based on common law causes of action. The most common of these is negligence.

When oil spills claims are made they need to be supported by documentary proof, formulated within the constraints of the international conventions and legislation under which they are given effect, and advanced in an orderly and logical manner. This is the work of the lawyer acting for the claimant, often supported by other professional people, such as marine surveyors, marine engineers and accountants.

This paper will only briefly mention common law actions, and then will outline the relevant international conventions, the legislation and the guidelines that have been published relating to oil spill claims.

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[1] *International Convention on Civil Liability for Oil Pollution Damage* 1969. It came into force internationally on 19 June 1975 and the 1992 Protocol came into force on 30 May 1996. NZ acceded to the 1969 CLC on 27 April 1976 which came into force for NZ on 26 July 1976 and the 1992 Protocol came into force on 25 June 1999.

[2] *International Convention on the Establishment of an International Fund for Oil Pollution Damage* 1971. It came into force internationally on 16 October 1978 and the 1992 Protocol came into force on 30 May 1996. For Australia the 1971 Convention came into force on 9 January 1995 and the 1992 Protocol came into force on 1 June 1996. For NZ the 1971 *Fund Convention* came into force on 20 February 1997 and the 1992 Protocol came into force on 20 February 1997. I am indebted to Mr Tim Workman, Legal Adviser, NZ Maritime Safety Authority, for assistance in relation to the NZ position. The NZ MSA web site, where some details of the NZ position is posted, is

Common Law Actions

If a ship should spill oil and that oil causes damage then, in the same way as any other scenario, it may be open to the party that has suffered damage to bring an action in tort against the tort feasor.[3] It is worth mentioning, at the outset, the an action in public nuisance is unlikely to succeed. The test case was in the *Southport Corporation Case*[4] in which the Southport Corporation brought suit for its costs in cleaning up its beaches, which had been fouled by oil pumped overboard from a ship that was in dire straits. It lost the action, as negligence was not a cause of action that was relied on and the House of Lords held that nuisance did not lie.

Two well-known cases of successful actions brought in negligence are those of the accidents from the *Amoco Cadiz* in 1978[5] and the *Exxon Valdez* in 1989. They involve very large sums of money, were and are being fought out in the USA courts, and were and are expensive, lengthy and involved. Common law actions seeking damages for oil spill pollution are usually against international companies, involve international parties and bring all of the complications that these aspects involve. They are not to be recommended for the ordinary litigant.

Further, as is mentioned below, if the country concerned is party to the CLC or the *Fund Convention* there is a prohibition on bringing a common law action. This paper is concerned mainly with the international conventions, so it is to those aspects that it will now turn.

International Conventions

Whilst there over 30 international conventions of which the International Maritime Organization (IMO) is the organizing body, see Appendix 1, there are only two main conventions that supply the 'insurance' structure for oil spill claims; namely, the CLC and the *Fund Convention*. It is to be noted that they apply to oil spills from oil tankers only. Oil spills from non-tankers are not covered although the IMO is considering a convention for compensation for oil spills of bunkers and other oil from non-tankers.

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www.msa.govt.nz. The Australian web site for material is that of the Australian Maritime Safety Authority (AMSA), which is www.amsa.gov.au.

[3] For a short discussion on the common law causes of action for oil spills, see White *Marine Pollution Laws of the Australasian Region*, 1994, Federation Press, section 2.1

[4] *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218 HL

Civil Liability Convention (CLC)

The CLC has as its main provisions a requirement that the oil tanker owners or operators should take compulsory insurance with a suitable insurer. As the only insurers specialising in the this type of risk are the Protection and Indemnity Clubs (P&I Clubs)[6] the effect is that the tanker owners pay premiums to P&I Clubs to cover claims for oil spill damages and costs of clean up.

The 1969 CLC was much amended by its 1992 Protocol, which is now in force for Australia and NZ. Under the 1992 Protocol the changes from the 1969 CLC were that the area in which the damage from the oil spill may occur was extended to the Exclusive Economic Zone (EEZ), the upper limit of liability was increased to 59.7 million SDRs,[7] and other changes were made.[8] As the texts of the 1992 Protocols are the determining ones for the CLC and the *Fund Convention* it is to those texts that one must turn. It is noted that the 1992 Fund Protocol is to be read with that 1992 CLC Protocol, as the definitions and some of the governing clauses are the same and are adopted one into the other.

The CLC applies to "pollution damage caused in the territory, including the territorial sea, of a Contracting State and ... in the [EEZ]",[9] so the criterion is the place where the damage occurs. If the damage occurs to the "territory" of a contracting party to the convention then the cover applies, and this is so even if the ship that causes the damage is flagged in or owned by a country which is not a party to the convention. It should be noted, however, that the oils covered are only those that are defined as "persistent oils", which are those that are of the heavier fraction.[10] After a marine casualty of a tanker in which oil is spilled, or is threatening to spill, the relevant P&I Club will then deal with the claimants for compensation for damages suffered or claimants to recover expenses incurred in preventive measures in dealing with the oil spill or threatened oil spill. The system has strict liability, so negligence does not have to be proven, and there is a limit of the upper amount of the damages and costs. It is a very successful insurance system.

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[5] See White, supra, section 2.1

[6] The P&I Clubs are mutual insurance companies that gradually grew out of the mutual insurance hull, and then other risks, societies of the 18th century. Their main bases are in the United Kingdom, Europe, Japan and the USA.

[7] The Special Drawing Right (SDR) is the Unit of Account under the CLC and many other international conventions. The exchange rate varies, as does any other exchange rate, and can be ascertained from any international banking source.

[8] See Appendix 3 for the major changes.

[9] Article II.

Its provisions are discussed further below and a summary of the differences between the 1969 CLC and the 1992 Protocol is set out in Appendix 2 to this paper.

Fund Convention

The second convention that deals with compensation for tanker oil spills is the 1971 *Fund Convention*. Under this convention the oil companies are required to be parties to a mutual fund, which is administered from its headquarters in London. The distinctions of the *Fund Convention* from the CLC are, first, that the costs fall on the oil companies and not on the tanker owners, and, secondly, the compensation comes from a mutual fund into which the oil companies pay rather than from an insurer. Under the *Fund Convention* the levies are calculated on the amount of oil which is landed in or shipped out of participating countries, with the levy being imposed at a rate per ton of contributing oil over a minimum of 150,000 tons a year.

State parties to the *Fund Convention* are required to pass legislation that imposes a reporting obligation on the oil companies which operate in their country and also an obligation to pay the levy to the Fund in London. A key provision is that the Fund must pay compensation to any person suffering "pollution damage" if unable to obtain full and adequate compensation under the CLC.[11] For this reason the *Fund Convention* is often known as the "top up" convention. The maximum level of compensation is much higher than that of the CLC. In the original version of the convention it was measured in terms of "1,500 francs for every ton of the ship's tonnage or of an amount of 125 million francs, which ever is the less, and (b) not in excess of ... 2,000 francs for each ton ..etc".[12] In the 1976 Protocol this was amended to "units of account"[13] and in the 1992 Protocol, see under, the Units of Account were made Special Drawing Rights (SDRs). The *Fund Convention* is to be read with the CLC as many of the common terms have the same definitions and meaning.

The 1992 Protocol to the *Fund Convention*, like for the 1992 Protocol to the CLC, substantially altered and widened the terms under which compensation could be claimed, raised the upper level of liability and, to give effect to this, started a whole new Fund. The 1992 Fund is

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[10] Art. 9(5).
[11] Article 4.
[12] Art.5.
[13] Art.III.

administered, like the 1971 Fund, from the headquarters in London. The upper liability under the 1992 Fund, of payments from the CLC and the Fund combined, is set at 200 million units of account (SDRs).[14] The amount of the SDRs vary, as to which see below.

It may be seen from Appendix 3 that there are a number of countries that are still members of the 1971 *Fund Convention*. The IMO is conducting a program to persuade countries to denounce the 1971 Convention and to accede to the 1992 Protocol. An added pressure on countries to do this is that there is a risk for countries staying in the 1971 Fund as the number of countries that remain party to it is becoming so small, and so weak commercially, that any levy may be quite high per ton. Further, there is a risk that the fund may not be able to raise sufficient monies from a levy on parties to the 1971 Convention to recompense a nation that suffers a very expensive oil spill from a tanker.

Legislation

(a) Australia

Protection of the Sea (Civil Liability) Act 1981

The provisions of the CLC were given the force of domestic Australian law by the *Protection of the Sea (Civil Liability) Act* 1981. Part 1 provided, amongst other things, for the Gazettal of such countries that had agreed to the provisions of the Convention. Part II gave the force of domestic law to most of the CLC, which made relevant tanker owners liable for "any pollution damage" that is caused by oil or other toxic substances which had escaped or been discharged from the vessel. There were the usual exceptions, such as war and that the owner had the usual right to limit liability. By Part III, Australian ships and foreign flagged ships visiting Australian ports were bound to carry the requisite proof of insurance required by the convention. Australian courts were given the right to hear disputes and review administrative decisions by Australian government officials.

Under Part IV of the Act the government Minister was given power to recover any expense that had been incurred in relation, not to the CLC, but to the *Powers of Intervention Act* 1981. By amendments to the Act in 1994 the provisions of the 1992 CLC Protocol were given effect and, amongst other changes, the Australian Maritime Safety Authority (AMSA) was given the authority to recover the expense to which it may have been put in cleaning up oil spills from

[14] Article 4. It was previously 135 million SDRs but the condition for raising it to 200 million has now been met.

tankers or in taking precautions in case a spill should occur.[15] By Part V and the Regulations under the Act provision is made for prosecution of offences and for governance of the Act. Overall, the Act is sensibly drafted and gives effect to the CLC, both as to the 1969 and the 1992 versions, in a sound and effective manner.

Protection of the Sea (Oil Pollution Compensation Fund) Act 1993

The Commonwealth Act that gives effect to the *Fund Convention* is the *Protection of the Sea (Oil Pollution Compensation Fund) Act* 1993. This Act took many years to be brought forward after the convention came into force as the Australian government was persuaded by the oil industry that there was no need to give effect to the *Fund Convention* as the risk was slight and any tanker oil spill was unlikely to exceed the maximum relevant provisions for the CLC. In the result they were right. No claim from Australian waters has ever exceeded the upper limits of the CLC so that a claim is made on the Fund and this is also the case for NZ. The *Oil Pollution Compensation Fund Act* 1993 was supported by three Acts which gave effect to the levies that are imposed by the Fund from year to year.[16]

Under the Australian Acts the participating oil companies are required to keep records, make reports and to pay the levies imposed by the Fund. AMSA is empowered to enforce these provisions, and the "Fund" is deemed to be a legal entity in Australian courts to enforce requisite payments (the levies). The main part of the Act is to give to persons who have suffered damage or been put to expense in cleaning up oil spills the right to compensation and, if necessary, the right to sue to enforce their claims. In effect, the *Oil Pollution Compensation Fund Act* 1993 provides that the Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damages, or costs of cleaning up the oil, under the CLC.

On the revenue side, the Act gives effect to the 1971 Fund and the 1992 Fund quite separately (Chapters 2 and 3). Both the 1971 Fund and the 1992 Fund are given the status of a legal entity recognized by the law and have the right to appear and be heard in Australian courts. The oil companies are required to make the relevant payments to the "Consolidated Revenue Fund" and then an equivalent amount is to be forwarded to the Fund in London. Record keeping is required and there are the usual powers of enforcement.

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[15] Part IVA.

(b) New Zealand

Maritime Transport Act 1994

The NZ act that gives legislative effect to the CLC is the *Maritime Transport Act* 1994 ("the MTA").[17] The Act follows the provisions of the CLC by enacting the provisions of the CLC in similar terms.

The key provision of the MTA for present purposes is s.345 in Pat XXV which provides that where "any harmful substance is discharged or escapes" or "any waste is dumped" from a ship into the sea the owner is liable for pollution damage in NZ marine waters "caused" by the discharge or escape.[18] The definition of "pollution damage" differs in its form from that in the international convention.[19] The definition of "harmful substance" is that specified in another section and "oil" which is defined as "any persistent hydrocarbon mineral oil".[20] The usual defences are included and there is a provision for joint and several liability where the liability cannot reasonably be separated between two or more ships.[21]

In Part XXV of the MTA there are a number of areas of liability of tankers for oil pollution that are differently worded to the provisions under the CLC and so, of course, the *Fund Convention*. The main one is that the provision of liability in s.345 departs from the wording of the CLC. The sense and sentiment of the provisions of the CLC are taken up and repeated in the MTA, but in

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[16] The *Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund - Customs) Act* 1993, and the two related *Excise* and *General* Acts

[17] Part XXV of the MTA gives effect to the CLC; by amendment in 1998. The 1971 CLC was originally given effect by the NZ *Marine Pollution Act* 1974. NZ has recently completed a review of the oil spill response plan, under the title "The 1999/2000 Review of the New Zealand Marine Oil Spill Response Strategy", which may be found on the web site www.msa.govt.nz.

[18] Section 345: "**Liability of Shipowners for Pollution Damage.** (1) Subject to the provisions of sections 347 and 348 of this Act, where, (a) any harmful substance is discharged or escapes; or (b) any waste or other matter is dumped .. from a ship into the sea or the seabed, the owner of that ship shall be liable in damages for all pollution damage in New Zealand, the internal waters of New Zealand, or New Zealand marine waters, or the seabed below such waters, caused by the discharge or escape of that harmful substance or the dumping of that waste or other matter."

[19] Under the NZ MTA it is: "'Pollution Damage' means damage or loss of any kind and -- (a) includes the cost of any reasonable preventive measures taken to prevent or reduce pollution damage and any damage or loss occurring as a result of those measures; and (b) includes the cost of reasonable measures of reinstatement of the environment that are undertaken or to be undertaken; and (c) includes losses of profit from impairment of the environment; but (d) does not include any costs in relation to the impairment of the environment other than the costs referred to in paragraphs (b) and (c)."

[20] S.342. This is an identical phrase to that used in the CLC.

[21] Ss.348, 346.

using different wording the potential for difficulties are created. It is more difficult, in such circumstances, to give effect to international comity and consistency, an important aspect contributing to the stability and certainty for the shipping industry, which is important.

The NZ MTA also gives legislative effect to the *Fund Convention*.[22] However, as the terms of liability and definition for the *Fund Convention* are those of the CLC, nothing further need be noted as to this aspect of the Act.

Aspects of Making or Resisting Claims

The Fund Convention secretariat and the P&I Clubs work closely together when there is a tanker oil spill. This is desirable as for any significant spill the claim may run from the upper limit of the CLC cover to the Fund. The amount of the cover under the CLC is based on the SDRs.[23] If the total claims exceed the maximum amount of the CLC then the Fund comes in to 'top up' to the required amount. They both follow a similar procedure so that the booklet published by the Fund can be a basis for claims against either or both sources of recompense.[24]

There are a considerable number of requirements that must be met before liability is established under the CLC or the *Fund Convention*. It is convenient to deal with them in turn. I will deal with the provisions of the Conventions but, of course, it is to the legislation that gives effect to them that requires close scrutiny.

(a) The amount of the claims likely to be received will determine whether the Fund comes into the matter and, if so, to what extent. One of the first steps, therefore, is to have some idea of the extent of the claims. Under the CLC, any persons acting for the relevant P&I Club will, therefore, need to establish the maximum liability for which the P&I Club will be liable. This will require inquiry as to whether the CLC is liable in the first place and, if so, whether any

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[22] MTA Part XVI and the Maritime Transport (Fund Convention) Levies Order 1996. The Order makes provision to give domestic force to the requirement of the Fund Convention that the oil companies pay the usual levy on the contributing oil. For details on this structure see, White, supra, section 4.2.1.

[23] At the time of writing, on 3 July 2000, one SDR exchanges at A$.4497 or NZ$.3502. Details of the Special Drawing Right (SDR) and the exchange rates can be obtained from the International Monetary Fund (IMF) site. In Australia the daily exchange rate is available from the Reserve Bank of Australia, web site www.rba.gov.au. In NZ it may be obtained from the Reserve Bank of NZ, web site www.rbnz.govt.na. The rate given is for 4pm EST 3 July 2000, but it fluctuates daily as for any international exchange rate. On 3 July 2000, therefore, the upper limit of the CLC was A$26.85 million and NZ$20.9 million (which is 59.7 million SDRs multiplied by the exchange rates). The upper limit of the Fund was A$89.9 million and NZ$70 million (which is 200 million SDRs multiplied by the exchange rates).

[24] See Appendix 4.

defences are open. If these are both in the affirmative the next inquiry needs to establish the full extent of the liability. This will require knowledge of the tonnage of the relevant tanker and the exchange rate (for the SDR) at the time of the casualty. Care needs to be taken to ensure that the P&I Club does not admit liability for claims that are in excess of the Club's liability.

(b) Is the vessel a "ship" within the meaning of the Convention? (I will use the general word "convention" as the requirements apply to both of the CLC and the *Fund Convention*.) To meet this requirement the vessel must be a "sea-going vessel ... constructed or adapted for the carriage of oil in bulk as cargo ... actually carrying oil in bulk as cargo and during any voyage following ... unless it is proved that it has no residues .. aboard."[25] The characteristics of the offending vessel need, therefore, to be ascertained and scrutinised.

(c) Is the offending oil a type that is within the Convention? For liability to arise the oil must be "any persistent hydrocarbon mineral oil ... carried on board ... as cargo or in the bunkers ...".[26] If it is oil of the lighter type then it may well not be the required "persistent oil", which is defined in terms of the heavier oils.

(d) Has the nexus between the claimant and the casualty been met? In this regard the requirements of "pollution damage" and causation will need to be addressed in that it must be "loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil ..". As to the costs of clean up, the requirement is that "pollution damage" includes "the costs of preventive measures and further loss or damage caused by preventive measures".[27] (my emphasis). The word "caused" has always had difficulties attached to it but causation now being a matter of common sense has greatly eased them.[28]

(e) Is the claim properly based on the other requirements? The Convention applies exclusively if the pollution damage has occurred within the territory, territorial sea or the EEZ of

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[25] Art 1 clause 1.
[26] Art. 1 clause 5.
[27] Art. 1 clause 6.
[28] For Australia is was so established by the High Court. In *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 it was held that where negligence is an issue, causation is essentially a question of fact to be answered by reference to common sense and experience and one into which considerations of policy and value judgments necessarily enter. The "but for" test is not a definitive test of causation. This decision was considered again by the High Court in *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 and the test seems now to have stabilised as decided in the *March Case*.

a contracting State.[29] No claim may be made against the owner otherwise than in accordance with the Convention. Further, no claim may be made against members of the crew, the pilot, any charterer, manager or operator, any salvor acting with the consent of the owner or on the instructions of a competent public authority or any person taking preventive measures, or the servants or agents of such persons.[30] In all of these situations where the Convention applies no common law claim is allowable. If one is brought, therefore, an injunction restraining the plaintiff may need to be sought and, if successful, the plaintiff may be ordered to pay the costs thrown away.

(f) Has the "owner" a defence? The liability lies with the "owner" at the time of the incident,[31] which is defined as the person registered as such or, in the absence of registration, the person owning the ship.[32] On the other hand the cause of the incident needs investigation, as liability does not attach if the owner proves that the damage:

1. "resulted from an act of war, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character"; or
2. "was wholly caused by an act or omission done with intent to cause damage by a third party"; or
3. "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";[33] or
4. if the damage resulted wholly or partially by any act or omission done by the party that suffered the damage, with the intent to cause that damage, or from the negligence of such person. In this case there is not a complete defence, as the tribunal has a discretion in that the owner may be "exonerated wholly or partially".[34]

(g) Can the liability be apportioned? Further on the aspect of apportionment, the Convention provides that where an incident involves two or more ships the owners, unless exonerated under Article III, shall be jointly and severably liable when liability is "not reasonably

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[29] Art. II.
[30] CLC Art. III clause 4.
[31] Art. III.
[32] Art. 1 clause 4. Similar defences are available to the Fund under the *Fund Convention*, Art.4, Clause 2.
[33] Aart. III clause 2.
[34] The is a presumption for Australian and NZ that the tribunal would apply its discretion in the same manner and on similar principles as it does to apportion liability in tort.

separable".[35] The terms of the Convention are silent on the position that applies if the tribunal finds that the liability is reasonably separable, but there is a discretion, in that case, to apportion liability in the usual way.[36] The Convention provides that nothing in it prejudices the owner's rights of recourse against any third party.[37]

It may be seen from these requirements and the defences that there may be many circumstances in which liability may not attach and that the P&I Club/ the Fund may be excused. In such cases it is also likely that there is no negligence on the part of the owner of the ship so there may, perhaps, be no party from whom recovery could be made by those suffering the loss or damage or put to the expense of cleaning up the oil or preventing a spill.

If the owner, or the P&I Club, wishes to establish a fund then provision for that is made in the CLC.[38] The practices and procedures for constitution of a fund are the usual ones, but they are outside the scope of this paper.

Proving the Claim

A very common situation after a spill is that the claimants present claims that are not sufficiently documented. Many claims for loss or damage from oil spills, such as those from the fishing and crustacean industry, the hospitality industry, marinas and the boating community, are brought by parties that have complex commercial accounts and, in these circumstances, expert accounting assistance is advisable.

In relation to claims for the costs of clean up, or prevention of the damage, the parties have an ability to plan how they will manage their records. In such cases it is important that there be full records kept of all persons involved and the times and events involving them, all equipment that is used or on stand-by and the accounts concerning them, and all receipts for financial outlays. In the crisis situation that prevails when a major oil spill occurs this may be difficult. There is some advantage, therefore, in having a team of persons whose responsibility includes ensuring that records and accounts are kept whilst the actual operation is taking place.

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[35] Art. IV.
[36] For NZ the MTA uses the phrase that there is joint and several liability where the liability "cannot reasonably be separated" - s.346.
[37] Art. III clause 5.
[38] Arts. V, VI.

Dispute Resolution

A claimant is not bound to accept the amount of clean-up costs or damages that is being offered by the P&I Club. Of course, it is preferable that any such dispute be resolved by negotiation or mediation. It is only if these fail that arbitration or litigation comes into the dispute. Negotiation, mediation and arbitration are matters of agreement between the parties, in the usual way.

As to litigation, the CLC provides that actions for compensation may only be brought in the courts of a contracting State where pollution damage has been caused in its territory, or preventive measures to prevent or minimize such is taken. Further, it provides that after any fund has been established the courts of the State in which the fund is established "shall be exclusively competent to determine all matters relating to the apportionment and distribution of the fund."[39] It also provides that parties to the CLC should ensure that its courts possess the necessary jurisdiction to entertain such actions for compensation.[40] Judgments given by a court with jurisdiction shall be recognized in any contracting State, except if obtained by fraud, or where there was lack of reasonable notice and a fair opportunity to present the opposing case.[41] A claim for pollution damage may be brought directly against the insurer or other person providing financial security for the owner.[42]

In relation to levies on contributing oil under the *Fund Convention*, State Parties are obliged to take appropriate measures under their law with a view to the effective execution of such obligations.[43] The Fund has the right to intervene, as a competent legal entity, in any litigation that concerns it.[44]

There are time limits within which to bring claims. Rights to compensation are extinguished unless action is brought within three years from the date when the damage occurred, and in no case shall action be brought after six years from the date of the incident which caused the damage.[45]

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[39] Art. IX, Clauses 1 and 3.
[40] Art. IX, Clause 2.
[41] Art. X. States should not allow review the original judgment and should allow it to be enforced - Art.8.
[42] CLC Art.VII, Clause 8.
[43] Art.13, Clause 2.
[44] Art.7, Clause 4.
[45] *Fund Convention* Art. 6, which also provides for the limit to run from date of notification to the Fund. The provisions are similar in the CLC, Art.VII, except that it also provides that the six year period runs, where there is a series of occurrences, from the date of the first occurrence.

Conclusion

As may be seen from the discussion above, that making and defending claims for oil spills has some complexity. There are many aspects of the terms of the CLC and the *Fund Convention* that are still not resolved. There has been no litigation concerning them in Australia or NZ. There has been litigation overseas in some countries,[46] but overseas decisions in countries that are not in the common law tradition may be of limited use, even though the decision arises from application of the same Convention.

It has to be faced that a major oil spill in Australia and in NZ is likely to occur at some time. There have been minor ones to date but in none of them has the total claim exceeded the upper limit of the CLC, so the Fund has never been called on in these two countries.[47] When a major oil spill does occur it is in the interests of all parties that there be a reasonable amount of expertise available to deal with the claims.

Michael White

Appendix 1 Summary of Status of IMO Conventions
Appendix 2 International Oil Pollution Compensation Funds Annual Report 1999; Section 2
Appendix 3 International Oil Pollution Compensation Funds Annual Report 1999; Section 3
Appendix 4 International Oil Pollution Compensation Funds Claims Manual (June 1998)

[46] The litigation concerning the Fund is fully reported in the annual reports, the latest of which is the 1999 Annual Report.
[47] The Fund has been, and is being, called on frequenly in other parts of the world; see the Fund Annual Reports.

SUMMARY OF STATUS OF CONVENTIONS
as at 31 May 2000

IMO Convention	17-Mar-58	158	98.47
1991 amendments	-	46	68.62
1993 amendments	-	86	82.19
SOLAS 1974	25-May-80	140	98.34
SOLAS Protocol 1978	01-May-81	93	93.12
SOLAS Protocol 1988	03-Feb-00	41	58.85
Stockholm Agreement 1996	01-Apr-97	8	9.37
LL 1966	21-Jul-68	144	98.34
LL Protocol 1988	03-Feb-00	40	58.81
TONNAGE 1969	18-Jul-82	124	98.05
COLREG 1972	15-Jul-77	134	96.77
CSC 1972	06-Sep-77	67	59.64
1993 amendments	-	5	3.07
SFV Protocol 1993	-	6	7.48
STCW 1978	28-Apr-84	134	97.93
STCW-F 1995	-	2	3.05
SAR 1979	22-Jun-85	65	46.82
STP 1971	02-Jan-74	17	22.12
SPACE STP 1973	02-Jun-77	16	23.71
INMARSAT C 1976	16-Jul-79	87	92.75
INMARSAT OA 1976	16-Jul-79	86	92.67
1994 amendments	-	38	31.93
1998 amendments	-	39	38.82

FAL 1965	05-Mar-67	84	53.60
MARPOL 73/78 (Annex I/II)	02-Oct-83	110	94.23
MARPOL 73/78 (Annex III)	01-Jul-92	93	79.39
MARPOL 73/78 (Annex IV)	-	77	43.44
MARPOL 73/78 (Annex V)	31-Dec-88	96	85.98
MARPOL Protocol 1997 (Annex VI)	-	2	4.86
LC 1972	30-Aug-75	78	68.38
1978 amendments	-	20	19.71
LC Protocol 1996	-	10	10.80
INTERVENTION 1969	06-May-75	74	68.25
INTERVENTION Protocol 1973	30-Mar-83	42	43.85
CLC 1969	19-Jun-75	66	36.89
CLC Protocol 1976	08-Apr-81	54	62.87
CLC Protocol 1992	30-May-96	60	85.79
FUND 1971	16-Oct-78	42	32.67
FUND Protocol 1976	22-Nov-94	34	55.07
FUND Protocol 1992	30-May-96	56	83.59
NUCLEAR 1971	15-Jul-75	14	21.35
PAL 1974	28-Apr-87	26	32.99
PAL Protocol 1976	30-Apr-89	20	30.40
PAL Protocol 1990	-	3	0.76
LLMC 1976	01-Dec-86	35	44.87
LLMC Protocol 1996	-	2	2.76
SUA 1988	01-Mar-92	45	47.39
SUA Protocol 1988	01-Mar-92	42	47.12
SALVAGE 1989	14-Jul-96	32	29.21
OPRC 1990	13-May-95	54	48.51
HNS Convention 1996	-	1	1.96
OPRC/HNS 2000	-	-	-

2 COMPARISON OF THE 'OLD' AND 'NEW' REGIMES

The main differences between the 'old' regime of the 1969 Civil Liability Convention and the 1971 Fund Convention and the 'new' regime of the 1992 Conventions are set out below.

The 1969 and 1971 Conventions apply to pollution damage suffered in the territory (including the territorial sea) of a State Party to the respective Convention. Under the 1992 Conventions, however, the geographical scope is wider, with the cover extended to pollution damage caused in the exclusive economic zone (EEZ) or equivalent area of a State Party.

The definition of pollution damage in the 1992 Conventions has the same basic wording as the definition in the original Conventions, but with the addition of a phrase to clarify that, for environmental damage (other than loss of profit from impairment of the environment), compensation is limited to costs incurred for reasonable measures actually undertaken or to be undertaken to reinstate the contaminated environment.

The 1969 Civil Liability Convention and the 1971 Fund Convention apply only to damage caused or measures taken after oil has escaped or been discharged. These Conventions do not apply to pure threat removal measures, ie preventive measures which are so successful that there is no actual spill of oil from the tanker involved. Under the 1992 Conventions, however, expenses incurred for preventive measures are recoverable even when no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

The 1969 and 1971 Conventions apply only to ships which actually carry oil in bulk as cargo, ie generally laden tankers. Spills from tankers during ballast voyages are therefore not covered by these Conventions. The 1992 Conventions apply also to spills of bunker oil from unladen tankers in certain circumstances. Neither the 1969/1971 Conventions nor the 1992 Conventions apply to spills of bunker oil from ships other than tankers.

The limit of the shipowner's liability under the 1969 Civil Liability Convention is the lower of 133 Special Drawing Rights (SDR) (£113 or US$183) per ton of the ship's tonnage or 14 million SDR (£12 million or US$19 million). Under the 1992 Civil Liability Convention, the limits are:

(a) for a ship not exceeding 5 000 units of gross tonnage, 3 million SDR (£2.6 million or US$4.1 million);

(b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 3 million SDR (£2.6 million or US$4.1 million) plus 420 SDR (£356 or US$579) for each additional unit of tonnage; and

(c) for a ship of 140 000 units of tonnage or over, 59.7 million SDR (£51 million or US$82 million).

There is a simplified procedure under the 1992 Civil Liability Convention for increasing these limits.

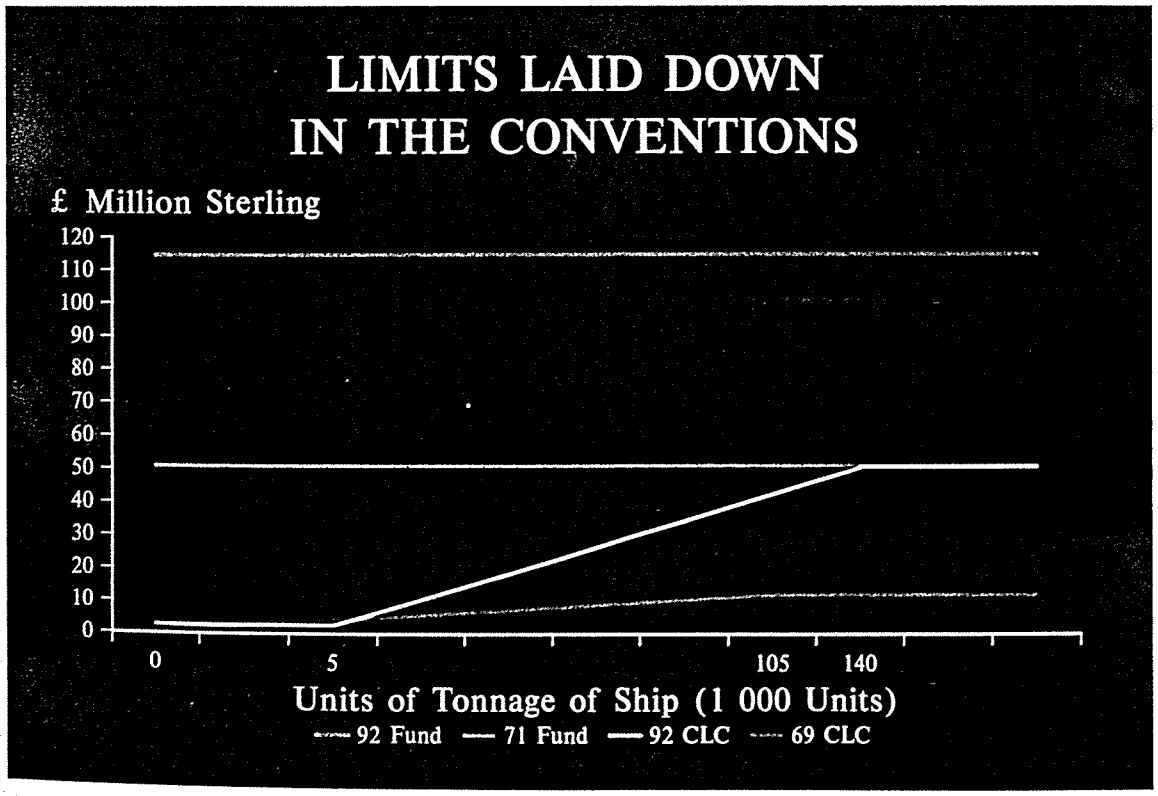
Under the 1969 Civil Liability Convention, the shipowner is deprived of the right to limit his liability if the incident occurred as a result of the owner's personal fault (actual fault or privity). Under the 1992 Convention, however, the shipowner is deprived of this right only if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the

intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Claims for pollution damage under the Civil Liability Conventions can be made only against the registered owner of the ship concerned. This does not preclude victims from claiming compensation outside the Conventions from persons other than the owner. However, the 1969 Civil Liability Convention prohibits claims against the servants or agents of the shipowner. The 1992 Civil Liability Convention prohibits not only claims against the servants or agents of the owner, but also claims against the pilot, the charterer (including a bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures.

The compensation payable by the 1971 Fund in respect of an incident is limited to an aggregate amount of 60 million SDR (£51 million or US$83 million), including the sum actually paid by the shipowner (or his insurer) under the 1969 Civil Liability Convention. The maximum amount payable by the 1992 Fund in respect of an incident is 135 million SDR (£115 million or US$186 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention. The 1992 Fund Convention provides a simplified procedure for increasing the maximum amount payable by the 1992 Fund.

Under the 1971 Fund Convention, the 1971 Fund indemnifies, under certain conditions, the shipowner for part of his liability pursuant to the 1969 Civil Liability Convention. There are no corresponding provisions in the 1992 Fund Convention.



3 MEMBERSHIP OF THE IOPC FUNDS

3.1 1992 Fund membership

The 1992 Fund Convention entered into force on 30 May 1996 for nine States. By the end of 1999, 39 States had become Members of the 1992 Fund. Eleven further States have acceded to the 1992 Fund Protocol, bringing the number of Member States to 50 by the end of 2000, as set out in the table below.

39 States for which the 1992 Fund Convention is in force (and therefore Members of the 1992 Fund)		
Algeria	Germany	New Zealand
Australia	Greece	Norway
Bahamas	Grenada	Oman
Bahrain	Iceland	Philippines
Barbados	Ireland	Republic of Korea
Belgium	Jamaica	Singapore
Belize	Japan	Spain
Canada	Latvia	Sweden
Croatia	Liberia	Tunisia
Cyprus	Marshall Islands	United Arab Emirates
Denmark	Mexico	United Kingdom
Finland	Monaco	Uruguay
France	Netherlands	Venezuela

11 States which have deposited instruments of accession, but for which the 1992 Fund Convention does not enter into force until date indicated	
China (Hong Kong Special Administrative Region)	5 January 2000
Sri Lanka	22 January 2000
Vanuatu	18 February 2000
Panama	18 March 2000
Dominican Republic	24 June 2000
Seychelles	23 July 2000
Italy	16 September 2000
Fiji	30 November 2000
Mauritius	6 December 2000
Tonga	10 December 2000
Poland	22 December 2000

It is expected that a number of 1971 Fund Member States will ratify the 1992 Fund Convention in the near future, eg Estonia, Colombia, Ghana, India, Malaysia, Malta, Mauritania, Morocco, Nigeria and the Russian Federation. It is likely that a number of other States will also become Members of the 1992 Fund in the near future, eg Argentina, Israel and South Africa.

3.2 1971 Fund membership

At the time of the entry into force of the 1971 Fund Convention in October 1978, 14 States were Parties to the Convention and thus Members of the 1971 Fund. By March 1998 there were 76 Member States.

The 1992 Fund Convention provided a mechanism for the compulsory denunciation of the 1969 Civil Liability Convention and the 1971 Fund Convention, when the total quantity of

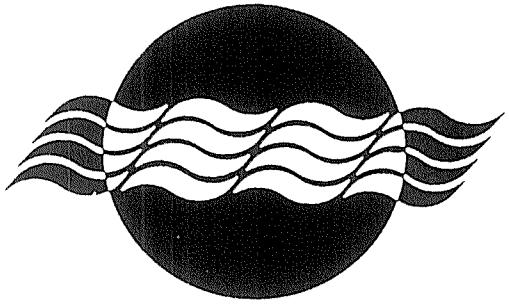
contributing oil received in States which were Parties to the 1992 Protocol to the Fund Convention (or which had deposited instruments of accession in respect of that Protocol) reached 750 million tonnes. Accordingly, all 24 States which had deposited instruments of accession to the 1992 Fund Protocol when this condition was fulfilled denounced the 1971 Fund Convention and ceased to be Parties to the Convention on 15 May 1998, thereby reducing the number of 1971 Fund Member States to 52.

Seventeen of these 52 States have since denounced the 1971 Fund Convention, reducing the number of 1971 Fund Member States to 35 by the end of 2000, as set out below:

35 States Parties to the 1971 Fund Convention		
Albania	Guyana	Papua New Guinea
Antigua and Barbuda	Iceland	Portugal
Benin	India	Qatar
Brunei Darussalam	Kenya	Russian Federation
Cameroon	Kuwait	Saint Kitts and Nevis
Colombia	Malaysia	Sierra Leone
Côte d'Ivoire	Maldives	Slovenia
Djibouti	Malta	Syrian Arab Republic
Estonia	Mauritania	Tuvalu
Gabon	Morocco	United Arab Emirates
Gambia	Mozambique	Yugoslavia
Ghana	Nigeria	

10 States Parties to the 1971 Fund Convention which have deposited instruments of denunciation which will take effect on date indicated	
China (Hong Kong Special Administrative Region)	5 January 2000
Sri Lanka	22 January 2000
Vanuatu	18 February 2000
Panama	11 May 2000
Seychelles	23 July 2000
Italy	8 October 2000
Fiji	30 November 2000
Mauritius	6 December 2000
Tonga	10 December 2000
Poland	22 December 2000

INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1992



CLAIMS MANUAL

June 1998

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INTRODUCTION

This Claims Manual is a practical guide to presenting claims against the International Oil Pollution Compensation Fund 1992. The Organisation was established in 1996 and is known as the 1992 Fund (or IOPC Fund 1992).

The 1992 Fund is a worldwide intergovernmental organisation, ie it is set up by States. The 1992 Fund provides compensation for oil pollution damage resulting from spills of persistent oil from tankers in States which are Members of the Organisation. The 1992 Fund is financed by levies on certain types of oil carried by sea. The levies are paid by entities which receive oil after sea transport, and normally not by States. At 1 June 1998, the 1992 Fund had 23 Member States, and nine other States will become Members during the following year, as set out on page 29.

The 1992 Fund is administered by a Secretariat, headed by a Director. The Secretariat is located in London, United Kingdom.

The Secretariat also administers another Organisation, known as the 1971 Fund, which operates in parallel to the 1992 Fund. The Member States of the 1971 Fund are different from those of the 1992 Fund. For claimants in a 1971 Fund Member State, a separate Claims Manual for that Organisation should be obtained from the Secretariat.

Section I of this Manual, which is divided into four main parts, sets out the legal framework within which the 1992 Fund operates and describes how the Organisation works. Section II explains how claims for compensation should be presented. The different types of admissible claims are dealt with in Section III.

This Manual does not consider legal questions in detail. These questions vary according to the type of claims submitted and the circumstances of the incident. The Manual does not give an exhaustive presentation of the obligations of the 1992 Fund to pay compensation.

The 1992 Fund examines each claim on its merits, in the light of the particular circumstances. The statements in this Manual are therefore without prejudice to the position of the Organisation concerning individual claims.

It should be noted that the 1992 Fund is able to pay compensation only in respect of claims fulfilling the criteria for admissibility laid down in the relevant international conventions referred to below, ie the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention).

This Manual should not be seen as an interpretation of the 1992 Civil Liability Convention and the 1992 Fund Convention. The admissibility of claims for compensation is governed by the texts of the Conventions.

I LEGAL FRAMEWORK: The 1992 Conventions

Introduction

The 1992 Fund operates within the framework of two international Conventions: the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention).

Under the 1992 Civil Liability Convention, claims for compensation for oil pollution damage may be brought against the owner of the ship which caused the damage (or his insurer). In certain circumstances, claims may also be brought against the 1992 Fund under the 1992 Fund Convention.

Geographic scope

The 1992 Civil Liability Convention and the 1992 Fund Convention apply to pollution damage caused in the territory or territorial sea of a State which is Party to the Convention in question, and to pollution damage caused in the exclusive economic zone (EEZ), or equivalent area, of such a State.

Compensation is also payable for the cost of reasonable measures to prevent or minimise pollution damage in the above-mentioned areas of a State Party to the Convention in question, wherever these measures are taken. For example, if a response on the high seas to an oil spill succeeds in preventing or reducing pollution damage within the territorial sea or exclusive economic zone of such a State, the response would in principle qualify for compensation.

Types of oil covered

The Conventions apply to spills of *persistent* oil, for example crude oil, fuel oil, heavy diesel oil and lubricating oil. Damage caused by spills of non-persistent oil, such as gasoline, light diesel oil and kerosene, is not compensated under the Conventions.

The term *persistent* is used to describe those oils which, because of their chemical composition, are usually slow to dissipate naturally when spilled into the marine environment and are therefore likely to spread and require cleaning up. Non-persistent oils tend to evaporate quickly when spilled and do not require cleaning up. Neither persistence nor non-persistence is defined in the Conventions. However, under guidelines developed by the 1971 Fund, an oil is considered non-persistent if at the time of shipment at least 50% of the hydrocarbon fractions, by volume, distill at a temperature of 340°C (645°F), and at least 95% of the hydrocarbon fractions, by volume, distill at a temperature of 370°C (700°F), when tested in accordance with the American Society for Testing and Materials' Method D86/78 or any subsequent revision thereof.

Types of ships covered

The 1992 Civil Liability Convention and the 1992 Fund Convention cover incidents in which persistent oil has escaped or has been discharged from a sea-going vessel constructed or adapted to carry oil in bulk as cargo (normally a tanker). The 1992 Conventions cover not only spills of bunker oil from laden tankers but also spills of persistent oil (including bunker oil) from unladen tankers.

Definition of pollution damage and preventive measures

The 1992 Fund, as well as the shipowner and his insurer, pays compensation under the Conventions for *pollution damage*.

This term is defined in the 1992 Conventions as "loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, 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". *Pollution damage* again includes costs of reasonable *preventive measures*. Expenses for preventive measures are recoverable even if no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

The interpretation of the terms *pollution damage* and *preventive measures* by the 1992 Fund is set out in Section III.

The 1992 Civil Liability Convention - the shipowner pays

Under the 1992 Civil Liability Convention, the shipowner has strict liability for pollution damage caused by the escape or discharge of persistent oil from his ship. This means that he is liable even in the absence of fault on his part. He is exempt from liability under this Convention only if he proves that:

- the damage resulted from an act of war or a grave natural disaster, or
- the damage was wholly caused by sabotage by a third party, or
- the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.

The shipowner is normally entitled to limit his liability to an amount determined by the size of the ship. Under the 1992 Convention, the limit is (a) for a ship not exceeding 5 000 units of gross tonnage, 3 million SDR

(£2.5 million or US$4.0 million)<1> ; (b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 3 million SDR plus 420 SDR (£344 or US$561) for each additional unit of tonnage; and (c) for a ship of 140 000 units of tonnage or over, 59.7 million SDR (£48.8 million or US$79.8 million).

The owner is deprived of the right to limit his liability, however, if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause pollution damage, or recklessly and with knowledge that such damage would probably result.

The shipowner is obliged to maintain insurance to cover his liability under the 1992 Civil Liability Convention. This obligation does not apply to ships carrying less than 2 000 tonnes of oil as cargo.

The 1992 Fund Convention - the 1992 Fund pays

The 1992 Fund exists to pay compensation when those suffering oil pollution damage do not obtain full compensation under the 1992 Civil Liability Convention in the following cases:

- the shipowner is exempt from liability under the 1992 Civil Liability Convention because the damage was caused by a grave natural disaster, or wholly caused by sabotage by a third party or the negligence of public authorities in maintaining lights or other navigational aids

- the shipowner is financially incapable of meeting his obligations under the 1992 Civil Liability Convention in full, and the insurance is insufficient to satisfy the claims for compensation

<1> Amounts in the 1992 Conventions are expressed in the Special Drawing Right (SDR) of the International Monetary Fund. In this Manual, the conversion from Special Drawing Rights to Pounds Sterling and US Dollars has been made using the rates of exchange applicable on 1 June 1998, ie 1 SDR = £0.81812 or US$1.33583.

- the damage exceeds the limit of the shipowner's liability under the 1992 Civil Liability Convention.

The 1992 Fund does not pay compensation if:

- the damage occurred in a State which was not a Member of the 1992 Fund, or

- the pollution damage resulted from an act of war or was caused by a spill from a warship, or

- the claimant cannot prove that the damage resulted from an incident involving one or more ships as defined (ie a laden or unladen sea-going vessel or seaborne craft constructed or adapted to carry oil in bulk as cargo).

The compensation payable by the 1992 Fund for any one incident is limited to 135 million SDR (approximately £110 million or US$180 million). This maximum amount includes the sum actually paid by the shipowner or his insurer under the 1992 Civil Liability Convention.

II PRESENTING A CLAIM

The role of the 1992 Fund

The role of the 1992 Fund is to compensate those suffering pollution damage. The 1992 Fund endeavours to settle claims out of court, so that claimants receive compensation as promptly as possible. Claimants nevertheless have the right to take their claims to the competent national court.

The Secretariat of the 1992 Fund is pleased to advise on the preparation and submission of claims. Claimants may consult the Secretariat on other matters, for example before undertaking preventive measures or engaging experts for surveying purposes.

Who is entitled to compensation?

Anyone who has suffered pollution damage in a Member State of the 1992 Fund may make a claim against that Organisation for compensation. Claimants may be private individuals, partnerships, companies, private organisations or public bodies, including States or local authorities.

If several claimants suffer similar damage, they may find it more convenient to submit co-ordinated claims. This can also facilitate claims handling by the Secretariat of the 1992 Fund.

To whom should a claim be addressed?

Claims for compensation under the 1992 Civil Liability Convention should be brought against the shipowner liable for the damage, or directly against his insurer. The insurer will normally be one of the Protection and Indemnity Associations (P & I Clubs) which insure the third-party liabilities of shipowners.

To obtain compensation under the 1992 Fund Convention, claimants should submit their claims directly to the 1992 Fund at the following address:

International Oil Pollution Compensation Fund 1992 (1992 Fund)
4 Albert Embankment
London SE1 7SR
United Kingdom

Telephone: +44-171-582 2606
Telefax: +44-171-735 0326
Telex: 23588 IMOLDN G
E-mail: iopcfund@dircon.co.uk

The 1992 Fund co-operates closely with the P & I Clubs in the settlement of claims. The P & I Club concerned and the 1992 Fund usually jointly investigate the incident and assess the damage. Full supporting documentation should be submitted either to the shipowner/P & I Club or to the 1992 Fund. If the documentation is presented to the shipowner or the P & I Club, the 1992 Fund should be notified directly of any claim against it under the 1992 Fund Convention.

In some cases, claims are channelled through the office of a designated local surveyor. Claimants should in such cases submit their claims to that office, for forwarding to the 1992 Fund and the P & I Club for decision. Occasionally, when an incident gives rise to a large number of claims, the 1992 Fund and the P & I Club jointly set up a local claims office so that claims may be processed more easily. Claimants should then submit their claims to that local claims office. Details of claims offices are given in the local press. All claims are referred to the P & I Club and to the 1992 Fund for decision on their admissibility. Neither designated local surveyors nor local claims offices may decide on the admissibility of claims.

Within what period should a claim be made?

Claimants should submit their claims as soon as possible after the damage has occurred. If a formal claim cannot be made shortly after an incident, the 1992 Fund would appreciate being notified as soon as possible of a claimant's intention to present a claim at a later stage.

Claimants will ultimately lose their right to compensation under the 1992 Fund Convention unless they bring court action against the 1992 Fund within three years of the date on which the *damage occurred*, or make formal notification to the 1992 Fund of a court action against the shipowner or his insurer within that three-year period (see Articles 6.1 and 7.6 of the 1992 Fund Convention). Although damage may occur some time after an incident takes place, court action must in any case be brought within six years of the *date of the incident*. The same applies to claimants' right to compensation from the shipowner and his insurer under the 1992 Civil Liability Convention. Claimants are recommended to seek legal advice on the formal requirements of court actions, to avoid their claims becoming time-barred.

The 1992 Fund endeavours to settle claims out of court. However, claimants are advised to present their claims against the 1992 Fund well in advance of the expiry of the periods mentioned above. This allows time for claims to be examined and settled out of court, but also ensures that claimants will be able to sue the 1992 Fund for compensation and prevent their claims from being time-barred, if they and the 1992 Fund are unable to agree on amicable settlements of the claims.

How should a claim be presented?

Claims against the 1992 Fund should be made in writing (including telefax, telex or electronic mail). a claim should be presented clearly and with sufficient detail for the 1992 Fund to assess the amount of the damage on the basis of the facts and the supporting documentation presented. Each item of a claim must be substantiated by an invoice or other relevant supporting documentation, such as work sheets, explanatory

notes, accounts and photographs. It is the responsibility of claimants to submit evidence supporting their claims.

The 1992 Fund usually appoints surveyors and technical advisers to investigate the technical merit of claims. Claims can be settled promptly only if claimants co-operate fully with these surveyors and advisers and provide all information relevant to the assessment of the claims.

The speed with which claims are settled depends largely on how long it takes for claimants to provide the 1992 Fund with the required information. Claimants are therefore advised to follow this Manual as closely as possible. If the documentation in support of a claim is likely to be considerable, claimants should contact the 1992 Fund (or where appropriate the designated surveyor or local claims office) as soon as possible after the incident to discuss claim presentation.

The working languages of the 1992 Fund are English, French and Spanish. Claim settlement will proceed more quickly if claims, or at least claim summaries, are submitted in one of these languages.

What information should a claim contain?

Each claim should contain the following basic information:

- the name and address of the claimant, and of any representative
- the identity of the ship involved in the incident
- the date, place and specific details of the incident, if known to the claimant, unless this information is already available to the 1992 Fund
- the type of pollution damage sustained
- the amount of compensation claimed.

Additional information may be required for specific types of claim. This is described in more detail in Section III (pages 19-21 and 25-26).

Claim settlement procedure

The claim settlement procedure of the 1992 Fund is laid down in its Internal Regulations, which are adopted by the Governments of Member States.

Claims submitted to the 1992 Fund are dealt with as promptly as possible.

The Director of the 1992 Fund has the authority to make final settlement of claims within certain limits. If those limits are exceeded, the Director has to submit the claim settlements for decision by the Executive Committee of the 1992 Fund, which will be established in October 1998. This body will be composed of representatives of the Governments of Member States. The Executive Committee may give the Director extended authority to settle claims arising from a particular incident.

The Director may make provisional payments before the final settlement of a claim, if victims would otherwise suffer undue financial hardship. Provisional payments are subject to special conditions and limits.

If the total amount of the claims approved by the 1992 Fund, or established by a court for a particular incident exceeds the total amount of compensation available under the 1992 Fund Convention, the compensation paid to each claimant will be reduced proportionately. When there is a risk that this situation will arise, the 1992 Fund may have to restrict payments of approved claims or provisional payments to a fixed percentage, to ensure that all claimants are given equal treatment.

III ADMISSIBLE CLAIMS

Claims policy of the 1992 Fund

The 1992 Fund can accept only those claims which fall within the definitions of *pollution damage* and *preventive measures* laid down in the 1992 and 1971 Conventions. a uniform interpretation of the definitions is essential for the functioning of the system of compensation established by the Conventions.

The policy of the 1992 Fund on the admissibility of claims for compensation has been established by the Governments of Member States. Each claim has its own particular characteristics, and it is therefore necessary to consider each claim on the basis of its own merits, in the light of the particular circumstances of the case. The criteria adopted by the 1992 Fund therefore allow for a certain degree of flexibility.

General criteria

The following general criteria apply to all claims:

- any expense/loss must actually have been incurred
- any expense must relate to measures which are deemed reasonable and justifiable
- a claimant's expense/loss or damage is admissible only if and to the extent that it can be considered as caused by contamination
- there must be a link of causation between the expense/loss or damage covered by the claim and the contamination caused by the spill

- a claimant is entitled to compensation only if he has suffered a quantifiable economic loss

- a claimant has to prove the amount of his loss or damage by producing appropriate documents or other evidence.

a claim is thus admissible only to the extent that the amount of the loss or damage is actually demonstrated. a certain flexibility is nevertheless exercised in respect of the requirement to present documents, taking into account the particular circumstances of the claimant or industry concerned or of the country in question. All elements of proof are considered, but the evidence provided must give the 1992 Fund the possibility of forming its own opinion on the amount of the loss or damage actually suffered.

Clean-up operations and property damage

Clean-up operations on shore and at sea, and property damage

Clean-up operations on shore and at sea would in most cases be considered as *preventive measures*, ie measures to prevent or minimise *pollution damage*.

The 1992 Fund compensates the cost of reasonable measures taken to combat the oil at sea, to defend sensitive resources and to clean shorelines and coastal installations.

Loss or damage caused by measures to prevent or minimise pollution is also compensated. For example, if clean-up measures result in damage to roads, piers and embankments, the cost of the resulting necessary repairs is admissible. However, claims for work which involves improvements rather than the repair of damage resulting from a spill are not accepted.

Claims for measures to prevent or minimise pollution damage are assessed on the basis of objective criteria. The fact that a government or

other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of the Conventions. The technical reasonableness is assessed on the basis of the facts available at the time of the decision to take the measures. However, those in charge of the operations should continually reappraise their decisions in the light of developments and further technical advice.

Claims for costs are not accepted when it could have been foreseen that the measures taken would be ineffective. On the other hand, the fact that the measures prove to be ineffective is not in itself a reason for rejection of a claim for the costs incurred. The costs incurred, and the relationship between these costs and the benefits derived or expected, should be reasonable. In the assessment, the 1992 Fund takes account of the particular circumstances of the incident.

Claims for clean-up operations may include the cost of personnel and the hire or purchase of equipment and materials. The cost of cleaning and repairing clean-up equipment and of replacing materials consumed during the operations is accepted. If the equipment used was purchased for a particular spill, deductions are made for the residual value when the amount of compensation is assessed. If a public authority has purchased and maintained materials or equipment so that they are immediately available if an incident occurs, compensation is paid for a reasonable part of the purchase price of the materials and equipment actually used.

Salvage and preventive measures

Salvage operations may in some cases include an element of preventive measures. Such operations can be considered as *preventive measures* only if the primary purpose is to prevent *pollution damage*. If the operations have another purpose, such as salving hull and cargo, the costs incurred are not admissible under the Conventions. If the activities are undertaken for the purpose of both preventing pollution and salving the ship and cargo, but it is not possible to establish with any certainty the primary purpose of the operations, the costs are apportioned between pollution prevention and other activities. The assessment of compensation

for activities which are considered to be *preventive measures* is not made on the basis of the criteria applied for assessing salvage awards; the compensation is limited to costs, including a reasonable element of profit.

Disposal of collected material

Clean-up operations frequently result in considerable quantities of oil and oily debris being collected. Reasonable costs for disposing of the collected material are admissible. If a claimant has received any extra income following the sale of recovered oil, these proceeds would be deducted from any compensation to be paid.

Property damage

Claims for the cost of cleaning or repairing property which has been contaminated by oil (for example boats, yachts and fishing gear) are accepted. If it is not possible for the property to be cleaned or repaired, then replacement costs are accepted, though with a reduction for wear and tear.

Cost of studies

Expenses for studies are compensated only if the studies are carried out as a direct consequence of a particular oil spill, and as a part of the oil spill response or to quantify the level of loss or damage. The 1992 Fund does not pay for studies of a general or purely scientific character. Reference is made to the last paragraph on page 27.

Fixed costs

Clean-up operations are often carried out by public authorities which use permanently employed personnel, or vessels, vehicles and equipment owned by those authorities. The authorities may then incur *additional costs*, ie expenses which arise solely as a result of the incident and which would not have been incurred had the incident and related operations not taken place. Reasonable *additional costs* are accepted by the 1992 Fund.

Authorities may claim compensation for so-called *fixed costs*, ie costs which would have arisen for the authorities concerned even if the incident had not occurred, such as normal salaries for permanently employed personnel and capital costs of vessels owned by the authorities. The 1992 Fund accepts a reasonable proportion of *fixed costs*, provided that these costs correspond closely to the clean-up period in question and do not include remote overhead charges.

Claim presentation

It is essential that supporting documentation shows how the expenses for clean-up operations are linked with the actions taken at specified work sites.

Major expenditures may be incurred for the use of aircraft, vessels, specialised equipment, heavy machines, trucks and personnel. Some of these may be government-owned; others may be the subject of contractual arrangements. Claimants should keep comprehensive records of all operations and expenditures resulting from an incident. Supervisory personnel should daily record the operations in progress, the equipment in use, where and how it is being used, the number of personnel employed, how and where they are deployed and the materials consumed. Standard work sheets, designed to suit the particular circumstances of the spill and the response organisation in the country concerned, are useful for such records. It is often useful to appoint a financial controller to keep adequate records and control expenditure.

Claims for *clean-up operations* and *preventive measures* should be itemised as follows:

- Delineation of the area affected, describing the extent of the pollution and identifying those areas most heavily contaminated (for

example using maps or nautical charts, supported by photographs or video tapes)

- Analytical and/or other evidence linking the oil pollution with the ship involved in the incident (such as chemical analysis of oil samples, relevant wind, tide and current data, observation and plotting of floating oil movements)
- Summary of events, including a description and justification of the work carried out at sea, in coastal waters and on shore, together with an explanation of why the various working methods were selected
- Dates on which work was carried out at each site
- Labour costs at each site (number and categories of response personnel, regular or overtime rates of pay, hours or days worked, other costs)
- Travel, accommodation and living costs for response personnel
- Equipment costs at each site (types of equipment used, rate of hire or cost of purchase, quantity used, period of use)
- Consumable materials (description, quantity, unit cost and where used)
- Any remaining value at the end of the operations of equipment and materials purchased
- Age of equipment not purchased but used in the incident
- Transport costs (number and types of vehicles, vessels or aircraft used, number of hours or days operated, rate of hire or operating cost)
- Cost of temporary storage (if applicable) and of final disposal of recovered oil and oily material.

Claims for *damage to property* should be itemised as follows:

- Extent of pollution damage to property and an explanation of how the damage occurred
- Description and photographs of items destroyed, damaged or needing replacement, repair or cleaning (for example boats, fishing gear, roads, clothing), including their location
- Cost of repair work, cleaning or replacement of items
- Age of items to be replaced
- Cost of restoration after clean-up, such as repair of roads, piers and embankments damaged by the clean-up operations, with information on normal repair schedules.

Consequential loss and pure economic loss

The 1992 Fund accepts in principle claims for loss of earnings suffered by the owners or users of property contaminated as a result of a spill (*consequential loss*). One example of consequential loss is a fisherman's loss of income as a result of his nets becoming polluted.

An important group of claims comprises those relating to *pure economic loss*, ie loss of earnings sustained by persons whose property has not been polluted. a fisherman whose boat and nets have not been contaminated may be prevented from fishing because the area of the sea where he normally fishes is polluted and he cannot fish elsewhere. Similarly, a hotelier or restaurateur whose premises are close to a contaminated public beach may suffer loss of profit because the number of guests falls during the period of pollution.

Claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself.

To qualify for compensation for pure economic loss, there must be a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. a claim is not admissible for the *sole* reason that the loss or damage would not have occurred had the oil spill not happened. When considering whether the criterion of reasonable proximity is fulfilled, the following elements are taken into account:

- the geographic proximity between the claimant's activity and the contamination
- the degree to which a claimant was economically dependent on an affected resource
- the extent to which a claimant had alternative sources of supply or business opportunities
- the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.

The 1992 Fund also takes into account the extent to which a claimant was able to mitigate his loss.

As regards the tourism sector, the 1992 Fund makes a distinction between (a) claimants who sell goods or services directly to tourists and whose businesses are directly affected by a reduction in visitors to the area affected by an oil spill, and (b) those who provide goods or services to other businesses in the tourist industry, but not directly to tourists. The 1992 Fund considers that in this second category there is generally not a sufficient degree of proximity between the contamination and the losses allegedly suffered by claimants. Claims of this type will therefore normally not be admissible in principle.

The assessment of a claim for pure economic loss is based on the actual financial results of the individual claimant for appropriate periods during the years before the incident. The assessment is not based on budgeted figures. The 1992 Fund takes into account the particular circumstances of the claimant and considers any evidence presented. The

criterion is whether the claimant's business as a whole has suffered economic loss as a result of the contamination.

Any saved overheads or other normal expenses not incurred as a result of the incident should be subtracted from the loss suffered by the claimant, for both consequential loss and pure economic loss.

Measures to prevent pure economic loss

Claims for the cost of measures to prevent pure economic loss may be admissible if they fulfil the following requirements:

- the cost of the proposed measures is reasonable
- the cost of the measures is not disproportionate to the further damage or loss which they are intended to mitigate
- the measures are appropriate and offer a reasonable prospect of being successful
- in the case of a marketing campaign, the measures relate to actual targeted markets.

To be admissible, the costs should relate to measures to prevent or minimise losses which, if sustained, would qualify for compensation under the Conventions. Claims for the cost of marketing campaigns or similar activities are accepted only if the activities undertaken are in addition to measures normally carried out for this purpose. In other words, compensation is granted only for the additional costs resulting from the need to counteract the negative effects of the pollution.

The criterion of *reasonableness* is assessed in the light of the particular circumstances of the case, taking into account the interests involved. The assessment is made on the basis of the facts known at the time that the measures are taken. As for marketing campaigns, measures of too general a nature are not accepted.

The 1992 Fund does not normally accept claims for measures to prevent pure economic loss until they have been carried out. The 1992 Fund is cautious about advance payments for such measures, since it will not take on the role of a claimant's banker.

When considering the admissibility of claims for the cost of an organisation's marketing activities, the 1992 Fund takes into account the organisation's attitude towards the media after the incident and, in particular, whether that attitude increased the negative effects of the pollution.

Contamination of fisheries and aquaculture produce

If there are mortalities in fish and aquaculture stocks following an incident, the claimant should document the loss by preserving samples and using photographic and other forms of recording to demonstrate the nature and extent of the loss. Claimants are advised to contact the 1992 Fund (or where appropriate the designated surveyor or local claims office) without delay so that a joint survey of the loss incurred can be carried out.

The 1992 Fund has in the past received claims for compensation based on the destruction of farmed fish and shellfish as a result of orders issued by public authorities in the form of fishing bans or exclusion zones. The 1992 Fund does not consider a fishing ban or exclusion zone imposed by a public authority as conclusive justification for destroying produce affected by a ban. Such claims are admissible if and to the extent that the destruction of the produce was reasonable on the basis of the scientific and other evidence available.

When assessing whether the destruction of produce was reasonable, the 1992 Fund considers the following points:

- whether the produce was contaminated
- the likelihood that the contamination would disappear before the normal harvesting time

- whether the retention of the produce in the water would prevent further production
- the likelihood that the produce would be marketable at the time of normal harvesting.

Since the assessment by the 1992 Fund of whether the destruction was reasonable is based on scientific and other evidence, it is important that sampling and testing are carried out, in particular testing for taint. Samples from an area affected by the spill (*suspect* samples) and *control* samples from a nearby commercial outlet outside the polluted area should be tested at the same time. The two groups of samples should be of equal numbers. Taste testers should not be able to identify whether the sample being tasted is a suspect or a control sample (*blind* testing).

Claim presentation

Claimants should substantiate their loss with appropriate documents or other evidence.

Claims for *consequential loss* and *pure economic loss* should include the following information:

- Nature of loss, including proof that the alleged loss resulted from the contamination
- Comparative figures for earnings in previous periods and during the period when economic loss was suffered, for example in the form of audited accounts or tax returns
- Comparison with similar areas outside the area affected by the oil spill
- Method of assessment of loss
- Saved overheads.

Claimants should indicate whether they have received any extra income as a result of the incident. For instance, fishermen who take part in clean-up operations may have been paid for their participation. Similarly, claimants should indicate whether they have received any aid or payments from public authorities or other international organisations in connection with the incident.

Claimants may wish to use advisers to assist them in presenting claims for compensation. The 1992 Fund will consider reasonable costs for work carried out by advisers in connection with the presentation of claims falling within the scope of the Conventions. The question of whether and to what extent costs are payable is assessed in connection with the examination of the particular claim for compensation. The 1992 Fund takes into account the necessity for the claimant to use expert advice, the usefulness of the work carried out by the adviser, the quality of the work, the time reasonably needed and the normal rate for work of that kind.

Environmental damage

Claims for impairment of the environment are accepted only if the claimant has sustained an economic loss which can be quantified in monetary terms. The definition of *pollution damage* in the 1992 Conventions provides that compensation for impairment of the environment is payable only for costs incurred for reasonable measures to reinstate the contaminated environment.

This definition of *pollution damage* clarifies and codifies the 1971 Fund's interpretation of the term *pollution damage* as contained in a Resolution of the 1971 Fund, which stated that "... the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models".

The 1992 Fund accepts claims for loss of profit (net income) resulting from damage to the marine environment suffered by those who

depend directly on earnings from coastal or sea-related activities, such as fishermen or hoteliers and restaurateurs at seaside resorts.

The 1992 Fund does not pay damages of a punitive nature, calculated on the basis of the degree of the fault of the wrong-doer and/or the profit earned by the wrong-doer.

Costs for measures taken to reinstate the marine environment after an oil spill may be accepted by the 1992 Fund under certain conditions. To be admissible for compensation, such measures should fulfil the following criteria:

- the cost of the measures should be reasonable
- the cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected
- the measures should be appropriate and offer a reasonable prospect of success.

The measures should be reasonable from an objective point of view in the light of the information available when the specific measures are taken. In most cases a major oil spill will not cause permanent damage to the environment, as the marine environment has a great potential for natural recovery. There are also limits to what man can actually do in taking measures to improve on the natural process.

Compensation is paid only for measures actually undertaken or to be undertaken.

Post-spill environmental studies are sometimes carried out to establish the precise nature and extent of the pollution damage caused by an oil spill and/or the need for reinstatement measures. The 1992 Fund may contribute to the cost of such studies, provided that the studies concern damage which falls within the definition of *pollution damage* laid down in the Conventions as interpreted by the 1992 Fund, including reasonable measures to reinstate the environment. In such cases, the 1992

Fund should be given the possibility of becoming involved at an early stage in the selection of the experts who will carry out the studies, and in the determination of the mandate of these experts. The studies should be practical and likely to deliver the required data. Their scale should not be out of proportion to the extent of the contamination and the predictable effects. The extent of the studies and associated costs should also be reasonable from an objective point of view and the costs incurred should be reasonable.

Members of the 1992 Fund

ie States for which the 1992 Civil Liability Convention and the 1992 Fund Convention were in force on 1 June 1998

Australia	Greece	Norway
Bahamas	Ireland	Oman
Bahrain	Japan	Republic of Korea
Cyprus	Liberia	Spain
Denmark	Marshall Islands	Sweden
Finland	Mexico	Tunisia
France	Monaco	United Kingdom
Germany	Netherlands	

States which will become Members of the 1992 Fund before 1 June 1999

ie States for which the 1992 Fund Convention will enter into force on the date indicated

Canada	29 May 1999
Croatia	12 January 1999
Grenada	7 January 1999
Jamaica	24 June 1998
Latvia	6 April 1999
Philippines	7 July 1998
Singapore	31 December 1998
United Arab Emirates	19 November 1998
Uruguay	9 July 1998

States Parties to the 1992 Civil Liability Convention but not the 1992 Fund Convention

ie Not Members of the 1992 Fund
as at 1 June 1998

Egypt	Switzerland

State for which the 1992 Civil Liability Convention will enter into force on date indicated

Singapore*	18 September 1998

* Becomes a Member of the 1992 Fund on 31 December 1998: see table overleaf