Oil Pollution Compensation - Supplementary Fund

The last volume of "Sea Venture" included a report on the status of the CLC and Fund Conventions, including the proposal to increase the available levels of compensation by means of a Supplementary Fund or third tier of compensation. The following is a brief report of the Diplomatic Conference on the Establishment of a Supplementary Fund for Oil Pollution Damage held at the IMO in May 2003.

Background

Following the Erika incident, the 1992 Fund Assembly mandated a Working Group to review various issues regarding the functioning and effectiveness of 1992 CLC and 1992 Fund Convention. One result was the development of a Supplementary Fund to add a third tier of compensation to that of 1992 CLC and 1992 Fund. E.U. member States were very keen to see an increase in the level of compensation available, and whilst preferring an international regime, there had been considerable pressure for a regional European compensation regime (the COPE Fund).

The creation of a Supplementary Fund should negate the need for any regional agreements and enforce the primacy of international conventions in this field.

Despite difficult and protracted negotiations, agreement was reached on a new Protocol.

The Supplementary Fund Protocol - General Points

Unlike the increase in limits of 1992 CLC and 1992 Fund, which will come into effect on the 1 November 2003, the Supplementary Fund is an optional tier of compensation. States that wish to join the Supplementary Fund must first have ratified 1992 CLC and 1992 Fund.

The detail of the Supplementary Fund Protocol is modelled on 1992 Fund Protocol.

Like the 1992 Fund, the third tier will be financed by levies on oil receivers in States party to the Protocol.

Supplementary Fund Limit (Article 4)

The Supplementary Fund will be triggered when the total established claims of a given incident are in excess of, or there is a risk that they will exceed, the limit available under 1992 Fund.

The limit per incident was set at 750m SDR ($1,064m\(^{1}\)). Pro-rata will apply where the total of established claims exceeds the Supplementary Fund limit. However, with the limit set at the upper end of proposed levels, there should be no need in the foreseeable future for pro-rating claims for incidents in Supplementary Fund States once it has entered into force. Thus, where the Supplementary Fund applies, victims of oil pollution damage should be fully compensated for their assessed claims.

As with the 1992 Fund, oil receivers will finance the Supplementary Fund. The continued desire of many of these companies and some delegations to see an increase in the limit of liability of tanker owners under the 1992 CLC was demonstrated by a Conference Resolution entitled "Review of the International Compensation Regime for Oil Pollution Damage for Possible Improvement". There may also be pressure on tanker owners and their P&I Clubs to increase the proposed 20m SDR ($28m) indemnity under the voluntary Small Tanker Oil Pollution Indemnification Agreement (STOPIA)\(^{2}\).

Contributions (Article 10)

Contributions will be levied on companies located in contracting States that receive more than 150,000 tonnes of contributing oil in a calendar year after sea transport, reflecting the 1992 Fund Protocol.

"Membership Fee" (Article 14)

A key difference between the 1992 Fund and the Supplementary Fund is the introduction of a "Membership Fee". This assumes that any State that has ratified the Supplementary Fund has a total contributing oil of at least 1 million tonnes regardless of the real imported value. This "virtual" amount will be applied throughout the Protocol.

This approach is based on the fact that ratification of the Supplementary Fund is optional and in addition to the compensation available under 1992 Fund. Consequently, States that wish to have this level of coverage should be prepared to accept a share of the financial burden regardless of the actual level of their contributing oil.

It assumes that those States that import a significant amount of oil feel most at risk and are therefore more likely to ratify the Supplementary Fund (e.g. developed countries). It also assumes that for other countries the increased limits of the 1992 Fund, which come into force in November 2003, will be sufficient. It does not, however, address concerns of those countries where passing tanker traffic poses the greatest threat, apart from the option of joining 1992 CLC and Fund.

Reporting of Contributing Oil by Member States (Article 15)

In light of on-going 1992 Fund problems regarding lack of reporting of contributing oil by Member States, the Supplementary Protocol reporting requirements appear to be more stringent.

Organisation and Administration (Article 17)

The 1992 Fund Secretariat and Director are likely to fulfil the same roles for the Supplementary Fund.
It was decided that companies in any given Member State would, in aggregate, contribute a maximum of 20% of the total annual contributions payable in any calendar year. This provision will operate until the earlier of
- the total contributing oil reaching 1,000 million tonnes or
- 10 years after the Protocol entering into force.

(By way of comparison, the 1992 Protocol had a capping level of 27.5%. This provision operated until the earlier of
- the total contributing oil reaching 750 million tonnes or
- 5 years after the 1992 Protocol entered into force.)

Entry into Force (Article 21)
The Protocol will enter into force
- 3 months after ratification by
- 8 States and
- The total contributing oil is at least 450 million tonnes.

The 1992 Fund Protocol must have entered into force in a given State if it also wishes to have the Supplementary Fund Protocol apply. It is expected that E.U. States will attempt to ratify the Supplementary Fund Protocol very quickly depending on legislative procedure and parliamentary time available. Japan is also assumed to be among those that will ratify sooner rather than later.

Estimated dates for when the Supplementary Fund will enter into force range from end 2004 to mid 2005. For the purposes of considering a likely date for entry into force, some combinations of countries which presently have a contributing oil total in excess of the required 450 million tonnes are set out below:
- Italy, Netherlands, France, UK and Spain
- Japan, Italy and Korea
- Japan, Italy and the Netherlands

Amendment to the Compensation Limit (Article 24)
In the event that the limit needs to be raised there are various requirements and restrictions as to how, how much and how frequently this can be carried out. These are similar to the 1992 Fund Protocol requirements and include the “fact acceptance” procedure - amendments adopted in IMO’s Legal Committee by two thirds of Contracting States present and voting can enter into force 24 months after adoption.

Termination (Article 28)
The Supplementary Fund will cease when either
- The number of contracting states falls below 7 or
- The total quantity of contributing oil falls below 350 million tonnes.

Click here to view Steamship website article giving update as at December 2004.
1. "Sea Venture" Vol. 20 page 88, "Increases in Compensation for Oil Pollution Damage".
2. International Oil Pollution Compensation Fund, 1992
4. A fund for Compensation of Oil Pollution in European waters
5. Exchanges rate as of 19 May 2003
6. This agreement has yet to be finalised. However, the principal elements have been agreed by the boards of members of the International Group of P&I Clubs.