Implementation of the International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) (the "Bunkers Convention")

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Introduction

The Bunkers Convention entered into force on 21 November 2008, some seven and a half years after its adoption by the International Maritime Organization (IMO) at a diplomatic conference in March 2001. The Convention, which is modelled on the International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC), 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.

A number of incidents involving spills from ships bunkers occurred in the 1990s where cost recovery proved difficult or indeed impossible. Examples in UK waters include the *CITA* (3038 GT), the *SONIA* (4659 gt), the *BORODINSKOYE POLYE* (3983 gt) and the *LUNOHODS -1* (2774 gt) incidents, all of which resulted in costs incurred by the UK authorities arising from pollution damage from the ships bunker oil. In respect of three of these incidents, the ships had no liability insurance cover in place at all. In the other incident – the *CITA* – the legal/practical difficulties which the UK authorities faced made it uneconomic to pursue the claims against the shipowner in the absence of effective financial security and proper access to that security, and therefore the UK Government eventually abandoned its recovery of the costs incurred. In what can be considered a rarity in terms of the content of the submission of papers to the IMO Legal Committee (LEG), the UK submitted a detailed document to the 77th session of LEG in April 1998 setting out just how difficult it was for the State to pursue its cost recovery against the *CITA* with the conclusion that the incident demonstrated that there was *"an urgent need for an international requirement for shipowners to have effective financial security to meet their liabilities to innocent third parties and that claimants must have proper access to this security."*

These incidents, amongst others, coupled with the potentially far reaching consequences to the marine environment of a spill from ships' bunkers together with the success of the 1969 and 1992 CLC, led to the development of the Bunkers Convention, which was seen by the IMO as a necessary and integral component of a framework of international maritime liability and compensation regimes[1].

It is not the intention of this paper to examine the key provisions of the Convention in detail, rather to analyse the practical effect of the application of the Convention for the current

[1] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS), the Nairobi International Convention on the Removal of Wrecks, 2007 (WRC), the Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (Athens), the 1992 CLC and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPCF) and the Bunkers Convention.

signatory State parties on vessels entered on their ship registries and those calling at their ports, and to consider the uniform application of the Convention and the burden that it imposes on States parties, owners and providers of financial security through the incorporated Flag State certification regime.

Effect of the Entry Into Force of the Convention – Insurance/Provision of Financial Security

In accordance with the provisions of the Convention, the registered owner of any ship having a tonnage greater than 1000gt and registered in a State party is required to maintain insurance or other financial security, which in the majority of cases will be obtained through a P&I provider, to cover their liability for pollution damage in an amount equal to the applicable national or international limitation regime, but in all cases not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims 1976, as amended. The registered owner is required to obtain a State issued certificate issued by a State attesting that cover is in place that meets the requirements of the Convention.

As of 7 April 2009, the Convention is in force in 38 States (not including the UK overseas territories and crown dependencies of Bermuda, the Isle of Man and Gibraltar). On the date of entry into force of the Convention there were 27 States parties, with 11 States ratifying or acceding since then. The total number of current States parties now represents approximately 76% of the world's merchant shipping (according to the IMO).

The objective of developing liability and compensation regimes at the international level is to ensure legal certainty and uniform, harmonised international rules and procedures. Shipping is an international business and as such should be regulated and legislated for at the international level in order to provide such uniformity, certainty and a level playing field for those engaged in maritime transportation. Can the ratification/accession of the Convention by 38 States representing 76% of the world's merchant shipping almost eight years after its adoption be seen as meeting this objective and what do these figures tell us in terms of the extent of application of the Convention worldwide?

Firstly, the figure of 76% of the world's merchant shipping governed by the provisions of the Convention may seem slightly disproportionate to the total number of current State parties. This arises from the fact that the majority of the largest ship registries by number of registered vessels have now ratified or acceded to the Convention, including Panama, Liberia, China, Russia, Singapore, and Bahamas. Secondly, although the Convention has been ratified by States with which 76% of the world's merchant shipping is registered, the financial security provisions of the Convention will only apply to a lower percentage of the world's shipping since these provisions are only applicable to ships with a gross tonnage greater than 1000gt. All vessels below this tonnage threshold do not therefore fall within the scope of the insurance provisions of the Convention.

The fact that the Convention and the incorporated insurance requirements only entered into force in November last year does not signify that those vessels to which the Convention applies

were trading without such cover in place before this date. Liability cover for pollution damage, including liability arising from ships' bunkers is, and has been, part of the standard Protection & Indemnity (P&I) cover provided by member P&I Clubs, members of the International Group (IG). Given that the IG Clubs cover approximately 90% of the world's ocean going tonnage, and approximately 60% by number of ocean-going vessels, and that there are a number of P&I providers that are not member Associations of the IG that provide such cover, it would be incorrect to deduce that the entry into force of the mandatory insurance requirements of the Convention has suddenly forced vessels now trading to obtain insurance or other financial security which they previously did not have to meet liabilities for pollution from bunker spills.

The IG Clubs will continue to provide liability cover for pollution damage arising from ships bunkers irrespective of whether their shipowner members' vessels are registered in a State party to the Bunkers Convention or a non-State party or are trading to or from a State party or a non-State party. Simply because 76% of the world's merchant shipping is registered in States parties does not therefore necessarily mean that 24% of the tonnage is operating without such liability cover.

It is also important to take into account that there are a number of jurisdictions that have their own domestic statutory compulsory insurance regime in place in respect of liability for pollution damage for vessels calling at their ports. Japan is probably the most notable amongst those States that are not a party to the Convention. Japan requires non-tank vessels that are 100gt or greater to maintain financial security to cover damage caused by bunker oil pollution (and wreck removal) and that such cover should be evidenced by a certificate of insurance carried on board the vessel issued by an insurer or other provider of financial security approved by the Japanese administration.

It is important to note that although the Bunkers Convention requirements currently cover 76% of the world's merchant shipping tonnage, as already noted, only 38 coastal States across the world are State parties and therefore require vessels entering their ports to have the insurance cover or other financial security in place to meet the Convention requirements and have the comprehensive implementing legislation in place that will allow for cost recovery through strict liability of the owner and direct action against the insurer or provider of financial security. On the one hand, since a number of the world's major trading nations are State parties, the great majority of IG entered vessels greater than 1000gt have been issued with Bunkers blue cards and on reliance on these, States have issued the certificates required under the Convention. On the other hand, one may consider this figure as relatively low given that it is now 8 years since the Convention was adopted. There are 39 coastal States alone in the African continent, and yet only Ethiopia out of these 39 has ratified or acceded to the Convention. Moreover, Australia as one of the largest coastal States in the world and the lead State in the IMO LEG in the development of the Convention may, in hindsight, wish they had ratified the Convention earlier given the *Pacific Adventurer* incident that occurred off the Queensland coast earlier this year.

So, it would be easy to misinterpret the scope of application and the effect of the current state of play in terms of the number of State parties and application of the Convention to the majority of

the world's merchant shipping. For the reasons mentioned above one should not be misled into over-estimating the effect of the implementation of the Convention in 38 Member States worldwide. Nonetheless, the figure of 38 State parties can also be seen in a positive light given that the only other liability and compensation regime adopted by the IMO that is currently in force is the CLC/Fund regime that applies to the carriage of persistent oil by sea, with the HNS and Wreck Removal Conventions either in the process of being amended or awaiting the necessary ratifications to bring them into force. Industry continues to support the world wide application and implementation of the Convention for the reasons already mentioned in terms of shipping being an international business that should be regulated at the international level and it is hoped that the total number of States parties increases in the near future across the world, and not just predominantly amongst European and Asian States.

Uniform Implementation of the Convention?

As already noted, the objective of developing the Convention at the international level was to ensure uniform, harmonised international rules and procedures and to provide a level playing field for those parties. To some extent this has been achieved amongst the State parties in terms of the application of the general insurance and liability provisions. However, on a more macro level it is clear that there remains a need for a common understanding and a harmonised approach to a wide range of practical issues in connection with implementation of the Convention and particularly with regard to the issuance of certificates. In this context it is worth noting that interested States and industry parties met in January 2009 at the IMO less than two months after the entry into force of the Convention, following a request from a small number of interested States to seek clarification on the obligations imposed on States, shipowners and the providers of financial security under the Convention. The report of this meeting, including the issues raised for discussion, issues where consensus was found and issues where further discussions would be useful was considered by the 95th IMO LEG session in early spring this year with a proposal to establish a Correspondence Group (CG) of interested parties. This proposal was agreed by the LEG meeting with the end objective of providing a final report to the 97th IMO LEG meeting in October 2010.

The very fact that this CG has been established to provide harmonized implementation of the Convention goes some way in itself to answering the question: to what extent does uniformity and harmonisation in implementation and application of the Convention actually extend to the procedures adopted by the State parties to fulfil their obligations under the Convention?

Clearly with regard to some issues the answer is "not very far". The specific issues which have been highlighted for further discussion by the IMO CG include:

- the interface between the 1992 CLC and the Bunkers Convention
- the link between the insurance requirements and the right to limit liability in accordance with LLMC
- the issuance of Bunkers certificates to new buildings

- the procedure for accepting P&I Clubs outside the International Group of P&I Associations and other financial providers

with the remit that any additional issues in relation to implementation of the Convention may be considered.

It is not the intention of this paper to go into detail on each of these issues. However, to give an idea of the lack of uniformity that exists in one important area, there remains a significant divergence of views amongst State parties as to whether a tanker carrying persistent oil and governed by the CLC regime is required to maintain a certificate on board issued by a State party to the Bunkers Convention attesting that insurance or other financial security is in place under that Convention as well as a certificate issued by a State party to the CLC attesting that insurance is in place under that regime. It is assumed that this divergence of views is reflected in the differences that exist in the Bunkers Convention implementing legislation of the State parties, based on the interpretation of the two Conventions by the administrations concerned.

On the one hand there is the view, which can be described as the view of the majority of the States parties as well as industry, that all CLC tankers are required to maintain a Bunkers certificate as well as a CLC certificate on board since there is no exclusion under the Bunkers Convention for CLC tankers from carrying such a certificate and, although pollution damage from the bunkers of a CLC tanker would be governed by the CLC, there may be a point in time during any one year when a tanker falls outside the scope of the CLC regime because it is operating in ballast and has no cargo of persistent oil or residues of the previous cargo on board. At such a point in time the pollution damage arising from a CLC tanker's bunkers in the event of an incident would be governed by the Bunkers Convention and not the CLC and the tanker would therefore need to be in possession of a Bunkers certificate as well as a CLC certificate.

On the other hand, there is a smaller number of States parties that do not or will not require the carriage of a Bunkers Certificate by tankers that have a CLC certificate on board on the basis that, amongst other considerations, it is unlikely that a CLC tanker will at any point during the year not be carrying a cargo of persistent oil or have residues of the previous cargo of persistent oil on board. However, these States have taken the position that, since they are aware that the majority of States parties do require CLC tankers to have both certificates on board, they will issue their registered owners of CLC tankers trading to foreign ports with the Bunkers certificates *on request*.

This may seem like a rather trivial difference of opinions over a matter of interpretation of two international treaties, but the consequences can potentially be significant in financial and operational terms since the UK, amongst other State parties, publicly stated at the 95th LEG session that Port State Control inspectors in UK ports will detain any CLC tanker entering a UK port that is not in possession of a Bunkers Convention certificate as well as a CLC certificate. Whilst this could in some circumstances create some confusion for the owners of CLC tankers, the IG Clubs have issued Bunkers Convention blue cards to all entered CLC tanker members and informed them that they will need to obtain a Bunkers Convention certificate as well as a CLC certificate if trading to or from a Bunkers State party.

It may be somewhat surprising that such a divergence of opinion on an issue such as the application of the Convention to tankers carrying persistent oil still exists some eight years after the Convention was adopted; some 13 years after the 1992 CLC entered into force, and also after a full consideration by the IMO Legal Committee in the early stages of development of the Bunkers Convention as to whether the instrument to govern liability and compensation arising from a bunker spill should be a free standing instrument or a Protocol to the 1992 CLC.

On the other hand, international treaties are open to interpretation by both the regulators and the courts, and we should not be surprised that different views on the treaty text exist considering the relatively small number of delegates that have been involved in the implementation process that were also either involved in the development of the Convention in the IMO in the run up to the 2001 diplomatic conference or attended the diplomatic conference itself. It should also be borne in mind that the IMO no longer prepares and publishes Official Records of IMO diplomatic conferences that have in the past recorded in great detail the papers submitted to, the discussions that take place at and the outcomes of IMO diplomatic conferences. Although these records were published by the IMO and existed for previous diplomatic conferences at which IMO liability and compensation regimes were adopted, this practice was unfortunately discontinued by the IMO before the 2001 Bunkers Convention conference.

Flag State certification

One of the key features of the Convention, as already referred to in this paper, is the Flag State certification regime which reflects similar regimes contained in the 1992 CLC and the HNS Convention, WRC and Athens Convention.

In the discussions prior to, and also at, the diplomatic conference in 2001 the IG stated that the experience of IG Clubs in relation to the provision of CLC certificates for tankers, pointed inescapably to the conclusion that the provision of State issued certificates for a vastly greater number of vessels than was the case under the CLC would be an enormous undertaking, not only for insurers, but also for States and against this background it was suggested that States revisit the question of whether the marginal benefit conferred by the issuance of a State certificate was disproportionate to the huge administrative burden that would be incurred. The IG Clubs stated that the policy objectives of States could be met as effectively by requiring that vessels carry on board Certificates of Entry demonstrating that the vessel had liability cover in place and was entered in an acceptable P&I Club - as recommended in the agreed IMO Guidelines contained in IMO Assembly Resolution .898 (21).

In the event that States were not prepared to accept this practical solution, the IG Clubs proposed that some attempt should be made to limit the administrative burden by imposing a high tonnage threshold on the compulsory insurance requirements of the draft instrument and that although there were exceptions, coastal and fishing vessels could generally be adequately regulated by coastal authorities, States could consider that further enquiry be made with respect

to ocean-going vessels calling at their ports. It was therefore proposed by the IG that the threshold for insurance purposes be set at 2,000 gt or even 5,000 gt as had also been suggested by Hong Kong China at the 82nd session LEG in 2000. It should be noted that this proposal related only to the provisions on compulsory insurance: vessels below 2,000 gt or 5,000 gt would still be subject to the liability provisions of the Convention.

In the event, the compromise reached by the diplomatic conference included a flag state certification regime with the insurance provisions applicable to vessels greater than 1000gt, and that this tonnage figure along with the possibility for a State to exempt from the insurance obligations vessels engaged in purely domestic voyages would have the effect of reducing the anticipated administrative burden. Concerns with the administrative burden of issuing certificates also played a role in the adoption of the relatively high number of ratifying/acceding States required, at least for IMO liability and compensation regimes, in order to bring the Convention into force. This was set at 18 States including 5 States each with ships whose combined gross tonnage is not less than 1 million.

Were the concerns expressed by the IG on the inclusion of a Flag State certification regime and an insurance and certification threshold set at 1000gt or greater justified following the experienced gained post entry into force of the Convention?

According to latest statistics, there are approximately 41,000 ships trading in the world fleet that have a gross tonnage greater than 1,000gt. Not all of these ships are registered in a Bunkers Convention State party or are trading to or from a State party. However, given that every ship greater than 1,000gt that was registered in a State party or trading to or from a State party needed a State certificate at the time of the entry into force of the Convention on 21 November 2008 and a new certificate again just three months later when the new P&I policy year commenced on 20 February 2009, a significant proportion of the above mentioned 41,000 ships will have been issued with two blue cards and two State certificates within the space of three months in order to meet the Convention requirements.

From the perspective of the States it is important to note that the issuance of the State certificates is of course not evenly distributed amongst the States parties. Whilst each State party will issue the vessels on its registry with the necessary certificates, assuming they have not already obtained one from another State party if the Convention only entered into force in that State after the entry into force date of the Convention, there has been the vexed question of which States parties would issue the certificates to vessels registered in non-State parties.

Indeed, until August 2008 (only 4 months away from the entry into force of the Convention) and despite two submissions by the IG to the member States of the 1992 IOPC Fund at their March and June meetings in 2008[2] on this very issue, no State party had agreed to issue certificates to such vessels. Given that the certificates are effectively a license to trade, bearing in mind the consequences as already described in respect of the UK's port state control procedures if a vessel

[2] 92FUND/EXC.40/10 and 92FUND/A/ES.13/8

entered a UK port without possession of such a certificate, if this position had been maintained by State parties upon entry into force of the Convention the risk of significant disruption to world trade with the possibility that such vessels could only operate subject to important geographical limitations was a real one.

Whilst it was understandable that no single State party wished to take on the considerable administrative burden of issuing certificates to the portion of the world's fleet that was registered in non-State parties but would need a certificate on account of its trade to or from the port of a State party, clearly this was a scenario that all interested parties wished to avoid.

With this obviously in mind, and following a significant degree of dialogue between the IG and some key States parties, the subsequent decision in the immediate run up to the entry into force of the Convention by the United Kingdom, Liberia, Cyprus and the Cook Islands to agree to issue certificates to non-State party registered vessels, even though it meant that they had to deal with the bulk of the issuance of State certificates amongst the State parties, was very much welcomed.

Mutual Recognition of Certificates

As is the case under the CLC, certificates issued by the authority of a State party under the Convention are required to be recognised and accepted by the authority of another State party i.e. mutual recognition of certificates by State parties. A State party may at any time request consultation with the issuing State should it believe that the insurer or provider of financial security named in the certificate is not financially capable of meeting the obligations imposed by the Convention, but it may not refuse entry to the ports of that State if it is possession of a Convention certificate issued by the authority of another State party. Provided that the cover satisfies the requirements of the Convention, it does however remain within the discretion of the issuing State party to determine the conditions of issue and validity of the certificate, which would include determining the financial standing of the insurer or provider of financial security.

Whilst one State party may be prepared to accept a "blue card" issued to a vessel by a particular provider of financial security, it is within the discretion of another State party to refuse to accept such a blue card due to concerns about the financial viability of the provider of financial security. In such a scenario, even though a State party may have refused to issue a Convention certificate in the name of a particular vessel because of such concerns, that vessel cannot be refused entry to the ports of that State party if it is in possession of a certificate issued by another State party that has been prepared to accept a "blue card" issued by the same financial provider.

Whilst the objective of flag state certification is to ensure by way of State attestation that the financial security maintained by the shipowner is reliable, one can appreciate that the effect of the mutual recognition of certificates procedure could detract from this objective since there is no requirement on States to apply common standards when vetting providers of financial security. It does appear that some State parties apply more rigorous standards in relation to the providers of financial security than other States parties, which has resulted in owner's obtaining a

Convention certificate from one State party after having been refused a certificate by another State party.

Indeed, the UK Government informed a number of IMO Member States and industry associations in correspondence on the work to develop a single Convention insurance certificate that "*as a point of principle, we [the UK] dislike reciprocal recognition of certificates…… shipowners and/or insurers who could not obtain a UK certificate on the grounds that we refused such certificates for reasons linked to the underlying insurance simply applied elsewhere and certificates were subsequently granted by other administrations. We (State Parties) are now compelled to accept those certificates. That, it seems to us, discredits the system*."

Conclusion

The flag state certification regime incorporated in the Bunkers Convention imposes a considerable administrative burden on both States and financial providers. The benefits of flag state certification when weighed against this burden may be questionable bearing in mind the mutual recognition of certificates requirements without the imposition of common standards when vetting financial providers. It is highly unlikely however that States will be prepared to accept that this provides sufficient justification, or that ample time has passed, to consider the development of an alternative system either in the context of an amendment to the Bunkers Convention or to the other IMO adopted liability and compensation regimes that contain similar certification regimes and that are yet to enter into force. Moreover, I am not aware of any instance when the financial provider has failed to respond under CLC when a legal liability has been established.

The entry into force of the Convention is welcomed though and is a positive step towards the implementation of the IMO framework of international maritime liability and compensation regimes. Whilst this paper has focused on some of the weaknesses of the Convention, it is inevitable that the Convention has both strengths and weaknesses given that the adoption of international treaties are often the result of complex comprise agreements reached by different parties with their own, often divergent, interests. The Bunkers Convention is no different in this respect.

However, if the objectives of developing the Bunkers Convention are to be met then there is clearly a need for a wider application of the Convention worldwide in terms of the number of State parties and also a common understanding amongst States on key issues that are currently the subject of discussion within the IMO, some of which I have referred to in this paper. This is important not just in the context of the Bunkers Convention but also in respect of the implementation of the other IMO liability and compensation regimes yet to enter into force – Athens, Wreck Removal and HNS Conventions - since a number of the same issues are applicable to these regimes as well. It is important that the lessons learnt by both States and industry in the implementation and application of the provisions of the Bunkers Convention are applied to these instruments <u>prior</u> to their entry into force in order to ensure a smooth and efficient implementation process.