

**Practice of Maritime Business: Sharing experience**

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**Cargo Liability for Oil Spills in Italian territorial waters and in Europe**

Alberto Batini

(BB & Partners, Italy)

Ladies and Gentlemen,

I wish to thank this prestigious organization for having granted to me the chance of presenting a paper on occasion of this event, which I hope shall be an open issue for discussion due to its stringent actuality.

I shall try to analyse in brief the following key issues:

- 1) Whether in the event of an accident at an Italian port or in Italian waters resulting in an oil spill, are there circumstances under local law in which Cargo owners may be held responsible for penalties or damages due to its capacity as (i) a time or voyage charterer or (ii) a cargo owner;
- 2) Which entities are liable for an oil spill;
- 3) What damages or penalties are likely to be imposed and whether they are limited by law;
- 4) Whether and of whom financial responsibility or contingency response plans are required;
- 5) Whether, how and by whom a spill must be reported;

- 6) Whether immediate spill response is required by law.

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Under Italian law the international compensation regime for damage caused by spills of persistent oil (i.e. crude oil, heavy and medium fuel oil, heavy diesel oil and lubricating oil) from laden tankers was based initially on two IMO Conventions - the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 CLC) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention). This 'old' regime was amended in 1992 by two Protocols, which increased the compensation limits and broadened the scope of the original Conventions. In October 2000 agreement was reached on increasing the limits of the 1992 CLC and Fund Convention by a little over 50% with effect from 1st November 2003. In May 2003 a Supplementary ('third tier') Fund was established at the IMO through a new Protocol that will increase the amount of compensation in States that ratify it to about US\$1,160 million (including the amounts paid under the 1992 CLC and Fund Convention).

In 1992, a Diplomatic Conference adopted two Protocols amending the 1969 CLC and 1971 Fund Convention, which became the 1992 CLC and 1992 Fund Convention. These 1992 Conventions, which provide higher limits of compensation and a wider scope of application than the original Conventions, entered into force on 30th May 1996. As in the case of the original Conventions, the tanker owner and P&I insurer are liable for the payment of compensation under the 1992 CLC, and oil receivers in countries that are party to the 1992 Fund Convention are liable for the payment of supplementary compensation through the 1992 IOPC Fund. As more States ratified or acceded to the 1992 Conventions, the original Conventions rapidly lost significance and the 1971 Fund Convention was terminated altogether on 24th May 2002.

The Supplementary Fund Protocol entered into force three months after it was finally ratified by eight states which have received a combined total of 450 million tons of contributing oil in a calendar year. These conditions were fulfilled on 3rd December 2004 when the Protocol had been ratified by Denmark,

Finland, France, Germany, Ireland, Japan, Norway and Spain. The Supplementary Fund therefore came into force on 3rd March 2005.

Italy is a party to 1992 CLC and 1992 Fund Convention but is not a Party to the Supplementary Fund Protocol.

Both Conventions apply to pollution damage caused by spills of persistent hydrocarbon mineral oil (whether carried as cargo or as bunkers) from any type of seagoing ship that is constructed or adapted for the carriage of such oil in bulk as cargo. Thus the Conventions can apply to spills from tankers, combination carriers (when they are carrying a cargo of persistent oil) and barges. Spills of bunker fuel from other types of ship (e.g. dry cargo ships, container liners, bulk carriers) are not covered by these Conventions.

The 1992 CLC covers pollution damage suffered in the territory or territorial sea or exclusive economic zone (EEZ) or equivalent area of a State Party to the Convention. The flag State of the tanker and the nationality of the owner are irrelevant for determining the scope of application. As the 1992 CLC covers spills of persistent cargo and fuel (bunker) oil from sea-going tankers, it can apply to both laden and unladen tankers (but not to dry cargo ships).

The 1992 CLC is based on the principle of 'strict liability'. This means that the owner of the tanker which spills the oil is liable regardless of whether or not he was actually at fault, subject to very few exceptions (e.g. if the damage resulted from an act of war or grave natural disaster, was wholly caused by sabotage by a third party, or was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids).

Claims for pollution damage under the 1992 CLC can be made only against the registered owner of the tanker concerned or his pollution liability insurer. The Convention prohibits making such claims against the servants or agents of the owner, members of the crew, the pilot, the charterer including bareboat charterer), manager or operator of the tanker, or any person carrying out

salvage operations or preventive measures (including clean-up measures). This last aspect is aimed to provide considerable reassurance to responders.

Under the 1992 CLC the tanker owner will normally be entitled to limit his liability to an amount based on the gross tonnage of the tanker involved in the incident (see later). If it is proved, however, to the satisfaction of a Court that the pollution damage resulted from the owner's personal act or omission, done with intent to cause pollution damage, or recklessly and with knowledge that such damage would probably result, the owner will be deprived of the right to limit his liability. The amount due by a tanker owner depends on the size of the tanker. Under the 1992 CLC, the maximum paid by the owner of a small tanker is SDR 3 million (about US\$4.2 million). The maximum for a large tanker is SDR 59.7 million (about US\$84 million).

On the relatively rare occasions that valid claims exceed the tanker owner's limit of liability under the 1992 CLC, supplementary compensation is provided under the terms of the 1992 FUND Convention. This is done through the IOPC Fund (1992 FUND). The maximum amount available from the 1992 FUND, quite differently from the 1992 CLC, is not dependent on the size of the tanker. Payments of compensation by the 1992 FUND are financed by contributions levied on oil companies and other entities located in all 1992 FUND Member States that receive crude oil and heavy fuel oil after sea transport (oil importers). Contributions are only sought after a spill in order to pay the resulting claims. Oil receivers based in Italy currently contribute about the 10,8% of the total.

Oil exporters, on the other hand, do not contribute. This was a decision taken when the original Conventions were being developed, partly on the grounds that it would be more straightforward to count oil quantities for contribution purposes when they were received at a port in a Member State after sea transport. This means that the financial burden of paying compensation falls mainly on consumers in industrialized countries since it is ultimately they who require the

oil to be moved on the world's oceans and seas, and around the coast of individual countries.

Also please note that the Italian legislation on the subject matter is quite different from the one provided by OPA 1990 in the United States. As a matter of facts the 1992 FUND Convention, though now allowing higher limits of liability, is excluding the restoration of the damage to the marine environment.

In recent times a debate arose among scholars in connection with potential profiles of civil liability of contracting carriers of crude oils in case of spills.

The Italian code of navigation regulates only the relations between the parties to the contract of carriage or to the charter-party but not the liability aspects towards third parties, save for collision cases and salvage. These aspects are, instead, ruled out in our civil code and, namely, under article 2051 (titled: Damage caused by things in custody or charge).

This rule states: Everyone is liable for damages caused by things in his custody or charge unless he proves that the damages were the result of a fortuitous event. Italy has not yet a clear or unanimous position on whose party of a time charter-party is in charge or custody of the cargo.

In case of damages produced by a cargo represented by a charterer's bill of lading, it might be held that the charterer was in charge of the cargo being the contractual carrier. This would be sufficient to trigger the general liability principal stated by article 2051 civil code.

Most of the Italian jurisprudence on time charter-parties consider the charterer as a carrier only when issues bills of lading - but not clearly as a bailee of the cargo - thus not fully excluding Charterers from the detrimental effects of the 2051 C.C. Rule under the circumstances. There are anyway dissenting opinions among judges while the majority of Italian literature is in favour of the theory

according to which the ship owner is the carrier – and indeed the bailee of the cargo - in a time charter party.

For the above reasons it is generally recommend to Crude Oil Owners, as well as to owners of other HNS substances (such as LNG), not to issue their own bills of lading. Charter parties should contain clauses and provisions pursuant to which Master is bound to sign bills of lading “as presented” by Charterers and should made clear that Charterers are not the bailee of the crude oil cargo during transit and navigation.

We have examined so far the civil liability profile arising out of an oil spill as regulated on an international and domestic level by the relevant governing international conventions. An oil spill in Italian territorial waters anyway will produce additional legal effects and implications dictated by domestic legislation in terms of sanctions imposed by the State (Public administration sanctions) and criminal offences giving rise to prosecution.

We shall now deal briefly with these additional aspects who might be of interest to you.

In line with the 1982 Montego Bay Convention on the Law of Sea (enacted in Italy by the Law 2.12.1994 n. 689) Italy passed the Bill 31.12.1982 n. 979 (also known as the Law of the Protection of the Sea). Art. 16, first paragraph, of the Law 979/1982, prohibits to *all vessels*, independently from their flag, to spill or cause spilling of hydrocarbons or hydrocarbons mixtures (and other noxious or hazardous substances defined in Attachments) in territorial waters, inland waterways or ports. Art. 16, 2<sup>nd</sup> paragraph, extends this prohibition in case of Italian flagged vessels to extraterritorial waters.

Article 20, first paragraph, of Law 979/1982 provides that the violation of such law as well as of Marpol 1973/1978 (and the related Annexes) will produce the application of the following sanctions:

- in case of spill caused by wilful or reckless misconduct the registered Owner, the ship-owner (as employer of the crew) and the Ship's Master shall be regarded as jointly responsible on the basis of a strict liability principle and therefore, in addition to the obligation to indemnify the Coastal State, the same shall be subject to the criminal sanction of imprisonment for a period ranging from two months to two years OR to a fine ranging from Euro 258.00 to Euro 5,164.00, subject to the Judge's discretion;
- in case of accidental spill, even if due to negligence, the same parties shall be subject to the above criminal sanctions and fines but reduced to the half. Same discipline would apply also in case of spill falling within the meaning of a general average sacrifice for the safety of the ship and/or the entire cargo or for the safety of someone's ship.

Furthermore the Decree 18.04.2003 prohibits access to Italian port facilities, off-shore terminals and anchoring areas in territorial waters to ships carrying heavy oil exceeding 5,000 tons of gross tonnage, regardless of their flag, aging more than 15 years unless complying with double hull requirements or meeting likewise technology as defined by Rule 13.F of Annex I to 1973 Pollution Prevention Convention (MARPOL) as modified by the 1978 Protocol.

The potential conflict between the Italian domestic legislation and the Marpol 1973/1978 (and related Annexes) suggested to the European Union the promulgation of the 2005/C 25E/03 Directive on Harmonization of sanctions in marine pollution caused by ships. This Directive is not self executing and therefore shall have to be enacted in each EU Member State.

The great innovation generated by this EU Directive is represented by a renovated will of the EU legislator purported to involve and eventually punish any protagonists of the supply chain of crude oil, including cargo owners and

even classification societies. The recitals of the Directive are explicit in this sense:

(4) Measures of a dissuasive nature form an integral part of the Community's maritime safety policy, as they ensure a link between the responsibility of each of the parties involved in the transport of polluting goods by sea and their exposure to penalties; in order to achieve effective protection of the environment there is therefore a need for effective, dissuasive and proportionate penalties.

(7) Neither the international regime for the civil liability and compensation of oil pollution nor that relating to pollution by other hazardous or noxious substances provides sufficient dissuasive effects to discourage the parties involved in the transport of hazardous cargoes by sea from engaging in substandard practices; the required dissuasive effects can only be achieved through the introduction of penalties applying to any person who causes or contributes to marine pollution; penalties should be applicable not only to the ship owner or the master of the ship, but also the owner of the cargo, the classification society or any other person involved.

(8) Ship-source discharges of polluting substances should be regarded as infringements if committed with intent, recklessly or by serious negligence. These infringements are regarded as criminal offences by, and in the circumstances provided for in, Framework Decision 2005/667/JHA supplementing this Directive.

The Directive is already in force but still to be implemented by the Member States, who are granted time until 1st March 2007 to comply. It will be interesting to see how far each Member States will go in terms of punishing cargo owners and/or classification societies if and when considered having acted recklessly or by serious negligence in contributing to an oil spill. Particular attention shall have to be made to the grey area of "serious negligence", whose notion might open endless litigation and debate. Is not clear from the main indications of the EU Directive how "serious" a negligent behaviour should be to trigger the sanctions. Member States shall have to dedicate particular attention to this aspect. Also the insurance market shall have to take into account the matter and probably we could assist for the first time in the industry to express liability sections for oil pollution within cargo insurance policies. This would certainly leads to substantial premium rise effects and eventually to additional rise in oil prices.

The applicable conventions, on the other hand, require mandatory financial responsibility cover from ship's owners and registered owners.

Under the terms of the 1992 CLC, the owner of a tanker carrying more than 2,000 tonnes of persistent oil in bulk as cargo is required to maintain insurance (normally with one of the P&I Clubs) or other financial security, and to carry on board a certificate attesting to the fact that such cover is in place. It is therefore rare that a tanker owner cannot meet his financial obligations under the 1992 CLC, but it can happen, for example in the case of small tanker that is not required to carry insurance. It can also happen if one of the exonerations that are applicable under the 1992 CLC but not under the 1992 Fund Convention is relevant (e.g. the incident was caused by a grave natural disaster). In these circumstances the 1992 Fund would meet all the claims, rather than just those that exceed the tanker owner's limit under the 1992 CLC. These two examples of the extra 'protection' provided by the 1992 Fund should give governments and oil companies considerable reassurance.

Spill response and reports obligation.

Italy is a Party to the 1976 Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, entered into force on 12.02.1978. This Convention, recently amended in 1995, is still in force in Italy in its original version, including the Protocol Concerning Cooperation in Combating Pollution of the Mediterranean Sea by Oil and other Harmful Substances in Cases of Emergency.

Annex 1 of such Protocol (referring to art. 8 of the Protocol) provides for the ship's master obligation to report, immediately following an oil spill and whenever possible, the following:

- (a) A clear indication or description of the harmful substances involved, including the correct technical names of such substances (trade names should not be used in place of the correct

technical names);

(b) A statement or estimate of the quantities, concentrations and likely condition of

harmful substances discharged or likely to be discharged into the sea;

(c) Where relevant, a description of the packaging and identifying marks; and

(d) The name of the consignor, consignee or manufacturer.

Cargo owners and voyage charterers are therefore invited to render (or to be ready to render) a clear description of the above elements and information to the ship's master.

Additionally, though no specific obligations are imposed upon cargo owners in terms of spill response and adoption of emergency plan in Italian territorial waters, it is advisable for owners of persistent oil and hydrocarbons engaged in regular trades to join international associations of those oil traders and companies willing to enhance their spill response capability. An example is **The Mediterranean Oil Industry Group (MOIG)**, comprising of oil companies and associations from countries around the Mediterranean Sea. MOIG was initiated by IPIECA following the IMO/IPIECA Oil Spill Response Seminar in Cairo in 1992, where a commitment was made to set up an industry network in the Mediterranean region. Officially institutionalized in Tunisia, MOIG provides a regional oil industry forum concentrating on oil spill preparedness and response for the Mediterranean Region. It provides a regional industry interface to the REMPEC (Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea). The main benefit of MOIG is enhanced spill response capability through: \_

- development of National Contingency Plans and ratification of Conventions (OPRC, CLC, FUND)
- local contacts in the region and information in case of incidents;
- direct contact with competent authorities;

- joint training and exercises;
- access to IPIECA and other organization's educational information;
- enhanced regional information
- sensitivity mapping;
- dissemination of information (newsletters, web site).

Many thanks for your attention,

Alberto Batini

**BB & Partners**

**Piazza Corvetto, 2/5**

**16122 Genoa, Italy**

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Alberto Batini graduated at the University of Pisa (Italy) – Law School in 1990 (*magna cum laude* – Thesis: “The European Economic Interest Group: an application in the Shipping Industry”). He has been former assistant solicitor with Sinclair Roche & Temperley, London – 1991. He joined as former assistant claims handler Standard Steamship Owners P&I Club, Charles Taylor & Co., London – 1992. Mr. Batini attended at the University of Southampton – Faculty of Law, the Institute of Shipping Law, obtaining the 18<sup>th</sup> Maritime Law Degree, 199. He is presently a Partner with the Italian law firm Batini & Associati since 1993. The firm is specialised in Maritime and Corporate Law with offices in Livorno, Genoa, Venice, La Spezia, Milan, Cagliari, Ravenna and Bologna. The author obtained a Post graduate Doctorate in Shipping and Transport Law – University of Trieste and Genoa in 1995 (Monography assigned : “The law of Tug and Tow – Public and Private Law Profiles”). Vice-President of the Ibero-American Institute of Maritime Law (IIDM) – Italian Section since 1998 - President of the Italian Young Lawyers Association - Maritime Law Sub-Commission - Editorial Articles in Shipping and Transport Law - Supporting Member of the Italian Association of Maritime Law (IAMA) and active member of the Italian Working Group for Maritime Liens and Mortgages and Arrest of Ships at the CMI Centenary Conference held in Antwerp in June 1997. Various Articles and publication

Areas of Practice: Admiralty Law and Marine Insurance Law