

9. FINANCIAL ASPECTS

9.1 REIMBURSEMENT OF COSTS OF ASSISTANCE

Financial impact of assistance rendered

According to Paragraphs 1 and 2 of Regulation 9 of Annex VII of the Helsinki Convention the Contracting Parties shall bear the costs of assistance referred to in Regulation 8 of Annex VII of the Helsinki Convention and the costs of joint actions in accordance with the following formula:

- a) If the action was taken by one Contracting Party at the express request of another Contracting Party, the requesting Party shall reimburse to the assisting Party the costs of the action of the assisting Party. If the request is cancelled the requesting Party shall bear the costs already incurred or committed by the assisting Party.
- b) If the action was taken by a Contracting Party on its own initiative, this Party shall bear the costs of its action.
- c) The principles laid down above in subparagraphs a) and b) shall apply unless the Parties concerned otherwise agree in any individual case.

Calculation of the total costs, which should be paid by the Requesting Party to the Assisting Party or Parties

According to Paragraph 3 of Regulation 9 of Annex VII of the Helsinki Convention, unless otherwise agreed, the costs of the action taken by a Contracting Party at the request of another Party shall be fairly calculated according to the law and current practice of the assisting Party concerning the reimbursement of such costs.

According to Paragraph 4 of the said Regulation the provisions of this regulation shall not be interpreted as in any way prejudicing the rights of Contracting Parties to recover from third parties the costs of actions taken to deal with pollution incidents under other applicable provisions and rules of international law and national or supra-national regulations.

As far as Regulation 9 of Annex VII of the Helsinki Convention does not already specify and besides that said above, according to HELCOM Recommendation 5/3 (1984) the Governments of the Contracting Parties to the Helsinki Convention should use the following guidelines when deciding the financial implications between the Requesting Party and the Assisting Party or Parties:

- a) a fundamental principle for the *calculation of costs* which should be paid by the requesting party to the assisting country or countries is that the calculation must be based on *cost price*;

- b) an assisting country shall at any time be prepared to give the requesting party a *preliminary estimation of the costs* for the assistance.

9.2 INFORMATION ON COMPENSATION FOR POLLUTION DAMAGE

Third party liability

The costs of action to deal with pollution or the threat of pollution may be recoverable on the basis of the legal third party liabilities of the owner of the ship, from where the pollution emanates/threats to emanate. Such liabilities will be insured by any prudent entity. A major part of all ships has entered *Protection and Indemnity Associations*, commonly called *P&I Clubs*. The word Club is used because the insurance they provide is arranged on a mutual basis. In the text which follows the *liability underwriter* is assumed to be a P&I Club.

The P&I Club covers only shipowner's legal liabilities in the sense of damage or compensation which the owner is legally obliged to pay to others, together with certain other losses, costs and expenses, which are specified in the terms of the insurance given to the shipowner. Shipowners are normally entitled to limit their liability under various international conventions or national law. In practice the insurance cover is mostly restricted to the limitation amount applicable to the ship.

The main job of the liability underwriter in a marine pollution emergency is to handle all claims against their members and to pay the valid ones. The first thing the P&I Club might do is put up financial security to ensure the release of the ship, in case the ship has been arrested. This is commonly done either by the claimant accepting a letter of guarantee or bond with a local bank.

The P&I Club will usually try to get independent technical assistance to advise on the type and extent of the occurred pollution, what effect it is likely to have under different scenarios, what needs to be done to abate or prevent the effects and the most efficient way of doing so. This advice will be available to the coastal State should it ask for it. The P&I Club will also be involved in the decision concerning a possible lightening of the ship to another vessel because of the liabilities the lightening ship may occur as well as in a possible wreck removal, the latter being one of the risks *P&I Clubs* insure. *So far the liability underwriter is for the coastal State one of the most important entities, on the ship owning interest's side, to discuss with in a marine pollution emergency caused by oil or even other harmful substances.*

International compensation regimes for oil pollution damage

The 1992 Civil Liability Convention and the 1992 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

The Director of the *International Oil Pollution Compensation Fund (1992 Fund)* should be informed immediately about an oil pollution incident which may effect the liability and

compensation for the damage on the basis of the Civil Liability Convention and the Fund Convention.

Damages resulting from oil spills from tankers are covered by an international system of compensation based on the principle of strict (i.e. "no fault") liability. Compensation is governed by two international conventions, the 1992 International Convention on Civil Liability for Oil Pollution Damage (*Civil Liability Convention, CLC*) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (*Fund Convention, FC*). The *International Oil Pollution Fund (1992 Fund)* set up under the Fund Convention is an organisation established to administer the regime of compensation created by the Fund Convention.¹

The CLC governs the liability of shipowners for oil pollution damage and creates a system of compulsory liability insurance. A shipowner can normally limit his liability to an amount which is linked to the tonnage of his ship. The FC is supplementary to the CLC and establishes a regime for compensating victims when the compensation under the CLC is inadequate.

Only those States which have become Parties to the CLC can become Parties to the FC. By becoming a Party to the Fund Convention, a State becomes a Member of the 1992 Fund.

The CLC applies to *oil pollution damage* resulting from spills of *persistent* oil from *tankers*. Spills of cargo or bunker oil from sea-going vessels constructed or adapted to carry oil in bulk as cargo, whether the tanker is laden or unladen, are covered by the CLC.

The CLC covers pollution damage suffered in the territory, territorial sea or exclusive economic zone (EEZ) or equivalent area of a State party to the Convention. The flag State of the tanker and the nationality of the shipowner are irrelevant for determining the scope of application.

"Pollution damage" is defined as loss or damage caused by contamination. For environmental damage (other than loss of profit from impairment of the environment) compensation is restricted, however, to costs actually incurred or to be incurred for reasonable measures to reinstate the contaminated environment. The notion of pollution damage includes measures, wherever taken, to prevent or minimise pollution damage in the territory, territorial sea or EEZ ("preventive measures"). 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.

¹ Only one Contracting Party is still party to the 1969 Civil Liability Convention and the 1971 Fund Convention, whereas all other Contracting Parties have already or will by a certain date denounce these two conventions.

Claims under CLC can be made only against the registered owner of the tanker concerned 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 the shipowner. If the damage exceeds the owner's liability under the CLC, or the owner is financially incapable and his insurance is insufficient, or he is exempted from liability under the specific exemptions listed in the CLC, the 1992 Fund will pay the share of compensation that is not paid under CLC. To obtain compensation under the FC, claimants should submit their claims directly to the 1992 Fund.

It is in the interest of claimants to submit their claims as soon as possible after the damage has occurred. Claimants will ultimately lose their right to compensation under the FC unless they bring court action against the 1992 Fund within three years from 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. 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 CLC.

Compensation can be paid to a claimant only to the extent that his claim is justified and meets the criteria laid down in the FC. A claimant is therefore required to prove his claim by producing explanatory notes, invoices, receipts and other documents to support the claim. According to the 1992 Fund's "Claims Manual" (latest version June 2000 and obtainable on www.iopcfund.org) each claim should contain at least the following basic information: name and address of the claimant, identity of the ship involved, the date, place and specific details of the incident, the type of pollution damage sustained and the amount of compensation claimed. The 1992 Fund's "Claims Manual" further gives directions as to how to itemise claims for clean-up operations and preventive measures, claims for the cost of measures to prevent pure economic loss, claims for consequential loss and pure economic loss as well as claims for environmental damage.

The 1992 Fund will cooperate with the insurer of the shipowner's third party liability (normally one of the P&I Clubs) in the settlement of claims. The investigation of an incident and the assessment of the damage will usually be done jointly by the P&I Club and the 1992 Fund.

The 1992 Fund, like P&I Clubs, endeavours to settle claims out of court. If an agreement cannot be reached, the claimant may pursue his claim before the court of the State where the damage occurred, if that State is a Party to the FC. Claimants should bring their claims against the 1992 Fund well before the expiry of the period mentioned above, in order to safeguard the possibility of suing the 1992 Fund for compensation, if the claimant and the 1992 Fund cannot agree on an amicable settlement of the claim.

In order for a claim to be accepted, it has to be proved that the claim is based on a *real expense* actually incurred, that there was a *link* between the expense and the incident and that the expense was made for *reasonable purposes*. Compensation is paid for expenses incurred for

clean-up operations at sea or on the shore, for preventive measures, consequential loss and pure economic loss, measures to prevent pure economic loss and environmental damage.

The costs may relate for instance to the deployment of vessels, salaries of crews and other personnel, use of booms, recovery equipment and other material, sealing of fractures in a grounded vessel to prevent oil from escaping, etc. However, the definition only covers expenses for *reasonable measures*. Expenses for preventive measures are recoverable even if no spill of oil occurs, provided there was a grave and imminent threat of pollution. Losses which do *not result directly* from an incident are not compensated.

Further information about the Conventions and claims is available in the publications by the 1992 Fund, which are obtainable on their web-site: www.iopcfund.org.

Other international conventions dealing with liability and compensation resulting from maritime casualties

- Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971
- International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea (not yet in force)

The HNS Convention will make it possible to pay out compensation to victims of accidents involving HNS, such as chemicals. The HNS Convention is based on the same two-tier approach as the CLC and FC (see above).

- International Convention on Civil Liability for Bunker Oil Pollution Damage (not yet in force)

The Bunker Convention will provide a liability and compensation regime for pollution damage caused by bunker oil (excluding the damages covered by the CLC and FC regime, see above).

- Draft Convention on Wreck Removal (to be considered by a Diplomatic Conference during the 2004-2005 biennium)

The Wreck Removal Convention is intended to provide international rules on the rights and obligations of states and shipowners in dealing with wrecks and drifting or sunken cargo which may pose a hazard to navigation and/or pose a threat to the marine environment. The Convention is intended to clarify rights and obligations regarding the identification, reporting, locating and removal of hazardous wrecks, in particular those found beyond territorial waters.

Awaiting the entry into force of the 1992 HNS Convention, the Bunker and the Wreck Removal Conventions, damage, ensued from pollution by harmful substances, other than oil as well as oil pollution from vessels other than oil tankers, has to be settled otherwise.

Compensation for pollution damage not covered by international conventions

Claims against polluters may be successful on the basis of the coverage of vessels' insurances for damages of third parties (P&I Clubs) and/or on the national law concerned. Whether such ships are insured by P&I Clubs or not, compensation payable can be limited under the relevant law, such as the *Convention on Limitation of Liability for Maritime Claims, 1976 as last amended in 1996* (the 1996 Protocol had as of 1 January 2001 not yet entered into force) (*Limitation Convention*).

9.3 CALCULATION FOR REIMBURSEMENT AND CLAIM FOR COMPENSATION

Especially in cases where a joint operation has been conducted in one country's territory, a claim can be brought against the polluter for all the costs of action, including costs of the assistance of other countries. Before claiming, the Lead Country shall pay the costs of that assistance. Each claimant has to prove that his claim is justified and meets the general criteria. For that he needs all relevant reports and records, explanatory notes, invoices, receipts and other documents to support the claim. Therefore, the documentation for the calculation of costs to be presented by any assisting party to the Lead Country for a reimbursement shall include such documents, too. Assisting parties should be able, even later, to give all further information which the handling of the Lead Country's claim may require. The Lead Country shall present basic particulars, like the statement of the reasons for actions, evidence, events etc.

In cases where actions have taken place in international waters or partly even in response regions of other countries, the countries involved may agree otherwise how to take care of the costs and claiming for them in the most efficient way.

9.4 CALCULATION OF COSTS FOR ASSISTANCE RENDERED

The calculation of costs for assistance rendered is normally based on national regulations. If specific national regulations do not exist, the following formula should be used:

- A. Ship's cost (rent of a ship): Yearly maintenance and capital (write off and capital interest) costs.
- B. Fuel, lubricants and hydraulics. Consumption of oil products.
- C. Labour costs. Salaries and fees concerning ship crews and duty officers.
- D. Other: Lost material, rent of special equipment, repairing, special cleaning, etc.

Re. A: The ship's cost is based on the hours the ship has been used. The hours are calculated from departure base port to arrival base port. For a possible standby in other ports during operation capital costs is charged, but normally no maintenance costs.

The following formula can be used in calculating ship's rate (cost per hour). Because costs of the year of an incident are not known before the end of the year and may include some rare main investments or repairs, the ship's actual fair rate may be the previous year's rate or an average of the ship's rates for the last three years, converted to the concerned year's price index:

$$\text{Cost per hour (ship's rate)} = \frac{a + b + c}{24 \times \text{days}}$$

Explanation:

- "a" = Yearly maintenance and service cost. Expenses for running the ship, like year docking, overhauling engines and hull, paintings, renewing worn parts and other normal maintenance and service. That does not include expenses of fuel and other oil products and expenses of the ship's crew.
- "b+c" = Capital costs are the sum of the write-off capital annually and the remaining capital's annual interest. Either the write-off in the balance or the write-off remaining values annually methods can be used. Remaining values-method gives higher costs at first and lower later and is more difficult to calculate than the write-off in the balance method. In the following the write-off in the balance - method is presented.
- "b" = Write-off in the balance. The lifetime of the vessel depends generally on its size. For boats under 18 meters it is about 15 years, for ships under 30 meters 20 years and for bigger ones 25 years. Therefore "b" is equal to one/lifetime of the day's price of the ship. Today's price of the vessel is calculated from its delivery costs, like building or purchasing costs, and technical investments to the ship after its delivery, all converted to the concerned year's price index. Possible scrap value at the end of the use time (for instance 5%) may also be considered.
- "c" = Interest of capital. The amount of the capital the vessel presents is its remaining value. In the write-off in the balance-method the today-price of the vessel has to be reduced with (100/lifetime) % per year. The result has to be multiplied with the appropriate government's rate of interest (6-9 %).
- "24xdays" = Amount of days when the ship will be ready for operations. For getting the cost per hour the result has to be divided with 24.
- Re. B: Consumption of oil products is calculated by gauges on board the ships.
- Re. C: Only all real labour expenses are charged. Besides normal wages and sea service compensations, also the overtime working compensations, which shall be verified by proper record keeping, are payable. Working on a voluntary basis in very hard tasks may be rewarded and such rewards can be claimed too, if justified and properly recorded.

To find out the total expenses caused by state employees to the state, one must add some percentages to salaries actually paid. That addition depends on legislation for employment and conditions of work and employment. They may include all other direct costs from employment, like salary during annual leave, extra money paid during annual leave, salary during sick leave, a social insurance fee and costs of retirement allowance. Total percentage for that varies and may be up to 70%. The salaries and fees are without any general overhead.

Labour costs include costs of combatting personnel, such as crews of vessels and other strike teams. To simplify calculations the salary and fee may be estimated on the basis of an average of the entire crew's salaries and fees. Labour costs of administrative personnel in duty for the incident may also be included, when properly recorded and justified. No other administration fee should be included.

Re. D: "Other" includes expenses like:

- lost material: value of redelivery,
- rent of special equipment: wearing of it (for instance rent of oil booms 2% of purchase price per day in real use or 1% for a skimmer) or a rent calculated by another way,
- repairing: full price if not fault by own neglect,
- cleaning costs of equipment and vessels,
- handling costs of recovered oil and oily wastes,
- cost of the use of telecommunication, etc.