The Bunkers Convention - Two Years On

Colin de la Rue (Ince & Co) examines the impact of the Bunkers Convention and considers some of the recent problems that have arisen. Colin de la Rue is a co-author of Shipping and the Environment *(Informa, 2nd ed. 2009).*

INTRODUCTION

The International Convention on Civil Liability for Pollution by Ships' Bunkers, adopted by the IMO in 2001, came into force in November 2008, twelve months after the last of the 18 ratifications needed for it to take effect. Two years later it was in force in no less than 50 States, and now it is well established as a major international regime.

The main features of the Convention are well-known:

- strict liability of shipowners for pollution by ships' bunkers;
- a right to limit liability in accordance with any applicable national or international limitation regime;
- and a system of compulsory insurance and certification.

But as with many laws which at first appear simple, the devil lies in the detail.

This article highlights some of the issues which have arisen with the entry into force of the Convention, or been highlighted by bunker pollution incidents in the last two years. These have fallen into two broad categories: first, those relating to certification of insurance, and second, those affecting the right of limitation.

CERTIFICATION OF INSURANCE

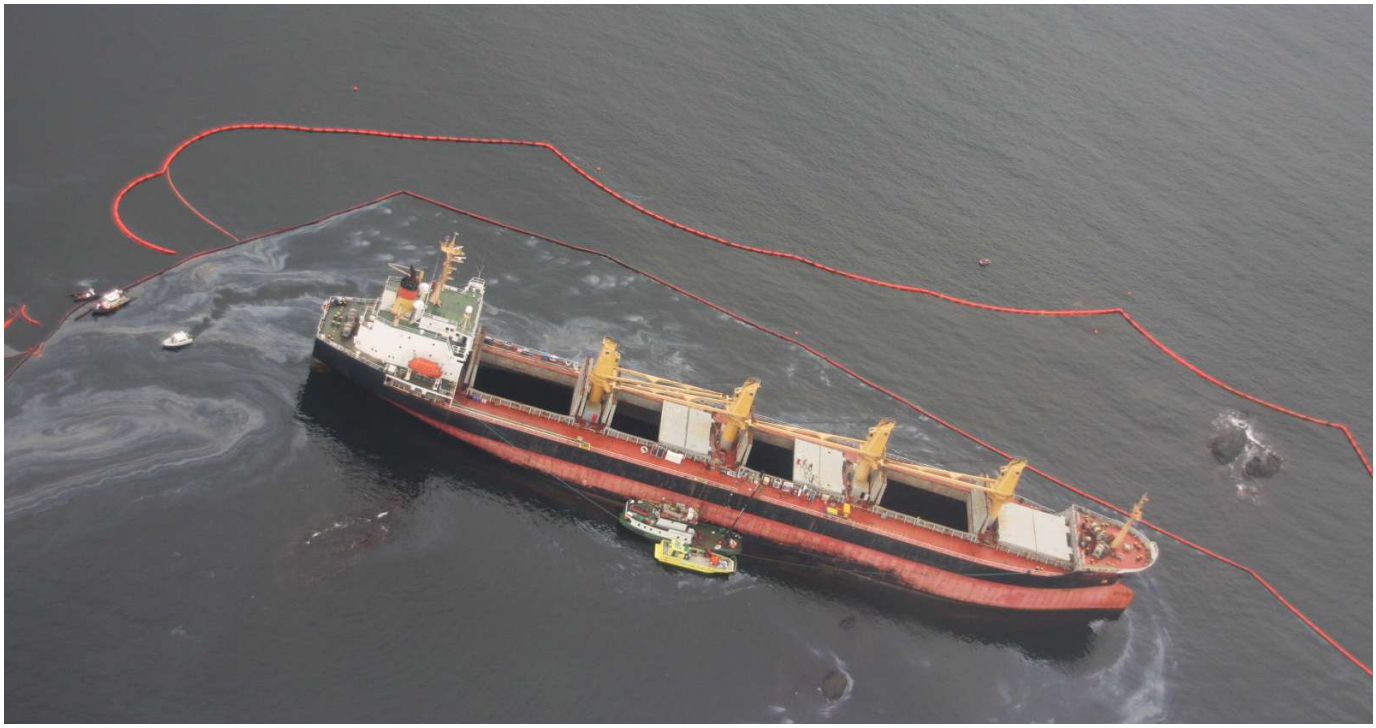
The compulsory insurance and financial security requirements are very similar to those governing oil tankers under the Civil Liability Convention 1992 (CLC). Ships must carry on board a certificate issued by their flag state administration attesting that appropriate insurance or other financial security is in place to cover any liabilities incurred by the shipowner under the Convention. The insurer or other guarantor named in the certificate is directly suable, and may not rely upon policy defences other than wilful misconduct of the shipowner.

The main differences from CLC are of a practical nature. While it is one thing for flag state administrations and P&I Clubs to handle the paperwork required to certificate a few thousand oil tankers, the world's non-tanker fleet is far larger and the administrative burden is correspondingly greater.

The Convention contains provisions designed to avoid a disproportionate workload: the certification requirements apply only to ships of 1,000 gross tons or more, and not to vessels engaged purely on "domestic voyages". However they still apply to a very large number of ships, and States have made it clear that oil tankers must be included, even if they carry certificates under the Civil Liability Convention: CLC applies only to spills of persistent oil, whereas the Bunkers Convention covers all bunker fuel spillages, including any involving oil which is non-persistent.

The workload has also been significantly increased by a lack of uniform practice on key issues among contracting states.

One relates to the precise form of evidence which shipowners must produce to satisfy the flag state certificating authority that adequate insurance is in place. Ever since 1975, when the Civil Liability Convention 1969 came into force in relation to oil



Full City - Photo Credit - Norwegian Coastal Administration

tankers, the usual practice has been for the owner's insurer, normally one of the P&I Clubs, to provide a so-called "Blue Card": essentially a certificate of its own attesting that insurance is in place which complies with the Convention. In the last decade the normal form of Blue Cards has been brought into line with modern forms of electronic document exchange, and the vast majority of administrations now accept electronic Blue Cards as Portable Document Format (PDF) files. Nonetheless, a small but significant number of administrations have continued to require hard copy Blue Cards, with some even maintaining additional requirements, such as that Blue Cards be embossed with Club stamps, or printed on watermark paper.

To allay any lingering concerns, all International Group Clubs have established databases of vessels on their websites from which verification can easily be obtained that a specific ship is entered with the necessary cover and that a Blue Card has been issued.

The IMO has also endorsed a recommendation of a Correspondence Group of Member States, established to promote harmonised implementation of the Bunkers Convention, that all States Parties should follow the practice already adopted by the vast majority, and accept Blue Cards issued by International Group Clubs in electronic form.

A second area in which there has been a lack of consistency is that of approval of insurers. The IMO has recommended that International Group Clubs be universally accepted as approved insurers, but some States continue to insist on time-consuming approval procedures which would render the system unworkable if the same procedures were to be applied by other States.

It is to be hoped that experience gained in addressing these issues will improve certification procedures not only under the Bunkers Convention but also under other regimes expected to enter into force in the years ahead, e.g. the Nairobi Convention on the Removal of Wrecks.

LIMITATION OF LIABILITY

The Bunkers Convention provides that it does not affect the right of the shipowner to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims 1976 as amended. The 1976 Convention (LLMC) was amended by the 1996 LLMC Protocol mainly to introduce higher limits, and it has become the most widespread international regime of this type.

Unfortunately LLMC does not explicitly grant a right of limitation for pollution claims. Certainly it was the intention of the 2001 IMO Diplomatic Conference, at which the Bunkers Convention was adopted, that any liability under it would be limitable under LLMC in States where that Convention

Photo Credit - Norwegian Coastal Administration

applies. Indeed, proposals to make this clear in the Bunkers Convention itself were rejected as unnecessary tinkering with the text. However the sort of problems which may arise were illustrated by the *Full City* incident in 2009.

The case involved a bunker spill in Norway, which has exercised an option under LLMC to omit from its national legislation some of the limitable claims prescribed by the Convention. One of these covers claims for wreck removal: an area in which it was considered that States should remain able, if they wished, to maintain a policy of unlimited liability. However the omission of the relevant LLMC provision (Art. 2.1(d)) has been said by some States to have the effect of eliminating, also, the right to limit liability for claims for bunker pollution clean-up. Among these States is Norway, which does not allow such claims to be limited under LLMC and requires the owner to provide for these claims by establishing a separate fund.

In the UK, where strict liability for bunker spills was introduced some years ago, steps were taken to put the matter beyond doubt by stipulating in the UK Merchant Shipping Act that all claims for bunker oil pollution were to be deemed to be claims for property damage within the meaning of LLMC Art. 2.1(a). There is a strong argument that this is, in any case, the proper interpretation of Art. 2.1(a): indeed there is a decision of the Federal Court of Australia, given in 2009 in the case of *The APL Sydney*, that damage to property in this context is not limited by reference to proprietary rights but includes all physical damage. This also accords with the obvious intention of the 2001 Conference. On this basis, LLMC States which do not allow limitation under the Convention for claims for bunker pollution clean-up costs are not acting in conformity with their treaty obligations.

Amount of liability limits

In 2009 a bunker spill took place off the coast of Queensland, Australia, from the containership *Pacific Adventurer* when it got caught up in a tropical storm off Brisbane. This resulted in some of the containers carried on deck being lost overboard into the sea, where they punctured the ship's shell plating and caused bunker fuel to escape.

The clean-up costs incurred by the Queensland State and Federal authorities amounted to approximately double the ship's liability limit under the 1996 Protocol. The case

achieved international notoriety as a result of the political duress imposed on the shipowner to pay substantially more than the liability limit. The Australian Government then proposed to the IMO that the case demonstrated the need for the 1996 limits to be raised. In response to requests for relevant data to be provided to the IMO Legal Committee, the P&I Clubs in the International Group have supplied information showing that, in 595 reported incidents since 2000, only eight (or 1.34 per cent) have given rise to pollution claims above the 1996 limitation figure.

It is expected that a decision on this issue will be taken at the spring session of the IMO Legal Committee in 2012, when it is likely that an increase will be agreed in accordance with the tacit amendment procedure set out in the 1996 Protocol.

Concluding Comments

In most contracting states the Bunkers Convention probably results in few legal changes apart from the introduction of compulsory insurance and certification of ships other than tankers. Although this involves insurers and flag state authorities in a good deal of work, governments considered it appropriate in a sector where the proportion of ships insured outside the International Group of P&I Clubs is higher than is the case with tankers.

As a single-tier compensation regime the Bunkers Convention offers no top-up for claims which are not fully compensated by the shipowner because they exceed his liability limit. Domestic measures have in some cases rendered illusory the limitation rights which the shipowner would normally expect in international law. Two-tier regimes exist in some parts of the world, where a national fund is available to pay for clean-up not fully compensated by the shipowner, but generally these do not respond to incidents in co-operation with the owner and his insurer, as has been the case with the International Oil Pollution Compensation Funds. The creation of an IOPC Bunkers Fund would be a positive development that could avoid problems of the kind noted in this article.