CARGO OWNER´S LIABILITY FOR OIL POLLUTION DAMAGE

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Content

1 Introduction

1.1 The objective of this thesis

The aim of this thesis is to assess the efficiency of the conventions regarding their capacity to avoid oil pollution damage caused by vessel´s accident. This assessment will focus on the following conventions: the Intervention Convention and the Liability Convention of 1992 (hereinafter referred to as "CLC92") the Fund Convention of 1992 (hereinafter referred as "Fund 92") and the Supplementary Fund Protocol.
In particular the thesis will study the inability of the channeling of liability provision stated in the CLC92 to provide the cargo owner with the necessary incentives to choose a seaworthy vessel when they are selecting it for transporting their cargo.

The thesis will consider that the lack of incentives is the main cause of the vessel´s oil pollution damages and it takes into account that the cargo owner is the first party in the oil transport chain and as a party must also be held responsible in oil spills situations. Therefore, the principle objective of this thesis will be establishing the introduction of the cargo owner as liable for oil pollution in the Conventions as a solution to avoid future oil spills. This is support by Alan Knee-Jin Tan who mentions in one of his books that all the actors in the transport chain must share the burden to eliminate the sub-standards vessels that cause these incidents.[1]

[1] Alan Khee-Jin Tan. *Vessel-source marine pollution: the law and politics of international regulation*. Cambridge, (Cambridge University Press), 2006, page 379

1.2 The background of the thesis

"*Si la prise de risque inhérente au transport maritime est, par nature, admissible, elle cesse de l'être et devient une faute d'imprudence, lorsque, aux périls résultant de conditions de navigation d'un pétrolier, fût-il muni de tous les certificats, s'ajoutent d'autres dangers, tels que ceux liés à l'âge du navire, à la discontinuité de sa gestion technique et de son entretien, au mode d'affrètement habituellement choisi et à la nature du produit transporté, qui sont décrits comme autant de circonstances clairement identifiées, dès l'époque de l'acceptation de l'Erika à l'affrètement par le service vetting de la société Total SA, pour avoir, chacune, de réelles incidences sur sa sécurité.*"[2]

- The Paris Court of First Instance, ERIKA Judgment dated January 16, 2008.

On December 8th 1999, the Erika, a 25 years old Italian-owned and Maltese registered oil tanker of some 37,000 deadweight, left Dunkirk (France) and sailed down the Channel bound for Italy with a cargo of heavy fuel oil.[3] As the vessel entered the Bay of Biscay, it ran into a heavy storm. The storm worsened and on December 12th, 1999 the Erika broke into two and started to sink. Thousands of tons of oil leaked from its cargo tanks, polluting 400 kilometers of the French coastline.[4]

The damages caused by the accident to the environment and its economic consequences made the Erika- oil spill one of the major environmental disasters of recent years.

Nine years later, the Court of First Instance of Paris was to blame the shipowner, the manager, the classification society and the oil company, changing the scenario for

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[2] "Although risk-taking inherent in maritime transport, is by its nature, acceptable, it ceases to be and becomes a fault of imprudence, when, to the dangers resulting from the navigation conditions of an oil tanker, regardless of whether it had all the certificates, are added other dangers, such as those linked to the age of the ship, to the discontinuity of the technical management and her maintenance, to the mode of chartering customarily chosen and to the nature of the product transported, each of which are described as circumstances clearly identified, from the time of the acceptance of Erika for chartering by the vetting department of the company that became TOTAL SA, as having actual effects on safety." The Erika Judgment, Paris Court of First Instance, dated January 16, 2008

[3] La justicia francesa declara culpable a Total del hundimiento del Erika. *El País Online*, Available at: http://www.elpais.com/articulo/sociedad/justicia/francesa/declara/culpable/Total/hundimiento/Erika/elpepusoc/20080116elpepusoc_4/Tes (accessed 29 July 2008)

[4] *Ibit*

assessment of potential environmental liability arising out of the transport of petroleum products by oil tankers.

In a comprehensive decision, liability was imposed on the shipowner and the classification society who acted together to –deliberately- reduce the number of structural repairs and save costs at the expense of jeopardizing the safety of the ship. The oil company was also blamed for its negligence in chartering a vessel beyond its intended life expectancy to transport dangerous and persistent[5] oil products.

It was predictable that the shipowner and the classification society would be held liable. The shipowner had manipulated the survey and the repair process to save costs while the classification society inspector had participated in approving a temporary classification certificate. However, what was surprising was the liability imposed on the oil company, Total S.A. liability (hereinafter "Total").

The reason given by the Court of First Instance of Paris in its judgment was the intervention of Total in the process of control or "vetting" applied to the Erika vessel.[6] The Court estimated that the acceptance of the vessel by Total was imprudent since the oil company chartered the Erika five days after its vetting approval had officially expired. Furthermore, Total did not take into consideration other operational factors that would not allow Erika´s navigation such as,

- Multiple changes in the ownership, up to seven times;

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[5] The U.S. Environmental Protection Agency and U.S. Coast Guards define persistent oil as petroleum –based oil that does not meet the distillation criteria for non-persistent oils.
The non-persistent oil is a petroleum based oil that consists of hydrocarbon fractions:
- at least 50% of which by volume, distill at a temperature of 340ºC (645ºF);and
- at least 95% of which by volume, distill at a temperature of 370ºC (700ºF)
Typical persistent oils include IFO 180, bunkers, heavy fuel oil, and NSFO.
The Determination of Oil Persistence: A Historical Perspective. In: Freshwater Spills Symposium, 7 April 2004. Available at : http://www.epa.gov/OEM/docs/oil/fss/fss04/watts_04.pdf (accessed 29 July 2008)

[6] The vetting is a voluntary process (it is not required by any international convention) and is defined as a process by which an oil company determines whether a vessel is suitable to be chartered, based on the information available to it. The main purpose of the vetting inspection is to ensure the quality of the ship and its crew in terms of safety and prevention of accidents or pollution risks to accept the chartering. www.total.com/ (accessed 29 July 2008)

- several changes in its classification society including four different class societies; and
- change four times the state of its flag, among others Panama and Malta.

Therefore the French Court held that Total was acting in a reckless manner when deciding to hire a vessel like the Erika and failing to fulfill its own internal vetting rules.

With this judgment, the Court fined Total €375,000[7] for maritime pollution, and a share of almost €200 million in damages, most of which will be paid to various regional governments, several environmental groups and France.

Having received the judgment Total announced an appeal against it in the Erika pollution trial. Obviously, there is the chance that the appeal would be accepted however the main important point for this thesis is that the judgment launches a debate: The real efficiency of the international conventions since the French Court decision applies its own law.[8] The French Court ignored the conventions, in particular the channeling of liability stated in the CLC 92. And furthermore, after the Erika incident it was the first time that the European Community (hereinafter the "EC") had taken an intense interest in proposing changes,[9] which once more pose a serious threat to the existence of the Convention system and their capacity to deal with the real market situation.

1.3 The structure of the thesis

In order to achieve the purpose of this thesis, the next following chapters will approach the subsequent subjects. Chapter 2 will approach the International Conventions on civil liability applicable nowadays with regard to oil spill situations. The chapter commences studying the historical development of the actual conventions and it will reveal that after every oil tanker incident the conventions are revised since they are not able to response with adequate solutions (section 2.1). Thereafter, it will study in detail the CLC92

[7] 375,000 euros is the maximum amount set forth in the law for non-physical individuals in marine pollution. *supra*, note 3
[8] The French Court applies its article 8 of the Law 83-583 of 5th of July 1983.
[9] Michael Faure and Wang Hui. *The International Regimes for the Compensation of Oil-Pollution Damage: Are they Effective?*.In: Reciel 12(3) 2003, page 248

Convention (section 2.2) and the Funds Conventions (section 2.3) where the key elements of the Conventions will be explained trying to explore their weak points.

Chapter 3 will deal with the exclusion of cargo owner as potential liable party in an oil spill. According to this, it will launch the negative consequences of the non inclusion of the cargo owner as potentially liable in the CLC 92 (section 3.1) to continue with the changes on the Convention system proposed by the European Union (section 3.2).

Chapter 4 will consider the United States of America (hereinafter "United States") position which has its own legislation, the Oil Pollution Act of 1990, well-known as OPA90 (section 4.1). The chapter will investigate its main characteristics (section 4.2) to later focus on those States that introduces the cargo owner as liable in oil spill situations (section 4.3).

Finally, chapter 5 will arrive at the conclusion if the actual Conventions are efficient avoiding accidents at sea or instead, the imposition of the cargo as liable for oil pollution in the Conventions is a solution to avoid them.

2 The legal framework: the International Conventions

To enable to discuss the efficiency or not of the current Conventions, I would like first to look into the history of the Conventions which will help us to understand their origin and, second, explain briefly the basic and weak elements of these Conventions.

2.1 History

In 1967, the Torrey Canyon spilled 880,000 barrels of cruel oil off the Southwest coast of England. The incident showed that the maritime world was not prepared for such major pollution incidents and confirmed the inadequacies of the traditional legal principles[10] in dealing with problems concerning oil pollution liability and compensation.

Thus, the Torrey Canyon incident initiated intensive activities at national and international level[11] to achieve a new regime capable to cope with these problems. To address the issue of marine oil pollution liability and compensation, the International Maritime Organization[12] (hereinafter the "IMO") passed the International Convention on Civil Liability for Oil Pollution Damage of 1969 (hereinafter the "CLC 69") which established the grounds for a Compensation Fund.

This Compensation Fund was formalized under the International Convention on the establishment of an international fund for compensation for oil pollution damage of 1971

[10] Liability for oil pollution damage was generally limited under the International Convention Relating to the Limitation of Liability of Owners of Sea-Going Ships of Brussels, 10 October 1957.
[11] Chao Wu. *Liability and Compensation for Oil Pollution Damage: Some Current Threats to the International Convention System.* In: Spill Science & Technology Bulletin, Vol.7, Nos. 1-2 (2002), page 106.
[12] At that point it was called the International Maritime Consultative Organization, IMCO. The IMO has the status of an executive agency of United Nations as of 1980 and it is a specialized agency with responsibility for the safety of shipping and the prevention of marine pollution by ships. Available at: www.imo.org (accessed 24 July 2008)

(hereinafter the "FUND 71"). The abovementioned Conventions became the basis of the pollution liability system in the following years, even if the shipping industry and the oil industry produced two private schemes, TOVALOP in 1969 and CRISTAL in 1971, to provide compensation on an equivalent basis to the CLC and FUND Conventions.

The CLC 69 was criticized by both the shipowners and the victims. On one hand, the shipowners considered the CLC 69 excessive for the conservative world of the marine law of 1969 since it replaced fault liability with strict liability and doubled the liability limits.[13] On the other hand, the victims feared that compensation might be inadequate for oil pollution damage from large tankers because the compensation would be decided by the capacity of the insurance market rather than by the oil pollution damage or the shipowners´ conduct.[14]

After the entry into force of the CLC 69 and FUND 71 Conventions the Amoco Cadiz disaster took place[15] and once again it was showed that the liability limits of the old regimes were too low to provide an adequate compensation in the event of a major oil spill.[16]

In 1983 the IMO legal Committee met for the purpose of revising the conventions.

One year later, in 1984 two protocols were adopted[17] to achieve the objective of adapting compensation in cases of larger oil spills: the Protocol of 1984 to amend the International Convention on Civil Liability for Pollution Damages 1969 and the Protocol of 1984 to amend the International Convention on the Establishment of an International Fund for compensation of Oil Pollution Damage 1971.

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[13] Jacobsson M. *The International Conventions on liability, compensation for oil pollution damage and the activities of the international oil pollution compensation Fund.* In: Lloyd´s of London Press (1993), pages 39-55

[14] *Ibit at* pages 39-55

[15] A spill of 223,000 tonnes off the Brittany coast of France in 1978

[16] Michael Faure and Wang Hui, *supra,* note 9, page 245

[17] *Ibid at* page 245

In an effort to induce United States participation, the Protocols broadened the scope of both geographical application and recoverable damages and substantially raised the liability limits of the two conventions.[18] However, the United States rejected the idea of limited liability and believed polluters should suffer unlimited liability for the damage caused. Besides, in 1989 the Exxon Valdez[19] incident occurred and the United States decided to adopt its own legislation, the Oil Pollution Act of 1990 (hereinafter the "OPA90"). As a result, the Protocols failed to enter into force because of insufficient support from major countries particularly from the United States.

The experience taken during almost twenty years of application stemmed in a new IMO diplomatic conference in 1992. The IMO created new protocols to the two conventions. These protocols were identical to the 1984 Protocols except for the entry into force requirements.[20] The main purpose of the new Protocols was to facilitate the fulfillment of the requirements for the entry into force of the 1984 Protocols. This change was intended to make the conventions effective without the participation of the United States. The 1992 Protocols became effective from May 1996.

The 1992 Protocols constitute a two-tier system of compensation. The first level, the Civil Liability Convention 1992, imposes limitation of liability on the shipowner while the second level, The Fund Convention 1992, establishes supplementary regime addressed to compensate when the damages exceeds the limits of the first level.[21] Both conventions are still applicable,[22] and I will therefore discuss them in a bit more detail immediately below.

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[18] Suzanne Hawkes and R. Michael M´Gonigle. *A black (and rising?) tide controlling maritime oil pollution in Canada.* In: Osgoode Hall Law Journal (1992), page 175

[19] Exxon Valdez ran aground in Prince William Sound, Alaska and spilled over 11 million gallons on March 24, 1989. Inho Kim. *A comparison between the international and US regimes regulating oil pollution liability and compensation.* In: Elsevier Science Ltd. (2003), page 12

[20] The Protocol changed the entry into force requirements. It reduces from six to four the number of large tanker-owning countries that are needed to become the Protocol effective. Available at: www.imo.org (accessed 25 July 2008)

[21] Francisco Javier Martín. *Los convenios internacionales de responsabilidad e indemnización de 1992*. In: Petrotecnia, (April 2003), page 41

[22] In October 2000 the IMO Legal Committee agreed to increase in 50% the amounts available under the 1992 protocols as a response to the Erika accident. Michael Faure and Wang Hui, *supra*, note 9, page 247

However, before going into the conventions in depth could be interesting analyze this historical development under IMO. As we can notice the conventions were revised after each oil tanker incident demonstrating that they were not able to response with adequate solutions. This reveals that IMO is not an active but a reactive organization,[23] IMO only revises its regulation once the accident has already taken place and in addition, the new conventions are slowly ratified by the Member States and take numerous years to come into force.[24]

The main cause of this slowness is that the conventions are the result of the battle between the different Member States into IMO: coastal states and flag states. The coastal states have an interest in seeing damages to the marine environment and higher levels of compensations included in the conventions in order to protect their coasts[25] while the flag states support the shipping interests and they are not prone to accept the implementation of new measures. The difficulty to arrive to a common solution makes IMO "as slow as its slowest member."[26] However, must be keeping in mind that IMO is still being a dynamic organization and therefore, in the following sections we will studies the developments that IMO has made in CLC 92 and the Fund 92.

[23] It is important to have in mind that IMO is a consultative organization with law-making competence given under the UN Law of the Sea Convention. This competence allows the IMO to create not only non-binding instruments but also binding instruments. Peter Ehlers and Rainer Lagoni. *International Maritime Organisations and their Contribution towards a Sustainable Marine Development.* 1st edition. Hamburg (LIT Verlag), 2006, pages 78-79

[24] An example of this slowness is the OPRC Convention which was adopted in 1990 after the Exxon Valdez incident and came into force in 1995, five years later the Oil Pollution Act, *Ibid at* page 92

[25] This interest can be extracted from the works of the ILA Committee on Coastal States Jurisdiction relating to Marine Pollution. *Vessel-source Pollution and Coastal State Jurisdiction.* 1st edition. The Hague (Kluwer Law International), 2001

[26] Peter Ehlers and Rainer Lagoni, *supra*, note23, page 97

2.2 The Intervention Convention and the Liability Convention of 1992

The CLC92 is the main international regime governing the liability of shipowners in oil pollution cases. This regime has been adopted by more than 100 states around the world with the US as the most notable exception.[27]

The basic scheme of CLC92 imposes strict liability on the owner of the vessel for oil pollution damages regardless of fault. This liability is excluded in a restricted number of cases and it is also limited to an amount which depends on the tonnage of the vessel. The strict liability and the limited liability will be studied in depth in the following sections. Following, firstly I will study the exclusive provision stated in article II of the CLC92. Secondly, I will analyze the Fund 92. And, finally I will clarify the legal consequences of these provisions in relation to the cargo owner.

2.2.1 The channeling of liability

The strict liability is mentioned through the channeling provision found in article III of the CLC92. [28]This article contains two mentions "shall be liable" and "pollution damage", meaning that we are facing a rule for civil liability. Section 1 of the named article clearly establishes the liability of the owner of the ship, which is defined by 3 concepts: ship, person and property.[29]

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[27] The regimen has been adopted by 103 States parties Available at: www.iopcfund.org (accessed 25 August 2008)

[28] Article III section 1 of the CLC92 states: "Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the incident, or, where the incident consists of a series of occurrences, at the time of the occurrence, shall be liable for any pollution damage caused by the ship as a result of incident"

[29]Article I section 1 of the CLC92 defines vessel as "any sea-going vessel and any seaborne craft of any type whatsoever, constructed or adapted for the carriage of oil bulk as cargo, provided that a ship capable of carry other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk during any voyage following such carriage unless it is proved that it has no residues or carriage of oil in bulk aboard."
In this way CLC92 differs itself from the CLC69 which not included the ship in ballast and is more briefly: "Ship means any sea-going vessel and any seaborn craft of any type whatsoever, actually carrying oil in bulk as cargo."

It follows that the owner of the vessel could be any individual, society or public law entity (constituted or not as a company), even a State or any of its politics subdivisions, registered as owner of the vessel or if the ship was not registered, who owns the vessel.[30]

Moreover, CLC92 imposes strict liability on the owner of the vessel. The main consequences of the term "strict liability" is that claimants do not bear any burden of showing how the incident happened, or of proving negligence on the part of the shipowner, his crew, or others for who, he may be held responsible.[31] The shipowner will pay the damages caused by the ship´s pollution, even if some of the owner´s responsibilities are transferred to the charterer.[32]

However, the strict liability imposed by the convention on the shipowner is subject to a number of exceptions. The owner of the vessel will not pay damages, exonerate him from liability, if it can be proved that the damages were caused by circumstances as: [33]

> "(a) resulted from act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
>
> (b) was wholly caused by the act or omission done with intent to cause damage by a third party, or
>
> (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function."[34]

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[30] Article I section 2 of the CLC92 defines person as "any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions" and continues in section 3 defining owner as "the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship."

[31] Colin de la Rue and Charles B. Anderson. *Shippping and the Environment.* 1st edition. London, (LLP, London Hong Kong), 1998, page 87

[32] This happens for example under the time charter where the charterer is responsible for manning and equipping the vessel and sometimes even for maintaining. Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *Scandinavian maritime law, The Norwegian perspective.* 2nd edition. Oslo (Universitetsforlaget) 2004, page 239

[33] Article III section 2 of the CLC 1992

[34] The main characteristic that difference section (a) from (b) and (c) is the fact that in section (a) is sufficient for the exemption to be the dominant cause and it is not necessary to be the "wholly caused" for the pollution damage while in sections (b) and (c), the shipowner must prove that the damage was entire caused by matters falling with the exclusions. Colin de la Rue and Charles B. Anderson, *supra,* note 31, pages 87-93

Therefore, taken into consideration these circumstances we can assume that the convention establishes an original civil liability system which moves away from the system based on fault.

It was pointed out that this liability has an objective character. The liability is independent from the careful behavior or not of the owner of the vessel, who will be liable *ipso iure*, once it has been checked the causal relation between the spill and the damage.[35]But should we really understand the liability as an objective civil liability? One could think this but even the objective civil liability still need the causal relation, meaning that it would need at least a direct intervention from the shipowner in the activity generating the damage, even if this intervention was not personal,.[36] Nevertheless, the CLC92 does not demand that causal relation and article III of the Convention really mentions "obligation *ex lege*".[37]

The idea that the actual intention of the Convention was to establish an "obligation *ex lege*" is not really valid because the main intention of the drafters was to anticipate exactly the person who will compensate the damages in each single circumstance: the owner of the vessel. In this way the Convention will avoid future litigations about who is the actual liable in an oil spill.[38]Consequently, article III of CLC92 covers not only situations where the shipowner was actively operating the vessel but also situations where he is not directly involved, such as bareboat charter.

There is a good reason why the CLC92 adopted this attitude. The owner of the vessel is the easiest person to identify through the registration of the ship because the functional conditions of the charterer and of the owner could not be fit in the same person. There are

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[35] This causal relation is based on the idea that the person who obtains benefits from dangerous activities but social useful, must bear their costs. José Luis Meilán Gil. *Estudios sobre el regimen jurídico de los vertidos de buques en el medio marino.* 1st edition. (Aranzadi) 2006, page 441

[36] *Ibit at* page 441

[37] Obligation ex lege is the obligation that is directly born from the law, is not predictable, only is requirable the obligation expressly named. Rafael Arenas García. *La distinción entre obligaciones contractuales y obligaciones extracontractuales en los instrumentos comunitarios de derecho internacional privado.* In: Anuario Español de Derecho Internacional Privado (2006), page 397

[38] José Luis Meilán Gil, *supra*, note 35, page 441

contracts of affreightment such as: leasing, voyage chartering and time chartering where the functional conditions of the transport are split. For example, the owner of a vessel can operate his own vessel becoming also his shipper and even, sometimes, carrier. In this way, the owner combines all these functions in one person. However, the situation can also be the contrary: the owner can charter his vessel and transfer its nautical control and therefore, he is not becoming shipper and even the shipper could not become carrier.

The CLC92 solves the scenario by choosing the easiest solution: the owner of the ship is the only liable[39] in the strictest sense of the term. Specifically, "the owner of the ship at the incident, or, where the incident consists of a series of occurrences, at the time of the occurrence, shall be liable for any pollution damage caused by the ship as a result of incident".[40] According to this, the buyer of a vessel sold during a voyage will not be liable for accidents took place before the sale but during that voyage.

Section 4 of article III establishes a reservation made to section 5 of the same article:[41]

> "[n]o claim for pollution damage under this Convention or otherwise may be made against:
>
> (a) The servant or agents of the owner or the members of the crew;
>
> (b) The pilot or any other person who, without being a member of the crew, performs the ship.
>
> (c) Any charterer (howsoever described, including a bareboat charterer) manager or the ship
>
> (d) Any person performing salvage operations with the consent of the owner or on the of a competent public authority;
>
> (e) Any person taking preventive measures;
>
> (f) All servants or agents of persons mentioned in subparagraphs (c), (d) and (e);"

[39] The CLC 92 Convention uses the term "ship of the owner" instead of "shipowner" which is the term used in the general conventions about limitation of liability, trying to introduces under the term "shipowner" the shipper without property, the charters.. José Luis Meilán Gil, *supra*, note 35, page 446

[40] Article III section 1 of the CLC 92 Convention

[41] Article III section 5 states : " Nothing in this Convention shall prejudice any right of recourse of the owner against third parties"

The meaning of this section is really dangerous since it states a legal prohibition to claim for oil pollution damages to a large number of persons different than the owner of the vessel, and it states also the impossibility to present claims on the grounds of other dispositions[42] because the CLC92 announces "no claim compensation for pollution damage under this Convention or otherwise may be made".[43]

Consequently, the CLC92 goes further than the CLC69 Convention which never tried that these other individuals, apart from the owner of the vessel, were not considered liable and were not obligated to compensate damages.[44]

Nevertheless, this article is not *numerus clausus*, since in the last paragraph it states that

> "unless 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".

Given what is said above, it is allowed to claim compensation to servants, agents or persons performing salvage operations among others in cases where the "subjective" requisite of the last paragraph is met. Section 5 of article III should be studied in the framework of the last paragraph of section 4 as it states that the only allowed to claim compensation to these other individuals is the owner of the vessel through the right of recourse.

But what happen with the cargo owner who is not specifically mention in the list? The answer to the question will be discussed afterwards however, as an introduction we can affirm that the completely silence as regards the cargo owner is a double-edged sword. On one hand the cargo owner is not going to be liable since he is not mentioned in article III section 1. However, on the other hand the channeling provision of the convention will not

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[42] The expression "disposition" makes reference to different Codes as the Maritime Codes and Commerce Codes among others.
[43] Article III, section 4 of the CLC92 Convention.
[44] José Luis Meilán Gil, *supra*, note 35, page 448

protect him as it does with the persons described in section 4 of the same article. Thus, this means that the cargo owner can be liable under rules of non-contractual responsibility.

2.2.2 Limitation of liability

The CLC92 establishes in article 5 section 1 that

> "the owner of a ship shall be entitled to limit his liability under this Convention in any one incident to an aggregate amount".

However section 2 raises an exception to section 1

> "the owner shall not be entitled to limit his liability under this Convention 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."

Therefore, the privilege of limitation of liability is not absolute, but not as bad as it could thought after reading section 2 since the burden of proof with respect to the facts which would prevent the shipowner from the limitation of liability lies on the claimant.[45] Consequently, the regime of limitation of liability in maritime claims has been established in favour of the shipowner.[46]

The right of shipowners to limit their liability[47] for pollution damage under CLC92 is important not only as a *quid pro quo* for the strict liability imposed upon them but also for the role it plays in apportioning the burden of oil spills between the shipowner and the shipping and oil industries under the system of compensation established by the Civil Liability and Fund Conventions.[48]

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[45] The idea comes from the basis of the case Goldman v. Thai Airways, this case dealt with the same limitation wording stated in the Warsaw Convention. Gotthard Gauci. *Limitation of liability in maritime law: an anachronism?*. In: Marine Policy, Vol. 19, no.1 (1995), page 71

[46] *Ibit at* page 71

[47] One of the arguments to retain the limitation of liability is that since the CLC92 imposes compulsory insurance, it would be very difficult to obtain any insurance in claims where there is not limitation. *Ibit at* page 66

[48] José Luis Meilán Gil, *supra*, note 35, page 454

Under the CLC92 the limit of the ship´s liability is set at 3 million SDR[49] for ship up to 5,000 tons. Above that size, the limit increases by 420 SDR each ton over said threshold up to a maximum of 59.7 million SDR.[50] These figures are substantially higher than those set by CLC69. Moreover, while in the CLC69 there is no minimum liability limit for small tankers, the CLC92 establishes a minimum limit of 3 million SDR which applies for tankers of up to 5,000 tons.

2.2.3 The exclusive provision

The CLC92 states in its article II:

> "[T]he Convention shall apply exclusively:
> (a) to pollution damage caused:
> (i) in the territory, including the territorial sea, of a Contracting State, and
> (ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in…
> (b) to prevent measures, wherever taken, to prevent or minimize such damage"

In this way article II provides for an exclusive provision which warrants that the State signing the Convention cannot apply another civil liability legislation in cases of an pollution damage of the characteristics[51] described in the CLC92.

As an example of the effects of this exclusive provision could be mentioned the implementation of the CLC92 into the Norwegian Maritime Code which announces in its section 193 first sentence:

> "Claims for compensation for oil pollution damage can only be made against the owner of the ship according to the provisions of this Chapter"

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[49] Special Drawing Right (SDR) is defined in the rules of the International Monetary Fund and is based on a weighted average of dollars, yen, pounds and euros.
[50] Article 5.1 of the CLC92 Convention
[51] The type of pollution damage covered by the CLC92 is described in article I, paragraph 6 as "(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 cost 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"

Section 193 is included in chapter 10 “Liability for Damage from Oil Pollution” of the Norwegian Maritime Code which clearly mentions that the liability and damages from oil pollution will be regulated according to the rules of the CLC92. Thus, the Norwegian Code has not other choice than to regulate the chapter according the CLC92.

Therefore, the Convention states a maximum standard about the applicable liability, liability that cannot be exceeding by any Contracting State. As we will see later the EC is nowadays developing its own rules to avoid oil spills; this means that if the EC would establish stricter rules, these rules could not be applied according to the exclusive provision in the Contracting States of the CLC92. The consequences of the confrontation between the EC and the CLC92 are still not established but sadly, I hardly believe that would be negative for the CLC92 and its continuity.

2.2.4 The oil company in the CLC 92

The scheme established by the CLC92 and the FUND92 Convention is the result of the commitment between the principal actors of the oil maritime transport industry: the vessel´s owners and the companies producing the oil. Thus, the owner of the ship will respond in case of an incident while the oil companies contribute to the Funds depending the volume of the oil transported. Both responsibilities are completely different since on the one hand the owner of the vessel only pays if there is an accident and on the other hand, the oil companies contribute regularly to the Funds in exchange for not paying when the vessel that transport their cargo has an incident.

The oil company can directly hire the transport of its crude oil by a chartering contracts becoming at this point charterer, but it is also possible that the oil company delegates the charterer functions in a third company. In this last scenario its only relation with the vessel is that the oil company is the owner of the cargo that the vessel transports

The distinction between cargo owner as charterer and cargo owner as simple cargo owner must be taken into consideration when we will study the consequences of the channeling provision of the CLC92. The reason why this distinction is so necessary is because if the

cargo owner becomes charterer he will be protected under article III section 4. However, if he is just cargo owner the section will not protect him. Consequently, in the latter scenario his liability must be studied by the rules of non-contractual responsibility.

2.2.4.1 The charterer

As previously studied, the CLC92 introduces an important exception to the channeling provision through article III section 5 that

> ”nothing in this Convention shall prejudice any right of recourse of the owner against third parties.”

The aim of this section is to channel all the claims to the owner of the vessel to avoid arguments about the role of third parties in the incident since the result of these arguments would be the delay in the claims payment. Nevertheless, this section allows the owner of the vessel once the damages are repaired to call for the actors taking part in the incident to collaborate in the reparation.[52]

Therefore, the CLC 92 allows the owner of the vessel to claim by right of recourse the costs of the repaired damages to the charterer but this right does not mean that the charterer will be jointly liable for the damages. Consequently, the owner should demonstrate that there is a causal relation between the charterer´s conduct and the incident and this, of course, will partly depend on the degree of the charterer´s participation in the operation of the vessel, in short, in the type of chartering contract signed.

2.2.4.1.1 Demise or bareboat charterers

A shipowner who fixes his ship on a voyage or time charter is obliged to man and equip the vessel. In any case, there are situations where the contract involves the ship itself, where

[52] The aim of the right of recourse is to avoid the injustice of imposing liability on the shipowner in bareboat charter contracts.

the shipowner has no obligations with respect to manning and equipment the vessel. These types of contracts are known as a bareboat or demise charter.[53]

In terms of bareboat charters, the charterer has the completely disposition of the vessel. The charterer has the responsibility for the navigation and administration in return of a quantity of money. The control that the charterer has over the vessel makes him hire the master, officials and crew and control that the ship is equipped. Then, the owner of the vessel is apart from the operation of the vessel.

The idea that the charterer will have total control of the vessel will establish the existence of a causal relation between his conduct and the incident. To provide with a better right of recourse the use of standard forms of demise or bareboat charterparties are common. These standard forms include terms of indemnity from the charterer to the owner. A typical clause is number 15 in the BARECON 89:[54]

> "The Charterers shall indemnify and hold the Owners harmless against any lien of whatsoever nature arising upon the Vessel during the Charter period while she is under the control of the Charterers, and against any claims against the Owners arising out of or in relation to the operation of the vessel by the Charterers. Should the Vessel be arrested by reason of claims or liens arising out of her operation hereunder by the Charterer, the Charterers shall at their own expense take all reasonable steps to secure that within a reasonable time the Vessel is released and at their own expense put up bail to secure the release of the vessel"

Therefore, it is enough to compensate the owner of the vessel when at the time of the accident the vessel was operated by the charterer. The need to demonstrate the fault or negligence in the navigation of the vessel by the bareboat charterer is not necessary.

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[53] Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *supra*, note 32, page 434
[54] Colin de la Rue, Charles B. Anderson, *supra*, note 31, page 630

2.2.4.1.2 Time or voyage charterers

In terms of voyage charters, the owner of the vessel is who manages all the principal aspects of the vessel operation and the charterer is the one that loads and discharges the cargo. However, in the time charter the charterer participates more in the operation of the vessel controlling commercial part of the vessel while the owner of the vessel controls the nautical part.[55]

Therefore, both types of contract have in common that the owner of the vessel and the charterer share, in different ways, the operation of the vessel. The fact that the owner and the charterer share the operation of vessel complicates the decision about who is liable in case of an incident. Just to mention briefly, the main important discussion in these types of contracts is the safe port or berth warranty provision. This provision states that the vessel must load and discharge at the harbor or place which is considered to be safe by the charterer. This provision is a warranty for the owner of the vessel since the charterer is taking the risk of choosing a safe port, even if the insecurity of the port was not known at the moment of signing the contract. [56]

The port is considered to be safe whether damages would be avoided by the right behavior of the master or the crew, and unsafe whether the crew should show a higher degree of knowledge to avoid oil pollution damages.

2.2.4.1.3 The cargo owner

As said above, the oil company can delegate to a third party the typical activities of the charterer, meaning that the relationship with the vessel is just the property of the transported cargo. This option is the central object of this thesis because it will have important consequences for the civil liability of the oil companies.

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[55] Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *supra*, note 32, pages 244-245

[56] Colin de la Rue and Charles B. Anderson, *Liability of Charterers and Cargo Owners for Pollution from Ships* .In: Tulane Maritime Law Journal, Vol. 26 (2001), page 29

The cargo owner is not mentioned by the CLC92 all along its regulation. This results in not considering the cargo owner liable for pollution damages on those cases foreseen by the convention. In the preparatory works of 1969 and 1992 conventions, the inclusion of the cargo owner as a liable party, together with the owner of the vessel was considered. However this liability was not introduced as, among other things, it was understood that it would complicate the claim procedure. [57]

Therefore, this silence also means that the cargo owner is not protected by the channeling provision and that there is not any disposition that allows the victims to address their claims to the cargo owner. Conversely, the experience demonstrates that this omission is not as important as it seems to be and in practice it is really difficult that the claims will suceed against the cargo owner.[58]

In effect, due to the fact that there is not a disposition in the whole convention that states the potential liability of the cargo owner the claim must be governed by non-contractual responsibility. The non-contractual responsibility demands a negligent action or omission to be the fact resulting of the accident, and is at this stage when the difficulties appear. It is very difficult to get the cargo owner liable since he is not the one who took the control of the vessel and as a result, there would not be a clear causal relation between the damage and his action.[59]

However, the possibility to impose liability on the cargo owner would not be something so strange since this is common in a numerous of national environmental rules, as i.e. article

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[57] The inclusion of the cargo owner as a liable party was also considered during the preparatory works of the Oil Pollution Act in United States and the Merchant Shipping Act in UK but as the CLC69 and CLC92 the cargo owner was never introduced. Gotthard Gauci, *Oil Pollution at Sea: Civil Liability & Compensation for Damage* London,(John Wiley & Sons Canada, Ltd.),1997, page 98

[58] Huesca Viesca M. and Rodríguez Ruíz de Villa D. *Responsabilidad Civil por Contaminación Marina por Vertido de Hidrocarburos. A propósito del Prestige.* 1st edition. Oviedo, (Universidad de Oviedo) 2004, page 82

[59] *Ibid at* page 82

1908 of the Spanish Civil Code.[60] Thus, it might be possible to impose liability applying the analogy of article 1908 of the Spanish Civil Code.

2.3 Fund Conventions

In addition to the compensation due from the shipowner under the CLC92, extra compensation is available under the Fund Conventions, also named IOPC Fund. However, the Fund 92 is not unlimited in its compensations and as the CLC92 establishes a limit to the maximum amount offered to each compensation. The available aggregate compensation under the CLC92 and the FUND92 is more than double that the provided by the original versions of 1969 and 1971.[61]

Yet, recent accidents involving oil tankers as the Erika and the Prestige[62] incidents highlighted once again that this compensation was not enough to cover the damages and in May of 2003 IMO tried to solve the problem creating a new protocol to the FUND92 on compensation for oil pollution, the Supplementary Fund Protocol 2003. The Supplementary Fund Protocol 2003 could lead to a trebling of the amounts available for oil pollution compensation as compared with today´s scheme.

The Protocol 2003 has established a maximum for the quantity of compensations. The maximum quantity to incidents occurred before the first of November of 2003 was of 208 millions of dollars, including the sum paid by the owner of the vessel. The limit increased in that date with 50 % to 313 US$. In March 2005, a complementary Fund with of 844 millions of dollars was created. This Fund will be in addition to the before amount in that

[60] The Spanish Civil Code gets liable the cargo owner for damages, among others, where the machinery exploits due to the lack of due diligence or when people or properties get damaged due to the excessive smoke.
[61] Article 5 of the CLC69 and CLC92, article 5 of the Fund Convention 1971 and article 4 of the Fund Convention 1992
[62] In 2002 the Prestige grounded contaminating the Galician coast, in northern Spain.

States which decide to voluntary join this protocol.[63] One of the principal purposes of the Fund under the 1971 Convention was to pay indemnification to the shipowner, to relieve him of part of the financial burden imposed upon him by CLC69 but no similar provision can be found in CLC92. [64]

Nowadays, the main purpose of the Funds is to pay compensation for oil pollution from ships when adequate compensation cannot be obtained from the shipowner under the CLC92. It is understood as inadequate compensation under the CLC92 when one of these circumstances are met:[65]

a) where no liability for the damage arises under the CLC
b) where the owner liable for the damage under the CLC is financially incapable of meeting his obligations in full, and any financial security provided under CLC the does not cover or is insufficient to satisfy the claims for compensation which result from an incident; or
c) where the damage exceeds the owner´s liability as limited by the applicable version of CLC."

However, even if the compensation is not adequate under the CLC92 the Funds will not pay compensation in the following circumstances:[66]

a) The damages happened in a State which was not a member of the Funds;
b) the damages were the consequences of war act or other act related to a warship; or
c) the claimant cannot demonstrate that the damages were caused by a vessel."

The IOPC Fund is financed by the oil company´s contributions, the oil companies who receive the oil transported by sea,[67] in short, the receivers of the crude oil or heavy fuel oil.

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[63] 21 States are member of this Protocol, including Spain and Norway. Available at: www.iopcfund.org (accessed 25 August 2008)
[64] Colin de la Rue and Charles B. Andersom, *supra*, note 31, page 127
[65] Article 4.1of the Fund Convention 1992
[66] Article 4.2 of the Fund Convention 1992
[67] Explanatory note prepared by the Secretariat of the International Oil Pollution Compensation Funds of August 2008. Available at: http://www.iopcfund.org/npdf/genE.pdf (accessed 21 August 2008)

In this manner, through the Funds the oil companies promise to cover the pollution damages with the fund created for this purpose. In particular, the FUND92 imposes to contribute to the companies of the member States receiving per year more than 150.000 oil tons transported by sea. Finally, the membership fees paid by the oil company depend on the amount required by the Funds each year to perform their mandate.

Therefore, the international maritime community through the compensations to the IOPC Fund tries to connect the receivers to the oil spill. However, this convention is not effective since the contribution of a particular cargo owner is not modified when the vessel where his cargo is transported has an accident that causes pollution damages. According to this, the accident is not going to change the cargo owner´s economic results and thus, the connection does not really exist.

3 The cargo owner in the actual conventions

This chapter is the most critic of the whole thesis since studied the main problems of the conventions. Firstly, I will try to demonstrate the lack of incentives to hire a safe vessel given by the CLC92 and the Fund 92 and the consequences that this has in the number of oil spills. Secondly, I will present the European Commission position since it thinks that the change in the channeling of liability is necessary. And finally, I will reflect on the efficiency of the conventions.

3.1 The negative consequences

On the previous chapter of the thesis, we have emphasized the introduction of strict liability on the owner of the vessel by article III of the CLC92 and the corresponding exclusion of the charterer as liable in its article IV(c). The convention does not specifically mention the cargo owner in any of its articles. The result of this silence is that the cargo owner will not be liable for damages caused by the vessel´s pollution. However, as seen before,[68] the silence will not receive the protection given by the channeling provision either. In practice, this non-protection will not be really important since it is hard to prove the cargo owner´s implication in the accident.

Therefore, having analyzed the relevant conventions, it is time to pose the following two questions:

-Which are the consequences of the non-inclusion of the cargo owner in the CLC92? and,

-Is this silence of the CLC92 influencing in the oil transport market?

[68] Section 2.2.4.1.3, the cargo owner.

The most important and criticized consequence produced by the non-introduction of the cargo owner in the CLC92 is the lack of incentives for the cargo owner to avoid accidents. Once the cargo owner realizes that he is not going to be liable in any case for pollution damages caused by the vessel´s accident inside of him "grows the feeling" that not only the accident but also, the pollution damage is something not relating to him.

Certainly, the quasi-impossibility to claim against the cargo owner is translated in the lack of incentives to hire a safe vessel capable to transport his cargo since in the case of an accident, the accident is not going to affect in his economic results anyway. This is the main reason why during the last century the oil companies got rid of part of their fleets and they have started to charter vessels to transport their products, especially in cases of really cheap cargo.[69]

According to this, we can also affirm that nowadays the oil companies only control one fourth of their fleet, the rest is controlled by independent shipowners. In 1974 the companies controlled 40% of the oil tankers and in 1999 just 25%. [70] According to this we can demonstrate that the conventions imposition of liability only on the owner of the vessel has produced a disincentive for oil companies to carry the oil in their own vessel.
The oil companies perfectly know that the CLC92 is on their side and getting rid of their fleets has the convenient result that they are not going to be liable for oil pollution damages during a vessel´s accident.

Another reason to get rid of their fleets is the public opinion. Any time that there is an oil spill of one of the oil companies´ vessels the oil company is judged by the public opinion. An example of this affirmation is the Exxon Valdez case where the vessel belonged to Exxon-Mobil.[71] As opposed to Exxon-Mobil, in the Prestige case the oil company had

[69] The Prestige was transporting really low quality oil which would not be possible to legally use as combustible in the European Union. *El Prestige seis meses después.* 1st edition. Greenpeace, (2003), page 8
[70] *Ibit at* page *9*
[71] The economic costs for the pollution damages were really high, but the highest cost was its company image. In 1989 Exxon was one of the five biggest companies in United States but its oversight of information about the catastrophe to the public let Exxon in a very bad position. Juan José Larrea, *Entre la espada y la*

chosen an unknown intermediary: Crown Resources. The used of an unknown company as Crown Resources was an advantage for the real company who face up the accident without the citizens/consumers pressure.

However, the disincentive to carry the cargo in their own vessel is not the only consequence of the non-liability on the cargo owner under the CLC92; another important consequence is that many cargo owners are opting for the cheapest and oldest vessel.[72] The oil market and the chartering market are really competitive markets and in these type of markets finding the cheapest oil tanker is an essential business element.[73] In these terms the only vessel´s characteristic taken into account when it comes to hire the vessel is its price, not its risk. In short, most of cargo owners are not interested in paying more for better ships even though there are serious worries about the environmental safety of these vessels.[74]

The damages caused to the environment and the economic consequences in accidents as the Erika and the Prestige confirms the risk presented by old and poorly maintained ships. As an example of this risk, an important relation between the age of the vessels and the accidents was established: 60 of the 77 oil tankers that wrecked from 1992 to 1999 were older than 20 years old.[75]

Moreover, the ISL Market[76] analysis World Shipbuilding and Maritime Casualty studied the losses of vessels between January 2002 and June 2006 and it has established the percentage of losses according the age of the vessel:
-more than 25 years old, 22.8%

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comunicación, article part of the book *Profesionales para un futuro globalizado*,1st edition, Ediciones Uñate (2003) page 10

[72] It is important to mention that the charter rate is very low, especially for hydrocarbons such as fuel oil, and this does not promote the use of newer vessels. *Supra*, note 3

[73] Communication from the Commission to the Parliament and to the Council about maritime safety in oil transportation, COM (2000)142 final, 21 March 2000.

[74] Jeffery D. Morgan. *The Oil Pollution Act of 1990: A look at its impact on the oil industry*. In: Fordham Environmental Law Journal , Vol. VI, (1994), page 17

[75] *Supra*, note 73

[76] The ISL is an Institute of Shipping, Economics and Logistics which one of its competences is "prepare and offer knowledge and information around marine logistics for all the involved actors" Available at: www.isl.org/index.php?lang=en (accessed 10 August 2008)

-between 20 and 24 years old, 37.1%
-between 15 and 19 years old, 26.8%
-between 10 and 14 years old, 5.3%
.between 0 and 9 years old, 8%
This demonstrates indeed, that from 15 years old, even from more than 20 years old, the accidents are increasing in relation to the years of the vessel. Of course, this affirmation does not mean that all vessels older than 15 years are unacceptable but at least it shows that the risk of defective ship in this age is higher.

Therefore, at this point of the discussion we can state that the cargo owner does not have any type of incentive to hire for the transportation of his oil a solvent company with a safe vessel. Contrary, if an accident takes place the cargo owner will not be liable and then, the choice of a substandard and old vessel does not make any change in his liability.
In short, one important element that influences the decision to hire one vessel or the other is the lowest price. Obviously, must be taken into consideration that another element that influences the decision is the possible loss of the cargo however, this is just important when it comes to transport a precious cargo and not when the cargo is really cheap.[77]

However, being the owner of the vessels the only liable in case of accident, why the vessel´s conditions are not improved? At the current situation, cargo owners only care about profitability. Therefore, they will always choose the cheapest option. There is a big difference in price between a new and safe vessel and a substandard and old one. In this situation cargo owners will choose the substandard and old. Hence, there is not any incentive for the vessel´s owner to replace and modernize their fleet, it will not be logical to order new vessels.

Another element that disincentives the owner of the vessel to improve the quality of the vessel is the short-terms agreements. The cargo owners refuse to enter into long-term charter agreements because they prefer short-term charter agreements. However, this kind

[77] As it was mention in footnote number ,67 the Prestige was transporting oil with a very poor quality.

of agreements does not provide security to the owner of the vessel to invest in new tankers.[78] The shipowner will not invest in a new vessel if he is not completely sure that he is going to have the chance to hire it for a long period of time.

In this type of short-terms charter agreements, the vessel´s age is once again not the important characteristic. It is not only because the cargo owner is not hiring it for a long time (in most of cases for a simple voyage) but also because the price of the vessels is dictated by the shipowner with cheaper prices who offers the oldest vessels. Due to the fact that it is difficult to find quality and profitability, small independent shipowners[79] are winning market quota without taking into account the risk associated with the navigation of the vessel.

The cargo owners affirm that it is responsibility of the shipowners to change the old vessels. This change would increase the rate and profitability of new vessels,[80] and as said before, only old vessels provide money to the shipowner which means that those vessels will be running until their death. Hence, the old vessel market is only a downwards spiral. The shipowners do not invest in new tankers because the cargo owners always choose the cheapest vessel (in most of cases the oldest) and the cargo owners choose the old vessels because they are the only available on the market.

In short, as we can notice, the current market is too competitive to think about the environmental consequences of using a substandard vessel. This is the reason why we need the help of organizations which will regulate the market to avoid future catastrophes. The solution given by the IMO was the CLC92 which declares strict liability on the shipowner.

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[78]The order of new ships started to decrease in the second half of 1990. By mind-1992 sixty percent of the world´s tanker tonnage was fifteen years old or older. Moreover, recent orders for new tankers have not been sufficient to correct this trend. Jeffery D. Morgan, *supra,* note 74, page18

[79] There are three types of tanker ownership: independent ownership, goverment ownership and oil company ownership. Inho Kim. *OPA 90 and the decisions to own or charter tank vessels.* In: Journal of Maritime Law & Commerce, Vol. 35, No. 2, (2004), page 231

[80] Jeffery D. Morgan, *supra,* note 74, page18

However, is CLC92 effective to control the market and establish measures to avoid accidents? The answer, at this stage, comes alone. It is not effective.

It can be argued that the cargo owner can bear part of the damages through contributions to one of the IOPC Funds. However, it will be studied that the IOPC Funds are not capable to create the incentives necessary for the cargo owner to improve the safety of the vessels. As mentioned above, the cargo owner bears part of the pollution damages through its contribution to the Fund. These contributions are set according to the tons transported and they are invariable regardless the pollution. In brief, the contributions are not increased once an accident takes place.

Moreover, their main problem, together with the limitation of the available compensations, is that the Funds are not a preventive but a compensation mechanism. Compensations are only payable if necessary when damages are not full covered by CLC92. Of course, it is much better for the cargo owner to face the payments when an accident has occurred rather than to assume the cost of operating a vessel and controlling it when the crew fulfills the necessary levels of security and training.[81]

In addition, compensations are not only insufficient for the seriousness of the damages caused, but also the path to achieve the compensation is long and difficult. It is worthy to mention that only few weeks before the Prestige accident the Fund of 1971 just paid the compensations regarding the Aegean Sea which ran aground in A Coruña in December 3, 1992.[82]

As we described above, the contributions to the IOPC Funds are made by the crude oil´s importers. Therefore, a paradoxical situation will arise when an accident occurs, the cargo owner who has been negligent selecting the vessel not only would never be found liable for

[81] M. Vázquez , M. Varela y Albino Prada. *¿Canto debe pagar o que contamina?*. In: Revista galega de cultura, (2003), pages 42-49. According to this article, IOPC has only paid approximately 630 millions of euros for the 120 incidents in which it has taken part.
[82] Report on the activities of the international oil pollution compensation funds in 2007, Annual report 2007. Available at: www.iopcfund.org/npdf/AR07_E.pdf , pages 57-59 (accessed 3 August 2008)

the pollution caused but also would be entitled to receive compensation due to the cargo lost in the accident.

It is important to mention that there is the voluntary possibility for the cargo owners to help to repair the pollution damages motivated by the necessity to watch over the company´s image. This was showed at the Erika accident. At this time, even if from the beginning the convention was applicable and there was not any exception to break the channeling provision stated in article III of the CLC92, Total[83] assigned about 200 millions[84] to recuperate the coastline, evacuate pollution and finance the pumping of the Erika among others.

However, this type of acts must not be used to affirm the successful operation of the actual conventions because these acts take place when the cargo owner has a special relation to the place where the oil spills have happened. In contrast, must be clarified that it will be not strange if this will not happen when the oil spill is far away from the place where his costumers are. Taking into account the explanations above, it is hard to affirm that the CLC92 Convention follows the "polluter pays principle"[85] which established that the costs generated by the pollution has to be borne by the entities responsible for the environmental impact. Those who profit from an activity should bear the risk generated by such activity.

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[83] French oil company charterer and cargo owner in the incident.

[84] Available at: www.total.com/en/finance/fi_press_releases/fpr_1999/991230_pumping_Erika_1702.htm (accessed 14 August 2008)

[85] The polluters-pays principle was first recognized and defined at international level in the 1972 Recommendation by the OECD Council: "The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays Principle. This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and /or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment"
The principle was introduced at the EU level in its article 174.2 of the Treaty that states: "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that polluter should pay." Jonathan Remy Nash. *Too much market? Conflict between tradable pollution allowances and the "polluter pays" principle.* In: Harvard Environmental Law Review, Vol. 24, Issue 2 (2002), pages 468-472

And the main important question: Why must be the cargo owner be excused from liability when he is an important party in the oil transport chain? As Inho Kim establishes in one of his articles "the cargo sector should not be excused from sharing spill costs simply because the cargo sector defers to the shipping sector in matters of risk management."[86]

3.2 The European Perspective

Every year 800 millions of crude tons are transported from/to the European ports. Approximately the 70% of the maritime crude transportation in the European Union is carried out in front of the Atlantic Ocean, the North Sea and the rest 30% in the Mediterranean Sea. Apart from that, large number of oil tankers sail in European waters without stopover which means a higher volume of tankers and of course, a higher risk.

This is the main reason why the European Commission has played a central role in the process of updating the international regime of oil-pollution compensation. However, since the Erika incident in December 1999 the EC has taken an intense interest in proposing changes which pose a serious threat to the existence of the Convention system. At this point it is important to mention the continuous criticisms that the channeling provision has received by the European Commission. It has been criticized the inappropriate balance between the responsibilities of different players and their exposure to liability. In this way, it has been recommended amendments to the CLC92 Convention to abate shipowners limitation of liability rights.[87]

In the communication in response to the Prestige accident, the Commission invited Member States to support proposals aimed at "removing the *de facto* immunity of other key players, in particular the charterer, operator or manager of the ship from compensation

[86] Inho Kim, *Introducing Oil Cargo Liability in the Oil Pollution Act of 1990.* In: Journal of Maritime Law & Commerce, Vol.33, N. 2, (2002), page 187
[87] Michael Faure and Wang Hui, *supra,* note 9, page 248

claims"[88] instead from recourse claims by the registered owner, because this provision avoid the capacity of the victims to claim directly to these parties. Thus, the Commission is focused on the principal element in a pollution damage, the compensation of its victims.

In the past years, the Commission, due to the numerous accidents in front of its coast, has changed its direction when it comes to avoiding the accidents. It established in a Directive to the European Parliament[89] the necessity to change the actual maritime rules. The Directive states that the actual Conventions, based on international regimes of civil liability, are insufficient in relation to deterrent effects because they do not discourage the negligent acts limiting themselves as useless instruments to avoid the accidents and considers that only the criminal sanctions are sufficiently effective to make work the legislation against pollution damages. The Commission is convinced that we will obtain a deterrent effect when we will announce that the pollution damages constitute criminal sanctions. Only at this point a social disapproval will be born in a different character than the one in the civil compensations instruments. Hence, the criminal sanction is a serious warning to the future players in the maritime transport with a better deterrent effect.[90] And it ends affirming that if the actual Conventions and the changes applicable to them[91] will not have any result, the Commission will present a proposal to approve an European Legislation which will implement an European system with regard to marine pollution. This system would require the formal complaint of actual Conventions in Liability and Compensation for oil Pollution Damage.

This thesis is not defending the opinion that only criminal sanctions would solve the current situation as this study is focused on civil regimens. However, it is important to not forget that current conventions are not being fulfilling an important objective, which is

[88] Communication from the Commission to the Parliament and to the Council on Improving Safety at Sea in response to the Prestige Accident, COM(2002) 681 final, 20 December 2002
[89] EC Directive 2003/0037
[90] *Ibid*
[91] Not right for the shipowner to limit his liability and capacity of being liable other players in the maritime transport.

avoid environmental accidents at sea. Therefore, there are many scholars and organizations as the European Commission that are questioning the actual efficiency or not.

The last proof from the European Union of the inadequacies of the channeling provision in the CLC Convention and, therefore, the necessity of change is the opinion of the Advocate general Kokott[92] in accordance with the Waste Framework Directive[93] and its consequences in the Mesquer Judgment.[94] The European Court of Justice affirms that if the cost of disposing of waste from a tanker´s oil spill is not or cannot fully be borne by the owner of the vessel and or by the International Fund for Compensation for Oil Pollution Damage, the national law of a Member State of the European Union may provide for that cost to be borne by the producer of the product.

As a result of the Erika accident the heavy fuel oil spilled in the accident polluted among others, beaches in the Commune of Mesquer which was claiming damages against Total Group, the owner and producer of the oil. The town claimed that the oil accidentally spilled at sea was *per* definition "waste" by the Waste Framework Directive, such that Total International Ltd and Total France should be liable for the cost of disposal, in their capacity as 'previous holders' or 'producer of the product from which the waste came' respectively.

The case reached the Supreme Court of France which raised three questions to the Court of Justice. For the purpose of this study we will focus on the third one: "[w]hether in the event of the sinking of an oil tanker, the producer of the heavy fuel oil spilled at sea and/or the seller of the fuel and charterer of the ship carrying the fuel may be required to bear the cost of disposing of the waste thus generated, even though the substance spilled at sea was transported by a third party, in this case a carrier by sea."[95] The Court answered affirmative:

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[92] Opinion of Advocate General Kokott) in the case C-188/07 Commune de Mesquer v Total France SA and Total International Ltd. of 13 March 2008
[93] Directive 75/442/ECC
[94] Judgment of the Court (Grand Chamber) in the case C-188/07 Commune de Mesquer v Total France SA and Total International Ltd. of 24 June 2008
[95] *Ibit at* argument 64

> "[W]hen heavy fuel oil, produced during the refinement of crude oil, was discharged from a ship at sea, the producer of the oil, as well as the seller of the oil and the charterer of the ship, could be held liable for the cost of disposing of pollution on the coast caused by the oil."[96]

With this new judgment of the European Court of Justice, the European Union re-affirms the necessity to change those rules that nowadays are not successful.

3.3 The summary

We have previously studied the most important elements of the current conventions, the CLC92 and the Fund92 with its Supplementary Fund Protocol 2003. Moreover, in this chapter we have been also studied the negative consequences of these elements and the European position concerning the conventions. Therefore, at this stage we should wonder whether an important objective of the convention as must be avoid accidents is being fulfilled.

Since the CLC92 and Fund92 are ruling, the number of oil spills caused by vessel´s accidents has not decreased. There are still accidents happening as,
-1996: Sea Empress ran aground spilling 10,000 tons of cruel oil
-1999: Erika broke apart spilling 3 million gallons of heavy oil
-2002: Prestige sank and 20 million gallons of oil remains underwater
-2003: Tasman Spirit cracked into two pieces leaking 28,000 tons of crude oil into the sea
-2007: Hebei Spirit collided with a steel wire spilling 2.8 million gallons of crude oil.

We cannot deny IMO efforts to avoid oil spills. The raise in compensations would not have been possible if they would not have lobbied to change the Conventions. However, these changes are not enough and perhaps the efforts should direct to the heart of the problem: the strict liability only on the side of the owner of the vessel. In my opinion, the solution

[96] *Supra*, note 93, argument 65

must be the extension of the liability to other parties involved in the transportation of the oil as the cargo owner who at the end is the party trusting in the capacity of the vessel when it comes to transport his cargo and as some authors announces the cargo owner "is the creator party of the pollution risk".[97]

[97] Ignacio Arroyo Martínez, *Problemas Jurídicos Relativos a la Seguridad de la Navegación Marítima (Referencia Especial al Prestige).* In: Anuario de Derecho Marítimo, Vol. 20, (2003), page 35

4 The North America´s solution

This chapter will study the legislation applicable in the United States legislation with regarding oil spills. As we already mentioned the United States has passed its own Act moving away from the international perspective, the CLC92 and Fund92 conventions.[98]

First of all, this chapter will make an overview of the situation where the Oil Pollution Act of 1990 (hereinafter OPA 90) was born and its relevant elements for this thesis, to later on study the States that establish the liability on the cargo owner in their own law. Therefore, the purpose of this chapter is to conclude whether OPA 90 and the States laws are the right legislation to reduce the oil spills accidents.

4.1 Oil Pollution Act 1990

In March 1989 the tanker Exxon Valdez transporting 53 million gallons of oil from the Trans-Alaska Pipeline terminal at Valdez (Alaska) to California, grounded in Prince William Sound spilling more than 11 million gallons of crude into Alaska waters. Within weeks, there were three major spills in Newport, Delaware and Houston in a two-day period. This was followed by the super tanker Mega Borg off Galveston spilling 4.3 million gallons into the Gulf of Mexico and after by the tanker spill in Huntington Beach (California) and several spills in New York Harbor.[99]

[98] Section 2.1, history
[99] Richard L. Jarashow, *The New Regime for Oil Spill Liability in the United States.* In: Canada- United States States Law Journal, Vol.18:299, (1992), page 305

The Exxon Valdez together with these last accidents catapulted the problem of oil pollution to the front pages of the national awareness. In the face of these events, the Congress had three choices:[100]

a) keep debating the ratification and postpone the decision

b) ratify the international conventions, as recommended by the Coast Guard, because it would solidify an uniform international oil spill regime; or

c) react and enact a legislation with an important domestic impact.

Finally, the Congress which was concerned about the costs and risks of maritime oil transportation, moved quickly to pass the Oil Pollution Act [101] in August 1990.[102]

However, in 1992 the United States participated in the CLC but it rejected the amendments, most of scholars affirm that United States considered the CLC, even with the 1992 modifications, not efficient in large spills accidents and refused to join an international convention with a lower compensation than the one provided by its legislation, the OPA 90.[103]

The scope of the OPA 90 is to reduce the occurrence of future oil spills through preventive measures, such as improved tanker design and operational changes and to reduce the impact of future oil spills through heightened preparedness. In these terms, the OPA 90 addressed a number of areas of concern including oil pollution liability and compensation, spill response planning, international oil pollution prevention and removal.

The new law was really criticized since it introduces new requirements for oil shippers to the United States. Taken into consideration the United States' growing dependence on

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[100] *Ibid at* page 305

[101] The OPA was enacted without a single dissenting vote. Jeffery D. Morgan, supra, note 74, page 4

[102] What is not well known is the existence of an oil pollution legislation similar to OPA 90 before, the 1978 Oil Pollution Act which had initially sought to establish a compensation fund to pay for damages and clean-ups.

[103] Jaclyn A. Zimmermann, *Inadequacies of the Oil Pollution Act of 1990: Why the United States should adopt the Convention on Civil Liability*. In: Fordham International Journal, Vol.23:1499 (2000), page 1516

oil[104] and the potential future oil producers´ reactions in regard to these requirements, one commentator even announced that the United States with the enact of the Act became "the first nation in history that has tried to blockade itself".[105]

As will be seen at the end of this chapter, the years have demonstrated the bad precision of this declaration,[106] but firstly should be interesting studied the elements introduced in the shipping industry by the OPA 90.

4.1.1 Liability

The OPA 90 places strict joint and several liability on the

> "responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone".[107]

Moreover, the "responsible party" is defined in the case of a vessel as "any person[108] owning, operating, or demise chartering the vessel".[109] Hence, thanks to this broad definition the OPA 90 expands the scope of liability and provide injured parties with a great chance of recovery the damages. Moreover, OPA 90 requires proof of financial capacity to cover an oil spill before the entrance of a ship in U.S. waters since its main aim is to ensure that parties injured by an oil spill are compensated for their damages,.[110] In addition, OPA 90 allows claimants to pursue claims against any and all responsible parties

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[104] The United States is the world´s largest importer of oil. In 1990, the year of the Oil Pollution Act, the United States imported a total of 277 million tons of seaborne oil, meaning that for every day of the year, vessels carry an average of 770,000 tons (5,400,000 barrels). Intertanko Comments to Notice of Proposed Rulemaking on Financial Responsibility 1992.
[105] Jeffery D. Morgan, *supra*, note 74, page 1
[106] A study commissioned by the U.S. Department of Energy concluded in 1992 that most tanker owners have continued trading to the United States at the same level as prior the OPA 90 was enacted.
[107] Oil Pollution Act 33 U.S.C.§ 1001 (1990)
[108] A "person" under the OPA 90 includes an individual, corporation, partnership or an association.
33 U.S.C.§ 2701 (27)
[109] Oil Pollution Act 33 U.S.C.§ 2701 (32)(a)(1988)
[110] Oil Pollution Act, 33 U.S.C.§ 2716 (1990)

and it also states unlimited liability on grossly negligent polluters, attempting to promote safety and pollution prevention before spills occur.

The OPA 90 differs from CLC92 on the liability imposed on the demise or bareboat charterer and on the time or voyage charterer. In terms of bareboat charterer, the OPA 90 expressly announces strict liability for clean-up costs and damages arising from an oil spill.[111] This is quite usual in general maritime law since the bareboat charterer is considered owner *pro hoc vice.* Nevertheless, the really big change from the common law that the OPA 90 introduces is that the liability is joint and several with the owner of the vessel and the operator. This means that in a spill accident where the costs exceed the limitation applicable to the owner of the vessel[112] the claimants have the capacity to look to other responsible parties, i.e. the bareboat charterer.

In terms of time or voyage charterer, it can be argued that this type of charterer is neither the owner nor the demise charterer. Therefore, it can be mentioned that the inclusion of a demise charterer as the responsible party excludes, by negative implication, the time or voyage charterer.
There are not case law that can clarify this, neither the OPA 90. Then, the only possibility would be addressing the liability of the time or voyage charterer under the term "operator". However, the typical operator´s activities are none of the normal activities control by the time or voyage charterer. This results in the impossibility to include the time charterer or voyage charterer under the term "operator" found in the OPA 90.[113]

Thus, as small introduction to the section 4.1.3 we can affirm that OPA 90 as the CLC92 does not impose liability on the cargo owner. Nevertheless, this affirmation is not

[111] Oil Pollution Act 33 U.S.C.§ 2701-2702(32)(a)
[112] We need to take into account that the Act has a two –tier structure that joins a liability scheme with a fund scheme. OPA 90 holds shipowners directly liable for oil pollution costs and taxes cargo interests to finance the Oil Spill Liability Trust Fund (OSLFT). In the event of a spill, OPA 90 first the shipowner sector liable for the compensation for oil pollution costs. If the compensation available from the shipping sector is insufficient to meet those costs, then the OSLFT is charged for the remainder. Available at: http://www.uscg.mil/npfc/About_NPFC/osltf.asp (accessed 25 July 2008)
[113] Charles B. Anderson and Colin de la Rue, *supra*, note 56, page 9

completely true since OPA 90 allows its States to impose the liability on the cargo owner in their own legislations.

4.1.2 Limitation of Liability

The limits[114] established under OPA 90 are not effective if the accident is caused by the responsible party´s gross negligence, willful misconduct or violation of an applicable federal safety, construction or operating regulation. The responsible would also be deprived of limitation of liability if he fails or refuses to report the incident, to provide reasonable cooperation or assistance in connection with removal activities, or to comply with orders relating to removal activities or protection of public health,[115] providing no protection for responsible parties under state law. Moreover, removal costs and damages exceeding the liability limits of the OPA 90 will be covered by the Oil Spill Liability Trust Fund (hereinafter the "OSLTF") up to 1 billion dollars per incident.

However, there are so many federal regulations so easy to infringe that the promise of limitation of liability under the OPA 90 seems practically impossible.[116] Apart from this, OPA 90 does not prohibit the States to enact their own legislation in oil pollution affairs.[117] This means that the States could impose additional liability or unlimited liability in cases of oil spills. Hence, we can affirm that in practice the limitation of liability imposed by the OPA 90 will never exist thanks to federal regulations and additional liabilities.

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[114] The limit of a tank vessel liability for each spill incident is set at the greater of either 1,200 dollars per gross ton or 10 million of dollars if the vessel is greater than 3,000 gross tons, and 2 million of dollars if the vessel is 3,000 gross tons or less. Oil Pollution Act 33 U.S.C.§ 2704 (a)(1999)

[115] Oil Pollution Act 33 U.S.C.§ 2704 (c)(1999)

[116] Inho Kim, *supra*, note 79, page 220

[117] OPA specifically provides that the preexisting Limitation of Liability Act does not preempt state law, 33 U.S.C.§ 2718. By August 1991, 36 states among California, Connecticut, Louisiana and Maine had imposed unlimited liability on petroleum carriers. Jeffery D. Morgan , *supra*, note 74, page 6

4.1.3 The cargo owner in the OPA 90

The OPA 90 originally had a provision which made the owner of the oil liable for pollution damages and clean-up the zone where the oil spill has happened, but during the legislative process the idea of cargo owner being liable was abandoned.[118] Finally, the OPA 90 only imposes strict liability in the "responsible party" that in this case is the owner of the vessel, the operator or the demise charterer. Therefore, the definition does not include the owner of the cargo aboard the vessel: there is not federal statutory oil spill liability. Of course, cargo owners have, in general, less control over the vessel than other parties but this must not be an excuse to not be liable, they may be subject to liability for negligence in situation as elections of the vessel.

Scholars have suggested that the result of not imposing liability on the cargo owner betrays the OPA 90´s main purpose which is prevent spills, not pay for them once they took place. In addition, scholars have understood that to not impose liability on the side of the cargo owner creates no real incentives when it comes to choosing its carriers. Presumably, the theory is that the shipper will not select carriers with poor spill records, the carriers with poor spill records will cease to be profitable and ultimately, these carriers will cease operating.[119]

Even if the cargo owners escape from the OPA 90 there is one situation where they do not have that escape. This is the situation where the damage was caused "solely by act or omission" of the cargo owner. Meaning that the owner or operator will escape from liability if he is completely free of fault and the cargo owner´s negligence is proven.

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[118] During the negotiations of the OPA 90 was the proposal to introduce the cargo owner as secondarily liable but the proposal was deleted from the final draft imposing strict liability to the owner, operator, or demise charterer of the vessel, Gotthard Gauci, *supra*, note.57, page 98

[119] Marja Jo Wyatt, *Financing the Clean-Up: Cargo Owner Liability for Vessel Spills.* In: University of San Francisco Maritime Law Journal, Vol. 7, (1995), pages 353-378

A case law demonstrating this is Boykin v. Bergesen[120] where in relation to article 2702 section 2 of the OPA 90 the court decided that the cargo owner was negligent in failing to advise the carrier of the dangerous character of the coal cargo which exploded during discharge. However, it is quite difficult to imagine a scenario where this could happen, a scenario where the cargo owner is the solely responsible for the accident. The reason is that there are other parties more involved in the transport than the cargo owner. Moreover, the OPA 90 states the prohibition of the contractual re-assignments of oil spill liability in its article 1710 section b, meaning that is going to be even more difficult expand the cargo owner liability.

However, the OPA 90 is not the only source for oil pollution liability in the United States. The States also have the capacity to legislate their own laws and as it will be seen in the next section, some States have included the liability of the cargo owner in an oil pollution accident.

4.2 The States´ law

Many States fought hard to protect their liability legislations and finally, the OPA 90 permitted the States to impose liabilities on polluters in excess of those imposed under the new federal law.[121] This is exposed in its article 2718 which states"[122]

> "Nothing in this Act shall- affect, or be construed or interpreted as preempting the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to:
>
> (a) the discharge of oil or other pollution by oil within such State ; or
>
> (b) any removal activities in connection with such a discharge"

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[120] D.Y. A/S, 835 F. Supp.274, 1994

[121] James E. Beaver, James N. Butler and Susan E. Myster, *Stormy seas? Analysis of new oil pollution laws in the west coast states.* In: Santa Clara Law Review, Vol. 34, (1994), page 792

[122] Article 2718 does not only allow the State to impose liability, counties, cities, towns and the like also have the opportunity to adopt requirements different from the federal regulation. Daniel G. Rauh. *State Authority Under the Oil Pollution Act of 1990: Federalist Elixir, or Should the Supreme Court Sink Intertanko v. Locke?*In:Tulane Maritime Law Journal, Vol.24,(1999), page 329

In these terms, another scope of the OPA 90 is to coordinate national and States laws to ensure adequate compensation. In this way, since the adoption of the OPA 90 every coastal State, Hawaii and the States bordering the Great Lakes have adopted their own legislation in order to avoid future oil spills. [123]

Therefore, even if OPA 90 does not hold cargo owner liability, it achieves the same result by preserving existing States laws.[124] OPA 90 invites the States to supplement the existing regulations with their own legislation that in cases can be stricter than the national one.[125] However, the important fact for this thesis is that many States implement cargo liability to achieve their environmental protection.

In this way, when an accident takes place the cargo owner does not face liability under the OPA 90 but could face liability if the accident took place in a State where its oil pollution law states liability on the cargo owner. Unlimited cargo owner liability is established in some States, such as: Alaska, Carolina, Hawaii, Maryland, North Carolina, Oregon and Washington. Limited cargo owner liability is established in other States as: Florida, New Jersey and New York.[126] And of course, there are other States where their legislation does not explicit mention the cargo owner´s liability. However, this liability is quite abroad and the cargo owner can be considered as potential liable.

We can find this last option in States such as: Mississippi, Missouri, Virginia or Ohio among others. Mississippi´s legislation establishes liability on "any person who causes pollution or causes a contaminant to be placed in a location likely to cause pollution."[127]

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[123] *Ibit at* page 329

[124] Colin de la Rue. *Liability for damage to the marine environment* Lloyd´s of London Press (1993), pages 39-55

[125] The line between the OPA 90 and the States´ laws is still testing. In United States v. Massachusetts, a federal court did not accept a state law. This state law should deal with logistics in the tankers. Jonathan L. Ramseur, *Oil Spills in U.S. Coastal Waters: Background, Governance, and Issues for Congress.*CRS Report for Congress, 25 October,2006, pages 22-23

[126] Inho Kim, *A comparison between the international and the US regimens regulating oil pollution liability and compensation*. In: Marine Policy, Vol. 27, Issue 3, May 2003, page 273

[127] Mississippi Code Ann. §49-17-29(2)(a)(1990)

Missouri states in its legislation "any person who causes pollution or causes, permits or places a contaminant in a location where it is reasonably certain to cause pollution."[128] Virginia announces in its rules "any person discharging or causing to be discharge" or "any person who owns, operates, charters, rents, or otherwise exercises control over or responsibility for a facility, vehicle, or vessel."[129] And finally, Ohio which declares that will be liable "any person who causes contaminates to be place in a location to cause pollution."[130]

As we have seen these States just mention as liable the "person" without specified the owner or operator of the vessel, leaving the definition quite open to introduces as possible liable the owner of the oil transported. In short, we can affirm that the States have their own oil pollution laws,[131] and following we will illustrate some States that introduces specifically in their legislations the cargo owner as liable in an oil spill.

4.2.1 California

The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (hereinafter the "Act") was enacted in September of 1990.[132] The Act regulates all aspects of oil spill prevention and response. The Act understands as "responsible party" for the oil spill among others:

> "the owner or transporter of oil or a person or entity accepting responsibility for the oil."[133]

Thus, in California is not only responsible the owner or the operator of the vessel, as the OPA 90 affirms, is also the owner of the oil, the cargo owner. Moreover, the cargo owner

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[128] Missouri Ann. Stat. § 644.051 (Vernon 1988)
[129] Virginia Code Ann. §§ 62.1-44.34.18C, 62.1-44.34.14 (Michie 1992)
[130] Ohio Rev. Code Ann. §6111.04 (Anderson 1991)
[131] A curiosity to mention is that the States pollution laws where the cargo owner is liable were enacted before the OPA 90 which does not impose liability on the cargo owner, and since the OPA 90 no state has imposed liability on the cargo owner. Inho Kim, *supra*, note 79, page 222
[132] It was enacted after the Exxon Valdez accident in Alaska and the American Trader in Huntington Bay, both in 1989.
[133] California Government Code § 8670.3(o) (West 1994)

will be liable for the following damages:[134] cost of response, containment, clean-up, removal and treatment, injury to or economic losses resulting from destruction or injury to real or personal property, destruction or loss of natural resources, including reasonable costs of rehabilitating wildlife or loss of use and enjoyment of natural resources among others. Therefore, the cargo owner does not escape from the Carolina´s legislation and he will pay for all the damages caused.

4.2.2 Alaska

Alaska State imposes liability to "a person causing or permitting the discharge of oil" and he "shall immediately contain and clean up the discharge."[135] Nevertheless, the clean up must be carried out in the manner approved by the Department of Environmental Conservation of Alaska. If the clean up manner is not approved, the Department of Environmental Affairs will contract the persons to clean up the area and the costs will be paid by the responsible of the oil spill. Therefore, the owner and the person having the control of the oil that is spilled into Alaska´s waters are jointly and severally liable for damages from the release of the oil without regard the fault.[136]

4.2.3 Oregon

Oregon States imposes strict liability by law to "any party owning of having control over the oil that enters the water and pollutes the water to collect the oil and remove the oil immediately."[137] If it was not possible to collect and remove the oil the same party must take all practicable actions to contain, treat and disperse the oil.[138] Under these rules then, the cargo owner is responsible for the cleanup of the damaged zone and, in case of this not being possible, to treat the spilled oil.

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[134] California Government Code § 8670.56.5(g) (West 1994)
[135] Alaska Stat. § 46. 04.20
[136] Alaska Stat. § 46. 03.822
[137] Oregon Rev. Stat. § 468B. 315(1)
[138] Oregon Rev. Stat. § 468B. 315(2)

4.3 The results of the Oil Pollution Act 1990 and the States´ law

After the enactment of the OPA 90 there were many authors that criticized it since it was considered that the OPA 90 isolates the United States from the rest of the world.[139] It could be true; but it is also true that the OPA 90 has demonstrated that it has been successful in achieving its principal objective: avoiding oil spills.

Since the adoption of the Act in 1990 until 2004, there has been a reduction in the number and volume of oil spills by tanks in the United States´ waters. The number of oil spills is still maintaining a downward trend.[140] It was established that if the OPA 90 was never enacted, nowadays the oil spills would be at least 80% higher than in 1990.[141]
Moreover, the vessels that enter nowadays in the waters of the United States are better and newer than before[142] and both the shipowners and cargo owners have increased the vigilance in their choice of vessels, the initiatives for preventing oil spills and the stricter standards to protect the environment.[143] In short, as the CRS Report for the Congress affirms the OPA 90 is the key player in the spill volume reduction.[144]

But, who is the real key player: the OPA 90 or the States´ law?

As we have seen, OPA 90 establishes unlimited liability without introducing the cargo owner as potentially liable, limiting in this way the risk of the cargo owner in oil spill accidents. This results in a lack of incentives for the oil industry. Thus, exactly the same situation that we have studied in relation with the CLC92 in the previous chapters.

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[139] Jaclyn A, Zimmermann, *supra*, note 103, pages 1534- 1535
[140] Anthony C. Homan and Todd Steiner, *OPA´s impact at reducing oil spills.* In: Marine Policy, Vol. 32 (2008), page 711
[141] *Ibid at* page 718
[142] Leonard K. Rambusch, *OPA 90:Evolution or Revolution.* In: International Business Lawyer, Vol. 24, No. 1, September (1996) page 367
[143] Inho Kim, *Ten years after the enactment of the Oil Pollution Act of 1990. A success or a failure.* In: Marine Policy, Vol. 26 (2002), page 203
[144] Jonathan L. Ramseur, *supra*, note 125, page 2

Moreover, liability imposed on the shipowner and on the cargo owner creates more important incentives than the imposition of liability only on the side of the shipowner. To support this argument it was concluded that in the States where the cargo owner is liable there are fewer oil spills than in the States where their legislation do not impose this liability on them.[145]

Therefore, I hardly believe that the success achieved by the OPA 90 to reduce the number of oil spills is not its success. The real key players in this reduction are the States´ laws where the cargo owner is liable, which were able to solve the lack of incentives under the OPA 90.

4.4 Canada

Canada also has its own legislation which imposes liability on the cargo owner, The Canadian Arctic Waters Pollution Prevention Act. The Act states:[146]

> " [T]he owner of any ship that navigates within the arctic waters and the owners of the cargo of any such ship…are jointly and severally liable, up to the amount…, for costs, expenses and loss or damage…resulting from any deposit of waste…The liability of any person…is absolute"

It follows that the cargo owner will be liable to the same extent as the shipowner for the costs of the pollution. Then, the Canadian regimen suggests that it is possible to find a way of imposing liability on the cargo owner, although this solution is more complicated than simply impose the liability on the shipowner.

[145] Inho Kim, *supra,* note 86, page 197
[146] Article 6.1 of the Canadian Arctic Waters Pollution Prevention Act.

5 Conclusion

It would be unfair to affirm that the current conventions are completely ineffective since they have introduced really important elements to the international maritime world. Firstly, one of their contributions was to tackle the oil pollution problem from an international perspective since it is an international problem that affects most of countries.[147] Secondly, the conventions have been ratified by a great number of States so the remedies that they present are common to most States of the world.[148] And finally, they have been modified to solve the problems each time that an accident demonstrated their limitations, so they are active systems.

However, the current conventions have not been effective in a specific area: Avoiding the oil spills. The reason for this inefficiency is that the cargo owner receives very little incentives from the CLC92 and FUND92 conventions and they still base their choice on the price and not on the safe conditions of the vessels.

There are many voices, as the European Union, that affirm that we should change the way to tackle the accidents which caused the oil spills. Their idea is to change civil liability into criminal liability, but there are some problems of imposing the criminal liability: Firstly, to impose strict criminal liability in situations of oil spills caused by vessels is evidently tending to hinder the effective protection of the environment from the effect of spills. And secondly, a consequence of this criminal liability is that it raises a serious impediment to cooperation and coordination between those who are liable by law.[149]

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[147] Jaclyn A. Zimmermann, *supra*, note 103, page 1529
[148] *Ibit at* page 1529
[149] John J. Gallagher. *The Application of Strict Criminal Liabilities to Spillage of Oil: The Practical Impact on Effective Spill Response*. In: Spill Science & Techonology Bulletin, vol.7, Nos.1-2, (2002), page 39

Even if the CLC92 which is based on the civil liability nowadays is not as effective as we would like to I am still thinking that the civil liability is the solution to deal with oil spills. The solution that I have tried to expose during the whole thesis is that there must be a change in the channeling of liability. The shipowner cannot be the only one liable in cases of oil spills because this has as a consequence a disincentive in the complete oil transport chain. This was also stressed by the European Commission who thinks that there is a real relationship between the liability of the party and the incentives to choose a safe vessel.[150]

Some can argue that the extension of the liability can carry problems such as lengthy and duplication of procedures or that the victims have to wait too many years for their compensations.[151] However, I think these problems are not enough to avoid the change. It is odd that this second problem is already a problem in the actual conventions (I have been discussion this in chapter three).

There are also scholars that go further and affirm that the shipowner and the oil companies are not the only polluters. There are other entities that also get benefits from this oil since the carriage of oil is indispensable to the industrialized nations. In this way, they understand that the general citizenship of those nations should be paying the damages or at least, share the risk.[152] Nevertheless, the consumer cannot be understood as a responsible party since there is a huge number of consumers and the costs incurred by the consumers are hard to capture.[153]

My solution would be the introduction of the cargo owner as a liable party because this will create a much closer link to the risk of the ship. As was said before the cargo owner is an important member of the oil transport chain together with the shipowner. Therefore, the oil companies influence the decisions of the shipowners through the conditions of their

[150] Michael Faure and Wang Hui, *supra,* note 9, page 252
[151] This is the argument of G.J. Van der Ziel. Michael Faure and Wang Hui, *supra,* note 9, page 250
[152] Chao Wu, *supra,* note 11, page 111
[153] Inho Kim, *supra,* note 86, page 186

chartering contracts. Moreover, they would be capable of making decisions in the safety measures of the shipowners´ vessels.
Someone could think that the solution would be exchange the shipowner´s liability for the cargo owner´s liability. This solution would be completely wrong since the imposition of the liability on the cargo owner is not an option. Following this solution there would be a lack of incentives for the cargo owner and the corresponding consequences that we already know.

However, the inclusion of the cargo owner as potentially liable must be linked to the IMO´s effort to play a more prominent role in the implementation and enforcement of the new regulation with the intention to come unstuck the shipping interest.
Therefore, with the IMO´s effort and the introduction of the cargo owner as potential liable in oil spills their influence over the shipowners and their vessels could be realized and the number of oil spills would be decreased drastically.

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