

LIABILITY & COMPENSATION FOR POLLUTION DAMAGE

- 1 Dealing with marine pollution, whether at sea or on the shore, can be a protracted and expensive business. Initially, the costs of clean up operations fall on the bodies incurring them.
- 2 This appendix gives a brief description of the ways that those involved in clean up operations can later recover their costs. However, its purpose is not to provide definitive legal advice.
- 3 The route by which compensation is available for a pollution incident inside the UK Pollution Control Zone and the UK sector of the continental shelf (UKCS) is dependent upon the source and the type of the pollutant involved. The paragraphs below and table provided at the end of this Appendix seek to identify the relevant legislation for most pollution incidents.
- 4 For a pollution incident involving a commercially operated tanker¹, four categories of compensation are available:
 - 4.1 For a pollution incident involving **persistent oil² carried as cargo**, compensation up to a fixed amount (currently approximately £730 million) is available under an international compensation regime (comprising the 1992 Civil Liability Convention, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol). Compensation is obtainable from the tanker owner or the tanker's insurer up to an amount dependent upon the size (gross tonnage) of the tanker with the remainder obtainable from the International Oil Pollution Compensation Fund (IOPC Fund);
 - 4.2 For a pollution incident involving **persistent bunker fuel³ carried by a tanker**, compensation is also available up to a fixed amount (approximately £730 million) under the same international compensation regime provided the tanker was carrying persistent oil cargo or has the residues of a persistent oil cargo onboard at the time;

¹ A tanker is defined under the 1992 Civil Liability Convention as 'any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo...' (where the oil is persistent, see the Convention for a full definition). However, a broader definition of a tanker would encompass the carriage of other bulk liquid cargoes and, as such, a tanker may be defined as 'any ship (whether or not self-propelled) designed, constructed or adapted for the carriage by water in bulk of crude petroleum, hydrocarbon products and any other liquid substance'

² The definition of persistent oil is highly technical, being based on the distillation characteristics of an oil. Hydrocarbon mineral oils such as crude oil and heavy fuel oil are persistent oils. Aviation fuel and petrol are non-persistent oils. Vegetable based oils are excluded from this definition.

³ Defined under the Bunkers Convention as any "hydrocarbon mineral oil, including lubrication oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil"..

- 4.3 For a pollution incident involving persistent **bunker fuel carried by a tanker that has no persistent oil cargo or residues onboard or for non-persistent bunker fuel**, compensation is available under a different international compensation regime (“the 2001 Bunkers Convention”). The amount of available compensation is dependent upon the size (gross tonnage) of the tanker;
- 4.4 For a pollution incident involving **non-persistent oil carried as cargo or other pollutants carried in bulk as cargo**, for example hazardous and noxious substances, compensation is dependant upon establishing a valid claim under UK common law. The amount of available compensation is limited by a separate convention, the Convention on Limitation of Liability of Maritime Claims 1976 as amended by its Protocol of 1996 (LLMC 1996), dependent upon the size (gross tonnage) of the ship.
- 5 For a pollution incident involving a commercially operated ship other than a tanker, for example a container ship or a cruise ship, two categories of compensation are available:
 - 5.1 For a pollution incident involving **bunker fuel** carried by a commercially operated ship **other than a tanker**, compensation is available under the 2001 Bunkers Convention. The amount of available compensation is dependent upon the size (gross tonnage) of the ship;
 - 5.2 For an incident involving **other pollutants** carried by a commercially operated ship **other than a tanker**, for example hazardous and noxious substances carried in containers on a container ship, compensation is dependant upon establishing liability under UK common law. The amount of compensation that may be paid is limited by the LLMC 1996, dependent upon the size (gross tonnage) of the ship.
- 6 For a pollution incident involving a **government owned or operated ship**, other than a ship used for commercial purposes, compensation may be available from the State concerned.
- 7 For a pollution incident from an **offshore installation**, compensation should be sought first from the operator of the installation. If the operator is unable to pay, compensation may be available from the Offshore Pollution Liability Association Limited (OPOL), currently up to £155 million (US\$250 million) for all claims (including the costs of remedial measures) arising out of an accident.
- 8 If the specific **source of the pollution cannot be identified**, compensation may still be available. The IOPC Fund pays compensation for pollution damage if the claimant can prove (for example, by sophisticated chemical analysis) that the pollution resulted from a spill of

persistent oil from a tanker. The MCA would commission a chemical analysis in an attempt to determine the source of the pollution.

- 9 The remainder of this appendix describes each case in more detail below.
- 10 MCA's Counter Pollution and Salvage Branch (telephone 023 80 329482), DfT's MSE's Pollution Prevention team (telephone 0207 944 5452 or 5444) can provide additional information on liability and compensation for pollution from ships. The Offshore Pollution Liability Association Limited (telephone 0208 786 3640) can provide additional information regarding offshore installations. If they are uncertain about the rules on liability and compensation that apply in a specific case, claimants should seek their own legal advice.

POLLUTION CAUSED BY PERSISTENT OIL CARRIED IN TANKERS

- 11 Three international instruments establish the international compensation regime for oil pollution damage from tankers:
 - the International Convention on Civil Liability for Oil Pollution Damage 1992 (the "1992 Civil Liability Convention");
 - the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the "1992 Fund Convention"); and
 - the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 ("the Supplementary Fund Protocol") .
- 12 The 1992 Civil Liability Convention deals with the liability of tanker owners. The second convention establishes the IOPC Fund and the Supplementary Fund Protocol establishes the Supplementary Fund. The Merchant Shipping Act 1995 implements the Civil Liability Convention, the IOPC Fund Convention and the Supplementary Fund Protocol in the UK⁴. All three instruments are in force in the UK.
- 13 Under the regime, the tanker owner is strictly liable for the costs of clean up operations. Strict liability means that the claimant need not prove fault to obtain compensation. The tanker owner may escape liability only if they can prove that one of a limited number of exceptional circumstances (for example, an act of war) caused the damage.

Amount of compensation available

⁴ The relevant provisions are in Chapters III and IV in Part VI of the Merchant Shipping Act 1995.

- 14 Tanker owners generally have the right to limit liability to an amount determined by the gross tonnage of the tanker. This amount varies from about £4.3 million (US\$7 million)⁵ for a small tanker (less than 5,000 gross tonnes) to about £86.25 million (US\$139 million)⁶ for a very large tanker (over 140,000 gross tonnes). Owners must maintain insurance cover for any tanker carrying more than 2,000 tonnes of oil as cargo to cover their potential liabilities. Tankers must carry a State-issued certificate on board to confirm that such insurance is in place. Most tanker owners obtain this insurance through a P&I Club. The Civil Liability Convention enables claimants to make their claims directly against the insurer.
- 15 The IOPC Fund is an intergovernmental organisation. It generally pays compensation to supplement that available from the tanker owner. In some rare cases, however, the Fund may meet all claims (for example, if the claimant cannot identify the tanker owner, or if the tanker owner has no insurance cover and is insolvent).
- 16 The UK fully joined the Supplementary Fund Protocol in September 2006. The Supplementary Fund makes additional compensation available when the total damage arising from an incident exceeds or is expected to exceed the limit of compensation available under the 1992 Fund Convention, namely 203 million SDR (about £ 194.7 million). When combined with the amount from the ship owner and the 1992 Fund Convention), the total compensation available comes to 750 million SDR, (about £719.5 million).
- 17 Oil pollution incidents do not only result in claims for clean up and reinstatement costs. The four categories of claims are :
- Clean-up and preventive measures;
 - Property damage;
 - Economic loss; and
 - Environmental damage.

If the total of all valid claims exceeds the total amount of compensation available, claimants will only receive a percentage of their claims. Concerns in the early stages of an incident that this situation might arise can result in the P&I Clubs and IOPC Fund making initial payments at less than 100% of eligible claims. The Fund makes top up adjustments as the claims position becomes clearer. However, this situation is only likely to arise following major oil spills.

Claiming for Recoverable Activities

⁵ As at 2 May 2012

⁶ As at 2 May 2012

- 18 Following an oil spill, the tanker owner, their insurer, and the IOPC Fund generally pay compensation for the cost of response measures. These might include measures taken to clean up the oil at sea, to defend sensitive resources, to clean shorelines and coastal installations and to dispose of any recovered oily debris. Claims for any consequential loss or damage caused by such measures should also be eligible for compensation. For example, if clean up measures result in damage to a road, pier or embankment, the cost of work carried out to repair the damage should be claimed and be eligible for compensation.
- 19 Admissible claims for clean up operations 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 operation is also admissible. However, if the responders purchased the equipment to be used for a particular spill, they cannot expect to receive 100% of the cost if the equipment still has a use at the close of operations. In this event the insurers and the IOPC Fund may make deductions for the residual value.
- 20 Compensation may be available for the costs of environmental advice. If the aim of the advice is to assist the clean up operation (for example, by helping to identify the most appropriate response techniques in given circumstances), its costs in general qualify for compensation.
- 21 Compensation is also available in cases where there is no oil spill, if there is a grave and imminent threat that pollution damage might occur. For example, the costs of mobilising clean up resources to the site of a tanker aground on a rocky coastline in bad weather would normally be admissible, even if a successful salvage operation subsequently prevents any oil from being spilled.

Impact Assessment

- 22 Compensation may be available for Impact Assessments, again depending on the source of the pollution.

Operation of the International Oil Pollution Compensation Fund (IOPC Fund)

- 23 The IOPC Fund has developed a series of criteria for establishing whether claims are eligible for compensation. In relation to clean up and reinstatement operations, the fact that a government or other public body decides to take certain measures does not automatically mean that the Fund will reimburse the cost of those measures.

- 24 More generally, the following criteria would apply:
- the cost of the measures should be proportionate to the scale of the incident;
 - the cost of the measures should not be disproportionate to the results achieved; and
 - the measures should be appropriate and offer a reasonable prospect of success.
- 25 The IOPC Fund's claims manual summarises its criteria in more detail. This manual, and a general information booklet, are available online at <http://www.iopcfund.org/publications.htm> or from:

International Oil Pollution Compensation Fund
Portland House
Bressenden Place
London SW1E 5PN
Tel: 020 7592 7100
Fax: 020 7592 7111
E-mail: info@iopcfund.org
Web site: www.iopcfund.org

Small Tanker Oil Pollution Indemnification Agreement

- 26 Small Tanker Oil Pollution Indemnification Agreement (STOPIA) and Tanker Oil Pollution Indemnification Agreement (TOPIA) are special arrangements between certain tanker owners, the IOPC Fund and the Supplementary Fund to provide for a greater contribution to compensation by the ship owner. These agreements do not affect claimants or alter the amount of compensation payable.

POLLUTION CAUSED BY BUNKER FUEL OIL CARRIED IN SHIPS OTHER THAN TANKERS

- 27 Under the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention), shipowners are strictly liable for damage arising from ships' bunker fuel and must maintain insurance to meet their liability which is calculated in accordance with the Convention on Limitation of Liability for Maritime Claims 1976 as amended by its Protocol of 1996⁷. It is necessary to commence action under this Convention within three years from the date when the damage occurred or six years after the date of the incident, whichever is soonest.

⁷ Schedule 7 to the Merchant Shipping Act 1995 contains the text of the convention as it has the force of law in the UK. The UK has ratified the 1996 Protocol to amend the 1976 Convention. This Protocol entered into force in May 2004 with significantly increased limits of liability.

- 28 The Convention was adopted to ensure that adequate, prompt and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers. The UK has national legislation to make owners of ships, other than those to which the Civil Liability Convention applies, strictly liable for pollution damage caused by bunker oil⁸. Claimants do not have to prove that the shipowner was at fault.
- 29 Shipowners must maintain liability insurance and the compulsory insurance requirements of the Bunkers Convention applies to ship owners of vessels of 1,000 gross tonnes or greater.

POLLUTION CAUSED BY OTHER POLLUTANTS

- 30 There are statutory provisions in force imposing liability and compensation for pollution damage by persistent oil and bunker fuels/oils. The ordinary rules of UK common law apply to liability and compensation for other pollution damage.

POLLUTION CAUSED BY OFFSHORE INSTALLATIONS

- 31 In the first instance, it is the operators of offshore oil and gas installations, that are responsible for meeting the costs of any pollution caused by their activities. The Operator and other parties maintain insurance cover for the period of exploration and/or production activity being undertaken, including drilling operations, to cover first party risks such as well control; relief well drilling and removal of debris and third party liability associated with compensation for pollution damage and reimbursement for remedial measures.
- 32 However, in the event the operator, for whatever reason, is unable to meet its liabilities, the provisions of the Offshore Pollution Liability Agreement (OPOL) may come into force. All operators currently active in offshore exploration and production on the UKCS are party to a voluntary compensation scheme known as OPOL. DECC requires, as part of its licence approval process, under the Petroleum Act 1998, that all operators become a party to the OPOL Agreement or have liability cover of the same value as that offered by OPOL.
- 33 Under the OPOL process, operators accept strict liability (subject to limited exceptions), up to a maximum of US\$250 million per incident, comprising US\$125 million to cover pollution damage claims and US\$125 million for remedial measures claims. OPOL administers the provisions of the Agreement, under which participating oil companies who are

⁸ The main provision is section 154 of the Merchant Shipping Act 1995

operators accept strict liability for pollution damage⁹ and remedial measures¹⁰ up to a maximum amount per incident.

- 34 Operators under the OPOL Agreement must provide evidence of financial responsibility in respect of their obligations to claimants, subject to the limits in the Agreement, but the OPOL Agreement does not preclude claimants from seeking redress in the Courts for losses incurred. If an operator fails to meet his obligations to claimants under the OPOL Agreement, then the remaining operators, who are parties to the OPOL Agreement, have agreed to guarantee payment of claims up to the maximum aggregate amount of US\$250 million per incident.
- 35 The OPOL Agreement covers not only fixed installations and pipelines but also mobile offshore drilling units (MODU), production facilities such as Floating Production Storage and Offloading facilities (FPSOs) and Floating Storage Units (FSUs) while being used in the production process, as well as when temporarily removed from its operational site for any reason whatsoever.
- 36 Under the OPOL Agreement, claimants are required to submit their claims within one year of the date of the incident to the relevant operator who is obliged to handle and pay the claim directly.
- 37 It should be remembered that the OPOL Agreement does not act as a limit on an operator's member's liability at law and claimants are free to pursue their rights through the Courts for losses which exceed the maximum recoverable under the OPOL Agreement or those beyond the scope of the OPOL Agreement.
- 38 For further information about OPOL, please visit the OPOL website at www.opol.org.uk or contact:

Offshore Pollution Liability Association Limited
Bank Chambers
29 High Street
Ewell
Surrey KT17 1SB
Tel: 020 8786 3640
Fax: 020 8786 3641
Email: info@opol.org.uk

⁹ "Pollution damage" means direct loss or damage (other than loss of or damage to any offshore facility involved) by contamination which results from a discharge of oil.

¹⁰ "Remedial measures" means reasonable measures taken by any party from any of whose offshore facilities a discharge of oil occurs and by any public authority to prevent, mitigate or eliminate pollution damage following such discharge of oil or to neutralize the oil involved in such discharge.

POLLUTION FROM AN UNIDENTIFIED SOURCE

- 39 Generally, claimants can only obtain compensation if they know its precise source. However, there is one exception to this. The IOPC Fund pays compensation for pollution damage if the claimant can prove (for example, by sophisticated chemical analysis) that the pollution resulted from a spill of persistent oil from an unidentified tanker.

OTHER APPLICABLE LEGISLATION

Removal of Wrecks

- 40 The Nairobi International Convention on the Removal of Wrecks (“2007 Wreck Removal Convention”), which is not yet in force (see R.44), covers the liability for the removal of wrecks and was adopted by the IMO in 2007. This Convention provides a legal basis for State Parties to remove, or have removed, shipwrecks potentially affecting the safety of lives, goods and property at sea, as well as the marine environment.
- 41 The registered owner of the ship that becomes a wreck and that constitutes a hazard, is liable to remove the wreck. In particular, the ship owner is liable for the costs related to locating, marking and removal of the wreck.
- 42 The owner of a ship over 300 gross tonnes must maintain insurance or provide other financial security to cover the liability under the Convention. A State-issued certificate attesting that such a security is in force shall be carried on board the ship. A right of direct action against insurers is provided to the State Parties.
- 43 The owner and the person(s) providing insurance or other financial security is entitled to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims (1976 LLMC) and its Protocol
- 44 This Convention is not yet in force and will enter into force twelve months following the date on which ten States have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the IMO Secretary General. The UK expects to accede before the end of 2012.

Insurance of Shipowners for Maritime Claims Directive

- 45 Directive 2009/20/EC on the insurance of shipowners for maritime claims, was adopted on 23 April 2009 and became effective from 1 January 2012. It obliges all EU Member States to require that the ships flying their flags, or calling at their ports, must have liability insurance covering the maritime claims, subject to limitation under the LLMC and up to the relevant maximum limit as calculated on the basis of LLMC. A certificate confirming the existence of such insurance must be carried on board. This Directive applies to ships over 300 gross tonnes.
- 46 The Directive is given effect through the Merchant Shipping (Compulsory Insurance of Shipowners for Maritime Claims) Regulations 2012 which came into force 5 October 2012.

Environmental Liability Directive

- 47 Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. This Directive establishes an administrative system to prevent and/or remediate environmental damage caused by an operator of the economic activity in question (which can include shipowners) and was transposed into UK law by the Environmental Damage (Prevention and Remediation) Regulations 2009.
- 48 Some operators of hazardous activities, listed in an annex to this Directive, are strictly liable; all other operators have been assigned with a fault based liability¹¹.
- 49 Environmental damage, as defined by the Directive, comprises:
- damage to protected species and habitats (based on the Habitats¹² and Birds Protection¹³ Directive);
 - water damage (based on the EU Water Framework Directive¹⁴);
 - land damage.
- 50 Some of the damage types mentioned in the previous paragraph may occur at sea (namely 'damage to protected species and habitats' and 'water damage'). However, this Directive is not applicable to incidents

¹¹ Fault based liability is a type of liability in which the claimant must prove that the polluter has been at fault or negligent.

¹² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive).

¹³ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Birds Directive).

¹⁴ Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy.

falling within the scope of the following international compensation regimes:

- the International Convention on Civil Liability for Oil Pollution Damage;
- the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- the International Convention on Civil Liability for Bunker Oil Pollution Damage;
- the Convention of relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.

51 The operators maintain the right to limit their liability in accordance with national legislation implementing the LLMC 1996.

Waste Framework Directive

52 Directive 2008/98/EC came into force on 19 November 2008. It has been implemented through the Waste (England and Wales) Regulations 2011, the Waste Regulations (Northern Ireland) 2011, and the Waste Regulations (Scotland) 2012. Appropriate authorities¹⁵ are required to draw up Waste Management Plans which include the territorial sea and are required to exercise their offshore licensing function in accordance with the Directive.

¹⁵ In England the Secretary of State and in Wales the Welsh Ministers.