The CLC 1969-1992

Channelling of liability (Art. III.4(b))

France

Tribunalde Grande Instance de Paris – XI Chambre Correctionnelle 16 January 2008 - *(The "Erika")* (not yet reported)

On 8th December 1999 the tanker "Erika" of Maltese flag sailed from Dunkerque with a cargo of 30,884.471 tons fuel oil bound to an Italian port to be named. Soon after sailing the ship met with adverse weather conditions and on 12th December the master sent an emergency call stating that the ship was breaking in two. After the crew had been rescued by helicopters the forward section of the ship sank in a position 35 miles south-east of Pointe de Penmarc'h (Finistère) while the aft section. after having been taken in tow in order to move it away from the coast, sank the following day in the position latitude 47°9' and longitude 4°15'west. The fuel oil escaped from the tanks of the ship caused a grave pollution of the coast.

Criminal proceedings were commenced in the Tribunal de Grande Instance of Paris against several companies, including the owners of the ship and the classification society, and several individuals. Amongst the issues considered and decided by the Tribunal there was that relating to the exemption from liability of the classification society under article III paragraph 4(b) of the CLC 1992.

Held, by the Tribunal de Grande Instance of Paris, that:

> *[1] The services performed for the ship reference to which is made in article III paragraph 4 (b) of the CLC 1992 are services performed by persons that participate directly in the maritime operations and cannot include classification societies.*

United States

Reino de España v. The American Bureau of Shipping – The "Prestige", United States District Court – Southern District of New York 2 January 2008

The Reino de España brought proceedings in the United States District Court-Southern District of New York against American Bureau of Shipping (ABS) claiming pollution damages caused to its coasts after the casualty of the "Prestige".
ABS moved, under Rule 56 of the federal Rules of Civil Procedure, for summary judgment dismissing Plaintiff's case on the ground that Plaintiff was unable to prove the requisite degree of culpability on ABS' part or, in the alternative, partial summary judgment finding Spain's pursuit of its claims against ABS in that forum precluded by the International Convention on Civil Liability for Oil Pollution Damage ("CLC").
ABS argued that the District Court had no jurisdiction over the claim since under article IX (1) of the CLC 1992, of which Spain is a party, all claims for pollution damage should have been brought in the courts of Spain and that in any event no claim for compensation could be made against ABS pursuant to article 3 paragraph 4 (b) of CLC 1992.

Held, by the USDC-Southern District of New York, that:

> *[1] A classification society is a person who, without being a member of the crew, performs services for a ship within the meaning of article III paragraph 4 (b) of CLC 1992.*

Costs – Costs in pursuing claim against IOPCF

Scotland

Landcatch Limited v. *The International Oil Pollution Compensation Fund* (Inner House, Court of Session, Edinburgh, 19 May 1999 ([1999] 2 Lloyd's Rep. 316; 1999 S.L.T. 1208)*

The tanker *Braer* ran aground at Shetland, an island off the mainland of Scotland in January 1993 during severe weather. Almost 85,000 tonnes of crude escaped. Landcatch, a salmon farming company, claimed £1,900,000 from the owners of the tanker, their insurers and the International Oil Pollution Compensation Fund. The claim was for loss of profits said to have been sustained in 1993 and 1994, attributed to the fall in demand for Shetland salmon following the spill. The plaintiff also claimed for the expenses in pursuing their claim against the IOPCF.

The insurers of the *Braer* paid the relevant limitation fund into Court under and in terms of CLC 1969; the IOPCF also was a party to the defence of the various claims made upon the fund in Court, further to its contingent liability in terms of the Fund Convention 1971.

It was admitted on behalf of the owners, insurers and IOPCF that they were liable for "damage" in terms of implementing UK legislation that gives effect to the 1969 and 1971 Conventions, but contested the issue of whether the loss of profit claimed by Landcatch fell within that description.

Held, by the Court of Session (Inner House), that:

(1) the owners and insurers were not liable for the plaintiff's loss of profits caused by the escape of the oil carried by the "Braer"; such loss of profit was not loss or damage caused directly and immediately by contamination within the meaning of the Convention or the implementing UK legislation.

(2) if Landcatch had sued the shipowners for damages at common law in regard to those losses, its claim would have failed on the application of the recognised pragmatic rule against secondary or relational claims for purely economic loss.

(3) there was no basis for the recovery of costs in pursuing the claim against the IOPCF. The expenses incurred in submitting a claim to the IOPCF are of no concern to shipowners. Since the liability of the IOPCF is contingent upon that of the owners such expenses should not form a separate head of claim against the fund in court.

* The synopsis of this decision has been kindly prepared by Ed Watt, LLB (Hons) LLM, Solicitor, Henderson Boyd Jackson W.S., 19 Ainslie Place, Edinburgh EH3 6AU, UK. Fax +44 131 225.2086 – E-mail: e.watt@HBJ.co.uk – Internet: www.shippinglawyer.com

Economic loss

England

R. J. Tilbury & Sons (Devon) Ltd. v. *Alegrete Shipping Co. Inc., Assuranceforeningen Skuld, International Oil Pollution Compensation Fund 1971 and Others - The "Sea Empress"* [2003] 1 Lloyd's Rep. 327.

The *Sea Empress* grounded at St Ann's Head, Milford Haven on 15th February 1996, leading to the escape of some 72,000 tonnes of crude oil into the sea. There followed a fishing ban in an area of sea around Wales extending from St David's Head in the west to the Gower Peninsular in the east.
At the material time R. J. Tilbury & Sons (Devon) Ltd. (Tilbury) had a business which included the processing of whelks in Devon, at Exmouth which is some 200 miles by road from Milford Haven. They had a long term contract for the supply of Welsh whelks to a Korean buyer, Yusung Mulsan Co. Ltd. and had contracted with 8 fishing vessels (based in the South Wales area) to take such whelks as it would catch for the 6 month period ending 31st July 1996. The ban brought an immediate end to the catching of Welsh whelks, and destroyed Tilbury's business with its Korean buyers.
Tilbury commenced proceedings against the Owners of the *Sea Empress*, Alegrete Shipping Co. Inc., its P&I Club, Assuranceforeningen Skuld, and the International Oil Pollution Compensation Fund 1971 at the Admiralty Court claiming a loss of gross profits totalling £746,632, less avoided expenses of £103,075 which it accepted would have been incurred but for the contamination of the fisheries.
By judgment dated 29th May 2002 given on the trial of a preliminary issue, David Steel J determined against the claimants that their claim for loss of profits did not constitute "damage caused … by contamination resulting from the discharge or escape of oil from the *Sea Empress* within the meaning of section 153 of Schedule 4 to the Merchant Shipping Act 1995". The claimants appealed.

Held, by the Court of Appeal, that:

> *(1) The inability to carry out processing and deliveries of processed and packed whelks at points far away from the contaminated areas is a form of secondary economic loss, which is outside the intended scope of a statute (schedule 4 to the Merchant Shipping Act 1995) which is closely focused on physical contamination and its consequences.*

Exclusive Jurisdiction (Art. IX)

Italy

Corte di Cassazione – Sezioni Unite 17 October 2002, No. 14769 – *International Oil Pollution Compensation Fund 1992* v. *RINA S.p.A. and Others – Total Fina Elf S.A. and Others* v. *RINA S.p.A. and Others – French State* v. *RINA S.p.A. and Others* – m/t *"Erika"* (2003 Dir. Mar.139).

On 12 December 1999 the m/t *Erika*, after having loaded 30,000 tons of oil at Dunkerque, during a storm in the Gulf of Guascogne broke into two pieces and sank. Part of the oil carried by the tanker escaped from the tanks of the vessel contaminated the French coast.
RINA S.p.A., the society by which the vessel had been classified, commenced proceedings in the department of Augusta of the Tribunal of Syracuse against the French State, the Conseil Général de la Vendée, the owners of the *Erika* Panship Management & Services S.r.l., Steamship Mutual Underwriting Association Bermuda Ltd., Total Fina Elf S.A., owners of the oil loaded on board requesting that it be established that it was under no liability in respect of the occurrence. RINA maintained that the Tribunal of Syracuse was the court of competent jurisdiction since the *Erika* had been classified in Augusta where, therefore, the alleged wrong would have been committed.
The liability insurers of RINA, Assicurazioni Generali, Riunione Adriatica di Sicurtà, Assicurazioni d'Italia, Toro Assicurazioni, Navale Assicurazioni and SASA, joined the proceedings.

In turn Conseil Général de la Vendée commenced proceedings in the Tribunal de Commerce of Nantes against RINA and all other parties sued by RINA in Italy, except the French State. The International Oil Pollution Compensation Fund (who had joined the Italian proceedings) the French State and Total Fina Elf, who had entered an appearance denying that Italian jurisdiction existed, with three separate petitions applied to the Italian Corte di Cassazione requesting that the issue of jurisdiction be decided immediately by the Supreme Court. Meanwhile the proceedings in the Tribunal of Syracuse were stayed.

Held, by the Corte di Cassazione, that:

> *(1) Article IX.1 of CLC 1992 must be interpreted in the sense that the exclusive jurisdiction of the courts of the State in the territory, territorial sea or area indicated in Article II of which pollution damage has occurred is not limited to cases where actions are brought against the owner of the ship or its insurer, but exists whoever is the person against whom actions for compensation are brought.*

United States

Reino de España v. The American Bureau of Shipping – The "Prestige", United States District Court – Southern District of New York 2 January 2008

(The summary of facts may be found in the section "Channelling of liability")

> *[1] A State party to CLC 1992 must, pursuant to article IX of the Convention, bring proceedings in connection with pollution damage to its coasts only in its own courts and, therefore, a court of the United States has no jurisdiction to hear a claim of Spain against a United States company allegedly liable for such pollution damage*

Limitation proceedings - Time bar for submission of claims

Italy

Corte di Cassazione 3 May 2004, No. 8337, *Venha Maritime Ltd., The United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd. and the 1971 International Oil Pollution Compensation Fund* v. *Mauro Pesca S.r.l. and Others - The "Haven"* (2005 Dir. Mar. 193)

Mauro Pesca S.r.l. and other claimants submitted their claims in the limitation proceedings commenced in the Tribunal of Genoa by Venha Maritime Ltd., following the pollution damage caused by the *Haven*, who exploded and sank west of the Genoa harbour after the expiry of the time limit set by the Tribunal, pursuant to article 623 of the Italian Navigation Code. Venha Maritime filed an opposition, together with its P&I Club and the 1971 International Oil Pollution Compensation Fund, on the ground, inter alia, that claims that are not included in the list of liabilities drawn up by the Court are forfeited.
The Tribunal of Genoa rejected the claims belatedly submitted on the ground that in the applications reference had wrongly been made to procedural provisions of bankruptcy law. The Court of Appeal reversed that decision and Venha Maritime, its P&I Club and the Fund appealed to the Corte di Cassazione.

Held, by the Corte di Cassazione, that:

[1] In limitation proceedings there is no prescribed time limit for the submission of late claims, in respect of which claimants may only share the balance of the limitation fund after the satisfaction of claimants who have timely submitted their claims.

"Pollution damage" – Physical injury and psychological damage

Scotland

Black v. *The Braer Corporation* (Outer House 30 July 1998, Scots Law Times, Issue 39, 3.12.99 and 2000 Dir. Mar. 999)

Following the pollution caused by the *Braer* when it went aground off the Shetland Islands on 5 January 1993, Derrick Black, a farmer, claimed damages on account of the stress, anxiety and depression caused to him by the contamination.

Held, by the Outer House, that:

> *(1) "Damage" within the definitions of the Merchant Shipping (Oil Pollution) Act 1971 and of the Merchant Shipping Act 1974 includes physical injuries and psychological conditions such as stress, anxiety and depression.*

Time bar (Art. VIII)

Scotland

Eunson v. *The Braer Corporation and Assuranceforeningen Skuld* (Outer House, Court of Session, Edinburgh, 30 July 1998; reported 1999 S.L.T 1405) *

The tanker *Braer* ran aground at Shetland, an island off the mainland of Scotland in January 1993 during severe weather. The cargo of crude oil was lost, and oil was deposited on the coastline and also carried by the storms further inland.

A claim was made by Mr Eunson for damage caused by airborne oil to his home. The property was jointly owned by Mr Eunson and his wife. His wife was not a party to the action until more than three years after the grounding of the tanker and the damage to the property took place.

For the claimant, it was argued before the Scottish Court of Session that section 9 of the Merchant Shipping (Oil Pollution) Act 1971, implementing Article VIII of CLC 1969 in the United Kingdom, operated to allow the claim of Mrs Eunson despite the lapse of more than the three years provided for by Article VIII. It was argued by Counsel for the Braer Corporation, the Owners of the vessel, that Article VIII operated such that her right to claim had expired.

Held, by the Court of Session (Outer House), that:

> *(1) Article VIII of the 1969 Convention is an extinguishing time bar; the claim is extinguished after three years. If the claim is not enforced by an action within this time limit the claim is wholly lost, and the Court has no discretion whether to entertain it.*

* The synopsis of this decision has been kindly prepared by Ed Watt, LLB (Hons) LLM, Solicitor, Henderson Boyd Jackson W.S., 19 Ainslie Place, Edinburgh EH3 6AU, UK. Fax +44 131 225.2086 – E-mail: e.watt@HBJ.co.uk – Internet: www.shippinglawyer.com

Stephen Gray and Stanley Gray v. *The Braer Corporation and Assuranceforeningen Skuld* (Outer House, Court of Session, Edinburgh, 29 December 1998; reported 1999 S.L.T. 1410)

The tanker *Braer* ran aground at Shetland, an island off the mainland of Scotland in January 1993. The cargo of crude oil was lost, and in the surrounding waters an Exclusion Zone was imposed by the UK Government. Fishing was prohibited within the Exclusion Zone, and many of the islanders were prevented in this way from carrying on their business.

Claims were made before the Scottish Court of Session in which the partners of Gray Fishing Company sued the owners and insurers of the *Braer* for pollution damage alleged by reason of the imposition of the Exclusion Zone around the island.

The claim of the partnership was made in Court more than three years after the oil spill.

The issue then arose as a matter of construction of section 9 of the Merchant Shipping (Oil Pollution) Act 1971, implementing Article VIII of CLC 1969 in the United Kingdom. Counsel for the partnership alleged that in the circumstances of continuing losses, the six year time bar period applied, in contrast to a single incident of loss, to which it was said the three year time bar contained in Article VIII applied. Counsel for the Braer Corporation argued that the claim became time-barred three years from the date on which the claim emerged, *viz*. the date of the oil spill itself, and that the six year time limit applied only to claims that arising more than three years after the first occurrence resulting in the discharge or escape of oil.

Held, by the Court of Session (Outer House), that:

> *(1) Article VIII of the 1969 Convention does not create two alternative time bar periods. The Convention applies one period of three years applicable to all claims, with a long-stop provision that after the elapse of six years from the date of the relevant occurrence no action can be brought to enforce any claim whether for losses already sustained or for losses apprehended.*
>
> *(2) To be timeous any action must meet two requirements. The claim must be raised within three years from the date on which the claim first arose; and in any event it must be raised within six years of the date of the first discharge or escape of oil. These requirements are cumulative and not optional. Article VIII of the 1969 Convention envisages a single date as beginning the time bar period – the date "when the damage first occurred".*