

REPORT ON THE LEGAL FRAMEWORK FOR CIVIL LIABILITY FOR VESSEL SOURCE OIL SPILLS IN POLAR REGIONS¹

1. Executive summary

The legal infrastructure in the Arctic is very good in the sense that the coastal states have in place legislation that deals with pollution, liability, calculation of losses, responsible parties and funding.

The vastness of the area is a great challenge from a response perspective and it appears that currently there is a lack of adequate response resources and infrastructure to meet a severe spill.

A difference of opinion exists as to whether a major oil spill may reveal the need for considering the current regulation of “pollution damage” in the CLC 1992 Convention in terms of what measures are “reasonable” and as regards impairment of the environment.

There are also dissenting views as regards the possibility that a major oil spill will stress the monetary limits of the CLC and Fund Convention regime although the Supplementary Fund may be sufficient in most instances.

It is an open question how the requirement that environmental reinstatement cost must be reasonable – in the context of the CLC and Fund Convention regime – will be applied by courts in the relevant coastal states and the International Oil Pollution Compensation Fund (“IOPCF”) to such reinstatement attempts in the special Arctic environment. Clarification of the recoverability of reinstatement costs under the CLC and Fund Convention regime would thus assist the coastal States.

¹ Prepared by certain members of the CMI Polar Shipping Working Group and by the persons mentioned in the report. Organised, compiled and edited by Lars Rosenberg Overby.

Russia would benefit from participating in the Supplementary Fund Protocol to the Fund Convention 1992 should a major oil pollution occur. So would Iceland.

There is a gap with respect to the High Seas in the Arctic but this is not problematic at the moment. In time, the issue should be addressed in the interest of the International community though.

The Antarctica is exposed to legal uncertainty in the event that a pollution incident occurs until the liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty is ratified. Therefore, it is specifically recommended that the Antarctic Treaty Protocol States ratify the Liability Annex described in section 7 above.

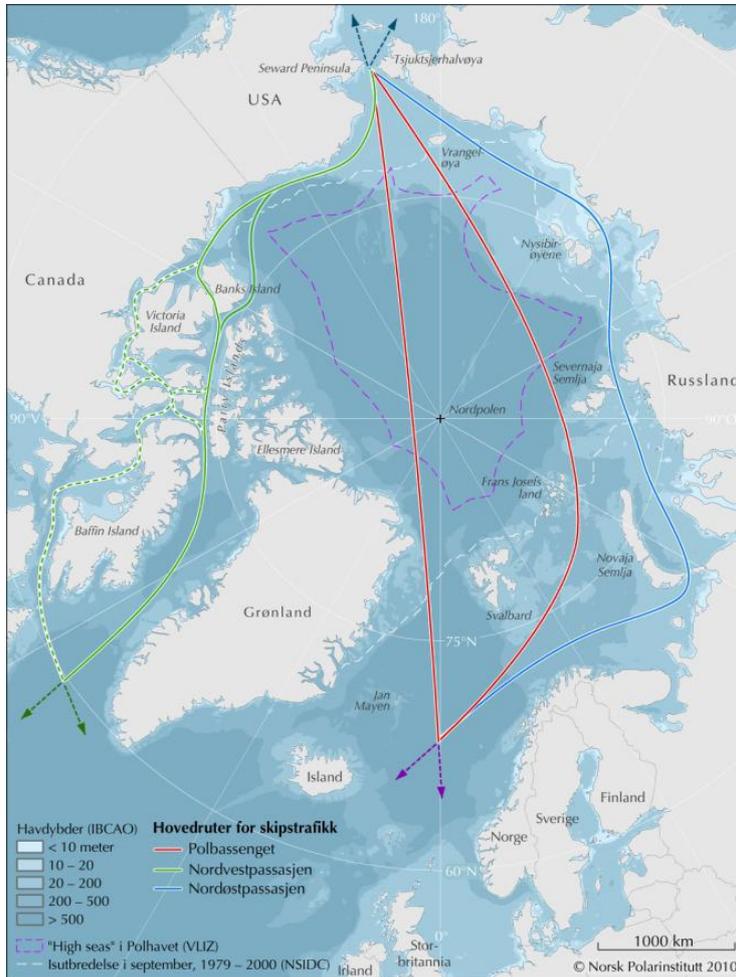
2. Background

The Comité Maritime International (CMI)'s International Working Group (IWG) on Polar Shipping agreed at CMI Hamburg (17 June 2014) that a working paper should be developed regarding how the existing pollution liability regimes² and adjacent relevant Conventions actually apply (or do not apply) to the Polar Regions. The scope of the work was to be in respect of oil spills from all vessels (i.e., not simply tankers) such that the working paper would not extend to exploration and production or pipelines, etc.

The figure below provides impressions of the actual or potential international shipping routes in the Arctic. At this time, the most active international shipping route is the Northern Sea Route through Russian Federation waters, followed by the Northwest Passage mostly through Canadian waters. The routes are navigated during the summer season. The transpolar route across the North Pole is not feasible at this time, but that may change in the future.

² The National marine pollution legislation and International Conventions

Figure 1: International Navigation Routes in the Arctic



Source: Norsk Polarinstitutt

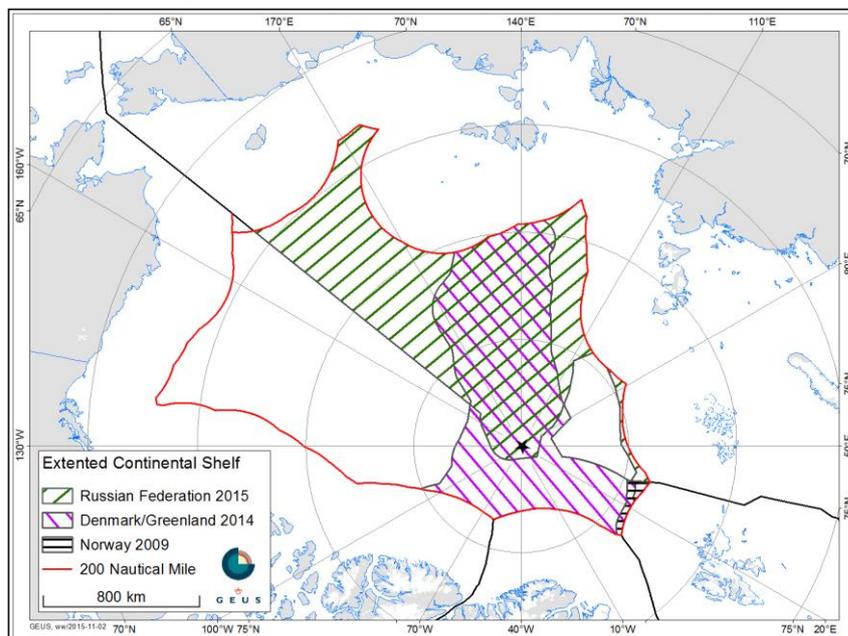
3. Introduction and scope

This report is a study of the issues that can be expected to arise, including with regard to claims for compensation for preventative measures and pollution damage in a polar context, the impact of the likely high costs of response measures in the Polar Regions, the limited capability to respond to oil spills, the limited options for disposal of recovered oil, etc. Also, the question of reasonableness of measures within the CLC 1992 and IOPC Funds framework will be discussed.

The report explores these issues by describing the international regimes for compensation, limitation and liability with reference to the Polar context, and applicable national law with regard to environmental protection, emergency response and liability applicable to Polar Regions. Further, the report explores any potential gaps that may exist with regard to compensation and liability regimes in the event of pollution damage and the resources needed to respond to such an event in these remote regions.

Figure 2 describes the maritime zones under national jurisdiction in the Arctic. The 200 nautical mile limit includes the territorial seas and Exclusive Economic Zones (“EEZ”) declared in the region by Canada, Denmark (Greenland), Norway, Russian Federation and the United States. Beyond the limits of the EEZ, these Arctic Ocean coastal States are entitled to make submissions to define the outer limits of their continental margins to the Commission on the Limits of the Continental Shelf by virtue of Article 76 of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). Norway is the first State to receive recommendations from the Commission that will enable it to define the outer limits. The Russian Federation was the first to make a submission and recently made a revised submission. Denmark has made a partial submission. Neither Denmark nor the Russian Federation have received recommendations to enable definition of outer limits. Canada is expected to make its submission in the near future. It is expected that the USA (a non-party to UNCLOS) will claim entitlement to the continental shelf in the Arctic on the basis of customary international law, but it is unclear whether it will benefit from the procedure established in UNCLOS to enable it to determine the outer limits the continental shelf. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas. UNCLOS protects the right of international navigation through the territorial seas, straits used for international navigation, EEZs and high seas of the Arctic.

Figure 2: Current and Potential National Maritime Jurisdiction Limits in the Arctic



Source: GEUS

4. Structure of the report

Section 5: Overview of Conventions:

- UNCLOS

- CLC 1992
- Fund Convention overview
- Intervention Convention
- Oil Pollution Preparedness and Co-operation Convention
- Bunker Convention
- HNS Convention
- LLMC 1996

Section 6: National oil pollution regimes and environmental laws

- Greenland (Denmark)
- Canada
- USA
- Norway
- Russia

Section 7: Antarctic waters

Section 8: Non-regulated geographical areas

Section 9: The Polar Code

Section 10: Emergency preparedness and response measures

Section 11: Discussion

Section 12: Conclusions and recommendations

5. Overview of Conventions³

5.1 UNCLOS⁴

The UNCLOS has been described as the “constitution” for the world’s oceans. Accordingly, it has a very wide scope, providing a framework for the application of the international maritime conventions and customary law. The Convention applies a so-called zonal approach under which the marine areas within national jurisdiction are divided in different parts: internal waters; archipelagic waters; the territorial sea; the EEZ; and the continental shelf. Rights and obligations depend on the zone at stake. The international community enjoys rights of innocent passage, archipelagic sea lanes passage, transit passage (through straits used for international navigation), and freedom of navigation. The exercise of international navigation rights is accompanied by the duty to protect the marine environment. A coastal state can establish an EEZ up to 200 NM where, in addition to resource rights, it has a general duty to protect the marine environment. Furthermore, UNCLOS provides for the global commons, namely high sea areas and the international seabed area.

³ Contributed by Kiran Khosla, International Chamber of Shipping, Lars Rosenberg Overby, Hafnia Law Firm and Nigel H. Frawley and Professor Aldo Chircop, University of Dalhousie

⁴ United Nations Convention on the Law of the Sea (1982)

Article 234 is particularly relevant to the Arctic region because it provides coastal States with an exceptional power not enjoyed by States in other marine regions. It provides that coastal States bordering ice-covered waters have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the EEZ, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment. The Article 234 power is subject to "due regard" to international navigation considerations and its exercise must be non-discriminatory and on the basis of the best available scientific evidence.

Article 234 contains ambiguities, such as whether its application "within the limits" of the EEZ includes the territorial sea and, if so, what relationship there is between this power and the rights of innocent and transit passage.⁵

5.2 CLC 1992⁶

The scope of the CLC 1992 is actual or threatening oil pollution by persistent oil from tankers in the national territory and EEZ of the State parties⁷. "Persistent oil" refers to hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil. Damage caused by non-persistent oil, such as gasoline, light diesel oil, kerosene or liquefied natural gas (LNG) and liquefied petroleum gas (LPG) is not covered by the CLC 1992.

In geographical terms, the regime covers pollution damage in the coastal waters including territorial sea and waters up to 200 NM from the coastline of the participating States and preventive measures, wherever taken, to prevent or minimize such damage. It is hence not necessary for the coastal State to establish an EEZ to be covered by the regime, but the zone must be determined "in accordance with international law".

All areas of the Arctic where shipping takes place will normally⁸ be covered by the CLC 1992. Also, the Convention is relevant to adjacent areas beyond the 200 NM zone if oil is spilled there and threatens areas within the 200 NM zone.

The Convention provides for strict liability on the part of the registered owner of the tanker to pay compensation for "pollution damage"⁹. The liability only applies

⁵ Bartenstein: The "Arctic Exception" in the Law of the Sea Convention: A contribution to safer Navigation in the Northwest Passage, *Ocean Development & International Law* Vol. 42:1-2 (2011) and a and Chircop: "The Growth of International Shipping in the Arctic: Is a regulatory Review Timely?", 24 *The International Journal of Marine and Coastal Law*, 2009 at page 372.

⁶ The International Convention on Civil Liability for Oil Pollution Damage, 1969 and 1992 Protocol

⁷ Article II; i.e. basically the area within 200 NM from the coast line.

⁸ An exception could be certain areas near Svalbard, which Norway has given status as "fishery protection zone".

⁹ Article III, 1.

to losses due to damage (or threat of same) outside the tanker caused by contamination by oil from the tanker¹⁰. "Pollution damage" is defined in article I. 6 and means:

- (a) *loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;*
- (b) *the costs of preventive measures and further loss or damage caused by preventive measures.*

The definition of "pollution damage" also encompasses what is often referred to as "pure environmental damage" (although this is not defined in the Convention). This category of claim is subject however to the stipulation that compensation for impairment of the environment, other than for loss of profit from such impairment, shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken¹¹. Accordingly, loss of use and similar losses are not recoverable under the Convention.

Such reasonable reinstatement measures that fall within the scope of the Convention are aimed at accelerating natural recovery of the damaged components of the environment, and may include measures taken at some distance from, but still within the general vicinity of, the damaged natural resource, so long as it can be demonstrated that they would actually enhance recovery. This approach is intended to encourage innovative approaches to reinstatement. Contributions may also be made to the costs of post-spill studies, including studies to establish the nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible.

The IOPCF Manual (2013 Edition) states as regards reinstatement measures:

"Environmental damage

1.4.12 Compensation is payable for the costs of reasonable reinstatement measures aimed at accelerating natural recovery of environmental damage. Contributions may be made to the costs of post-spill studies provided that they relate to damage which falls within the definition of pollution damage under the Conventions, including studies to establish the nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible."

As it will be normally impossible to recreate the ecological position prior to a spill, the purpose of reinstatement measures has been described as creating a biolog-

¹⁰ Article I, 6 and 8.

¹¹ Article I, 6. (a).

ical habitat that organisms which were characteristic for the habitat as it was before the spill can live¹². The costs incurred in this regard must be reasonably proportionate considering the extent of the environmental damage and the expected positive effect of the measures.

It is notable that the definition of “pollution damage” and in particular the “loss of profit” arising from the impairment of the environment creates rights for recovery of economic losses which are otherwise not recoverable under e.g. English law. The IOPCF practice as confirmed in the IOPCF Manual (2013 Edition) is that loss of earnings caused by oil pollution suffered by persons whose property has not been polluted (i.e., pure economic loss) may be covered. In particular, the manual suggests as permissible claims: loss of earnings by fishermen whose nets were not contaminated but who may be prevented from fishing because of the pollution of the area they normally fish; loss of income by hotel owners located close to a contaminated public beach; and even costs of marketing campaigns to prevent or reduce economic losses by counteracting the negative publicity arising from a major pollution incident.

Compensation is also available for preventive measures “wherever taken”. Notably, 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. There is no restriction regarding the jurisdictional zone in which the preventive measures have to be taken in order to be covered by the CLC 1992.

The liability is channelled to the registered owner and as such, an operator or bareboat charterer has no liability (except if the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result) but may, however, be subject to recourse claims¹³. A claimant is entitled, however, to bring an action in tort against other persons liable outside the framework of the Civil Liability Conventions, but it is not possible to bring an action against other persons in the “tanker’s” sphere such as servants and agents of the registered ship-owners, and also pilots, charterers, managers, operators, salvors and persons who take preventive measures, and their agents and servants enjoy protection.

Although the basis of the liability is strict, there are a few defences available to the registered owners: a) damage resulting from war etc. b) damage wholly caused intentionally by third parties and c) damage caused by negligence of a government or other authority responsible for maintenance of lights and navigational aids in the exercise of that function¹⁴.

The registered owners’ liability may, however, be limited to sums calculated by reference to the tonnage of the vessel: < 5,000 GT max. SDR 4.51 million and > 5,000 GT max SDR 89.77 million¹⁵. The maximum amount currently is SDR 89.77

¹² Jacobsson: Miljöfarlige sjötransporter – Internationella skadeståndsregler p.142.

¹³ Article II, 4. and 5

¹⁴ Article III, 2

¹⁵ Article V, 1. and. 9.

million which at current exchange rates, would result in a USD limitation amount of USD 123 million.

In rare circumstances, the limit of limitation may be breached. Still, that requires that the incident resulted from the owners' act or omission committed with intent to cause pollution damage or recklessly and with knowledge that such damage would probably result¹⁶. This is only likely to occur in exceptional circumstances.

The registered owner is under a duty to insure his liability under the Convention and the tanker must carry evidence of this insurance by way of so-called "CLC certificates"¹⁷. Accordingly, the Convention requires shipowners to have in place compulsory insurance or other financial security up to the maximum amount of the particular ship's liability under the Convention, such insurance to be verified by a certificate of Insurance issued by a State party to the Convention. The Convention also provides for a direct right of action by third party claimants against the provider of financial security for the owner's liability under the Convention. This ensures that recovery will be available even if the owner is not financially capable of paying.

The CLC 1992 prohibits in general direct action against the insurer in cases where the damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The liability regime described in the above is not exhaustive, and if the loss exceeds the said limitation amount or if the owner is exempt from liability, the International Oil Pollution Compensation Fund(s) will provide additional funding to the claimants (see below).

5.3 Fund Convention¹⁸

The Fund Convention 1992, which is supplementary to the CLC 1992, establishes a regime for compensating victims when the compensation due under the applicable Civil Liability Convention is inadequate or unavailable. The fund is contributed to by the oil industry with levies *calculated on the basis of the imported quantity of qualifying oil*. A Protocol to the Fund Convention 1992 was agreed on 27 May 2003 for the creation of a voluntary third tier of liability for oil pollution. This third tier, the Supplementary Fund, came into force in 2005. This was agreed in recognition of the fact that the maximum compensation available under the CLC 1992/Fund Convention regime 1992 might be insufficient to meet compensation needs in certain circumstances in some Contracting States to that Convention. The Supplementary Fund does not affect what damage is compensated or the criteria for compensation, but only raises the maximum compensation available

¹⁶ Article V, 2

¹⁷ Article VII.

¹⁸The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 and Protocols

from SDR 200 million to SDR 750 million and thus reduces the risk of incomplete compensation, or delays in compensation due to 'pro-rating' of claims. The level of compensation available for oil tanker incidents in the Arctic would therefore be improved if all the Arctic Coastal States contributed to the Supplementary Fund¹⁹.

The Supplementary Fund is also contributed to by the oil industry in the member State parties and it is available only in those States which are party to it, the rationale being that it provides higher levels of compensation in States which choose to become parties, while enabling States which do not wish to burden their oil importers with the higher levels of contribution involved to remain outside. The Supplementary Fund currently has 31 contracting States.

Whilst the International Oil Pollution Compensation Fund(s) is intended to assist victims when the CLC 1992 regime is inadequate to cover the damage (where the damage exceeds the shipowner's maximum liability), it also offers recourse where the shipowner can invoke any of the defences allowed in the CLC 1992 or where the shipowner (and the insurer of the shipowner's liability) is financially incapable of meeting the obligations. It is therefore closely linked to the CLC 1992 Convention and has the same scope, definitions and geographical coverage as the CLC 1992.

The combined limits of CLC 1992 and the Funds are some SDR 953 million (approx. USD 1.3 billion) per incident.

5.4 Intervention Convention²⁰

The Convention affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from pollution by oil or the threat thereof, following upon a maritime casualty²¹.

Such action must be necessary to protect the coastline from damage arising from a pollution incident or potential incident, which gives rise to a "grave and imminent" threat of pollution, from a vessel within the EEZ or on the high seas. This action may include removal of cargo or fuel and other substances deemed hazardous from a stricken ship, taking charge of, or sinking the ship. The coastal State is, however, empowered to take only such action as is necessary, and after due consultations with appropriate interests including the flag State of the ship involved, the owners of the ship or cargoes in question.

¹⁹ Russia and USA do not contribute.

²⁰ International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969. Extract from <http://www.imo.org/About/Conventions>

²¹ Norway, Russia and the USA are parties to both the Intervention Convention and the 1973 Protocol. Denmark is only a party to the former while Canada is not a party to either. There is a similar provision in UNCLOS, Part XII

A coastal State which takes measures beyond those permitted under the Convention is liable to pay compensation for any damage caused by such measures. Provision is made for the settlement of disputes arising in connection with the application of the Convention.

The Convention applies to all seagoing vessels except warships or other vessels owned or operated by a State and used on Government non-commercial service.

The instrument does not contain any provision with respect to geographical scope or applicability. It thus applies in the Arctic Ocean, but probably not – in the absence of coastal States – in the Antarctic Ocean. However, the parties to Annex IV to the Protocol on Environmental Protection to the Antarctic Treaty have agreed on certain basic obligations in this area. See further below in section 7.

Article 1.1 reads:

"Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil following a maritime casualty ... which may reasonably be expected to result in major harmful consequences."

The 1969 Intervention Convention applied to casualties involving pollution by oil. In view of the increasing quantity of other substances, mainly chemical, carried by ships, some of which would, if released, cause serious hazard to the marine environment, the 1969 Brussels Conference recognized the need to extend the Convention to cover substances other than oil.

The 1973 London Conference on Marine Pollution therefore adopted the Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil. This extended the regime of the 1969 Intervention Convention to substances which are either listed in the Annex to the Protocol or which have characteristics substantially similar to those substances.

The 1973 Protocol entered into force in 1983 and has been amended subsequently to update the list of substances attached to it.

5.5 Oil Pollution Preparedness²²

The International Convention on Oil Pollution Preparedness, Response and Co-operation deals with coastal States' preparedness and response to oil pollution incidents. Its parties "undertake, individually or jointly, to take all appropriate measures ... to prepare for and respond to an oil pollution incident²³". It includes both obligations on ships flying the flag of the party (such as emergency plans and reporting procedures), and obligations in their capacity as coastal States

²² The Oil Pollution Preparedness and Co-operation Convention, 1990

²³ The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

(contingency plans, notification, cooperation with other States). A Protocol from 2000 extended the regime to other hazardous and noxious substances.

This instrument does not contain any provision with respect to geographical scope or applicability either. It thus applies in the Arctic, but probably not – in the absence of coastal States – in Antarctica.

There is a specific Arctic instrument implementing the OPRC: The Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic was agreed in 2013 by the members of the Arctic Council. It includes some more detailed obligations for the Arctic States taking into account the remoteness of the areas and the difficulties involved with recovering oil in cold circumstances. The Agreement is not yet in force.

5.6 Bunker Convention²⁴

Liability and compensation for damage and losses following oil spill damage from bunkers on board ships are covered by the Bunker Oil Pollution Convention 2001 which came into force on 21 November 2008.

The Convention also follows the CLC 1992 model in that it establishes strict liability for the shipowner coupled with compulsory insurance and direct action against insurers. Unlike the CLC 1992/Fund/ Supplementary Fund system, the Bunkers Convention is a single tier regime and does not provide for a separate “stand-alone” limitation fund for additional compensation. It also does not contain an express limit of liability to the shipowner but it preserves existing rights to limit liability, which the shipowner might have whether under national or international law. The channelling provisions are also not quite the same as in the CLC 1992/Fund Convention regime, as claims against persons other than the shipowner who are involved in the vessel’s operation are not excluded under the Convention. The geographical scope of the Convention for compensation for damage costs and for the costs of preventive action is the same as in the CLC 1992/Fund Conventions.

The shipowner (and the insurer) is exempted from liability under the Bunker Convention where the pollution damage is wholly caused by the intentional act of a third party.

As noted above, there is no expressly specified limit of liability amount under the Bunker Convention. Instead, the right to limit liability and the amount is subject to the applicable national or international legislation such as the Convention on Limitation of Liability for Maritime Claims, 1976 as amended (see below in section 5.8). The term “shipowner” is defined as the owner, charterer, manager and operator of the ship and all these persons are entitled to limit their liability.

²⁴ The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

As in the case of the CLC 1992, the Bunker Convention provides for a system of compulsory insurance by the registered shipowner of a vessel of more than 1,000 GT, to be verified by a certificate of insurance from a State party. The Convention also provides that claimants are entitled to bring action directly against the insurer but the direct liability of the insurer is limited to “the amount equal to limits of liability under 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”. Effectively then, the claimant is entitled to bring direct action against the insurer up to this limitation amount and the insurer may not invoke any policy defence which could be invoked in defence of a claim for indemnity under the policy.

5.7 HNS Convention²⁵

This Convention was adopted in 1996 to provide for compensation to claimants following accidents involving hazardous and noxious substances carried on board ships, including bulk cargoes (solids, liquids, or liquefied gases) and packaged goods. The Convention also covers oil substances which do not fall within the definition of “persistent oil” under the CLC 1992 and 1992 Fund Convention, such as gasoline, light diesel oil, etc.

It is modelled on the CLC 1992 and Fund Conventions in that there is a two-tier system of compensation, the first tier paid by shipowners and the second by a Fund financed by contributions from HNS receivers when the first tier is inadequate in amount to meet the claims. However, unlike the CLC 1992/Fund Convention regime, both tiers of compensation are contained in a single Convention.

As with the CLC 1992/Fund Convention regime, the HNSC provides for strict liability on the part of the registered shipowner, up to an amount limited by reference to the ship’s tonnage, along with compulsory insurance and claimants’ right of direct action against the insurer.

The 1996 HNS Convention has been ratified by 14 States, but has not entered into force due primarily to the difficulties of setting up systems to report the quantities of hazardous and noxious substances (“contributing cargo”) that are received by sea transport in their respective territory, and the difficulties in setting up a reporting system for packaged goods.

The Convention was amended by a Protocol in 2010 to overcome some of the identified obstacles to the entry into force of the HNS Convention. The substantive provisions of the 1996 HNS Convention are unchanged, although the liability scheme under the first tier has been changed (and the shipowner’s limits of lia-

²⁵ The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 and the 2010 Protocol

bility increased) and the concept of contributing cargo has been amended. Despite these amendments, the Convention remains difficult for States to implement²⁶.

5.8 LLMC 1996²⁷

The Convention establishes shipowners' and certain other parties' rights to limit their liability for so-called Maritime Claims. It provides a fall back position for shipowners and others because it is secondary to "specialist" Conventions such as CLC 1992 that take precedence.

Under the 1976 Convention, the limits are specified for two types of claims, namely claims for loss of life or personal injury, and property claims (such as damage to other ships, property or harbour works).

The limits under the 1976 Convention were set at 333,000 SDR for personal claims for ships not exceeding 500 GT plus an additional amount based on tonnage. For other claims, the limit of liability was fixed under the 1976 Convention at 167,000 SDR plus additional amounts based on tonnage on ships exceeding 500 GT.

The Convention provides for a virtually unbreakable system of limiting liability. Shipowners and other protected parties may limit their liability, except if "it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result".

The protocol of 1996 came into force in 2004. Under the Protocol, the amount of compensation payable in the event of an incident is substantially increased and also introduces a "tacit acceptance" procedure for updating these amounts.

New limits came into force on 8 June 2015 under the tacit acceptance procedure. Under the amendments to the 1996 Protocol, the limits are raised as follows:

The limit of liability for claims for loss of life or personal injury on ships not exceeding 2,000 GT is 3.02 million SDR (up from 2 million SDR). For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 GT, 1,208 SDR (up from 800 SDR)
- For each ton from 30,001 to 70,000 GT, 906 SDR (up from 600 SDR)
- For each ton in excess of 70,000 GT, 604 SDR (up from 400 SDR).

The limit of liability for property claims for ships not exceeding 2,000 GT is 1.51 million SDR (up from 1 million SDR).

²⁶ For information about the status see

<http://www.imo.org/en/OurWork/Legal/HNS/Pages/HNSConvention.aspx>

²⁷ The Convention on Limitation of Liability for Maritime Claims 1976 and the 1996 Protocol

For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 GT, 604 SDR (up from 400 SDR)
- For each ton from 30,001 to 70,000 GT, 453 SDR (up from 300 SDR)
- For each ton in excess of 70,000 GT, 302 SDR (up from 200 SDR).

6. National oil pollution regimes and environmental laws

6.1 Denmark (Greenland)²⁸

Introduction

Firstly, it is worth observing that Greenland is a self-governing country within the Kingdom of Denmark. Greenland enjoys extensive self-governance but areas such as defence, security and foreign affairs cannot be taken over by the government of Greenland and is governed by the government of Denmark. Greenland is not a member of the EU but an OTC ("Overseas Countries and Territories").

As such, Greenland is not a sovereign State. Rather, it is a self-governing unit within the Danish realm and the Danish constitution also applies to Greenland. Laws adopted by the Danish parliament also apply to Greenland unless Greenland is specifically exempted. The political system is very similar to the Danish style of parliamentary democracy. The parliament elects the Self Rule Government, the "Naalakkersuisut", which is headed by the Premier.

In general, Self Rule has resulted in Greenland taking control over all matters of domestic policy, the economy, the education system, culture, social affairs etc. In all these matters, legislative competence rests with the Self Rule authorities.

Foreign affairs were a matter for the Danish State until the Home Rule (before it became the Self Rule in 2009) was given certain powers in 2005. These powers have gradually been expanded with the implementation of the Self-Government so that the Naalakkersuisut will be authorised to negotiate and enter into agreements as well as being involved in foreign policy issues under the jurisdiction of the Danish State authorities.

Greenland is represented in the Danish UN delegation by two members, who are elected by the Inatsisartut (Landstinget). Greenland has two Nordic Council members, and the Inatsisartut participates in the Nordic Council of Ministers. In addition, Greenland also cooperates with the Faroe Islands and Iceland in various regional fora.

²⁸ Contributed by Lars Rosenberg Overby, Hafnia Law Firm.

Jurisdiction

The territorial waters of Greenland extend for three NM from the coastline²⁹. Further, an exclusive economic zone up to 200 NM (where possible) has been established for Greenland³⁰.

Conventions

Denmark is a signatory to the International Convention on Civil Liability for Oil Pollution Damage (1969), including the 1992 protocol, as well as the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage 1971 and 1992 and the 2003 protocol to the 1992 Fund Convention as enacted in Denmark also apply in Greenland. Equally, the LLMC 1996 applies in Greenland. The Nairobi Convention came into force for Denmark on 22 January 2015, but has so far not been made applicable in Greenland³¹. The Bunker Convention forms part of the Danish Merchant Shipping Act (the "DMA")³² and came into force on 21 November 2008 whereas the HNS Convention has also been implemented in the DMA³³ but has not yet come in to force³⁴. The Bunker Convention has so far not been made effective for Greenland³⁵. Finally, Denmark is party to the Protocol of 1978 to the International Convention for the Prevention of Pollution from Ships 1973, relating to the International Convention for the Prevention of Pollution from Ships, International Convention on Oil Pollution Preparedness Response and Cooperation, 1990 and Protocol of 1997 relating to the International Convention for the Prevention of Pollution from Ships, These Conventions apply to Greenland also.

The majority of these Conventions have been implemented in the DMA. The DMA has been made effective for Greenland³⁶ and thus applies there.

Liability and response

The basis for making a claim for damages following an oil spill depends on where the spill or pollution has occurred and the type of oil or substance involved: Any spill within the abovementioned 3 NM territorial waters is subject to a local regulation regarding the protection of the marine environment³⁷. Beyond that zone, the Danish Marine Environment Act (DMEA) applies³⁸. Both acts prohibit the discharge of oil and provide strict liability for spills and pollution by any type of oil, including non-persistent oil and thus supplement the DMA.

²⁹ See Anordning (Executive order) no. 1004 of 15 October 2004.

³⁰ See bekendtgørelse (Order) no. 1020 of 20 October 2004 that sets out the accurate coordinates and defines the boundaries towards Norway and Canada

³¹ November 2015

³² See lovbekendtgørelse (consolidated act) no. 75 of 17 January 2014

³³ See Lov (Act) no. 599 of 24 June 2005

³⁴ November 2015

³⁵ November 2015

³⁶ by virtue of Anordninger (Executive orders) no. 8 of 15 January 1996, no. 911 of 14 November 2003 and no. 217 of 11/03/2005

³⁷ See Landstingsforordning no. 4 of 3 November 1994 as amended

³⁸ See lovbekendtgørelse no. 963 of 3 July 2013 section 9 (1). DMEA applies in Greenland in accordance with Anordning (order) no. 1035 of 22 October 2004. Lov (Act) no. 466 of 17 June

Greenland's local government ("Inatsisartut") is charged with pollution response within its territorial waters³⁹ whereas the Danish Arctic Command is responsible for this task outside this area. In both cases, the authorities have the power to intervene; including taking preventive measures and arranging clean up. They may further require the owner of the vessel to provide security and detain the vessel. Further, the authorities may board the vessel suspecting of polluting and conduct investigations without a court order. In addition, the master of a polluting vessel is obliged to report the spill.

The two sets of environmental legislation provide liability for the costs of reasonable emergency and response measures but not compensation for other losses such as economic losses and on shore clean up. Nevertheless, such losses could be recovered in tort from the responsible party (that is in the ordinary course of events the owner or bare boat charterer of the vessel). The responsible party may rely on the LLMC 1996 as implemented in the DMA and limit its liability if relevant.

To the extent that the situation is covered by the CLC 1992 Convention as enacted, (i.e. so far as persistent oil is concerned) the tort regime overlaps with the DMA but the latter would prevail as *Lex Specialis*. Further, section 206 (2) of the DMA provides that sections 191 and 192 (basically implementing articles I-III of the CLC 1992 Convention) also apply to pollution damage caused by vessels other than tankers but – by implication – is only relevant to persistent oil. In such cases, the LLMC 1996 would be the relevant limitation of liability regime for e.g. the owners of a passenger vessel having spilled HFO.

If CLC 1992 applies then the restrictions in the Convention as to which claims are recoverable and the monetary limits apply.

Whilst the DMEA implements the EU Environmental liability Directive⁴⁰ and stipulates strict liability for any environmental damage or a threat thereof to the marine environment⁴¹, these rules do not apply in Greenland.

6.2 Canada⁴²

Introduction

Canada is a confederation consisting of ten (10) provinces and three (3) territories whose jurisdictions and powers are limited by the Constitution Act, 1982⁴³. Also limited by this Act are the powers of the federal authority (often referred to as Canada, or the Canadian government authority), which has sole jurisdiction over

2008 (Environmental Damage Act) and lov (Act) no. 225 of 6 April 1994 (Compensation of Environmental Damage Compensation Act) do not apply in Greenland

³⁹ See section 27 of Landstingsforordning no. 4 of 3 November 1994 as amended

⁴⁰ Directive 2004/35/CE of the European Parliament and of the Council of 21/04/2004 on environmental liability with regard to the prevention and remedying of environmental damage.

⁴¹ DMEA § 47 (b) (2)

⁴² Contributed by Peter J. Cullen, Stikeman Elliott LLP

⁴³ Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, C11

navigation and shipping throughout the country and its navigable waters, both internal and external.

Jurisdiction

Canada's authority over its external waters is limited to its territorial sea (12 NM from Canada's jurisdictional coastline) and the adjoining EEZ (which stretches 200 NM beyond the jurisdictional coastline). However, a portion of the international boundary between Canada and Greenland is less than 200 NM from the baselines of Canada's territorial sea). Also, Canada has extensive claimed internal waters on the basis of historic title and which are defined as waters enclosed by the system of baselines delineated along the outermost points of the Arctic archipelago⁴⁴.

Conventions

Canada is a party to a number of international Conventions relating to oil pollution, including the International Convention for the Prevention of Pollution from Ships, 1973, Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, International Convention on Oil Pollution Preparedness Response and Cooperation, 1990 and Protocol of 1997 relating to the International Convention for the Prevention of Pollution from Ships, and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001. Further, Canada is currently a party to 1992 International Oil Pollution Compensation Fund (IOPC Fund), and the 1992 Civil Liability Convention and the 2003 Supplementary Fund Protocol. Such Conventions have been incorporated into federal legislation under Canada's principal oil pollution liability statute, the Marine Liability Act⁴⁵ (MLA) – occasionally with some modifications (some of which are more fully described below) – and apply in Canada's arctic waters. It must be noted that amendments to the MLA, in respect of the Hazardous and Noxious Substances Convention, have yet to come into force.

Liability

An important modification in the MLA is that the liability rules of the Civil Liability Convention apply to all ships that cause oil pollution, with special rules in Division 1 of the MLA in respect of "Convention ships" - tankers carrying persistent oil in bulk as cargo. The liability of non-Convention ships is found in Division 2 of the MLA, where "oil" is defined in broader terms as meaning oil of any kind or in any form (including petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes – but not dredged spoil). Also, a "ship" is defined as any vessel or craft designed, used or capable of being used (either solely or partly) for navigation, without regard to its method of propulsion or lack of propulsion (and includes stranded, sunk or wrecked vessels). The difference between Division 1 and 2 vessels is also relevant in terms of access to the IOPC Fund (limited to spills involving Convention vessels under Division 1).

⁴⁴ The source for Canada's maritime zones is the Oceans Act, Part I

⁴⁵ S.C. 2001, c.6

Generally speaking, Canada's pollution laws apply to spills on navigable waters, be they on fresh water or sea water (whether ice covered or not). Provincial and territorial pollution laws apply to non-navigable waters and provincial/territorial shorelines. On occasion, such jurisdictions may overlap depending on the nature and effect of the spill. Thus, charges under both the federal and provincial/territorial pollution statutes may be laid in connection with a marine spill. In Canada's arctic regions this would include the province of Quebec's (and to a smaller degree the province of Newfoundland & Labrador's) northern non-navigable waters and shorelines, and the non-navigable waters and shorelines of the three territories – Nunavut, the Northwest Territories and the Yukon Territory – in addition to Canada's large expanse of arctic waters.

In 1970, Canada enacted the Arctic Waters Pollution Prevention Act⁴⁶ (AWPP), an Act that has since been made subject to the MLA. The AWPP prohibits the deposit of waste in arctic waters. The term "arctic waters" is defined as the internal waters of Canada and the waters of the territorial sea of Canada and its EEZ, within the area enclosed by the 60th parallel of north latitude, the 141st meridian of west longitude and the outer limit of the EEZ (with, as previously indicated, the exception of the boundary with Greenland), and essentially covers the arctic archipelago. The term "waste" is broadly defined to cover any substance that, if added to water, would degrade or alter the quality of such water to an extent detrimental to their use by man or by any animal, fish or plant that is useful to man. This definition parallels the definition of "pollution" under the MLA.

The AWPP is enforced through Canadian pollution prevention officers who may board and inspect any vessel within defined Safety Control Zones (broadly including all Canadian arctic waters) and take action where necessary. The AWPP also provides federal authority to implement regulations in respect of pilotage and the use of ice navigators in Canada's arctic waters. In this regard, the use of qualified ice navigators is mandatory on specific vessels (including all tankers) in certain Safety Control Zones.

It is noteworthy that the AWPP was enacted to ensure that "the national resources of the Canadian arctic are developed and exploited and the arctic waters adjacent to the main land and islands of the Canadian arctic are navigated only in a manner that takes cognizance of Canada's responsibility for the welfare of the Inuit and other inhabitants of the Canadian arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian arctic"⁴⁷.

Pollution under the MLA (Division 1 or 2) essentially gives rise to strict liability (not dependent on proof of fault or negligence) for oil pollution damage (including any damage as a result of impairment to the environment and the costs of reasonable measures of reinstatement) as well as the costs and expenses incurred

⁴⁶ R.S.C., 1985, c.A-12

⁴⁷ R.S.C., 1985, c. A-12 (Preamble)

by the federal Minister of Fisheries and Oceans (an authorized response organization under the Canada Shipping Act, 2001⁴⁸) or others in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage. This includes the Minister's reasonable costs of monitoring a spill and clean up efforts. As the Canadian Coast Guard (and its fleet of ice breakers, tenders and patrol vessels) and Fisheries Canada (and its fleet of patrol and inspection vessels) report to the Minister, it is these entities who are generally engaged in such matters.

Canada has implemented a Ship-source Oil Pollution Fund (SOPF) headed by a federally appointed Administrator who reports annually (info@sopf.gc.ca). In 2014, the SOPF reported on two oil pollution claims stemming from vessels in Canada's arctic waters. The first involved a Bahamian-registered passenger vessel in a 2010 grounding in the Coronation Gulf off the Yukon Territory (monitoring costs and expenses under dispute between the shipowner and the Canadian Coast Guard and the Canadian Hydrographic Service). The second involved a Canadian registered product tanker in a 2010 grounding near Gjoa Haven, off the Nunavut Territory (monitoring costs in respect of a Coast Guard ice breaker that stood by). The Administrator continues to monitor the first dispute, and has settled the second on a compromise basis (based on the reasonableness of certain expenses).

The SOPF's jurisdiction to pay oil spill claims is not limited to matters involving tankers carrying persistent oil - it covers all classes of ships and also deals with "mystery spills" (unattributed spills). Furthermore, it may be a fund of first resort for claimants⁴⁹ as well as a fund of last resort, and may provide a further layer of compensation in addition to the compensation regimes under the IOPC Fund and the 1992 Civil Liability Convention.

Additional relevant pollution statutes (providing for a mixture of criminal and public welfare offenses) which have occasionally been applied where there are overlapping federal departments, or overlapping jurisdiction with provincial/territorial non navigable waters or shorelines, include the federal Fisheries Act⁵⁰, Migratory Birds Convention Act, 1994⁵¹, and Canadian Environment Protection Act⁵², 1999, as well as Quebec's Environment Quality Act⁵³ and the Newfoundland and Labrador's Environmental Protection Act⁵⁴. These statutes generally provide that oil pollution constitutes a strict liability offence (without proof of fault or negligence) and like the MLA generally target the owner, custodian or person who had the charge, management or control of the polluting substance (such as the shipowner

⁴⁸ S.C. 2001, C.26

⁴⁹ Only for specified claimants under the MLA! Compensation is administered on an administrative basis, and a dissatisfied claimant can appeal the decision of the SOPF Administrator to the Federal Court.

⁵⁰ R.S.C., 1985, c. F-14

⁵¹ R.S.C., 1985, c. F-14

⁵² S.C. 1999 c.33

⁵³ R.S.Q., c. Q-2

⁵⁴ SNL 2002 C.E-14.2

or bareboat charterer). Some reach further and hold that the directors or officers of a company that commits an offence may be presumed to have participated in the offence unless they can establish that they exercised due diligence and took all necessary precautions to prevent such offence.

Finally, Canada's Admiralty Court, the Federal Court⁵⁵, has in rem jurisdiction in respect of navigation and shipping matters. It is a national admiralty court that sits across the country and is the court referred to in the MLA in respect of limitation proceedings and related claims for pollution matters.

6.3 USA⁵⁶

Introduction

The State of Alaska is the only U.S. state that borders the arctic. The northern and western Alaska coastline is bounded by the Beaufort Sea, the Chukchi Sea, and the Bering Sea. Vessels sailing between Europe and Asia must pass through the Bering Strait, a 41 nautical mile wide strait separating Alaska from the Russian Federation. While the United States has enacted federal legislation governing civil liability for discharges of oil from vessels within 200 NM of the United States coastline, the laws of the State of Alaska governing oil pollution apply to any discharges of oil that occur within three NM of the Alaska coast.

Conventions

While the United States have adopted some international Conventions relating to oil pollution discharges from vessels, such as the International Convention for the Prevention of Pollution from Ships (MARPOL) and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, it has not adopted the International Convention on Civil Liability for Oil Pollution Damage (CLC 1992). The United States have further enacted the Act to Prevent Pollution from Ships⁵⁷, which implements the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) in the United States. MARPOL 73/78 was enacted to control pollution from vessels as mandated by the Law of the Sea Convention⁵⁸. The United States ratified MARPOL on July 2 1980, and subsequently passed implementing legislation in the form of the Act to Prevent Pollution from Ships, which gives the Coast Guard broad authority to regulate vessel operations and enforce MARPOL requirements. This law allows the Coast Guard to enact necessary regulations or requirements to carry out the provisions of MARPOL⁵⁹. Regulations enacted pursuant to this authority and enforced by the Coast Guard establish criteria regulating the discharge of various categories of operational wastes from ships that are covered by the MARPOL annexes⁶⁰.

⁵⁵ Federal Court Act (R.S.C.), 1985, c F-7

⁵⁶ Contributed by Bert Ray, Keesal Young Logan, Anchorage, Alaska

⁵⁷ The Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§1901 – 1911.

⁵⁸ LOS Convention, Article 211(1).

⁵⁹ 33 U.S.C. §1903(b)(1).

⁶⁰ See extensive regulatory requirements in 33 C.F.R. Part 151, subpart (a), Implementation of MARPOL 73/78. Violation of these regulations may result in civil or criminal penalties. 33 C.F.R. §151.03 makes this subpart applicable to each ship that must comply with Annex I (Regulations

Jurisdiction

The United States have adopted the following maritime boundaries as measured from the baseline⁶¹:

1. Alaska Coastal Waters – three geographical miles⁶²
2. Territorial Sea – 12 NM⁶³
3. Contiguous Zone – 24 NM⁶⁴
4. Exclusive Economic Zone (EEZ) – 200 NM⁶⁵

Throughout the history of the United States, the U.S. has been a proponent of freedom of navigation and recognises the legal right to navigation through its territorial sea by foreign vessels under the doctrine of innocent passage, and the related doctrine of transit passage. Therefore, under U.S. law, ships in innocent passage, which by definition would exclude vessels bound for or departing from U.S. ports or places, are not required to comply with many of the laws and regulations applicable to U.S. flagged vessels or foreign vessels calling at U.S. ports or places. By way of example, United States' requirements relating to oil spill response plans do not apply to foreign flag vessels engaged in innocent passage or transit passage⁶⁶. However, foreign tank vessels operating in waters subject to the jurisdiction of the United States, including the EEZ, must immediately report any incidents⁶⁷ affecting the seaworthiness of the vessel or posing a threat to the environment.

Liability

In the United States, both federal and State laws may determine a vessel owner's civil liability for oil pollution discharges from vessels. The Federal Water Pollution Control Act (FWPCA)⁶⁸ prohibits the discharge of oil in a harmful quantity from a vessel into the navigable waters of the United States. A harmful quantity is defined as a quantity that produces a sheen. For purposes of the FWPCA, the navigable waters of the United States extend seaward to the limits of the United States EEZ. The FWPCA imposes civil penalties upon owners and/or operators of vessels that discharge oil in violation of the Act.

for the Prevention of Pollution by Oil), Annex II (Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk), or Annex V (Regulations for the Prevention of Pollution by Garbage from Ships) of MARPOL 73/78.

⁶¹ The normal baseline under the Convention on the Territorial Sea and the Contiguous Zone, Article 3, and the 1982 Law of the Sea Convention, Article 5, is the low water line along the coast as marked on large – scale charts officially recognized by the coastal State. Both Conventions recognize the method of “straight baselines” or by deeply indented coast lines or fringe islands may be used to measure the baseline. The United States has not used the straight baseline method to determine the territorial sea baseline.

⁶² Pursuant to the Submerged Lands Act, 43 U.S.C. § 1312, the seaward boundary of coastal States is generally a line three geographical miles from their coast line.

⁶³ Presidential Proclamation 5928, December 27 1988.

⁶⁴ Presidential Proclamation 7219, September 2 1999.

⁶⁵ 48 Fed. Reg. 10605 (March 10 1983).

⁶⁶ 33 C.F.R. § 155.1015(c)(7).

⁶⁷ 46 C.F.R. § 4.05 – 2(a).

⁶⁸ 33 U.S.C. § 1321(b).

The Oil Pollution Act of 1990⁶⁹ (OPA '90) imposes civil liability for unauthorized discharges of oil into the navigable waters of the United States. As with the FWPCA, navigable waters for purposes of OPA '90 extend to the outer limits of the U.S. EEZ.

Federal law also requires that vessels transiting through the U.S. EEZ that are bound for or departing from a U.S. port or place must have an approved vessel response plan for responding to an oil pollution incident. The federal vessel response plan requirements do not apply to vessels in innocent passage.

United States federal laws governing liability for oil pollution do not pre-empt the application of the law of coastal States imposing similar liabilities. Alaska is the only coastal State that borders the polar region. Alaska has enacted laws governing discharges of oil in its coastal waters that would be applicable to a discharge from a vessel operating within those coastal waters. Vessels transiting through the narrow Bering Straits between Alaska and Russia might operate within Alaska coastal waters.

Federal Law

The Oil Pollution Act of 1990

The liability provisions of OPA '90 apply to any incident involving the discharge or the substantial threat of a discharge of oil into the navigable waters of the United States or the U.S. EEZ⁷⁰. Each "Responsible Party"⁷¹ for an OPA '90 incident is liable for "removal costs" and "damages". Liability is strict, but OPA '90 provides limited defences to liability and a limitation on liability.

Defences to OPA '90 Liability

OPA '90 provides that, under certain conditions, a responsible party may be entitled to a complete defence to liability, or to limit its liability⁷². Complete defences under OPA '90 are difficult to maintain, and are only available if the oil discharge was "caused solely" by one or a combination of three events: an act of God; an act of war; or an "act or omission of a third party"⁷³ with which the responsible party was not in a "contractual relationship." An "act of God" means an "unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." No responsible party has successfully asserted an act of God defence to OPA '90 liability since the Act's enactment. Were a ship to spill oil due to an encounter with abnormally

⁶⁹ 33 U.S.C. § 2701 *et seq.*

⁷⁰ 33 U.S.C. § 2702.

⁷¹ Responsible Party with respect to a vessel is defined as any person owning, operating, or demise chartering the vessel. 33 U.S.C. § 2701(32).

⁷² 33 U.S.C. § 2703.

⁷³ The defense based upon an act or omission of a third party is not available if the third party's "act or omission occurs in connection with any contractual relationship with the responsible party." In addition, the responsible party must establish that it took precautions against foreseeable negligence and foreseeable consequences of that third party's negligence.

heavy ice in polar waters, it is unlikely that the vessel's owner or operator would succeed in asserting an act of God defence under OPA '90.

The defence to liability for spills caused by third parties does not apply if the third party was in a contractual relationship with the vessel. Privity of contract is not required to establish a contractual relationship between a third party and the vessel's owner or operator. For example, pilots, tugs, and others providing services to a vessel who are hired by the vessel's time charterer are considered, for OPA '90 purposes, to be in a contractual relationship with the vessel's owner and operator.

Defences under OPA '90 are not intended to allow a responsible party to simply assert a complete defence and avoid the obligation to respond to cleaning up a discharge⁷⁴. A defence is not available to the responsible party where it fails or refuses to report the incident as required by law, to provide reasonable cooperation and assistance in connection with removal activities, or, without sufficient cause, to comply with an order issued by the federal on-scene coordinator. Thus, the responsible party must pay for response costs and settle third party claims until the government agrees that it may stop doing so, or it risks losing its defence to liability. If the owner is ultimately adjudged to be entitled to a defence, it may recover amounts it has expended on response costs and damages from the federal government.

Limits on Liability

OPA '90 provides that a responsible party may limit its OPA '90 liability under certain circumstances. If a responsible party is able to establish its right to limitation of liability, limits are calculated by reference to tonnage and type of the vessel. Also, limits are expressed as being "the greater" of either a fixed amount or an amount calculated on the basis of the vessels gross tonnage. Because the limit is expressed as "the greater of" the two amounts, there is not really a "maximum sum" that can be stated but as per May 2015 the limits are as appears below.

The OPA limits are periodically adjusted for inflation and in 2014, the Coast Guard published a proposal to increase the liability limits to account for inflation. The following are the current limits on liability effective from 21 December 2015.

Single Hull Tanker > 3,000 GT: The greater of USD 3,500/GT or USD 25,845,000.

Single Hull Tanker < 3,000 GT: The greater of USD 3,500/GT or USD 7,048,800.

Double Hull Tanker > 3,000 GT: The greater of USD 2,200/GT or USD 18,796,800.

Double Hull Tanker < 3,000 GT: The greater of USD 2,200/GT or USD 4,699,200.

Non-Tank Vessel: The greater of USD 1,100/GT or USD 939,800.

Limitation of liability is not available where an incident was proximately caused by (1) gross negligence, (2) wilful misconduct, or (3) violation of applicable federal safety, construction, or operating regulations on the part of the responsible party,

⁷⁴ See, *Unocal v. United States*, 222 F.3d 528, 535 (9th Cir. 2001) and cases and statutes cited.

an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party⁷⁵.

As with the defence to OPA '90 liability, the right to limit liability under OPA '90 does not mean that a responsible party can stop paying response costs or settling third party claims as soon as its liability limit is reached. A responsible party will lose its right to limit its OPA '90 liability if it fails to provide reasonable cooperation and assistance requested of it by the federal government or to comply with clean-up orders. If the responsible party pays more than its limitation amount in responding to an OPA '90 incident, it can seek reimbursement of its excess payments from the federal government. The responsible party will also lose its right to limit its liability if it fails to immediately notify the Coast Guard of an OPA incident.

Damages

OPA '90 makes the responsible party strictly liable for removal costs and compensatory damages. The responsible party is not only the owner of the vessel but can also be the operator and bareboat charterer. Removal costs include the costs to contain and remove oil from water and shorelines, and other actions necessary to minimize or mitigate damage to public health or welfare⁷⁶. Liability for removal costs includes costs of cleaning up and responding to the spill, the costs incurred by the United States (typically the Coast Guard), and State and local officials for monitoring the clean-up.

Recoverable damages include response, removal, clean-up costs and "other damages" arising from a discharge or threatening discharge of oil, damage to natural resources and the cost of assessing them, damage or loss of real or personal property, loss of revenues by governments, loss of profits or earning capacity, lost subsistence damages, and damages for net costs of public services. Natural resource damages are a unique and controversial type of damages awarded under United States law. State and federal government agencies with jurisdiction to manage natural resources are considered trustees of those resources and manage them on behalf of the public. When natural resources are damaged or impaired as the result of an oil spill, the trustees are statutorily required to assess the damage to the resources, to assess whether they should implement restoration proposals to help damaged resources recover, and to develop remedial projects to compensate the public for the interim loss of use of damaged resources. Natural resource damage assessments are often costly and time consuming. The total costs of natural resource damage claims often are in the tens of millions of dollars in spills originating from vessels.

Claims must be made against the responsible party or its guarantor for the reimbursement and compensation⁷⁷. The responsible party is therefore under a duty to procure evidence of financial responsibility (so-called "COFR")⁷⁸.

⁷⁵ 33 U.S.C. § 2704.

⁷⁶ 33 U.S.C. § 2701(30) & (31).

⁷⁷ § 2705(a).

⁷⁸ § 2716(a).

Federal Water Pollution Control Act

A vessel owner or operator is also subject to a civil penalty under the Federal Water Pollution Control Act for discharging oil⁷⁹. The penalty can be up to USD 37,500 per day of violation, or up to USD 2,100 per barrel of oil discharged. However, in any case in which the discharge was the result of gross negligence or wilful misconduct, the penalty shall be not less than USD 150,000 or USD 5,300 per barrel of oil discharged. In smaller spills, the government may proceed with an administrative penalty, in which case the maximum penalty is USD 37,500.

The FWPCA also imposes civil penalties if the owner or operator fails to properly carry out removal of a discharge after being ordered to do so by the United States, or fails to immediately report a discharge.

Liability under Alaska State Law

In the litigation arising out of the Deepwater Horizon incident, the United States Court of Appeals for the Fifth Circuit held that State oil pollution laws do not apply to a spill that originates outside of the State's territorial waters and subsequently drifts into these waters. The Fifth Circuit Court of Appeals has jurisdiction over appeals from U.S. States along the Gulf Coast, but its jurisdiction does not extend to Alaska so its decision is not binding on courts in Alaska. It is thus unclear at this time whether Alaska law's strict liability provisions would apply to an oil spill from a vessel originating outside of Alaska territorial waters that drifts into State waters.

Alaska has jurisdiction over waters within three geographical miles seaward of the baseline, and offshore islands. While most commercial vessels would normally stay well outside of Alaska's territorial waters, there are areas in the vicinity of the narrow Bering Straits in which vessels might transit through State waters. Were a vessel to discharge oil, or other pollutants while in State waters, the strict liability provisions of Alaska law would apply to such a discharge.

Strict Liability under State Law

Alaska imposes unlimited strict liability for damages caused by oil spills on the vessel owner and operator and the owner of oil carried as cargo aboard tank vessels⁸⁰. Potential plaintiffs include the State of Alaska, municipalities, and private individuals. Damages are broadly defined to include personal injury and property damage as well as loss of income, the loss of means of producing income, loss of tax revenues, the loss of an economic benefit, and State response costs⁸¹.

Defences to strict liability are few. The defendant is not strictly liable if the discharge is caused solely by an act of God, but only if the defendant, within a reasonable time after the discharge, discovered the discharge and promptly commenced operations to clean up the discharge. No strict liability is imposed if the

⁷⁹ 33 U.S.C. § 1321(b)(6)-(7).

⁸⁰ A.S. § 46.03.822.

⁸¹ A.S. § 46.03.822.

discharge is caused solely by act of war or the negligent or intentional act of a third party other than a party or its agents in privity of contract with or employed by the defendant. However, the latter provision only precludes strict liability if the defendant exercised due care with respect to the hazardous substance and took reasonable precautions against the act or omission of the third party and discovered the discharge and began operations to clean up the discharge within a reasonable time after the discharge.

Civil Penalties for Discharges of Oil

Civil penalties may be imposed for failing to report discharges, failing to clean up discharges, or failing to comply with ADEC orders. Alaska has enacted three different civil liability provisions applicable to oil spills. The provisions relate to the size of the spill and the type of oil⁸².

For discharges under 18,000 gallons, Alaska Stat. § 46.03.760 provides for a civil penalty to be imposed against any person who “violates or causes or permits to be violated” a provision of Alaska pollution laws. The penalty may not exceed \$100,000 for the initial violation, nor more than \$5,000 for each day after that in which the discharge continues. It is a violation of Alaska pollution laws to discharge oil into State waters. Neither fault nor intent are required to violate this provision. Thus, a vessel owner or operator is liable for a civil penalty whenever oil is discharged from their vessel, regardless of whether they are at fault.

For discharges of crude oil or refined oil exceeding 18,000 gallons, Alaska law imposes a per gallon civil penalty on the vessel owner, bareboat charterer, or master⁸³. If the discharged oil was being carried as cargo, the owner of the oil is also liable for a civil penalty. The amount of the penalty is based on the size of the spill, the toxicity and disposability of the oil spilled, the sensitivity of the marine environment in which the spill occurred, whether the spill was caused by gross negligence or wilful misconduct, and the success of recovery efforts.

OSLTF

The liability regime works in conjunction with the American Oil Spill Liability Trust Fund (the “OSLTF”)⁸⁴. The ultimate sum in terms of compensation by the fund is USD 1 billion.

6.4 Norway⁸⁵

Introduction

⁸² A.S. § 46.03.760 governs civil penalties for discharges of oil, whether crude or refined, in amounts of 18,000 gallons or less. A.S. § 46.03.758 governs civil penalties for a discharge of refined oil which exceeds 18,000 gallons. A.S. § 46.03.759 governs civil penalties for discharge of crude oil which exceeds 18,000 gallons.

⁸³ A.S. 46.02.758 & .759.

⁸⁴ 26 U.S.C 9509.

⁸⁵ Contributed by professor Erik Røsæg, Scandinavian Institute of Maritime Law and senior legal advisor Kjersti Tusvik of the Norwegian Coastal Administration.

The section below outlines the Norwegian rules that apply in the Arctic and Antarctic not based on international Conventions regarding acute pollution from ships and drilling units. Rules on intervention will be mentioned to the extent there is a system for refund of costs associated with them. Only the portions that apply outside the territorial border of mainland Norway are outlined.

Possible conflicts of the provisions or between the provisions and the Conventions are not discussed.

Jurisdiction

The territorial waters of Norway extend for 12 NM from the coastline^[2]. The Norwegian claims for continental shelf jurisdiction beyond 200 NM have been recognized by the Commission on the Limits of the Continental Shelf (CLCS)^[3].

Conventions

Norway has ratified:

CLC 1992

Fund Convention 1992

Supplementary Fund Convention

Bunker Convention

LLMC 1996

Norway has also accepted the Liability annex to the Antarctic treaty.^[4]

Norway has not ratified:

HNS Convention (ratification expected shortly)

Nairobi Convention

Liability

Norwegian torts law may apply in the Arctic if the strongest connections of the incident are to Norway (see the Supreme Court case Rt-1923-II-58).

The Maritime Code (NMC)^[5]

NMC § 207 makes the strict liability provisions of CLC 1992 and the monetary limits applicable if the oil pollution happens on the High Seas or in a state that is not party to CLC 1992 or on the Norwegian continental shelf but outside the EEZ and Norwegian law is applicable as a matter of international private law. In these cases the limitation rules of CLC 1992 apply by virtue of §§ 194 and 207. A special limitation fund can be established in national law for these situations. Certain special provisions apply to the management of the fund (see § 207 (2)).

NMC § 208 makes the strict liability provisions of CLC 1992 applicable to oil pollution not subject to the CLC 1992 for all other reasons than the geographical scope. The global limitation regime (based on LLMC 1996) applies.

^[2] Act No. 57/2003

^[3] CLCS/62, 20 April 2009

^[4] See http://www.ats.aq/devAS/info_measures_list_filtered.aspx?lang=e&txt=Annex%20VI%20to%20the%20Protocol%20on%20Environmental%20Protecti&curr=False.

^[5] Act No. 39/1994, translated at <http://folk.uio.no/erikro/WWW/NMC.pdf>.

There is a special global limitation fund for clean-up costs (the possibility of reservation under LLMC Art. 18(1) has been utilized; see §§ 172a and 175a). There are also special global limits for drilling vessels (§ 181) and oil rigs (§ 507) in national law. The costs of the responsible party in respect of clean-up operations can be claimed in the abovementioned special limitation fund pursuant to NMC § 175a, but not in the ordinary global limitation fund pursuant to NMC § 175 (NMC § 179). Costs for clean-up operations following a bunker fuel spill is subject to limitation in accordance with § 175a (see NMC § 172a) if resulting from a collision or a grounding. Otherwise a bunker spill will be regulated by the Norwegian implementation of the Bunker Convention (§183).

The limitation limits in the NMC do not apply to the liability of off shore operators under the petroleum Act (see §209).

The Pollution Control Act

The scope of the liability provisions of the Pollution Control Act ("PCA")^[6] is similar to that of the corresponding provisions of the Maritime Code (PCA § 54). The Pollution Control Act applies to pollution from sources in the territorial waters, and in the EEZ if the source is a Norwegian ship or installation. The pollution Control Act does not apply for Svalbard (PCA § 3). The Act establishes strict liability for pollution (§ 55). In this connection, this is important because it makes the polluter; usually including the shipowner ("reder") strictly liable for pollution, including pollution from other substances than oil. The act also includes provisions pertaining to compensable environmental damages (§ 57). There are also provisions pertaining to who can claim on behalf of the general public in certain cases (§ 58). The claim can extend to costs of establishing e.g. alternative recreational facilities^[7].

In addition to torts liability, there are provisions for intervention to prevent pollution at the high seas^[8], subject to Norwegian treaty obligations (§ 74; this is a reference to, i.e., UNCLOS). After such intervention, the government can claim refund from a responsible party (§ 76). However, limitation rules and exceptions of maritime law take precedent as *lex specialis*.

The PCA § 7 provides that the person responsible for pollution shall undertake clean-up. The liability limits do not apply to this duty. The authorities may perform clean-up measures on behalf of the responsible polluter [see §§ 7 and 74. In the event of larger incidents the authorities will often take charge of clean-up operations pursuant to PCA § 46. After such response the authorities can claim recovery of expenses and damages from a responsible party (§76). However, limitation and exceptions of maritime law take precedent as *lex specialis*. Their recourse claim may be subject to, for example, global limitation rules. The result of this is that the less prepared the polluter is, the more likely that the authorities will take

^[6] Act No. 6/1981, translated at <http://www.regjeringen.no/en/doc/Laws/Acts/Pollution-Control-Act.html?id=171893>

^[7] In this direction Ot.prp. No. 11 (1979-1980) p. 96-97.

^[8] This provision also apply on Extension at Svalbard and Jan Mayen , SI No. 245/1997, available in Norwegian at <https://lovdata.no/pro/#document/SF/forskrift/1997-08-22-945?searchResultContext=1262>. It must therefore apply also at the high seas close to these islands, as anywhere else.

over the clean-up operation and the more likely that the polluter will benefit from limitation.

In addition to torts liability, there are provisions for intervention to prevent pollution at the high seas, subject to Norwegian treaty obligations (§ 74; this is a reference to, i.e., UNCLOS). Under this provision, the Intervention Convention is implemented in Norwegian law through regulation 1997-09-19 no. 1061.

The Svalbard Environmental Protection Act

The Svalbard Environmental Protection Act^[9] is further important. The act applies to the territorial Sea around Svalbard. The liability rules are quite similar to those of the Pollution control Act (§ 95 of the Svalbard Act). The Svalbard Environmental Protection Fund has a similar role as the local authorities in mainland Norway, and can be awarded compensation for conservation measures to compensate for the loss of irreplaceable environmental values. This compensation is close to a penal sanction^[10].

The Harbour Act

The Harbour Act^[11] gives regulations that apply to vessels in distress or danger. The authorities may order the responsible party, usually the ship-owner, to take action to avoid damage to the environment (§ 38 of the Harbour Act). The authorities may carry out the actions on behalf of the responsible party, and recover their costs in a recourse claim. However, if there is a threat of acute pollution, the Pollution Act take precedent. The Harbour Act § 38 applies in the territorial sea. The provision applies to the territorial sea around Svalbard with the exemption of the right to recover the costs for actions carried out by the authorities^[12].

Regulation on the Environment in Antarctic^[13].

The Regulation on the Environment in Antarctic (REA) implements the Liability Annex to the Protocol on environmental Protection to the Antarctic Treaty in Norwegian law. The regulation applies on Queen Maud's Land and Peter Ist's Island, and on Norwegian enterprises in Antarctic in general (REA § 2). The regulation provides rules on liability for pollution and limitation of liability.

6.5 Russian Federation⁸⁶

Introduction

According to the Russian Constitution, the Russian Federation consists of 85 constituent entities: 46 regions, 22 republics, 9 territories, 4 autonomous areas, 3 cities of federal significance and an autonomous region, all of which are equal

^[9] Act No.79/2001, translated at <http://www.regjeringen.no/en/doc/Laws/Acts/Svalbard-Environmental-Protection-Act.html?id=173945>.

^[10] Ot.prp. No. 38 (2000-2001) p. 164.

^[11] Act no.19/2009

^[12] Regulation 2009-12-30 no. 1846

^[13] Regulation 2013-04-26 no. 412

⁸⁶ Contributed by Professor *Alexander S. Skaridov*, *Russian State Polar Academy* and Dr. *Olya Gayazova*, *Scandinavian Institute of Maritime Law*, University of Oslo.

subjects of the Federation⁸⁷. The Constitution grants the federal government sole jurisdiction over the status of and activities in the territorial sea and the EEZ and on the continental shelf of the Russian Federation⁸⁸.

Jurisdiction

The territorial waters of the Russian Federation extend for 12 NM from the coastline⁸⁹. The waters of the EEZ of the Russian Federation extend for 200 NM from the coastline⁹⁰.

Conventions

The Russian Federation is party to a number of international Conventions pertaining to vessel-source pollution. Specifically, the International Convention on Civil Liability for Oil Pollution Damage 1969/1992 (CLC 1992); the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage 1971/1992 (Fund 1992); the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001; the Convention on Limitation of Liability for Maritime Claims 1976/1996 (LLMC 1996); and the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (HNS Convention). The latter Convention has not yet come into force, and Russia is not party to the 2010 Protocol to the HNS Convention.

The Russian Federation is also party to the International Convention for the Prevention of Pollution from Ships 1973/1978 and its 1997 Protocol (in other words, all MARPOL Annexes); the International Convention on Oil Pollution, Preparedness, Response and Cooperation 1990; and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 and its 1973 Protocol.

These Conventions have been implemented in federal legislation, in most cases under the Merchant Shipping Code of the Russian Federation (MSC)⁹¹.

Liability

MSC Chapter XVIII implements the terms of the CLC 1992. MSC Chapter XIX.1 implements the terms of the Bunker Convention. MSC Chapter XIX implements the terms of the HNS Convention, but the latter Convention has not yet come into force. LLMC 1996 is implemented in MSC Chapter XXI. FUND92 is implemented

⁸⁷ Constitution of the Russian Federation, adopted at National Voting 12/12/1993, §§ 65(1) and 5(1).

⁸⁸ Constitution of the Russian Federation, § 71(н).

⁸⁹ Federal Law N 155-FZ of 31/07/1998 "On the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation," § 2(1).

⁹⁰ Federal Law N 191-FZ of 17/12/1998 "On the Exclusive Economic Zone of the Russian Federation," § 1(3).

⁹¹ Merchant Shipping Code of the Russian Federation N 81-FZ of 30/04/1999.

in a separate law⁹². The Russian Federation is not party to the 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund.

In MSC Chapter XXVI on “Applicable Law” it is stipulated that the rules of MSC Chapter XVIII apply to vessel-source oil pollution damage in the territorial sea and EEZ of the Russian Federation⁹³. Accordingly, a wider applicability of the CLC 1992 rules than the narrow definitions of “vessel” and “oil” in the CLC 1992 is envisioned.

MSC would prevail as *lex specialis* over pollution liability provisions in the Water Code⁹⁴. However, if pollution damage occurs within the territorial sea, the Methodology of calculating the amount of damage caused to water objects and to be compensated for the purpose of restoration of the environment adopted under the Water Code⁹⁵ may be used⁹⁶. Claims based on the Methodology may be rejected if no evidence of actual costs undertaken or to be undertaken in accordance with a remediation project is provided⁹⁷.

The MSC provisions pertaining to liability for vessel-source pollution apply in the water area of the Northern Sea Route (NSR), which comprises the internal waters, territorial sea, contiguous zone and EEZ of the Russian Federation⁹⁸. The standard of the NSR regulation is specified in the Federal Law on the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation⁹⁹ as well as the MSC¹⁰⁰. The Rules of Navigation in the Water Area of the Northern Sea Route adopted under the MSC prohibit the deposit of any oil residues in the waters of the NSR and stipulate related equipment requirements¹⁰¹. The same Rules specify the terms of mandatory icebreaker assistance and ice pilotage as measures to ensure the safety of navigation and protection of the marine environment in the NSR water area¹⁰².

⁹² Federal Law N 26-FZ of 02/01/2000 “On the Accession of the Russian Federation to the Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, and the Denunciation by the Russian Federation of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.”

⁹³ Merchant Shipping Code of the Russian Federation, § 421.

⁹⁴ Water Code of the Russian Federation N 74-FZ of 03/06/2006, § 69(1).

⁹⁵ “On Approval of the Methodology of Calculating the Amount of Damage Caused to Water Objects due to the Violation of Water Legislation,” Order of the Ministry of Natural Resources of the Russian Federation N 87 of 13/04/2009.

⁹⁶ Water Code applies in the territorial sea but not the EEZ of the Russian Federation, § 1(6).

⁹⁷ Decision of the Arbitration Court of St Petersburg and Leningrad Region of 7 September 2010 N A56-45633/2010.

⁹⁸ Merchant Shipping Code of the Russian Federation, § 5.1.

⁹⁹ On the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation, § 14.

¹⁰⁰ Merchant Shipping Code of the Russian Federation, § 5.1.

¹⁰¹ “Rules of Navigation in the Water Area of the NSR,” Russian Ministry of Transport Order N 7 of 17/01/2013, § 65 and 61.

¹⁰² “Rules of Navigation in the Water Area of the NSR,” Chapters III and IV, respectively.

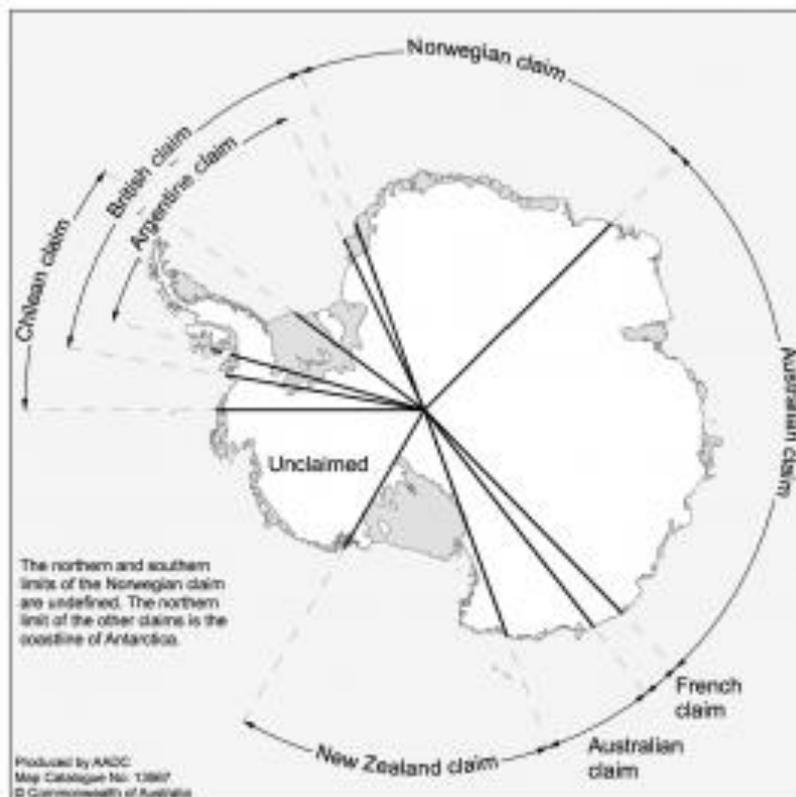
7. **Antarctic Waters**¹⁰³

7.1 Liability and Compensation for ship-sourced pollution damage in Antarctic Waters – the current position

In order to clarify the current position on liability and compensation for ship-sourced pollution damage in the Antarctic region, it is important to recognise that, while a number of States claim historic rights of sovereignty over areas of Antarctica, the Antarctic Treaty freezes all new claims to territorial sovereignty in Antarctica. As it appears below, this could lead to some legal conundrums with regard to the subject matter covered by this report.

A number of States, however, do maintain historic strategic, scientific and environmental interests in Antarctica, such as the United Kingdom, which administers the British Antarctic Territory.

Figure 3: National claims to Antarctic Territory



Source: Australian Antarctic Data Centre.

¹⁰³ Contributed by David Baker, International Group of P&I Clubs

The 1959 Antarctic Treaty came into force in June 1961 after ratification by the twelve countries¹⁰⁴ then active in Antarctic science. It covers the area south of 60°S latitude.

The Treaty will remain in force indefinitely with forty-six countries having acceded to it. Consultative (voting) status is open to all countries who have demonstrated their commitment to the Antarctic by conducting significant research. Twenty-eight States currently have consultative status.

The 1959 Treaty does not contain liability and compensation provisions for ship-sourced pollution damage south of 60°S latitude and therefore the adoption of a Liability Annex to the Protocol on Environmental Protection to the Treaty was required. The Liability Annex, which is explained in more detail in this report, is currently not in force.

This report already outlines the extensive scope of the IMO liability and compensation Conventions for ship-sourced pollution damage, along with various national regimes. The IMO Conventions cannot be applied to the waters south of 60°S latitude i.e. where the Antarctic Treaty applies since – for the purposes of liability and compensation arising from ship-sourced pollution damage – the relevant and in force IMO Conventions (namely the Bunker Convention 2001 and the CLC 1992) apply to “*pollution damage caused in the territory, including the territorial sea, of a State Party, and in the EEZ of a State Party (or equivalent area)*”. Furthermore, none of the Antarctic Treaty States Parties that are also States Parties to these IMO regimes have extended them to their Antarctic territories.

As a result, it would seem that the geographical scope of these IMO Conventions does not extend to the waters south of 60°S latitude simply because there are no coastal States with territorial sea and EEZ or equivalent zones there.

However, as has already been noted in this report with regard to the CLC 1992 and the 2001 Bunker Convention, costs incurred for preventive measures are recoverable under these two regimes even when no spill of oil occurs, provided that there was “a grave and imminent threat” of pollution damage and, more importantly in this context, there is no geographical restriction regarding the jurisdictional zone in which the preventive measures have to be taken. Preventive measures are limited to measures that prevent pollution damage as defined in Art. I.6.

Although the geographical scope of these Conventions applies “to preventive measures, *wherever taken*, to prevent or minimise such damage”, it appears to be debatable whether they apply if no territorial sea, EEZ or equivalent zones are threatened. Therefore, if a State Party to either of these Conventions undertakes preventive measures in response to a pollution incident south of 60°S latitude,

¹⁰⁴ Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America

such state is probably not able recover the costs (from the owner/owner's insurer) under the applicable Convention's liability provisions.

Further, these two Conventions also prescribe the jurisdiction where actions for compensation against owners and their insurers can be brought. Article 9 of the Bunker Convention which follows the same jurisdiction clause in the CLC 1992 provides that actions for preventive measures taken in the territory, territorial sea or EEZ may only be brought in the courts of States Parties. The Conventions do not make it clear, however, where actions may be brought to recover costs for preventive measures taken outside the territory, territorial sea or EEZ of a State Party.

It may be thought that such actions can only be brought in the courts of State Parties to the IMO Conventions but the jurisdiction provisions in the Bunker Convention and the CLC 1992 are silent on where actions to recover costs for preventive measures taken outside the territory, territorial sea or EEZ of a State Party can be brought, and it will be a decision for national courts to determine whether costs for preventive measures taken in waters south of 60°S latitude can be brought in such State Parties.

The IMO Conventions require registered owners of all vessels that are registered in or trade to a State Party to maintain financial security to cover their liabilities under the Conventions, and this is evidenced by a certificate which must be issued by a Convention State Party. The relevant financial security provisions stipulate that insurers shall respond to a claim brought directly against them. Enforcement of these financial security requirements generally takes place in States Parties to the Conventions through the Port State Control or Flag State inspection of ships.

So it is clear that owners of vessels that fall under the scope of these Convention regimes are required to maintain and provide evidence of financial security for their liabilities wherever they arise. This includes the waters south of 60°S latitude, albeit the geographical scope of these Conventions suggests that they would apply to such waters only for the purposes of preventive measures ("...wherever taken..."), and with the abovementioned caveat in terms of actions brought to recover costs for preventive measures where they are taken.

Also, the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (that deals with coastal States' preparedness and response to oil pollution incidents) probably does not - in the absence of coastal States in Antarctica - apply there. However, the parties to Annex IV to the Protocol on Environmental Protection to the Antarctic Treaty have agreed on certain basic obligations in this area:

The Antarctic region is not therefore fully covered by the provisions of an IMO regime providing statutory rights of cost recovery or a right to compensation for ship-sourced pollution damage. But by virtue of Article 15 of the Protocol on Environmental Protection to the Treaty, which is in force, the Parties to this Treaty

agree to “provide for prompt and effective response action to such emergencies which might arise in the performance of activities for which advance notice is required.” This was illustrated by the US and Argentina who shared the clean-up costs when in the Southern Ocean in 1989 the Argentinean supply and tourist vessel BAHIA PARAISO sank and about 830,000 litres of diesel fuel and lubricants entered the marine environment.

However, the absence of an international, statutory regime governing liability and compensation for ship-sourced pollution damage in the Antarctic region provided the catalyst for the discussions on a Liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty that were concluded in 2005.

7.2 The Liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty

Introduction

The following is an outline of the relevant provisions of the Antarctic Treaty with specific focus on Annex VI to the Protocol on Environmental Protection to the Treaty in the context of liability arising from environmental emergencies

Background

The Antarctic Treaty, which entered into force in 1961, establishes a mechanism for international co-operation to protect and preserve the continent of Antarctica. There are currently 29 Consultative Parties and 22 non-Consultative Parties to the Treaty. The Parties to the Protocol meet each year to exchange information and discuss matters relating to the Antarctic, as well as to adopt measures to further the purposes of the Treaty.

A Protocol on Environmental Protection to the Treaty, providing for the comprehensive protection of the Antarctic environment, was adopted in 1991 and entered into force in 1998, along with Annexes I-IV to the Protocol¹⁰⁵. Annex V covering protected areas was adopted in 1991 and entered into force in 1998.

It should be noted that the Protocol does, amongst other matters:

- Require all human activities undertaken in Antarctica to be planned and conducted so as to limit adverse impacts on the environment,
- Prohibit any activity relating to mineral resources other than scientific research (Article 7 of the Protocol),
- Until 2048, allow for modification only by unanimous agreement by all of the Consultative Parties to the Treaty, and
- Provide that the prohibition on activity relating to mineral resources cannot be removed without a binding legal regime on Antarctic mineral resource activities being in force. As a result, there is no foreseeable prospect of oil exploration or similar activities in Antarctica.

¹⁰⁵ Annex I – EIA, Annex II – Fauna and Flora, Annex III – Waste Disposal, Annex IV – Marine Pollution

In terms of mineral resource activities, this is in distinct contrast to the situation in the Arctic region.

Annex VI to the Protocol, titled “Liability Arising from Environmental Emergencies” was adopted by the Antarctic Treaty Consultative Parties in 2005 but is yet to enter into force.

The main tenants of the Liability Annex are:

For States Parties to require their State and non-State operators (as defined) to:

- (i) Take reasonable preventative measures to reduce the risk of environmental emergencies in Antarctica;
- (ii) Establish contingency plans for responses to incidents, and
- (iii) Take prompt and effective response action to environmental emergencies arising from their activities
- (iv) Establish a liability on the operator for the costs of response action taken by States Parties in the event that the operator fails to take prompt and effective response action,
- (v) Establish a limitation regime,
- (vi) Require operators to maintain adequate financial security to the limits established and
- (vii) Establish a fund to provide for the reimbursement of reasonable and justified costs incurred by a State, for response measures taken, in certain circumstances.

Scope

The Liability Annex applies to “environmental emergencies” in the Antarctic Treaty area which relate to scientific research programs, tourism and all other activities in the area for which advance notice is required under Article VII (5) of the Treaty itself. The Annex differs in this regard from the IMO adopted liability and compensation regimes relating to the carriage of persistent oil, HNS and bunker oil by sea in the sense that it does not refer to, or define, pollution damage per se, rather its scope of coverage applies to the type of incident that may occur i.e. an “environmental emergency”, which is defined as:

“...any accidental event that has occurred and that results in or imminently threatens to result in, any significant and harmful impact on the environment.”

The Liability Annex also defines the term “reasonable” in the context that “Each Party shall require its operators to undertake reasonable preventative measures that are designed to reduce the risk of environmental emergencies and their potential adverse impact”.

Whilst “reasonable” in the context of response measures undertaken pursuant to an incident under the scope of the IMO regimes is included in the definitions of “pollution damage”/“damage” in those regimes, it is not actually defined as it is in the Liability Annex, as follows:

“means measures or actions which are appropriate, practicable, proportionate and based on the availability of objective criteria and information, including:

- (i) Risks to the Antarctic environment, and the rate of its natural recovery;
- (ii) Risks to human life and safety, and
- (iii) Technological and economic feasibility”

Whilst this could be seen, on the one hand, as a means of overcoming the issues that have arisen in the context of ship sourced oil pollution damage (where carried as cargo) in past CLC 1992/IOPC Fund cases as to what is reasonable or not (notwithstanding the non-binding policy of the IOPC Funds in this regard), on the other hand the determination as to what is “reasonable” in the context of the Liability Annex still, inevitably, provides for a degree of subjectivity.

Liability

However, where an “operator” fails to take “prompt and effective response action to environmental emergencies arising from its activities”, it shall be liable to pay

- (1) The costs of response action taken by Parties or
- (2) When a State operator should have taken action and no response action was taken by any Party, the operator is liable to pay into a fund the costs of the response action that should have been undertaken, and
- (3) When a non-State operator should have taken prompt and effective action but did not, and no response action was taken by any Party, that operator shall be liable to pay an amount that reflects as much as possible the costs of the response action that should have been taken. Such money is to be paid directly into a fund or to the Party of the operator (who should make “best efforts” to make a contribution to the fund in at least the amount equal to that received from the operator).

In the event that an operator does not take prompt and effective response action, then the Annex encourages the Party of the operator or other Parties to do so and the Annex provides that such a Party may bring an action against a non-State operator, for the costs incurred, in the courts of a Party (which will be determined by whether the operator is incorporated in a Party or not).

Separate provisions apply in the case of State operators.

Basis of Liability

The Liability Annex provides for strict liability of the operator in terms of paying the costs of response action taken by a Party or Parties.

The onus however, and indeed it is a requirement to be imposed by the Parties, is for the operator to take “prompt and effective response action to environmental emergencies arising from the activities of that operator” in the first instance.

Time Bar

Such actions are to be brought within three years of the commencement of the response action or within three years of the date on which the Party bringing the action knew or ought reasonably to have known the identity of the operator, whichever is the later. However, under no circumstances shall an action (against a non-State operator) be commenced later than 15 years after the commencement of the response action.

The Fund

The Annex provides that a Fund is established, to be administered by the Antarctic Treaty Secretariat, to provide for the reimbursement of the reasonable and justified costs incurred by a Party in taking response action where an operator does not do so.

Reimbursement from the Fund will be generated by proposals made by the Party or Parties concerned to Consultative meetings of the Antarctic Treaty.

Limitation

Some debate took place during the final negotiations of the Annex as to whether distinct limits should be included in the final text or whether the operator's right to limit liability should be linked to the limits contained in the 1976 global limitation regime (International Convention on Limitation of Liability for Maritime Claims (LLMC)), as amended. Following this latter approach would have ensured that the limits contained in the Annex keep pace with any increases to the 1996 LLMC Protocol, such as the increases agreed by the IMO in 2010 and that are due to become effective in June 2015.

However, the agreement reached during the final negotiations took the former approach and a specific, sliding scale of limits based on the tonnage of the vessel concerned was included in the text of the Annex that reflects the non loss of life/personal injury limits contained in the 1996 LLMC Protocol as adopted in 1996, but without taking account of any future increases such as those agreed in 2010.

Since such limits are prescribed in the Liability Annex, they would not be affected by any unpaid balance of claims with regard to loss of life or personal injury claims in the same manner as the corresponding limits in Article 6 of LLMC.

There is, however, a provision for the Antarctic Treaty Consultative Meetings to review the limits every three years and for amendments or modifications to be made in accordance with the measure adopted in the Antarctic Treaty itself.

Financial Security

Operators are required to maintain financial security to cover their liability up to the applicable limits, which can be in the form of insurance or other financial security such as the guarantee of a bank or similar financial institution.

Unlike the IMO regimes, the Annex does not provide for State certification, the right of direct action against the financial security provider or the waiver of policy defences save for wilful misconduct of the assured. It is unlikely therefore that a blue card/COFR type system will be required by Parties for the purposes of compliance with the financial security requirements of the Annex.

Entry into Force

The Liability Annex will become effective following ratification by all 28 Consultative States to the Treaty. At the time of the last consultative meeting of the Antarctic Treaty, 13 States have ratified. The official list of ratifications can be found at <http://www.State.gov/documents/organization/189998.pdf>.

8. Non-regulated geographical areas¹⁰⁶

There are "white spots" on the marine chart; i.e. areas that are outside the geographical scope of the various Conventions such as the High Seas (see the illustration in section 2. above that identifies the High Seas areas).

Norway would appear to be the only State that has extended its application of the CLC 1992 (as implemented nationally) to oil pollution on the High Seas and that benefits both the environment and the polluting shipowner. The practical application of these rules remain unclear.

However, if pollution threatens a coastal State a legal framework is available because the Intervention Convention I applies if pollution is threatening a CLC 1992 State. Equally, if US waters are threatened OPA 90 would be applicable. Although current traffic in the Arctic does not affect the High Seas it is a fact that if the spill occurs in such area and does not spread it will not be governed by any of the existing legal regimes.

As a matter of international law, it seems that every state has the right to combat pollution on the high seas, but no existing legal regime appears to provide for compensation and logically such response must be for the account of the state that responds. Hence, there appears to be no legal basis for making a claim against the polluter. Instead, possibly an inter-state discussion can arise under UNCLOS art. 194. Art. 194 provides that

"States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection."

¹⁰⁶ Contributed by Lars Rosenberg Overby, Hafnia Law Firm.

9. The Polar Code¹⁰⁷

In the nature of preventive measures, the Polar Code is highly important and should be mentioned in this context by way of background information. The code lends itself to being incorporated in insurance policies and commercial contracts such as charter parties as rules to be adhered to and commercial standards.

Background

On 15 May 2015, the IMO adopted the environmental provisions of the International Code for Ships Operating in Polar Waters (the "Polar Code"), which will now require vessels in polar waters to comply with various safety and environmental requirements imposed by the Code. The Polar Code, which is expected to take effect on 1 January 2017, contains detailed requirements relating to safety, design and construction, operations, training, and the prevention of environmental pollution. Additionally, the Polar Code includes recommendations and guidelines relating to the mandatory portions of the Code. Major highlights from the Polar Code are summarized below.

Mandatory Safety Measures

Certificate and Survey

Under the Polar Code, vessels fall within one of three categories: Category A ships are vessels designed for operation in polar waters in at least medium first-year ice (70 cm to 120 cm thickness); Category B ships are non-Category A vessels designed for operation in polar waters in at least thin first-year ice (30 cm to 70 cm thickness); Category C ships are vessels designed for operation in open water or in ice conditions less severe than those described in Categories A and B. Many provisions of the Polar Code are detailed according to the category of the vessel.

All vessels to which the Polar Code applies must have a valid Polar Ship Certificate on board. The Certificate will be issued after an initial or renewal survey that will classify the vessel as either a Category, A, B, or C ship. The Certificate requires an assessment to establish procedures or operational limitations, which would take into account the anticipated range of operating and environmental conditions and hazards the vessel may face in polar waters. Such conditions and hazards may include operation in low ambient air temperature, ice, and high latitude, the possibility of abandoning ship onto ice or land, remoteness, and the effect of polar conditions on human performance. For vessels operating in low ambient air temperature, systems and equipment required by the Code must function at the polar service temperature ("PST"), which is a temperature specified for a vessel that must be set at least 10°C below the lowest mean daily low temperature for the intended area and season of operation in polar waters. Survival systems and equipment must be fully operational at the PST for the maximum expected rescue time.

¹⁰⁷ The section is a reproduction of Keesal, Young & Logan's Maritime Alert: *IMO Expands Provisions of Polar Code*, 21 May 2015.

Vessels must carry a "Polar Water Operational Manual," which must include information on the vessel's specific capabilities and limitations, procedures to be followed in normal operations in order to avoid exceeding the vessel's capabilities, and procedures to be followed in the event of an incident in polar waters or when conditions exceed the vessel's capabilities.

Ship Structure and Machinery Installations

For vessels intended to operate in low air temperature, materials used must be suitable for operation at the vessel's PST. The Code provides additional requirements depending on whether the vessel is classified as a Category A, B, or C ship. The Code also includes provisions to ensure sufficient subdivision and stability when the vessel is either intact or damaged. The Code imposes requirements relating to stability, vessel design, and ice removal equipment. Additionally, the Code includes requirements to ensure that the vessel maintains weathertight and watertight integrity, and to ensure that machinery will function in polar conditions, taking into account factors such as ice accretion and snow accumulation.

Fire/Safety Protection and Life-Saving Appliances and Arrangements

Fire safety systems and appliances must be protected from ice and snow and must account for the need for persons to wear bulky and cumbersome cold weather gear. If the vessel will operate in low ambient air temperature, fire safety systems and appliances must be effective under the PST. The Code also includes requirements to facilitate safe escape, evacuation, and survival in polar conditions. Among these are requirements that adequate thermal protection be available for each person aboard, and that all lifeboats be partially or totally enclosed.

Safety of Navigation, Communication, and Voyage Planning

Vessels must have means of receiving and displaying current information on ice conditions in the area of operation, have the ability to visually detect ice while operating in darkness, and must have two non-magnetic means to determine and display the vessel's heading. If ice accretion is likely, there must be a way to prevent the accumulation of ice on antennas required for navigation and communication. The Code also contains requirements to ensure effective communication for ships and survival craft in both normal operations and emergency situations.

When planning a voyage through polar waters, the master must take into consideration the Polar Water Operation Manual, current information on ice and icebergs in the vicinity of the intended route, statistical information on ice and temperatures from previous years, and information and measures to be taken when marine mammals are encountered relating to known areas with densities of marine mammals, including seasonal migration areas.

Manning and Training

The Code requires companies to ensure that masters, chief mates and officers in charge of a navigational watch on board ships operating in polar waters have

completed appropriate training. The extent of training depends on the ice conditions and the whether the vessel is a tanker, passenger ship, or other type of vessel. Every crew member must be familiar with the provisions in the Polar Water Operation Manual relevant to their assigned duties.

Mandatory Pollution Prevention Measures

The discharge of oil or oily mixtures from any ship into Arctic waters is prohibited by the Code. This prohibition does not apply to clean or segregated ballast. The Code also requires that oil fuel tanks of Category A and B vessels be separated from the outer hull. Discharge into Arctic waters of noxious liquid substances or any mixture containing such substances is also prohibited. The discharge of sewage and garbage within polar waters is prohibited unless performed in accordance with MARPOL Annex IV and V, respectively, and with additional requirements specified in the Code.

10. Emergency Preparedness and Response Measures

General comments

Whilst each Arctic Coastal State has its own command centres and response set-up, the question is whether the existing aircraft, vessels, equipment and resources are sufficient to respond to a major event in the Polar regions. If not then additional support has to be sourced and chartered in for the occasion, and that will in turn cause delays and increase costs dramatically. Experience with operations in remote areas shows that the costs of e.g. a wreck removal will multiply if personnel and equipment have to be mobilised. Also, in many scenarios there will be not local man power to rely on as opposed to the “ordinary” oil spill scenario.

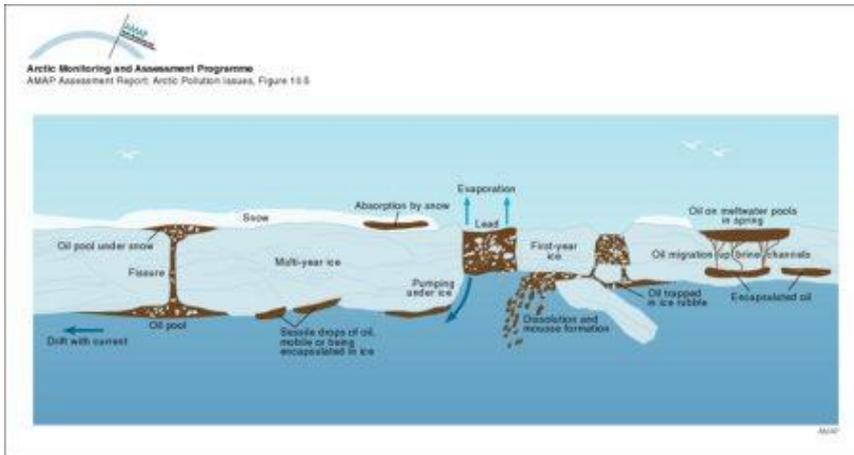
The lack of infrastructure would be a significant liability in the event of a large oil spill¹⁰⁸. The vastness of the Arctic inherently makes it difficult to calibrate the response capability properly in any event though.

The Arctic oil spill counter measures are mechanical containment and recovery, biodegradation, chemical dispersants and in situ burning. These are traditional and tested methods but the special conditions in a Polar environment seriously hamper these counter measures and further critical time will be lost due to the long distances that have to be overcome in order to get to the site. Further, oil that has been collected must be stored and disposed of however there are no such facilities in the area. There are concerns as to whether a large spill can be effectively mitigated in the Arctic¹⁰⁹ and some maintain that even if these methods are used in combination they will still only remove a fraction of the oil that has spilled.

¹⁰⁸ Natural Research Council: *Responding to Oil Spills in the U.S. Arctic Marine Environment* p. 9

¹⁰⁹ Natural Research Council: *Responding to Oil Spills in the U.S. Arctic Marine Environment* p. 93

Figure 4: The behaviour of oil in ice.



Source: AMAP

The Arctic Council Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic

Whilst the Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic from 2013 by the members of the Arctic Council is a useful instrument its impact depends entirely on the vessels, equipment etc. in the pool. The agreement includes non-binding operational guidelines. The relationship between this instrument and the compensation regimes is likely to be that the member state that has sourced some of its response measures under this agreement will the claim expenses incurred in the process from those liable after having paid the “contributing” member states in accordance with the tariffs. As such, the member states are supposed to be compensated directly from the state seeking assistance rather than having to make claims themselves.

International coast guard forum for cooperation in the Arctic

In late October 2015 a new international forum for cooperation in the Arctic was formed. The new Arctic Coast Guard Forum will include coast guards or similar agencies from Canada, Denmark, Finland, Iceland, Norway, Sweden, Russia and the United States. The Arctic Coast Guard Forum is designed to be an operational entity that can “leverage collective resources and coordinate communications, operational plans, and on-the-water activity”¹¹⁰.

Canada/ US bilateral cooperation

Under the Great Lakes Water Quality Agreement, Canada and the US have an annex that concerns joint oil spill response that applies to the Arctic. There are biennial exercises.

¹¹⁰ Source: Council on Foreign relations (<http://blogs.cfr.org/davidson/2015/11/02/u-s-coast-guard-unveils-a-new-model-for-cooperation-on-top-of-the-world/>)

*Coastal state summaries*¹¹¹

Denmark (Greenland)

Greenland's local government is responsible for pollution response within its territorial waters whereas the Danish Arctic Command is responsible for this task outside this area. A report published on 11 September 2013 by Statsrevisorerne (a permanent supervisory body under the Parliament) strongly criticised the capacity to respond to environmental incidents in the Arctic. Work is in progress to improve the response measures and currently (January 2016) an extensive risk assessment and analysis as to how that risk can best be managed is being conducted by the Danish authorities. Greenland has established its own national organisation, Greenland Oil Spill Response ("GOSR") to meet the challenges.

Canada

Canada's ship-source spill preparedness and response capabilities in arctic waters were extensively reviewed in 2014 by a Tanker Safety Expert Panel¹¹² which proposed a series of recommendations to "set the course to improve ship-source prevention, preparedness and response in the Canadian Arctic". These include modernizing Canada's arctic navigation systems, accelerating the collection of bathymetric data and hydrographic surveys, reviewing scientific data on hull strengths and safe ice loads, specified training of ice navigators and vessel officers, requiring Shipboard Arctic Spill Response Plans, developing arctic oil handling facilities and spill prevention, preparedness and response measures and advancing Canada's Coast Guard capability in the Arctic. These recommendations remain under review by Transport Canada but will very likely set the basis for further legislative and regulatory initiatives to significantly advance Canada's arctic waters response capabilities.

Russia

Rosmorrechflot, the Federal Agency of Maritime and River Transport under the Ministry of Transport of the Russian Federation, is the executive body in charge of the general administration of the federal system for the prevention and removal of marine oil spills¹¹³. Oil spill contingency plans and removal activities are managed, at the federal level, by Gosmorspassluzhba, the State Marine Accident and

¹¹¹ The information provided is not exhaustive and the national response capabilities are likely to change over time. The reader is invited to research the position in the present in order to get updated information.

¹¹² See the Panel report (Phase II) to the Minister of Transport, September 30, 2014 at www.tc.gc.ca/media/documents/mospr/TC-Tanker-E-P2.pdf . See also the Report of the Office of the Auditor General of Canada http://www.oag-bvg.gc.ca/internet/English/att__e_39878.html , October, 2014, which critically examined whether Transport Canada, Fisheries and Oceans Canada (including the Coast Guard and Hydrographic Service) and Environment Canada "adequately support safe marine navigation in Canadian arctic waters". The Report points out a number of shortcomings in Canada's approach to safe marine transportation in the arctic, and a lack of long-term national vision or coordinated departmental strategies to support such transportation

¹¹³ "Statement Concerning the Functional Subsystem of Coordinating Activities for the Prevention and Removal of Spills of Oil and Oil Products from Vessels and Structures regardless of their

Rescue Coordination Administration of Russia and, at the regional level, by the Marine Rescue Coordination Centres (MRCC)¹¹⁴. It is required that a marine oil spill is reported immediately to the nearest MRCC. Ports, oil terminals and harbours maintain local contingency plans. If local and regional oil spill removal capabilities are not sufficient, Gosmorspassluzhba mobilizes the federal Tier 2 and Tier 3 capabilities. For Tier 2 and Tier 3 oil spills, dispersants and all other oil spill combat methods are permitted, but in-situ burning and dispersant use require authorization by the Ministry of Health, the Ministry of Natural Resources and the Fisheries Committee¹¹⁵.

*Norway*¹¹⁶

The Norwegian Coastal Administration (“NCA”) is the government agency responsible for the national pollution preparedness and response in Norway with regard to acute pollution including oil spill at sea. The NCA reports to the Ministry of Transport and Communications. NCA administrates the national system for prevention and response to marine oil spills, and coordinates the national response system. The system includes three tiers of response, private, municipal and national. NCA supervises response carried out by private parties and municipal authorities. NCA has a 24/7 duty team handling cases of acute pollution around the clock. In case of larger oil spills, NCA may take charge of the response operation through an NCA command centre established in accordance with a national contingency plan.

The responsibility for the national response on Svalbard is placed both on the Governor of Svalbard and on NCA. A separate contingency plan is issued for Svalbard. For the islands of Jan Mayen and Bear Island, NCA will be in charge of the response but may include the resources of Svalbard in the response operation.

In the northern areas, Norway has implemented a number of risk-reducing measures such as increased vessel surveillance, mandatory ship routing, mandatory piloting services and increased information exchange. Through the Arctic Council working group EPPR, Norway is working actively to follow up the two major agreements on oil spill preparedness in the Arctic, the Arctic Oil Spill Response Agreement and the Arctic SAR Agreement. The government has funded a project within the framework of the Arctic Council EPPR that aims to further strengthen oil spill response in the Arctic. The project is managed by NCA and

Departmental Identity or Nationality,” Russian Ministry of Transport Order N 53 of 06/04/2009, §§ 7(1) and 8.

¹¹⁴ “Statement Concerning the Functional Subsystem of Coordinating Activities for the Prevention and Removal of Spills of Oil and Oil Products from Vessels and Structures regardless of their Departmental Identity or Nationality,” Russian Ministry of Transport Order N 53 of 06/04/2009, §§ 7(1) and 8.

¹¹⁵ For a summary in English, see the entry for the Russian Federation at the website of the International Tanker Owners Pollution Federation Limited (ITOPF) at <http://www.itopf.com/knowledge-resources/countries-regions/countries/russian-federation/>

¹¹⁶ Contributed by senior legal advisor Kjersti Tusvik of the Norwegian Coastal Administration.

will give recommendations on oil spill equipment and risk-reducing measures in the Arctic. The project will give its final report in 2017.

NCA maintains four emergency towing vessels, including two operating the northern areas of the mainland coast. In addition, through cooperation agreements, NCA have access to resources from other public and private parties, including the Coast Guard, the Norwegian Military Forces, The Norwegian Clean Seas Association for Operating Companies (NOFO), and has access to assistance from neighbouring countries and EU (EMSA). A number of private off shore vessels and coast guard vessels are equipped with oil spill equipment owned by the authorities. In order to cover the northern areas that are outside the normal AIS coverage, Norway has employed two satellites orbiting the northern areas. Data from the satellites are administrated through a national centre in Vardø and distributed to relevant authorities. Information exchange and handling are improved by the work of BarentsWatch, a collaboration between government agencies and research institutions working to collect, develop and share knowledge of coastal and marine areas close to Norway.

In 2015, a white paper on the Antarctica was handed over to the parliament¹¹⁷. In addition, a separate white paper was issued on the Bouvet Island. It is expected that a white paper on pollution preparedness and response will be handed over to the parliament during 2016. The white paper may further outline the government's strategy for the pollution preparedness and response in Norway including the polar areas.

USA

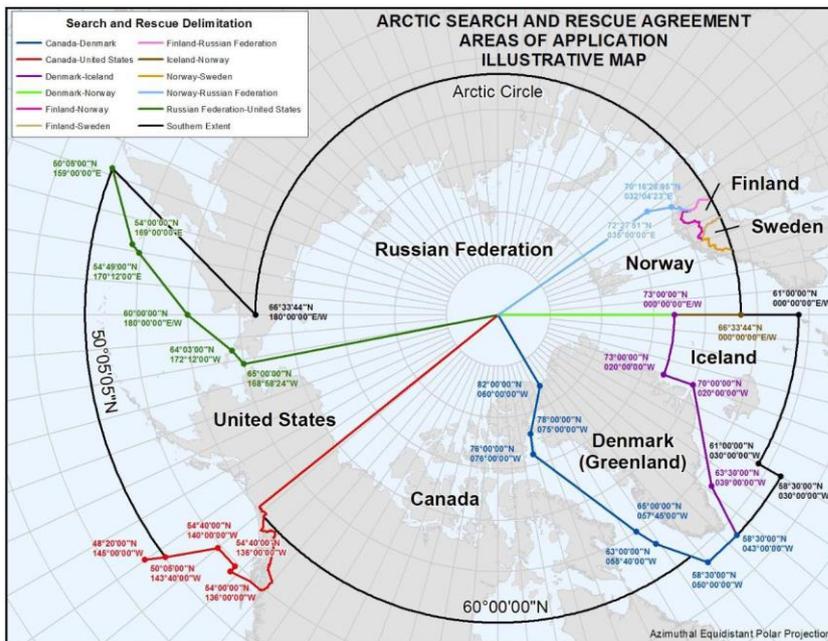
It has been reported that Coast Guard officials have warned that the U.S. government does not have the equipment or infrastructure needed to respond to emergencies in the Arctic the Coast Guard's Arctic Strategy describes the operational challenges to include vast distances, extreme weather, and limited infrastructure. The closest U.S. deep-water port to Barrow, Alaska, the main population center, is more than 1,100 miles away in Dutch Harbor and there are only two small commercial airports in the U.S. Arctic at Barrow and Deadhorse, Alaska. Other challenges include poor radio propagation, partial satellite coverage, geomagnetic interference with navigation equipment, and limited cellular networks.

Arctic Council SAR Agreement

Whilst the focus is different, it should be mentioned that there is also an Arctic Search and Rescue Agreement among the members of the Arctic Council. The illustration below serves to illustrate the vastness of the area that the agreement applies to.

Figure 5: Geographical scope of the Arctic Council SAR Agreement.

¹¹⁷ Meld.St. 32 (2014 – 2015)



Source: Wikimedia

11. Discussion

The Arctic States (Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the USA) have each identified activities in their Arctic region, which they consider to present risks due to location or operation. These risks are associated with oil and gas activities such as exploration, production, and marine transportation of the same. The threats involve release of oil, radiological and other hazardous materials from exploration activities and related shipping transportation and also in relation to shipping, abandoned and sunken vessels have the potential to leak oil and other hazardous materials. There are a variety of Conventions and agreements at international, multi-lateral and bi-lateral level to address these risks. The most significant of these have been described above in section 5.

Compensation for pollution damage caused by spills from oil tankers is governed by the international regime originating from the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention). In the United States, OPA 90 and the associated provisions apply.

Many of the international Conventions relate to emergency prevention, preparedness or response (for example, the International Convention for the Protection of Pollution from Ships (MARPOL 73/78), the International Convention on Oil Pollution Preparedness Response and Cooperation (OPRC 1990) and the Protocol On The Preparedness, Response and Cooperation On Pollution Incidents by Hazardous and Noxious Substances (OPRC-HNS Protocol 2000).

Pollution by non-persistent oil and other substances is also subject to national regulation that comprises liability, responsible parties and recoverable losses even though the HNS Convention is not yet into force.

As such there is a comprehensive network of international liability and compensation regimes for the Arctic region generally which would apply to cover damage caused by spills from oil cargo and vessels' bunkers (the CLC 1992, Fund Convention and Bunker Convention) when this occurs in the territorial sea and EEZ of a Contracting State party, irrespective of the flag of the ship/place of registry and whether or not they are contracting State parties.

Further, the Intervention Convention 1969 and the Intervention Protocol of 1973 permits the Arctic States to take action even beyond the EEZ, in the High Seas to prevent damage to their coastline when there is a "grave and imminent threat" of damage by pollution. The costs in this respect are recoverable from the CLC 1992/Fund Conventions/Bunker Convention when this concerns oil pollution.

Even if the full CLC 1992 compensation regime (including the strict liability, compensation limit, insurance requirements, direct action, etc.) applies to oil pollution incidents in the Arctic, there may still be substantive issues which deserve some consideration with regard to how well the 'regular' rules of the CLC 1992 cater for the special circumstances in the Arctic area. First and foremost, the question is whether the monetary compensation schemes will be sufficient to meet the costs of responding to a major oil spill considering a likely cost multiplier of more than 10 compared to an oil spill in e.g. Western Europe. The experience with major oil spills in the Arctic are limited to the EXXON VALDEZ incident in 1990 for which the reported clean up cost alone amounted to USD 2.5 billion. However, experience with other major – not even oil tanker – casualties in remote areas (e.g. the OLIVA in 2011 on Tristan da Cunha and the CULLUK in Alaska in 2012) suggest very high costs of responding to a spill.

The point is that pollution response measures need to be mobilised and brought in from afar and in many instances national response options will likely be inadequate and must therefore be supplemented by resources procured on market terms. That will escalate costs just as any other operation in a remote area. Further, the likely lack of local manpower will undoubtedly cause further costs to accrue.

By way of example, Norway has had to accept that the wreck of PETROZAVODSK (a fishing vessel) on the Arctic island Bear Island south of Svalbard cannot be removed due to the prohibitive costs involved in such operation. This raises the question if – where the CLC 1992 Convention applies – member States are restricted compensation-wise in the actions they can take, simply because the costs of the measures and the likely results are disproportionate. In the affirmative, it is debatable whether those who suffer losses due to an oil pollution in the Arctic can be adequately compensated.

Also, the assessment of the reasonableness of reinstatement costs and preventive measures may need specific criteria in the Arctic environment (in view of the costs involved in removing a wreck, or emptying tanks in remote Arctic areas, practical reinstatement options or the costs of the scientific studies of the conditions, baselines, recovery etc.). This is not least because the absence of solid experience with pollution in polar environments makes it difficult to assess if restoration is indeed possible and if the permitted claims by way of “Oil Pollution Damage” offer sufficient remedy because impairment of the environment under the CLC 1992 Convention is restricted to reinstatement costs. If it is impossible to recreate the ecological habitat or something similar, can it then be reasonable to incur costs in this regard under the CLC and Fund Convention regime? Clearly, it is not for lawyers to determine the ecological possibilities.

With respect to exemptions from liability, navigation in the Arctic is more likely than regular tanker trade to give rise to exemption under CLC 1992 Article III(2)(d) on navigational aids (including charts). This, in turn, increases the Arctic coastal States' exposure to liability under the CLC 1992 (though such incidents will still be covered by the Fund).

These matters may not need amendments of the Conventions, but could at least to a significant degree be addressed by a less formal interpretation of guidelines and changes to the IOPC claims manual.

Funding and specific insurance requirements are also relevant issues. Outside the scope of the CLC and Bunker Convention regimes only the vessels' P&I insurance cover will – in principle - be available to absorb the losses and then subject to the limitation LLMC 1996 (where in force).

There is also notionally a regime agreed at international level for liability and compensation for damage caused by HNS but which is not yet in force. Until such time when it enters into force, the limit of liability for damage caused by HNS will be governed by LLMC 1996 where this is in force or national law. The LLMC however does not regulate liability for such damage and it could be said therefore that there is vacuum until the HNS Convention is in place although national marine environmental legislation will cover such vacuum.

As regards the High Seas, there is an issue as to how pollution damage should be dealt with in the interest of the International community as such. Whilst it appears that there currently are few ice free areas beyond 200 NM (High Seas) it seems that an instrument similar to the Liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty (see section 7.2 above) may be appropriate in the Arctic.

A more simple approach would be to copy the Norwegian model of extending the application of the CLC 1992 (as implemented nationally) to oil pollution on the High Seas as that would benefit both the environment and the polluting ship owner.

The vastness of the area is a great challenge from a response perspective and possibly the problem could to some extent be managed by establishing transport corridors and restricting navigation to certain areas. A ban of HFO modelled on the Antarctic solution also offers itself for consideration in some areas.

The United States aggressively enforces its pollution liability laws. In recent years, it imposed stringent operating restrictions on companies seeking to conduct oil exploration in arctic waters on its continental shelf in order to protect the environment and to prevent interference with traditional subsistence activities of native Alaskans. If a vessel had a significant discharge in arctic waters subject to the jurisdiction of the United States, it is anticipated that the United States would demand a full response to the incident, and would pursue substantial claims for natural resource damages and civil penalties. The lack of adequate response resources or infrastructure from which to mount a response would hamper the ability of a vessel operator to respond to such a spill.

The Antarctica strongly needs ratification of the above mentioned liability annex in order to clarify the current uncertain legal position.

12. Conclusions and recommendations

The legal infrastructure in the Arctic is very good technically speaking in the sense that the coastal states have in place legislation that deals with pollution, liability, calculation of losses, responsible parties and funding.

A major oil spill may reveal the need for considering the current regulation of “pollution damage” in the CLC 1992 convention in terms of what measures are “reasonable” and as regards impairment of the environment. The representatives of the International Group of P&I Clubs and the International Chamber of Shipping do not believe that the analysis in section 11 of the report supports this conclusion.

It is possible that a major oil spill will stress the monetary limits of the CLC and Fund Convention regime although the Supplementary Fund may be sufficient in most instances. This view is not shared by the representatives of the International Group of P&I Clubs and the International Chamber of Shipping who consider the two funds in combination with the vessels compulsory P&I cover adequate.

It is an open question how the requirement that environmental reinstatement cost must be reasonable – in the context of the CLC and Fund Convention regime – will be applied by courts in the relevant coastal states and the IOPCF to such reinstatement attempts in the special Arctic environment. Clarification of the recoverability of reinstatement costs under the CLC and Fund Convention regime would therefore assist the coastal States. The representatives of the International Group of P&I Clubs and the International Chamber of Shipping disagrees with this conclusion.

These observations are even more apparent considering the current response facilities and equipment that are available in the Arctic.

Russia would benefit from participating in the Supplementary Fund Protocol to the Fund Convention 1992 should a major oil pollution occur. So would Iceland.

There is a gap with respect to the High Seas in the Arctic but this is not problematic at the moment. In time, the issue should be addressed in the interest of the International community.

As regards the United States there is no indication that it will join the CLC and Fund Convention regime, and will continue to enforce its domestic laws governing spills, including OPA 90.

The Antarctica is exposed to legal uncertainty in the event that a pollution incident occurs until the liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty is ratified. Therefore, it is specifically recommended that the Antarctic Treaty Protocol States ratify the Liability Annex described in section 7 above.

The Polar Shipping Working Group proposes that the report is submitted to the IMO Legal Secretariat and discussions take place with the IMO Legal Secretariat to consider further.

Finally, it would be natural for the coastal state IWG members to provide their competent local authorities with a copy of this report.

Copenhagen, 2 February 2016

Lars Rosenberg Overby