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Compulsory Insurance Under EC Directive 2009/20/EC – An Adequate Solution for Victims, or is it also Time for the Abolition of Maritime Limitation of Liability and the Establishment of an International Fund as an Insurer of Last Resort?

Gotthard Gauci*

I INTRODUCTION

The protection of victims through compulsory liability insurance is not a new phenomenon, and there are a substantial number of instances in indigenous as well as European sourced English legislation which provide for compulsory insurance.¹ Compulsory liability insurance has existed in relation to employers' liability and road traffic accidents in English law for a long time; the Employers' Liability (Compulsory Insurance) Act 1969 generally imposes a requirement on employers doing business in Great Britain "to insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business."² Compulsory insurance has been a constant feature of road traffic legislation since the enactment of the Road Traffic Act 1930.³ In some instances, victims of accidents are also protected by a

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¹See Merkin, R., *Tort, Insurance and Ideology: Further Thoughts*, (2012) 75 (3) MLR 301 at 317.

²Loc. cit., section 1.

³See *Churchill Insurance v. Wilkinson*, [2010] Lloyd's Insurance and Reinsurance Law Reports 591, where at p. 593 Waller LJ stated: "Compulsory insurance has been a feature of legislation in the United Kingdom for many years. The aim is to provide a guarantee that an injured person will obtain the compensation that he or she is awarded against the negligent driver."; see also: the Road Traffic Act 1988 c. 52 and the Motor Vehicles (Compulsory Insurance) Regulations 1987 (S.I. 1987/2171); the European Communities (Rights against Insurers) Regulations 2002 (SI 2002 No 3061).

replacement of negligence with strict liability.⁴ The tort system in English law is fragmented with common law negligence being the primary avenue for a remedy, some schemes for strict liability such as in relation to maritime pollution, as well as some instances of a back-up fund, e.g. the IOPC Fund systems referred to below, and the Motor Insurers Bureau⁵ scheme in relation to road accidents.⁶ In contrast, a bolder and more radical, though probably imperfect, approach for compensation based on community responsibility in lieu of liability was adopted in 1974 in New Zealand in respect of personal injury by accident. That scheme has not been followed in other common law systems, but has been said to have parallels in the social insurance schemes adopted in Sweden and some other legal systems.⁷

In maritime transport, one comes across compulsory insurance in CLC 1969⁸ and CLC 1992,⁹ in HNS 2010¹⁰ (Chapter 2), in the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, and in the Nairobi International Convention on the Removal of Wrecks 2007.¹¹ In these cases, compulsory insurance is coupled with a right of direct action in terms of which the victim has the right to proceed directly against the insurer.¹² A recent development is EC Directive 2009/20/EC¹³ in terms of which

⁴See Workmen's Compensation Act, 1897 and more recently the Merchant Shipping Act 1995, implementing the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC 1992), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage Fund Convention 1992 (Fund Convention 1992) and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

⁵See section 145 of Road Traffic Act 1988 c. 52.

⁶The Royal Commission on Civil Liability and Compensation for Personal Injury under the Chairmanship of Lord Pearson in its 1978 Report did not recommend a comprehensive non-tort compensation scheme. (See, generally, Cane P., *Atiyah's Accidents, Compensation and the Law*, (7th Edition, Cambridge University Press, 2006).

⁷See Lunney and Oliphant, *Tort Law*, OUP 2010, at p. 983.

⁸International Convention on Civil Liability for Oil Pollution Damage, 1969.

⁹International Convention on Civil Liability for Oil Pollution Damage, 1992.

¹⁰International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010.

¹¹An early Convention imposing a compulsory insurance scheme was the Convention on the Liability of Operators of Nuclear Ships (Brussels 1962). It has been said that "compulsory insurance created interest due to the large number of migrants carried by sea during the first quarter of the 20th century." (See Damar, D., *Compulsory Insurance in International Maritime Conventions*, (2009) JIML 151 at 155, and authority there cited.)

¹²See, for instance: CLC 1992, Article VII, paragraph 8; The European Communities (Rights against Insurers) Regulations 2002 (SI 2002/3061) regulation 3(2).

¹³Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims. Article 9 of the Directive requires member States to "bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 2012." See also EC regulation 393/2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents, in relation to the Carriage of Passengers and their Luggage by Sea, 1974, as amended by the 2002 Protocol.

insurance is imposed in relation to all claims subject to limitation under the 1996 Convention on Limitation of Liability. It should be noted, however, that, in terms of Article 3(e) of the Limitation Convention and section 185(4) of the Merchant Shipping Act 1995,¹⁴ a claim by the crew for personal injury is not necessarily encumbered by limitation in terms of an opt-out from the English Merchant Shipping Act 1995. Furthermore, claims in respect of “the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship” are subject to limitation of liability under article 2 of the London Limitation Convention of 1976. However, the Merchant Shipping Act 1995, which implements the Limitation Convention 1976/1996 into English Law, deals specifically with limitation in respect of wreck removal by providing in paragraph 3 that “(1) Paragraph 1(d) of article 2 shall not apply unless provision has been made by an order of the Secretary of State for the setting up and management of a fund to be used for the making to harbour or conservancy authorities of payments needed to compensate them for the reduction, in consequence of the said paragraph 1(d), of amounts recoverable by them in claims of the kind there mentioned, and to be maintained by contributions from such authorities raised and collected by them in respect of vessels in like manner as other sums so raised by them.”¹⁵

Limitation of liability for wreck removal is a practically contentious issue in particular because a place of refuge is in practice less likely to be made available by a coastal state where liability for the costs of removing the wreck is subject to limitation,¹⁶ despite the obligation on a coastal state under customary international law to provide a place of refuge to a vessel in distress.¹⁷ The victim is one obvious beneficiary of compulsory insurance, par-

¹⁴Section 185(4) provides: “The provisions having the force of law under this section shall not apply to any liability in respect of loss of life or personal injury caused to, or loss of or damage to any property of, a person who is on board the ship in question or employed in connection with that ship or with the salvage operations in question if—

- (a) he is so on board or employed under a contract of service governed by the law of any part of the United Kingdom; and
- (b) the liability arises from an occurrence which took place after the commencement of this Act.

In this subsection, “ship” and “salvage operations” have the same meaning as in the Convention.”

¹⁵Merchant shipping Act 1995, Part II, Schedule 7.

¹⁶See McMahon L., *Limiting Liability for Wreck Removal is not the Answer*, Lloyds List, 20/09/2013.

¹⁷As to the extent of the right to a place of refuge, see: Tanaka, Y., *International Law of the Sea*, 2012, Cambridge at pp. 81 et seq; Rothwell D.R., Stephens T., *The International Law of the Sea*, Hart Publishing, 2010, p. 55; Chircop A., *The Customary Law of Refuge for Ships in Distress*, pp. 163-230 (Chapter 8) in Chircop A., and Linden O., *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom*, Martinus Nijhoff, Leiden/Boston, 2006; Chircop A., *Law of the Sea and International Environmental Law Considerations for Places of Refuge for Ships in Need of Assistance*, pp. 231-270 (chapter 9), in Chircop A., and Linden O., *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom*, Martinus Nijhoff, Leiden/Boston, 2006.

ticularly if coupled with a right of direct action. However, this is not its only purpose, as there is also undoubtedly an obvious benefit to the insured. There is also the important benefit that when a decision is being made by a coastal state as to whether to provide a place of refuge to a vessel in distress, whether in internal waters or in the territorial sea zone, the existence of insurance makes the decision easier for the relevant maritime authority.¹⁸ This benefit will obviously be less effective if Protection and Indemnity Clubs achieve their demand¹⁹ for the capping of such insurance. Insurance or some other type of financial security also ensures that a judgment in relation to liability (in the maritime sphere likely to be protected by limitation of such liability) is likely to be executable and enforceable because an insurance company has a deep pocket.

The desirability of having financial security to provide repatriation for abandoned seafarers was highlighted in the ninety-first session of the Legal Committee of the International Maritime Organisation.²⁰ The Maritime Labour Convention of 2006 (now in force) stipulates that each Member shall require ships that fly its flag to provide financial security to ensure that seafarers are duly repatriated in accordance with the Code.²¹ This is backed up, if necessary, by Standard A2.5 – Repatriation, which attempts to ensure that a seafarer will not suffer the costs of repatriation.

Perhaps of as much importance as the existence of compulsory insurance is the fact that in most instances the victim of a maritime incident will find that a claim is likely to be partially subject to limitation of liability, generally under national legislation implementing at least one international convention. It may also be possible that more than one limitation regime is applicable to a particular loss, as would be the case where a claim under the Hague-Visby Rules is further limited under the 1996 Limitation Convention regime, or where a defendant in an action in recourse for oil pollution damage limits liability as a charterer under the 1996 Limitation regime in respect of a successful claim against a shipowner under the oil pollution liability regime.²² It is interesting to note that a compulsory insurance regime established by the Directive is inextricably linked with limitation of liability as discussed below.

¹⁸See, Donner, P., *Insurance Perspective on Places of Refuge*, in Chircop, A., and Linden, O., *Places of Refuge for Ships – Emerging Environmental Concerns of a Maritime Custom*, Martinus Nijhoff, Leiden/Boston, 2006, pp. 321-346 (Chapter 12), particularly at p. 346.

¹⁹See Mulrenan, J., *Costa Concordia Removal Sparks Demand for \$1bn Limit on Payouts*, TradeWinds, 20 September 2013, p. 21.

²⁰See IMO documentation LEG 91/12, at 18-20, 9 May 2006.

²¹Loc. Cit., Regulation 2.5.

²²See: The CMA Djakarta, (2004) 1 Lloyd's Rep. 460.

II THE ROLE OF INSURANCE IN THE ENGLISH TORT OF NEGLIGENCE

Legal strictures have at times not prevented an adjudicator from granting a remedy where one is not strictly available, and compulsory insurance in this respect is very relevant. In the case of *Nettleship v. Weston*,²³ an English court of appeal applied the same standard of care in terms of the law of negligence in relation to a learner driver as to a fully competent and qualified driver, in order to achieve the pragmatic result of granting a remedy to the victim of that learner driver. Lord Denning M.R. was quite clear in justifying that decision:

Thus we are, in this branch of the law, moving away from the concept: 'No liability without fault.' We are beginning to apply the test: 'on whom should the risk fall?' Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her.²⁴

Insurance is therefore used as a justification for granting a remedy where in terms of bare law one should not be granted, but policy dictates that a just solution should be made available. However, there are some objections to this rule, to the effect that liability should not be dependent on considerations relating to the availability or otherwise of first or third party insurance, whether voluntary or compulsory.²⁵ Indeed, as a matter of strict legal principle, the existence or otherwise of first or third party insurance in relation to a specific incident subject to litigation should not be considered at all relevant in the determination of tortious or delictual liability. Recent legal *dicta*²⁶ however follow the practical approach adopted by Lord Denning in the above statement, and the availability or otherwise of insurance in relation to a specific incident seems now to be a relevant policy consideration.

²³(1971) 2 Q.B. 691 (CA).

²⁴*Id.*, at 700.

²⁵See, in particular, Stapleton J, *Tort Insurance and Ideology*, (1995) 58 MLR 820.

²⁶See, in particular, *Vowles v. Evans* [2003] 1 WLR 1607 at 1614, per Lord Phillips MR in the context of litigation relating to a sports injury: "We accept that the availability of insurance, both to players against the risk of injury and to referees against the risk of third party liability could bear on the policy question of whether it is fair, just and reasonable to impose a duty of care on referees. These were matters explored in *Van Oppen v. Clerk to the Bedford Charity Trustees* [1990] 1 WLR 235."

III PROTECTION AND INDEMNITY CLUBS AND MARITIME LIABILITY INSURANCE

Maritime liability insurance is usually provided by Protection and Indemnity Clubs (P&I),²⁷ although their role in this respect is not exclusive; for example, a three-quarter collision liability insurance is provided under the ordinary hull clauses available on the London hull insurance market. Furthermore, European P & I Clubs²⁸ have been largely prohibited from providing insurance in relation to vessels carrying Iranian oil on the basis of European Council Regulation 267/2012,²⁹ thus necessitating the provision of alternative financial security.³⁰

In this context, one must mention that P&I Clubs specify in their contractual rules with the insured that “the owner is only insured in respect of such sums as he has paid to discharge the liabilities or to pay the losses, costs or expenses . . .” or words to similar effect. Such wording is known as the “pay first rule” or the “pay to be paid rule.”³¹ Such a rule will obviously provide a serious legal hurdle to any third party (to the insurance contract) who may wish to recover from the Club. However, it must be stated that, as a matter of Club practice, this rule is not always strictly applied and Clubs are often

²⁷For a history of Protection and Indemnity Clubs, see *The History and Development of Protecting and Indemnity Clubs*, Report of Advanced Study Group No. 109 of the Insurance Institute of London, 8th January 1957.

²⁸See IOPC Fund Assembly Documentation: IOPC/APR12/12/1 27 April 2012.

²⁹See: in particular Article 11 paragraph (d) of the said European Council Regulation; *Good Luck Shipping LLC v. Council of the European Union* (case T57/12 (ECJ General Court 6 September 2013); *Osler D., P & I clubs still barred from providing IRISL cover*, Lloyd's List, 23 September 2013.

³⁰http://www.ukpandi.com/fileadmin/uploads/uki/Latest_Publications/Report__Accounts/2012/Sanctions%20circular%20June%202012.pdf (accessed on 17th September 2013).

³¹See UK P & I Rules of 2013, Rule 2(i) which provide: “Unless otherwise agreed between an Owner and the Managers, the risks covered by the Association are as set out in Sections 1 to 26 below,

PROVIDED ALWAYS that: (i) Unless and to the extent that the Directors otherwise decide, an Owner is only insured in respect of such sums as he has paid to discharge the liabilities or to pay the losses, costs or expenses referred to in those sections. . . .”

Rule 5 of the same rules provides that: “(A) Payment first by the Owner. Unless the Directors in their discretion otherwise decide, it is a condition precedent of an Owner's right to recover from the funds of the Association in respect of any liabilities, costs or expenses that he shall first have discharged or paid the same out of funds belonging to him unconditionally and not by way of loan or otherwise. . . .

Save as provided in Rule 1(9), the cover provided by the Association as set out in these Rules is solely for the benefit of the Owner, and any Joint Owner, Group Affiliate, other association or insurer, or permitted assign, to the extent allowed by Rules 10, 11, 13 and 15. It is not intended, save as provided in Rule 1(9), that rights should be acquired by any third party, through the operation of the Contracts (Rights of Third Parties) Act 1999 of the United Kingdom or similar legislation.”

flexible in providing funds to victims of, for instance, ship-source oil pollution damage.

IV DIFFICULTIES WITH LIABILITY INSURANCE

As indicated earlier, liability insurance, particularly if compulsory, may well have given rise to a change in judicial attitudes to recovery. However, it is often associated with problems relating to the right of direct action as well as to the availability of a number of defences available to the insurer. Furthermore, although compulsory insurance enhances the chances of recovery for the victim, it is likely to be subject to a contractual capping as well as the limit of liability available in shipping law generally.

A. P & I Clubs and Direct Action

In the case of a direct action against the insurer, the insurer may invoke some defences which the shipowner could have used. For instance, the Oil Pollution Conventions would allow the insurer to utilise a defence that the loss was caused by an act of war, or a natural phenomenon of an exceptional, inevitable and irresistible character.³² The defence of bankruptcy or winding up of the shipowner is not permitted.³³ Furthermore, the insurer may limit its liability to an amount equal to the required financial security, even though the shipowner may himself have lost the right to limit liability. The insurer will be exonerated from liability if the loss was caused by the wilful misconduct of the shipowner.

A victim would most likely desire to use a right of direct action against an underwriter where the assured is in, or on the verge of, a state of bankruptcy, and hence the said assured would not be in a position to satisfy claims made against him. In English law this eventuality is provided for by the Third Parties (Rights against Insurers) Act 1930, which in terms of section 1(1), transfers to a victim the rights of the insured against the insurer in the eventuality of bankruptcy of the insured. Contractual avoidance of such transfer is deemed ineffective.³⁴ The 1930 statute is due to be replaced, at some point in the future, by the Third Parties (Rights against Insurers) Act 2010,³⁵ which in section 9(5) similarly provides that “the transferred rights

³²See CLC 1992 Article III, and CLC 1992, Article VII, paragraph 8.

³³CLC 1992, Article VII, paragraph 8; HNS 2010, Article 12(8).

³⁴Loc. cit., section 1(5).

³⁵2010 c. 10.

are not subject to a condition requiring the prior discharge by the insured of the insured's liability to a third party." However, section 9(6) of the 2010 statute states that "in the case of a contract of marine insurance, subsection (5) applies only to the extent that the liability of the insured is a liability in respect of death or personal injury."³⁶

B. The Fanti and the Padre Island

A Government's explanatory note in relation to section 9 of the Third Parties (Rights against Insurers) Act 2010 states that in terms of paragraphs 5 and 6 of section 9, the *Fanti and Padre Island*³⁷ case remains preserved in relation to marine insurance, except in the case of death or personal injury.³⁸ The decision of the Judicial Committee of the House of Lords in the *Fanti and the Padre Island*,³⁹ itself a very controversial decision, illustrates the difficulty of reconciling the "pay first" rule with a right of direct action against an insurer. In that case, it was held, in a situation of non-compulsory cargo insurance, that a defendant P & I Club can validly, despite a statutory right of direct action, defend itself against a direct action of a third party by claiming that the insured member has itself not paid the third party. The tragedy for the victim in such case is that the member, bankrupt or on the verge of bankruptcy, is in an impossible situation to pay. The crucial reasoning of the Judicial Committee of the House of Lords in this case was that, prior to winding up, the third party had only a contingent right against the Club. Indeed this is the whole purpose of the "pay first" rule. In the decision by the House of Lords,⁴⁰ reference is made to the earlier judgment of Lord Justice Bingham in the same litigation:⁴¹

He [Mr Justice Bingham] also stressed that under the Act there were to be transferred to the third party only such rights as the insured had under the contract of insurance, subject always to section 1(3) of the Act which in effect prevented contracting out of the statutory transfer. This being the statutory scheme, it is very difficult to see how it could be said that a condition of prior

³⁶It has been stated in this respect by Hazelwood, S., in *P & I Clubs Law and Practice*, 4th Edition, §17.44 that: "This change is less revolutionary than it may seem at first glance given that in preparation for the coming into force of the Maritime Labour Convention 2006, some Clubs have changed their rules to waive (i) any 'pay-to-be-paid' provision, and (ii) retrospective termination of cover in respect of claims for crew injury or death."

³⁷[1990] 2 Lloyd's Rep. 191.

³⁸loc. cit., p. 29, see Westlaw (accessed 28 December 2013); see also section 165(5) of the Merchant Shipping Act 1995.

³⁹[1990] 2 Lloyd's Rep. 191.

⁴⁰[1990] 2 Lloyd's Rep. 191, at 204.

⁴¹[1989] 1 Lloyd's Rep. 239 at pp. 247-248.

payment would drive a coach and horses through the Act; for the Act was not directed to giving the third party greater rights than the insured had under the contract of insurance. But it is also necessary to observe that, in contrast to, for example, employers and motorists, Parliament has not generally required (apart from special cases, *such as the Merchant Shipping Act, 1971*) that ship owners should be compulsorily insured against liability to third parties. Where Parliament does require compulsory insurance, it generally provides in the relevant legislation that clauses in the contract of insurance which defeat the purpose of such insurance will be ineffective (see e.g. sections 148-150 of the Road Traffic Act 1988, and paragraph 1 of the Employers' Liability (Compulsory Insurance) General Regulations, 1971, made pursuant to the Employers' Liability (Compulsory Insurance) Act, 1969).⁴²

The reference to the Merchant Shipping (Oil Pollution) Act 1971 in the case above requires examination. The Act, and now the Merchant Shipping Act 1995, make specific provision in relation to third party rights against insurers. Section 165 of the 1995 Act provides for a right of direct action against the person providing the insurance or other security. Where section 165 is applicable, the privity gap is bridged by statute in every case and not merely in the case of bankruptcy. Unlike the Third Parties (Rights against Insurers) Act, CLC 1969 and CLC 1992 do not contain any provision similar to section 1(3) of the Act which purports to render null certain clauses. However, Article VII, paragraph 8, provides for a direct right of action by a pollution victim against the shipowner's underwriter, and in wording replicated in later pollution conventions, provides that "*the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him.*" (emphasis added). This phrase would effectively render inoperative the "pay first" rule included in P & I Club rulebooks, even though the "pay first" rule has been held in an arbitration award to be applicable in litigation relating to the oil spill from the *Prestige*.⁴³

However, section 165 of the Merchant Shipping Act 1995 does not include this provision, thereby, *prima facie*, permitting the use of the "pay first" rule by the insurer even in an action brought by the victim. This is probably an oversight by the legislator in the drafting of the transposition of CLC 1992 into English domestic law,⁴⁴ and it could well mean that certifi-

⁴²Emphasis added.

⁴³See: *London Steam Ship Owners Mutual Insurance Association v. Spain (The Prestige)* [2013 EWHC 3188. Comm]. This matter is subject to an appeal, see Mulrenan, J., *Spain Wins Time to Fight Prestige Arbitration Award*, TradeWinds, 4 October 2013, p. 5.

⁴⁴In the case of implementation of CLC 1992 into English law, the draftsman reformulated the text of the convention without appending the actual text as a schedule. This is one of the two approaches utilised in the English legal system. The other method which simply gives effect to the Convention with the text of the convention adopted in a statute is preferable, as it is less likely to create problems of interpretation

cates of insurance acceptable to the Secretary of State do not satisfy the strict requirements of CLC 1992 as provided in Article VII paragraph 5 of CLC 1992. This unequivocally provides that:

An insurance or other financial security shall not satisfy the requirements of this article if it can cease, for reasons other than the expiry of validity of the insurance or security specified in the certificate under paragraph 2 of this article, before three months have elapsed from the date on which notice of termination is given to the authorities . . .⁴⁵

Within the context of the English Merchant Shipping Act 1995, it may well be the case that the United Kingdom's international law obligations as a party to CLC 1992 are not being adhered to. This can obviously be circumvented, if the case were to be put to an English court, through the application of a purposive interpretation of section 165 of the Merchant Shipping Act 1995 which would block utilisation of the "pay first" rule. Such a solution would not have been needed if CLC 1992 had been transposed into English without any alteration in its wording. Undoubtedly, the implementation of an international convention by reference without any change, or with only minor cosmetic changes, has its attractions, whether or not the international style of drafting is at variance with the domestic or national counterpart.

Furthermore, on the basis of the statement of Lord Bingham referred to above, it is strongly arguable that the *Fanti and Padre Island* decision should no longer be interpreted as applicable to instances of compulsory insurance, even when the statute does not provide for a right of direct action. At the very least a broad compulsory insurance scheme necessitates a different judicial policy approach.

C. Other Insurance Defences – CLC 1992

Article VII (8) of CLC 1992 provides that:

Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such case the defendant may, even if the owner is not entitled to limit his liability according to Article V, paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or wind-

which would not otherwise arise. See, further, Mukherjee, P.K., *Maritime Legislation*, WMU Publications, Malmo 2002, Chapter 9.

⁴⁵HNS 2010, Article 12(5); International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, Article 7(6).

ing up of the owner) which the owner himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the *wilful misconduct of the owner himself*, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings. (emphasis added).⁴⁶

The term “wilful misconduct” is an elusive term⁴⁷ and can cause substantial difficulty of interpretation and application.⁴⁸ “Wilful misconduct” occurs also in other conventions, for instance the CMR⁴⁹ relating to the carriage of goods by road, where “wilful misconduct” on the part of the carrier can lead to the loss of the right to limit liability. Indeed, someone may be grossly negligent without that action constituting wilful misconduct.⁵⁰ The term “wilful misconduct” also occurs in section 55 of the Marine Insurance Act 1906.⁵¹

Furthermore, difficulties may arise as to the identity of owner. As to the identity of the owner, similar problems have arisen in relation to section 39(5) of the Marine Insurance Act 1906 where the *alter ego* test has been

⁴⁶Similar wording exists in HNS 2010, Article 12(8), and the Nairobi International Convention on the Removal of Wrecks 2007, Article 12(10).

⁴⁷In *Lacey Footwear (Wholesale) Ltd v. Bowler International Freight Ltd*, [1997] 2 Lloyd's Rep. 369, Beldam, LJ stated that “Few phrases have been more fully considered in decisions of the Courts than wilful misconduct.”

⁴⁸See, further, generally, Damar D., *Wilful Misconduct in International Transport Law*, Hamburg Studies on Maritime Affairs, Springer, 2011.

⁴⁹*Convention Relative au Contrat de Transportation Internationale de Merchandises par Route*, Geneva, 1956, Article 29.

⁵⁰See *Denfleet International Ltd v. TNT Global SpA*, [2007] 2 Lloyd's Rep. 504 CA at §18, where a degree of awareness is held to be more relevant than the seriousness of the action itself; Lord Waller dealing with wilful misconduct in the context of the CMR distinguishes between the state of mind of a driver who is a professional and one who is not: “In my view, although it is fair to say that people who fall asleep at the wheel will have had warning signs before they fall asleep and, although it is grossly negligent to ignore those warning signs, that negligence is in failing to appreciate that a driver cannot, whatever he may believe, defeat the sleepiness. The state of mind of the driver who is sleepy and continues to drive is likely to be that he believes he will beat the sleep and be safe. A professional lorry driver is in a different position from an ordinary driver particularly because limits are set by regulations. He knows that the limits are set to avoid the risk of falling asleep, and if he deliberately ignores those limits he is guilty of wilful misconduct (see *Sidney G Jones Ltd v Martin Bencher Ltd*, [1986] 1 Lloyd's Rep 54). If something has demonstrated to the driver that the driver cannot beat the sleepiness, such as hitting the side of the road, again because he becomes aware that he cannot beat sleepiness, he would become guilty of misconduct, indeed wilful misconduct.”

See also Clarke, M., *The Convention on the Contract for the International Carriage of Goods by Road 1956: Wilful Misconduct Again – and Again*, 2008 JBL 184.

⁵¹See further *The Isothel*, (Supreme Court of Queensland (Full Court) December 1984) (Lloyd's Maritime Law Newsletter, 28 March 1985), where reckless disregard of the probable causes of one's conduct, without the requirement of an intention to cause the loss of the vessel, was held to give rise to the wilful misconduct of the assured for the purposes of the Australian Marine Insurance Act 1909.

applied.⁵² Application of the *alter ego* test outside the ambit of an actual owning company, for instance within a management company acting as agent for the owner, is also possible⁵³ as the Pollution Conventions avoid the use of the term “personal” as used in the 1976 Limitation Convention.

The exclusion of loss caused by wilful misconduct is effectively an application of the *ex turpi causa* doctrine, to the effect that one cannot generally rely on one’s illegality in the pursuit of a legal claim, and is also enshrined in section 55 of the Marine Insurance Act 1906. However, this doctrine has its limitations, because insurance law does allow a claimant to make a claim in respect of his negligence as long as this is not tantamount to wilful misconduct. Furthermore, P & I Clubs routinely provide coverage in respect of the payment of some types of fines imposed on the entered shipowner.

Although wilful misconduct of an employee during the course of employment may well give rise to the vicarious responsibility of the owner, the owner may still be able to recover from his insurer if he himself, or his *alter ego* in the case of a company or corporation, is not himself/itself contributory to the loss. This view is supported by the wording of section 41 of the Marine Insurance Act 1906 which provides details about the implied warranty of legality. However, an interpretational difficulty still persists in relation to the exact meaning and parameters of the term “wilful misconduct,” which conveniently also can be found in a number of international transport law conventions as part of the trigger for the mechanism which can disentitle a carrier from the right of limitation of liability.

The effect of exonerating an insurer from liability in the case of wilful misconduct may have the possibly unintended effect of removing a remedy from a victim, at the same time that the wilful misconduct or similar conduct is blocking the right for limitation of liability for the shipowner. The potential unfairness of allowing an insurer to avoid liability to a third party victim in the case of deliberately caused damage, evident in the outcome in the road traffic insurance case decided by the Court of Appeal *Bristol Alliance Ltd*

⁵²See: *The Eurysthenes* [1977] QB 49; *The Star Sea* [2001] UKHL 1.

⁵³The search of the *alter ego* of a company may necessitate a search beyond the confines of that company itself. In the context of the wording of the now inapplicable section 503 of the Merchant Shipping Act 1894 (relating to limitation of liability), the search for the *alter ego* of a shipowning company went as far as a partner in a ship management company; in *The Charlotte*, it was held that the case of *Lennard’s v. Asiatic Petroleum* was authority for the proposition that when a ship is managed by a firm of two partners, there would be fault or privity of the owner if there is fault or privity of any of the two partners. It is strongly arguable that the same interpretation should be applicable to section 55 of the Marine Insurance Act 1906, to the effect that the application of the law cannot be avoided by the delegation of tasks by the assured, thereby effectively delegating its privity and consequent effects.

Partnership v. Williams,⁵⁴ is offset by the fact that in such a road traffic case a remedy is subsequently available from the Motor Insurers' Bureau.

D. P & I Clubs' Reluctance to Act as Guarantors under the United States Oil Pollution Act of 1990 (OPA 1990)

When the Oil Pollution Act of 1990⁵⁵ came into force in 1990, P & I Clubs registered their reluctance to participate as guarantors of ship owners. That Act provides that:

. . . any claim for which liability may be established under section 1002 may be asserted directly against any guarantor providing evidence of financial responsibility for a party responsible liable under that section for removal costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke (1) all rights and defences which would be available to the responsible party under this Act, (2) any defence authorised under subsection (e), and (3) the defence that the incident was caused by the wilful misconduct of the responsible party. The guarantor may not invoke any other defence that might be available in proceedings brought by the responsible party against the guarantor.⁵⁶

Besides nullifying the effect of the “pay first” rule, the above provision could also see the guarantor losing the right to limit liability. Such a prospect caused substantial concerns to P & I Clubs, which insisted that their role was one of insurers and not guarantors,⁵⁷ and that as guarantors, they could be faced with unlimited liability.⁵⁸ P & I Clubs expressed concern about the possibility of “unlimited horizontal liability.”⁵⁹ It was also said that it is possible that individual state statutes in the United States could repeatedly expose a P & I Club to liability for the same incident.⁶⁰ COFR⁶¹ guarantors, which currently provide financial security for the purposes of OPA 1990, are likewise exposed to the possibility of direct action.

⁵⁴2013 2 W.L.R. 1029 CA (Civ Div); Hemsworth, Margaret, *Insurance Obligations, the Road Traffic Act 1988*, 2013, *Journal of Business Law*, 354.

⁵⁵Public Law 101-380 (H.R. 1465. August 18 1990).

⁵⁶OPA 1990, §1016(f); USC Title 33 §2716(f).

⁵⁷See Alcantara, L.F., and Cox, M.A., *OPA Certificates of Financial Responsibility*, 23 *J. Mar. L. & Com.* 368 at 378.

⁵⁸See, in particular, the statement of R.L. Youell before the House Merchant Marine and Fisheries Subcommittee on Coast Guard and navigation, Nov. 6, 1991, pp. 3-4.

⁵⁹Alcantara, L.F., and Cox, M.A., *op.cit.* at fn. 57, p. 380.

⁶⁰See statement of R.L. Youell before the House Merchant Marine and Fisheries Subcommittee on Coast Guard and navigation, 6th November 1991, p. 6.

⁶¹Certificate of Financial Responsibility for the purposes of OPA 1990.

V

DIRECTIVE 2009/20/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 23 APRIL 2009 ON THE INSURANCE OF SHIP OWNERS FOR MARITIME CLAIMS

This Directive, implemented into English Law by the Merchant Shipping (Compulsory Insurance of Shipowners for Maritime Claims) Regulations 2012/2267,⁶² constitutes a very important milestone in the history of maritime law. As indicated earlier, there has existed a system of compulsory insurance in international law for a number of years for some pollution claims,⁶³ wreck removal expenses,⁶⁴ and also more recently in terms of the Maritime Labour Convention 2006. For the purposes of domestic English law, power is granted to the Secretary of State in the Merchant Shipping and Maritime Security Act 1997⁶⁵ to make regulations requiring insurance as specified in such regulations.⁶⁶

A purpose of the Directive is stated in paragraph 4 of the Preamble thereof, which states, in part:

The obligation to have insurance should make it possible to ensure better protection for victims. It should also help to eliminate substandard ships and make it possible to re-establish competition between operators.⁶⁷

This paragraph refers also to resolution A.898 (21) adopted by the IMO Assembly on 25 November 1999 entitled "Guidelines on Ship Owners' Responsibilities in Respect of Maritime Claims."⁶⁸ In the Resolution, the Assembly invited Member governments "to urge ship owners to comply with the Guidelines."⁶⁹ Paragraph 4.1 of the Guidelines provides that "ship owners should ensure that liability for relevant claims up to the limits set under Articles 6 and 7 of the Limitation Convention is covered by insurance." The Limitation Convention is defined in paragraph 1 of the Guidelines as the 1976 Limitation Convention including amendments in force internationally, and the relevant claims are those referred to in Article

⁶²Partially in force as from October 5 2012. The regulations make special provisions in relation to liability for delay.

⁶³CLC 1992, The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

⁶⁴The Nairobi International Convention on the Removal of Wrecks 2007.

⁶⁵1997 c. 28.

⁶⁶Section 192A; see The Merchant Shipping (Compulsory Insurance: Ships Receiving Trans-shipped Fish) Regulations 1998 (S.I. 1998 No. 209).

⁶⁷Preamble, paragraph (4).

⁶⁸IMO Documentation A21/Res.898 (4 February 2000).

⁶⁹Loc.cit., Preamble.

2(1) of the Limitation Convention, with the exception of cargo claims. Whilst the Guidelines constitute an exhortation in respect of owners of ships of 300 gross tonnage and above, other ship owners are also encouraged to the same effect.⁷⁰ These Guidelines probably expose a substantial part of what is wrong with the International Maritime Organisation, namely the occasional lack of will to provide binding international legislation in respect of matters which can be left for another day.

Whereas, at the level of the international maritime law the imposition of compulsory insurance across the board has been talked about but never taken very seriously,⁷¹ this European Directive, which required transposition into national law before 1 January 2012, imposes a requirement of insurance to cover maritime claims subject to limitation under the 1996 Limitation of Liability Convention,⁷² and the requirement of “the amount of insurance for each and every ship per incident shall be equal to the relevant maximum amount for the limitation of liability as laid down in the 1996 Convention.”⁷³ The Directive excludes application to ships below three hundred gross tonnage,⁷⁴ as well as to warships, auxiliary warships or other State owned or operated ships used for a non-commercial public service.⁷⁵

The claims referred to in the Directive are listed in Article 2 of the Limitation Convention, and whilst not covering every imaginable claim, include “claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom.” The compulsory insurance Directive is enforced through a system of flag state control,⁷⁶ and port-state con-

⁷⁰Loc. cit., paragraph 2.1.

⁷¹Resolution A.898 (21) of the International Maritime Organisation implored States to urge ship owners to be properly insured.

⁷²This is a reference to the “Consolidated Text of the 1976 Convention on Limitation of Liability for Maritime Claims,” as adopted by the International Maritime Organisation (IMO), as amended by the 1996 Protocol, (Directive 2009/20/EC, Article 3(c)).

⁷³Loc. cit., Article 4(3).

⁷⁴Some legal systems impose insurance on vessels with a tonnage lower than that in the directive. For instance, regulation 5(1) of the Small Ships Regulations (Subsidiary Legislation 499.52, Malta) provides: “No mechanically driven small ship shall be eligible to be registered unless it is in compliance with regulation 4 and there is in force in relation to such mechanically driven small ship a policy of insurance for an amount to be approved by the Authority which indemnifies such person, persons or classes of persons as may be authorised and covered by the policy against any liability which may be incurred by him or them in respect of death, injury or damage to third party property caused by, or arising out of, the use of the mechanically driven small ship.”

⁷⁵Loc. cit., Article 2 (1) and (2).

⁷⁶Loc. cit., Article 4(1).

trol.⁷⁷ It will however be difficult for a coastal state to impose a requirement of insurance on vessels exercising the right of innocent passage in terms of customary international law or the United Nations Convention on the Law of the Sea 1982.⁷⁸ The Directive is silent as to the legal position as to whether the obligation of a coastal state to provide refuge to a vessel in distress is overridden by the legal requirement of compulsory insurance in term S of the Directive.

Although the Directive provides for compulsory insurance in respect of a number of substantial claims, it fails to provide a right of direct action against the insurer for the victim of an incident. This is obviously a detrimental factor in relation to the allocation of risks and may prevent a victim from obtaining satisfactory compensation. It is notable that Article 3 (c) of the Directive provides an exemplar of the relevant insurance by referring to the “indemnity insurance of the type currently provided by the International Group of P & I Clubs.”

The Directive requires each member State to require that shipowners of ships flying its flag have insurance covering such ships, but the mechanism of claiming by the insured against the insured shipowner and the existence of the “pay first” rule may create a difficult recovery for the victim. Different legal systems apply different prescriptive periods or time-bars, and damage, for instance in respect of personal injury, may occur at a later point in time after an incident occurs. To this effect, one notices the wording in the CLC 1992 and the HNS Convention in relation to the operation of the time bar.⁷⁹ Unless the time-bar in respect of the claim of the shipowner against the liability insurer is adequately matched by the contractual time-bar in the insurance policy, the cover may be of no avail to a victim pursuing a long-tailed claim, such as an asbestos-induced personal injury. For instance, Rule 5 (O) of the UK Protection and Indemnity Club Rulebook renders recovery dependent on timely notification by the insured shipowner⁸⁰ and may be used by the liability insurer to strengthen a defence based on the “pay first rule.”

⁷⁷Loc. cit., Article 5. Article 5 of the Directive provides an enforcement mechanism based on port-state inspections, and in case of non-compliance, and without prejudice to the detention mechanisms on the basis of Directive 2009/16/EC [2009 Directive on Port state Control], “the competent authority may issue an expulsion order to the ship which shall be notified to the Commission, the other Member States and the flag state concerned.” Member States will refuse entry until compliance (*ibid.*).

⁷⁸UNCLOS 1982. It is notable that Article 4(3) of the Directive cautiously provides that Member States can enforce territorial water compliance if this is in conformity with international law (*loc. cit.*, Art. 4(2)).

⁷⁹See: CLC 1992 Article 8; HNS Convention Article 37.

⁸⁰The wording of Rule 5 (O) of the UK P & I Club Rules of 2013 provides as follows:

“Time bar: In the event that:

(i) an Owner fails to notify the Managers of any casualty, event or claim referred to in paragraph (N) (i) of this Rule within one year after he has knowledge thereof; or (ii) an Owner

VI**LIMITATION OF LIABILITY - IS ABOLITION ANYWHERE ON THE HORIZON?**

Limitation of liability in maritime law has been around for a very long time, and there is hardly any prospect of its abolition, at least under the auspices of the International Maritime Organisation. Maritime Law seems saddled with a small number of ancient relics besides limitation of liability: e.g. the law of general average,⁸¹ and the application of the law of bailment in carriage of goods by sea.⁸² Nevertheless, there have been sporadic instances of judicial *dicta* raising a degree of concern about the continuing viability of maritime limitation of liability,⁸³ including a strong statement made by Judge Kozinski in the U.S. 9th Circuit Court of Appeals.⁸⁴

However, one can envisage that maritime limitation of liability may well be open to challenge as a violation of Article 1 of the first protocol to the European Convention on Human Rights, which provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

A strong argument can be made to the effect that the main purported justification for maritime limitation of liability is the perceived necessity of encouragement of maritime business by states,⁸⁵ whether this is through the

fails to submit a claim to the Managers for reimbursement of any liabilities, costs or expenses within one year after discharging or settling the same; the Owner's claim against the Association shall be discharged and the Association shall be under no further liability in respect thereof unless the Directors in their discretion shall otherwise determine."

⁸¹See generally, Selmer, K.S., *The Survival of General Average*, Pitman, London, 1958.

⁸²See McMeel, G., *The Redundancy of Bailment*, 2003, LMCLQ 169.

⁸³See, for instance: *The Bramley Moore* [1963] 2 Lloyd's Rep. 429 at 437; *The Garden City No. 2* [1984] 2 Lloyd's Rep. 37 at 44.

⁸⁴*Esta Lataer Charterers v. Ignacio*, 875 F.2d 234, 235 (9th Cir. 1989) where Judge Kozinski made the following statement in relation to the 1851 Limitation Act: "Misshapen from the start, the subject of later incrustations, arthritic with age, the Limitation Act has 'provided the setting for judicial lawmaking seldom equalled'... Congress might be well advised to examine other approaches or to consider whether the rationale underlying the Liability Act continues to have vitality as we enter the last decade of the twentieth century."

⁸⁵See generally: Adler, A. G., *For Abolition or Liberalization of Present Limitation of Liability Statutes*, 1968 A.B.A. Sec. Ins. Negl. & Comp. L. Proc. 409 (1968); Lord Mustill, *Ships are Different – or are they?*,

easier availability of insurance or through an outright subsidisation (backed by national judicial enforcement) of the maritime industry at the expense of other interests. By definition, limitation of liability is intended to provide partial immunity from civil action to a shipowner, and the practical answer to any disquiet about the regime results either in an occasional amendment to increase such limits or, in the aftermath of the *Erika* spill,⁸⁶ the creation of a new top-up regime, namely the Supplementary Oil Pollution Compensation Fund through the coming into force of the 2003 Supplementary Fund Protocol.⁸⁷ It is very significant that the latter instrument went through in the wake of a European Union initiative to create a regional oil pollution compensation fund.⁸⁸

In effect therefore, the edifice of limitation of liability is regulatory in nature and would therefore fall within the ambit of control of Article 1 of protocol 1 of the European Convention on Human Rights.⁸⁹ It is quite reasonable to argue that a regulatory system which flouts the basic delict/tort principle of *restitutio in integrum* by partially divesting the maritime party from responsibility, extinguishes an otherwise existing right of action and by allocating responsibility to the victim without justification, which violates both the public interest and the proportionality principles central to the application of Article 1 of Protocol 1 of the European Convention on Human Rights. The argument is stronger where the claim against the shipowner is based on fault or negligence rather than one based on strict liability; however, it cannot be excluded in the latter cases where the shipowner's role includes liability on the basis of the perceived need of society to encourage and facilitate international trade. Businesses of all types already are the beneficiaries of the capping of exposure to liability via the corporate structure sanctioned by company law. Further enhancement of this benefit via maritime limitation of liability undoubtedly lacks justification.

The first general part of the above mentioned Article 1 of Protocol 1 would appear to be violated with the application of maritime limitation of liability. One may at this stage refer to the celebrated case of *Bramelid and*

1993, LMCLQ 490; D. Steel, Q.C., *Ships are Different: the Case for Limitation of Liability*, 1995 LMCLQ 77; Gauci, G., *Limitation of Liability in Maritime Law: an Anachronism?*, Marine Policy, Vol. 19, No. 1 (1995), pp. 65-74; Little, G., *The Hazardous and Noxious Substances Convention: a New Horizon in the Regulation of Marine Pollution*, LMCLQ 1998, 4 (Nov.), 554-567.

⁸⁶December 1999.

⁸⁷The 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992.

⁸⁸See Blackburn Elizabeth QC, *Civil Liability for Marine Pollution, Damage by Hazardous/Noxious Substances, Nuclear Incidents and Compensation*, Chapter 19 at p. 971-972 in Mandaraka-Sheppard, A., *Modern Maritime Law*, 2d edition, Routledge Cavendish, 2007.

⁸⁹See *Gladysheva v. Russia* – ECHR 7097/10 Judgment 6.12.2011.

Malmstrom v. Sweden,⁹⁰ where, in the context of the first part of article 1 of protocol 1 of the European Convention on Human Rights, the European Commission on Human Rights stated in its decision that “the Commission must nevertheless satisfy itself that, when making rules as to the effects on property of legal relations between individuals, the legislature does not create an imbalance between them which would result in one person arbitrarily and unjustly being deprived of his goods for the benefit of another.”

Furthermore, in the case of *Sovtransavto Holding v. Ukraine*,⁹¹ even though “there was no direct deprivation by the domestic authorities of the applicant company’s possessions and no interference comparable to such a deprivation,” the European Court of Human Rights found that there was a violation of Article 1 of protocol 1 of the European Convention on Human Rights. This author is of the opinion that it is only a matter of time before limitation of liability is consigned to maritime history. In this respect, it is notable that developments in state, as distinct from federal United States law, have made inroads into the eventual abolition of limitation of liability in the field of compensation for ship source oil pollution damage.⁹² In addition, at the federal level, an attempt was made in the so-called *Oberstar Bill*⁹³ drafted in the wake of the *Deepwater Horizon* oil spill to remove the \$75 million limitation of liability cap under the Oil Pollution Act of 1990 in respect of offshore facilities. The shipping industry was however given a reprieve⁹⁴ and the bill unfortunately was not enacted.⁹⁵

VII CONCLUSION

Compulsory insurance *per se* is unlikely to provide a complete solution such as to constitute *restitutio in integrum*, although, to some extent, it may well reduce the immediate costs consequent to an accident which are borne

⁹⁰(1983) 5 E.H.R.R. 249, 12 October 1982.

⁹¹(Application no. 48553/99) Judgment, Strasbourg, 25 July 2002 06/11/2002.

⁹²See, generally, Gauci, G., *Oil Pollution from Ships – Civil Liability and Compensation for Damage*, John Wiley and Sons, Chichester 1997, at. 173.

⁹³Oil Spill Accountability and Environmental Protection draft bill (H.R. 5629 (111th)); the preamble to this bill (sponsored by Rep. James Oberstar) describes the aim of the bill as being: “To ensure full recovery from responsible parties of damages for physical and economic injuries, adverse effects on the environment, and clean-up of oil spill pollution, to improve the safety of vessels and pipelines supporting offshore oil drilling, to ensure that there are adequate response plans to prevent environmental damage from oil spills, and for other purposes.”

⁹⁴See: Joshi, R., *Shipping Sidesteps Unlimited Liability, but for How Long?* Lloyd’s List 12 July 2010; Joshi, R., *Shipping awaits vote on US Oil Spill Bill*, Lloyd’s List, 28 July 2010.

⁹⁵<http://www.govtrack.us/congress/bills/111/hr5629>, (accessed on 8th October 2013).

by society. Indeed, this point is tacitly accepted in the existing Conventions providing for compensation for pollution damage. The creation of an international fund, which in the ship-source oil pollution sphere can exist over and above, or as a supplement to, the protection of a claim through compulsory insurance, has been well utilised. This is the case in terms of the International Oil Pollution Compensation Funds of 1971 and 1992, the IOPC Supplementary Fund of 2003⁹⁶ and the still to be created HNS Fund. However, all these funds are protected by a limitation or capping of liability.

There are various reasons to justify the necessity of an international maritime fund as an insurer of last resort for claims subject to limitation of liability. The first reason would be that, however effective the enforcement of a compulsory insurance regime, there is always the possibility that an uninsured or an inadequately insured vessel will slip through the net. Second, as the liability of the insured is almost always going to be limited, a victim may well fail to achieve full compensation. Third, in the unlikely eventuality that an insured loses the right to limit liability, the insurer will in all probability, at least in English law, enforce a contractual or statutory capping on his liability. In the latter eventuality, even though a theoretical right of action to pursue *restitutio in integrum* against the insured shipowner exists, this avenue may not be worth pursuing in practice. Fourth, in the English system, there are the difficulties associated with the uneasy relationship between the right of direct action and the “pay first” rule.

It is suggested that, *de lege ferenda*, it may well be worthwhile pursuing at the international level, possibly under the auspices of the IMO, the setting up of a similar scheme to help victims of shipping incidents in their quest for full compensation. There are various options for the financing of such fund, including contributions from the major shipping liability insurers.

However, the ultimate solution will involve the abolition of limitation of liability, an imposition of compulsory insurance well beyond the ambit of application of the European Directive on the same matter, and by the imposition, where possible, of a regime of strict, rather than negligence/fault-based, liability. A Fund administered by the International Maritime Organisation should not be designated simply as a top-up system, but also as an insurance of very last resort. The question, however, remains as to whether this can be achieved at an international level in the foreseeable future.

⁹⁶See: www.iopcfunds.org.