COMITE MARITIME INTERNATIONAL

GUIDELINES ON OIL POLLUTION DAMAGE

approved by the

XXXVth Conference
of the
Comité Maritime International

Sydney, 8th October 1994

RESOLUTION

The XXXVth International Conference of the Comité Maritime International in Sydney from 2nd to 8th of October

Having decided *to adopt Guidelines on Oil Pollution Damage*

Recommends *the wide dissemination and application of the Guidelines;*

and

Resolves *that a Report of its work be annexed to the Guidelines by way of background, although the Report is not to be construed as forming part of the Guidelines.*

CMI GUIDELINES ON OIL POLLUTION DAMAGE

INTRODUCTORY NOTE

These Guidelines were adopted at the 35th International Conference of the Comité Maritime International (CMI), held in Sydney on 2-8 October 1994.

They are concerned with the admissibility and assessment of claims for oil pollution damage. They do not deal in any way with claims for personal injury. The CMI has as its object the unification of maritime law, and since its foundation in 1897 it has been wholly or partly responsible for the preparatory work leading to several international conventions in the maritime field. These include the Civil Liability Convention 1969 (CLC), the principal international instrument governing civil liability for oil pollution from ships. Together with the complementary Fund Convention 1971, which provides for supplementary compensation, CLC established an international system which has achieved widespread acceptance: by October 1994 it had been ratified by no less than 88 States.

The international community reaffirmed its commitment to this system in 1984 and again in 1992 when Protocols were agreed to modify both Conventions, and to keep the levels of compensation up-to-date.

CLC entered into force in 1975 and in the first 15 years of its operation it was almost invariably possible for claims to be settled by negotiation. In the early 1990s, however, there were concerns that increasing public interest in environmental issues would lead to growing problems resulting from legal uncertainties in this field. These were highlighted in 1990 when the USA decided not to join the international system, but to adopt its own laws in the form of the US Oil Pollution Act (OPA). The Act set out a detailed framework of compensation quite different from the concept of "pollution damage" as defined in the Civil Liability and Fund Conventions, and the Protocols thereto. This definition is couched in only very general terms, leaving scope for uncertainty as to the types of recoverable claim. It was foreseen that divergent decisions in different national courts could seriously undermine the uniform application of the Conventions which is so important for their success.

The scope for such divergences was seen as all the greater when some of the issues were marked in most countries by a paucity of legal precedent, whilst others involved notorious difficulty in defining the extent of recoverable loss. A particular problem envisaged was that of determining the proper scope of allowable claims for economic loss: this has

been a recurrent cause of difficulty in most legal systems, and the question arose whether clearer criteria could be developed in relation specifically to economic loss resulting from pollution. Similar problems were also anticipated in relation to economic loss claimed under the US Oil Pollution Act.

Against the above background the CMI decided in 1991 to appoint an International Sub-Committee and Working Group to examine this subject. National associations affiliated to the CMI were circulated with a Report and Questionnaire in which numerous issues were canvassed as to the types of claim for which compensation might be awarded under national laws. An analysis of the replies led to a Colloquium on the subject in Genoa in September 1992, and subsequently to further work described in a Discussion Paper which was presented for consideration by the 52 national associations affiliated to the CMI and reviewed at the Conference in October 1994. The Conference resolved that a Report based on the Discussion Paper be prepared and annexed to the Guidelines by way of background, although the Report is not to be construed as forming part of the Guidelines.

In preparing these Guidelines the CMI has aimed, first, to state the extent to which claims are thought to be recoverable under the law as applied in the majority of countries, and with due account being taken also of the criteria developed by the International Oil Pollution Compensation Fund; secondly, to employ terminology whose meaning is understood and acceptable in countries with a variety of different legal traditions; and thirdly, to strike a satisfactory balance between the desire on the one hand for greater certainty as to the types of recoverable claim, and on the other the need to retain sufficient flexibility to deal on their merits with the many different types of claims which may be made in practice.

The CMI Guidelines do not alter legal rights in any way. They are intended mainly to promote a consistent approach in cases of doubt as to what the relevant legal rights might be. They have been drawn up in the belief that many national courts will strive, when applying laws based on international conventions, to do so in a manner which is consistent with the approach taken in other countries. In that context it is hoped that when courts are faced with the task of determining difficult issues in this field, or of enunciating new principles of law, they may derive some assistance from the formulations which have evolved from the CMI's work.

PART I: GENERAL

1. The importance is to be recognised of maintaining internationally a uniform treatment of claims for pollution damage, including a uniform application of the International Convention on Civil Liability for Oil Pollution Damage (CLC 1969) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention 1971) together with any amendments thereof, and to that end due weight should be attached to any relevant policy, decisions or resolutions of the International Oil Pollution Compensation Fund.

2. Compensation may be refused or reduced if a claimant fails to take reasonable steps to avoid or mitigate any loss, damage or expense.

PART II: ECONOMIC LOSS

3. For the purpose of these Guidelines the following definitions are employed:

(a) "Economic loss" comprises both consequential loss and pure economic loss, as defined below;

(b) "Consequential loss" means financial loss sustained by a claimant as a result of physical loss of or damage to property caused by contamination by oil;

(c) "Pure economic loss" means financial loss sustained by a claimant otherwise than as a result of such physical loss of or damage to property;

(d) "Property" means anything in which the claimant has a legally recognised interest by virtue of a proprietary or possessory right.

4. In principle compensation is payable for consequential loss.

5. Pure economic loss may be compensated when caused by contamination by oil, but normally only as set out below. The loss must be caused by the contamination itself. It is not sufficient for a causal connection to be shown between the loss and the incident which caused the escape or discharge of the oil from the vessel involved in the incident.

6. (a) Pure economic loss will be treated as caused by contamination only when a reasonable degree of proximity exists between the contamination and the loss.

(b) In ascertaining whether such proximity exists, account is to be taken of all the circumstances, including (but not limited to) the following general criteria:

(i) the geographic proximity between the claimant's activities and the contamination;

(ii) the degree to which the claimant is economically dependent on an affected natural resource;

(iii) the extent to which the claimant's business forms an integral part of economic activities in the areas which are directly affected by the contamination;
(iv) the scope available for the claimant to mitigate his loss;
(v) the foreseeability of the loss; and
(vi) the effect of any concurrent causes contributing to the claimant's loss.

7. Whilst the result in practice of applying the foregoing general principles will always depend on the circumstances of the individual case, recovery will not normally extend -

(a) to parties other than those who depend for their income on commercial exploitation of the affected coastal or marine environment, such as, for example, those involved in:
  (i) fishing, aquaculture and similar industries;
  (ii) the provision of tourist amenities such as hotels, restaurants, shops, beach facilities and related activities;
  (iii) the operation of desalination plants, salt evaporation lagoons, power stations and similar installations reliant on the intake of water for production or cooling processes;
(b) to parties claiming merely to have suffered:
  (i) delay, interruption or other loss of business not involving commercial exploitation of the environment;
  (ii) loss of taxes and similar revenues by public authorities.

8. Compensation may be paid for economic loss if it results from damage to, or loss or infringement of, a recognised legal right or interest of the claimant. Such a right or interest must be vested only in the claimant (or in a reasonably limited class of persons to which the claimant belongs) and must not be freely available to the public at large.

9. Compensation may be paid for the costs of reasonable measures taken by a claimant to prevent or minimise economic loss, where such loss would itself have qualified for compensation under the terms of these Guidelines. In determining what is reasonable for this purpose, it will normally be required that:

(a) the costs of the measures were reasonable;
(b) the costs of the measures were in proportion to the loss which they were intended to prevent or minimise;
(c) the measures were appropriate and offered a reasonable prospect of being successful; and
(d) in the case of a marketing campaign, the measures related to actual targeted markets.

PART III: PREVENTIVE MEASURES, CLEAN-UP AND RESTORATION

10. (a) The cost of preventive measures (including clean-up and disposal) is recoverable insofar as both the measures themselves and the cost thereof were reasonable in the particular circumstances

(b) In general compensation is payable where the measures taken or equipment used in response to an incident were likely, on the basis of an objective technical appraisal at the time any relevant decisions were taken, to be successful in avoiding or minimising pollution damage. Compensation is not to be refused by reason only that preventive or clean-up measures prove ineffective, or mobilized equipment proves not to be required. A claim should however be refused if the steps taken could not be justified on an objective technical appraisal, in the circumstances existing at the relevant time, of the likelihood of the measures succeeding, or of mobilized equipment being required.

(c) Where a government agency or other public body takes an active operational role in preventive measures or clean-up, compensation may be claimed for an appropriate proportion of normal salaries paid to their employees engaged in performing the measures during the time of such performance, and such a claim will not be rejected on the sole ground that the salaries concerned would have been payable by the claimant in any event.

(d) Where any plant or equipment owned by a claimant is reasonably used for the purpose of preventive or clean-up measures, the claimant may claim reasonable hire charges for the period of the use, and any reasonable costs incurred to clean or repair the plant or equipment after its use; provided always that the aggregate of such charges and/or costs should not exceed the acquisition cost or value of the plant or equipment concerned.

(e) Compensation paid in accordance with sub-paragraphs (c) or (d) is to be limited to expenses which relate closely to the clean-up period in question, and is not to include remote overhead charges.

(f) Where equipment or material is reasonably purchased for the purpose of preventive or clean-up measures, compensation is payable for the cost of acquisition, but subject always to a deduction for the residual value of such equipment or material after completion of the measures.

(g) Compensation is payable for the reasonable cost of repairing damage caused by reasonable preventive or clean-up measures, such as damage to sea-defences, roads and embankments caused by heavy machinery.

(h) Compensation is payable for the cost of reasonable measures to clean birds, mammals or reptiles contaminated by oil.

11. Compensation for impairment of the environment (other than loss of profit) shall be limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken. It is not payable where the claim is made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.

12. (a) Admissible claims for the cost of reasonable measures of reinstatement need not be limited to the removal of spilt oil, but may include appropriate steps to promote the restoration of the damaged environment or assist in its natural recovery.

(b) Specific studies may be necessary to quantify or verify pollution damage and to determine whether or not reinstatement measures are in fact feasible and will accelerate natural recovery. Contributions may be paid to the reasonable costs of such studies, provided they are reasonably proportionate to the actual damage, and provided they produce, or are likely to produce, the required data.

(c) A claimant may recover a reasonable sum in respect of the estimated cost of reinstatement measures, before they have actually been carried out, provided always that the measures could not otherwise be carried out due to lack of financial resources, and provided an undertaking is given, or other satisfactory evidence is provided, that the proposed measures of reinstatement will actually be carried out.

(d) In determining whether measures of reinstatement are reasonable, account is to be taken of all the relevant technical factors including (but not limited to) the following:

(i) the extent to which the observed state of the environment, and any changes therein, are to be regarded as damage actually caused by the incident in question, as distinct from other factors whether man-made or natural;

(ii) whether the measures are technically feasible and likely to contribute to the re-establishment at the site in question of a healthy biological community in which the organisms characteristic of that community are present and are functioning normally;

(iii) the speed with which the affected environment may be expected to recover by natural processes and the extent to which the reinstatement measures concerned may accelerate (or inadvertently impede) natural processes of recovery; and

(iv) whether the cost of the measures is in proportion to the damage or the results which could reasonably be expected.