The Need for Reasonable and Cost Effective Response Operations

Sally Gregory, José Maura and Joe Nichols,
Claims Department,
International Oil Pollution Compensations Funds

Introduction

Two international Conventions, the 1992 Civil Liability Convention and the 1992 Fund Convention, govern compensation for pollution damage caused by spills from oil tankers.

The Civil Liability Convention, which governs the liability of tanker owners, lays down the principle of strict liability and introduces a system of compulsory liability insurance. The tanker owner is normally entitled to limit his liability to an amount linked to the tonnage of his ship.

The 1992 Fund Convention is supplementary to the 1992 Civil Liability Convention by providing compensation for pollution damage when the amount available under the Civil Liability Convention is inadequate. The International Oil Pollution Compensation Fund 1992 (1992 Fund) is a world-wide intergovernmental organisation set up to provide compensation in States which are Party to the 1992 Fund Convention. The 1992 Fund is administered by a Secretariat in London, which also administers another Organisation, known as the 1971 Fund, which operates in parallel to the 1992 Fund. Each Fund has an Assembly composed of representatives of all Member States of the respective Organisation and an Executive Committee of 15 Member States elected by the respective Assembly. The main function of the Executive Committees is to approve settlements of claims for compensation, to the extent that the Director of the two Funds is not authorised to make such settlements.

Compensation is available under both Conventions for pollution damage, including the costs of reasonable preventive measures. A uniform interpretation of the definition of pollution damage and preventive measures is essential for the functioning of the system of compensation.

This paper focuses on preventive measures, including clean-up, and draws upon the IOPC Funds' experience in handling claims for compensation arising from over 100 incidents. The paper considers the criteria against which claims for preventive measures are assessed by the 1992 Fund, in particular the question of reasonableness.

The International Regime and Recent Developments

The 1992 Conventions apply to pollution damage caused by spills of persistent oil from tankers and suffered within the territory, territorial waters or the exclusive economic zone (EEZ) or equivalent area of a State Party. Expenses incurred for preventive measures are recoverable even when no spill occurs, provided that there was a grave and imminent threat of pollution damage. The Conventions apply not only to spills from tankers carrying oil in bulk as cargo, but also, in some circumstances, to spills of bunker oil from unladen tankers.

Apart from exemptions from liability for pollution damage caused by acts of war, grave natural disasters, sabotage by a third party or negligence by public authorities in maintaining navigational aids, the owner of the tanker has strict liability (ie he is liable also in the absence of fault).

The limits of the tanker owner's liability under the 1992 Civil Liability Convention are:

(a) for a ship not exceeding 5 000 units of account, 3 million SDR[<1>] (£2.7 million);
(b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 3 million SDR (£2.7 million) plus 420 SDR (£375) for each additional unit of tonnage; and
(c) for a ship of 140 000 units of tonnage or over, 59.7 million SDR (£53.4 million)

The tanker owner is deprived of the right to limit liability if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The 1992 Fund pays compensation to those suffering oil pollution damage in a State Party who do not obtain full compensation under the 1992 Civil Liability Convention in the following cases:

(a) the tanker owner is exempt from liability under the 1992 Civil Liability Convention because he can invoke one of the exemptions under that Convention; or
(b) the tanker owner is financially incapable of meeting his obligations under the Civil Liability Convention in full and his insurance is insufficient to satisfy the claims for compensation; or
(c) the damage exceeds the tanker owner's liability under the Civil Liability Convention.

The maximum compensation payable under the 1992 Fund Convention in respect of an incident is 135 million SDR (£120 million), including the sum actually paid by the tanker owner (or his insurer) under the 1992 Civil Liability Convention.

The 1992 Fund is financed by contributions levied on any person who has received in one calendar year more than 150 000 tonnes of 'contributing oil' (crude oil and heavy fuel oil) after sea transport in a State Party to the 1992 Fund Convention. Each contributor pays a specified amount per tonne of contributing oil received, the amount levied being decided each year by the 1992 Fund Assembly.

The 'old' regime in decline

Two other Conventions, the 1969 Civil Liability Convention and the 1971 Fund Convention preceded the 1992 Conventions. These earlier Conventions have been denounced by a number of States and the number of 1971 Fund Member States will have fallen from 77 to 27 by October 2001.

A consequence of this departure from the 1971 Fund is that the total quantity of contributing oil, on the basis of which contributions to that Fund are assessed, has been drastically reduced, the effect of which is a considerably increased financial burden on contributors in remaining 1971 Fund Member States. Furthermore, there are at present over 20 Member States where there are no contributors because no entities receive more than 150 000 tonnes of contributing oil in a calendar year. In the situation set out above, the remaining 1971 Fund Member States may not have the financial protection which they would expect in accordance with the provisions of the 1971 Fund Convention. However, in order to overcome this difficulty the 1971 Fund has now taken out insurance to cover its liabilities arising from any new incidents.

[<1>] The unit of account in the Conventions is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this paper, the SDR has been converted into US dollars at the rate of exchange applicable on 1 October 2000, ie 1 SDR =£0.894.

Under Article 43.1 of the 1971 Fund Convention, that Convention ceases to be in force when the number of Contracting States falls below three, a number that is unlikely to be reached in the foreseeable future. In September 2000, the IMO convened a Diplomatic Conference at which a Protocol was adopted to amend Article 43.1 of the 1971 Fund Convention to the effect that the Convention would cease to be in force on the date on which the number of Member States fell below 25 or 12 months following the date on which the Fund Assembly (or other body acting on its behalf) noted that the total quantity of contributing oil received in the remaining Member States fell below 100 million tonnes, whichever was the earlier. The Protocol will enter into force on 27 June 2001 unless at least one third of the remaining Contracting States lodge opposition to its entering into force by 27 March 2001. On the assumption that such objections will not be lodged the Convention would cease to be in force during the summer of 2002 at the latest.

Improvements to the 1992 Conventions

Increase in the compensation limits

Some 1992 Fund Member States have expressed the view that two major incidents involving the 1992 Fund, namely the *Nakhodka* (Japan, 1991) and *Erika* (France, 1999) incidents, have shown that even with the higher amount of compensation available under the 1992 Conventions, there are still difficulties in providing full compensation to victims. A number of Governments submitted a proposal to the IMO to increase the limits in the 1992 Conventions. The Legal Committee of the IMO met in October 2000 and adopted two Resolutions amending the limits laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention by 50.37%, thereby resulting in a maximum amount available for compensation under the 1992 Conventions of 203 million Special Drawing Rights (£180 million). The amendments will enter into force on 1 November 2003, unless prior to 1 May 2002, a quarter or more of the Contracting States communicate to the IMO that they do not accept the amendments.

Possible revision of the 1992 Conventions

The 1992 Fund Assembly decided in April 2000 that it would be appropriate to consider whether, in the light of experience, the compensation regime needed improvements in order to meet the needs of the international community. A Working Group of the 1992 Fund met in July 2000 to hold a preliminary exchange of views and draw up a list of issues that could merit further discussion. Subjects discussed included:

- Ranking of claims/priority treatment (including prescription periods)
- Uniform application of the Conventions
- Sanctions for failure to submit oil reports
- Dissolution and liquidation of the Fund
- Maximum compensation levels
- Weighting of contributions according to the quality of ships used to transport oil
- Environmental damage

The 1992 Fund Assembly has decided that the Working Group should meet in March and June 2001 to continue to consider issues identified as important for the purpose of improving the compensation regime and to make appropriate recommendations to the Assembly.

Admissibility of claims for compensation for preventive measures, including clean-up

General considerations

The policy of the 1992 Fund on the admissibility of claims for compensation has been established by the Governments of Member States. The 1992 Fund has published a Claims Manual setting out the criteria for the admissibility of various types of claims and containing general information on how claims should be presented.

For a claim to be accepted by the 1992 Fund, it has to be proved that the claim is based on a real expense actually incurred, that there was a link between the expense and the incident and that the expense was made for reasonable purposes.

The 1992 Fund compensates the costs of measures to prevent or minimise pollution damage, such as reasonable measures to combat oil at sea, to defend sensitive resources, to clean shorelines and coastal installations and to dispose of collected oil and oily debris. The Fund also accepts costs arising from preventive measures associated with salvage operations provided that the primary purpose was to prevent pollution damage. If clean-up measures result in damage to roads, piers and embankments the cost of any necessary repairs is admissible. However, claims for work that involves improvements rather than the repair of damage resulting from the clean-up are not accepted.

Claims for measures to prevent or minimise pollution damage are assessed on the basis of objective criteria. The fact that a government or other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of the Conventions. The technical reasonableness is assessed on the basis of the facts available at the time of the decision to take the measures, and those in charge of the operations should continually reappraise their decision in the light of developments and further technical advice.

Claims for costs are not accepted when it could have been foreseen that the measures would have been ineffective. On the other hand, the fact that the measures prove to be ineffective is not in itself a reason for rejecting a claim for the costs incurred. Such costs, and the relation between those costs and the benefits derived or expected, should be reasonable. In its assessment, the 1992 Fund takes into account the particular circumstances of the incident.

Claims for the cost of personnel and the hire or purchase of equipment and materials are admissible as are the costs of cleaning and repairing equipment and of replacing materials consumed in any clean-up response. If equipment was purchased for a particular spill, deductions are made for the residual value when the amount of compensation is assessed. If a public authority has purchased and maintained materials or equipment so that they are immediately available if an incident occurs, compensation is paid for a reasonable part of the purchase price of the resources actually used in the clean-up.

The 1992 Fund accepts reasonable additional costs incurred by public authorities that use permanently employed personnel, vessels and other resources to undertake clean-up. Authorities may also claim for 'fixed costs', ie costs which would have arisen even if the incident had not occurred, such as normal salaries of permanently employed personnel and capital costs of vessels owned by the authorities. The 1992 Fund accepts a reasonable proportion of such costs, provided that these correspond closely to the clean-up period in question and do not include remote overhead charges.

Clean-up operations at sea

Monitoring the movement and behaviour of oil

The value of monitoring oil slicks at sea is well recognised, particularly if the monitoring is backed up with good communications, since it can facilitate the deployment of clean-up resources where they are most likely to benefit the overall response. Regular monitoring also helps in the prediction of which coastal areas or other sensitive locations are at risk of pollution, so enabling defensive resources to be deployed to best advantage.

It is also generally accepted that, subject to weather conditions and the availability of suitable aircraft, aerial surveillance is superior to the use of ships in terms of both speed and accuracy. In reviewing claims for the costs of monitoring oil at sea, the IOPC Funds have often found that there is a lack of overall co-ordination between air and sea operations. This has resulted in oil recovery vessels being utilised in the search for oil instead of the purpose for which they were intended. Aircraft are also sometimes diverted from their principal reconnaissance role and are used to transport people not directly involved in responding to an incident. Claims for costs associated with duplication of effort or public relations are not accepted by the 1992 Fund.

Dispersants

The application of dispersants to floating oil at sea offers one of the most effective ways of minimising the contamination of shorelines and other sensitive areas. Aircraft have been shown to be particularly effective in treating large amounts of oil in a relatively short period of time. Provided the oil is amenable to dispersant treatment and spraying operations are monitored to ensure they remain effective, claims for the associated costs are accepted.

The Fund has in the past rejected claims for the costs of using dispersants to treat viscous oils, such as heavy fuel oil, after field observations have indicated that the chemical is having no effect. The traditional method of monitoring the efficacy of dispersant spraying has relied on visual observations of the subsurface cloud of dispersed oil shortly after the application of chemicals.

Recent research has indicated that the oil viscosity criterion currently used to determine whether or not a particular type of oil is amenable to dispersant treatment is not always appropriate. Laboratory and field experiments have shown that under certain conditions some dispersants are effective against bunker fuels and viscous water-in-oil emulsions. However, the dispersion process for such oils is said to take much longer and is less discernable than it is with low viscosity oils. For this reason the researchers argue that the current method of assessing dispersant effectiveness is in some cases unsuitable. They advocate the in-situ measurement of dispersed oil concentrations as the only effective way of monitoring dispersant spraying operations.

While it remains to be seen whether these recent findings will lead to the widespread use of dispersants in the treatment of viscous oils, the Fund will continue to assess any claim in respect of such operations on the basis of its own merits and in light of the particular circumstances of the case.

Oil recovery

The application of dispersants to combat oil at sea continues to be as controversial today as it was thirty years ago and many countries still prohibit their use. The only viable alterative, other than to allow the oil to go ashore, is to attempt to recover the oil at sea. Despite the

overall ineffectiveness of oil containment and recovery techniques in open waters, many countries have invested heavily in specialised vessels and equipment.

The 1992 Fund's policy with regard to the assessment of claims for the costs of oil recovery operations at sea is exactly the same as with any other response technique, ie on the basis of objective criteria. All response measures at sea suffer from the problem of diminishing benefits once slicks become fragmented and scattered over a wide area. This problem is particularly acute in the case of at sea recovery when it becomes increasingly difficult to encounter oil in sufficient quantity to merit the deployment of skimming systems.

It has been the Fund's experience that oil recovery systems often remain deployed long after their continued use cannot be justified on technical grounds. There are no doubt political as well as media considerations that have to be addressed during any response and these may sometimes prevail over any technical consideration. Not surprisingly, given that the Fund assesses claims solely on the basis of technical criteria, claimants seek to justify their actions accordingly, even when their motives at the time were not driven by technical considerations. Many claimants simply justify the prolonged deployment of recovery systems while ever there is any oil at sea on the ground that shoreline clean-up, on a cost per ton basis, is very expensive. The assumption therefore is that every tonne of oil collected at sea leads to large savings in overall response costs. This is a spurious argument because, at this stage the effectiveness of at sea recovery is often so poor that the vast majority of the oil will usually end up on the shoreline irrespective of the number of units deployed.

Shoreline cleaning

Shoreline clean-up is usually straightforward and does not normally require the use of specialised equipment. A balance has to be struck between the desire to remove as much oil as possible in the shortest time and the need to avoid further damage to the shoreline and its resources. Heavy earth moving equipment, for example, is capable of removing large volumes of oil quickly, but the use of such equipment can result in serious erosion of shorelines and will inevitably generate substantial quantities of oily waste for disposal.

One of the most contentious issues in the context of determining the admissibility of claims for shoreline clean-up costs is the extent and duration of the operations. Once bulk oil has been removed, the Fund would expect consideration to be given to the overall benefits of further cleaning, taking in account the nature of the shoreline, its immediate importance, environmental factors and the rate at which natural cleaning is likely to take place.

Whilst exhaustive cleaning of amenity areas is usually justified, particularly if an incident occurs close to or during the holiday season, this is rarely the case for remote areas and shorelines that are not accessible to the public. Claims for the costs of cleaning shorelines to a higher standard than the pre-spill condition would not be admissible.

The costs of dismantling and reassembling sea defences constructed of tetrapods or rocks in order to remove oil trapped in their interstices would generally be considered inadmissible, unless there was a substantial risk of major pollution damage resulting from oil leaching out of the structures.

Costs

Whilst the assessment of claims for their technical reasonableness presents the Fund with many challenges, the assessment of response costs is often the most difficult to resolve, particularly with the tendency for public authorities to rely more and more on the private sector to undertake clean-up operations.

This is less of a problem when pre-contracts have already been negotiated with response organisations and all hire rates for equipment and personnel have been agreed in advance of an incident. Pre-contractual arrangements are key elements of any oil spill contingency plan and it can have serious consequences if it is overlooked. The main difficulty arises when resources are obtained on the spot market when those responsible for organising the response have no time to engage in prolonged negotiations and there are no readily available competitors. Whilst some opportunism on the part of commercial contractors may be expected in such circumstances, the Fund has received claims, for example for the costs of chartering vessels, where the rates are up to four times higher than current market rates.

The Fund policy on hire rates of specialised equipment such as booms and skimmers is to base the rate on the amortised capital cost of the equipment over its expected useful working life. A percentage uplift is then applied to allow for overheads such as storage and maintenance and, in the case of commercial contractors, profit. The Fund would normally expect the hire rates of clean-up equipment to be reduced by 50% when the equipment is on standby, unless it can be shown that it can be shown that it would have been deployed elsewhere but for the incident that led to its mobilisation.

Record keeping

It is essential when presenting a claim for clean-up costs that supporting documentation is submitted showing how the expenses are linked with the actions taken. Comprehensive records should be kept of all operations and expenditures, including daily records detailing the work being undertaken, the equipment in use, where and how it is being used, the number of personnel employed, how and where they are deployed and the materials consumed.

The Fund has frequently had to reject substantial amounts from claims as a result of claimants having not scrutinised invoices submitted by commercial contractors to ensure that only those resources actually deployed were charged for, that the rates charged were appropriate and in accordance with prior agreements.

Conclusions

Although the total compensation available under Fund Conventions has in only relatively few cases been exceeded during the 22 years of their existence and the maximum amount payable by the 1992 Fund will probably increase substantially in 2003, it is important that clean-up response measures remain within the bounds of reasonableness. This is particularly important in view of the tendency of governments to rely on the private sector to undertake clean-up, which will inevitably lead to increased costs without any improvement in the response.

However, provided that the measures taken are based upon a realistic technical appraisal and that the operations are effectively controlled and monitored, the compensation amount available through the Conventions should be sufficient to meet the needs of the great majority of future incidents.