

LEGAL COMMITTEE
108th session
Agenda item 13

LEG 108/13/1
23 April 2021
Original: ENGLISH
Pre-session public release:

WORK PROGRAMME

Proposal to add a new output under the work programme on the development of a Claims Manual for the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

Submitted by Canada, Finland, Spain, United Arab Emirates, International Group of Protection and Indemnity Associations (P & I Clubs), ITOPF Limited (ITOPF) and International Chamber of Shipping (ICS)

SUMMARY

Executive summary: The Committee is invited to consider a proposal for a new output under the work programme on the development of a Claims Manual for the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, under the auspices and in the name of the Organization

Strategic direction, if applicable: 1 and 6

Output: Proposal for a new output

Action to be taken: Paragraph 26

Related documents: LEG/CONF.12/19 and LEG 107/17

Introduction and background

1 At the 107th session of the Legal Committee, the International Group of Protection and Indemnity Associations (P & I Clubs) submitted document LEG 107/17 and invited the Committee to consider a proposal for the development and adoption of a Claims Manual for the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention), under the auspices and in the name of the Organization and, if agreed, a new output under the Committee's work programme to develop such a manual.

2 The report of LEG 107 notes that the Committee agreed with the proposal and invited P & I Clubs to submit a more detailed proposal on document LEG 107/17 to LEG 108, for further consideration at that session, and taking into consideration the comments made by the Committee. The Committee also noted that delegations interested in taking this work forward on an intersessional basis could contact P & I Clubs (LEG 107/18/2, paragraphs 17.8, 17.11 and 17.12).

3 As a result, the following interested delegations participated in an informal Correspondence Group during the intersessional period to develop the proposal for LEG 108:

CANADA
FINLAND
FRANCE
JAPAN
SPAIN
UNITED ARAB EMIRATES
INTERNATIONAL GROUP OF PROTECTION & INDEMNITY ASSOCIATIONS (P & I CLUBS)
INTERNATIONAL CHAMBER OF SHIPPING (ICS)
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)
INTERNATIONAL TANKER OWNERS POLLUTION FEDERATION LIMITED (ITOPF).
INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS (IOPC FUNDS)

4 Accordingly, this proposal fulfils the Committee's request at LEG 107 that a more detailed proposal be submitted to LEG 108 for a new output under the work programme for the development and adoption of a Bunkers Convention Claims Manual. In submitting this proposal, the co-sponsors are guided by:

- .1 the absence of a specific and dedicated guidance for claimants in the event of ship-sourced pollution damage arising from the escape or discharge of bunker oil in jurisdictions where the Bunkers Convention is in force; and
- .2 the fact that such guidance is available to claimants in the event of ship-sourced pollution damage resulting from the escape or discharge of oil carried in bulk at sea, where the 1992 Civil Liability Convention (CLC) or the 1992 Fund Convention are in force, and through the International Oil Pollution Compensation Funds' (IOPC) Claims Manual.

IMO's objectives

5 *The Strategic Plan for the Organization for the six-year period 2018 to 2023* (resolution A.1110 (30)) notes that the main role of IMO as a global regulator requires it to ensure that a universally adopted, effective, international regulatory framework is in place and implemented consistently, and that IMO instruments continue to ensure a level playing field.

6 The proposal will therefore contribute to the implementation of IMO's Strategic Directions 1: Improve implementation and 6: Ensure regulatory effectiveness.

Need

7 The Bunkers Convention provides a legal framework that establishes strict liability for bunker oil pollution damage and a process that is intended to facilitate the adequate payment of compensation for those that incur a financial loss resulting from a spill of ship's bunker oil. The publication of a dedicated and authoritative guidance would provide potential claimants with important information on the processes to follow before they submit claims which may be considered as falling within the scope of the Convention. Without such guidance, States may be at a disadvantage when contingency planning for ship sourced bunker pollution damage incidents and all claimants may be disadvantaged when they incur a loss arising from such damage.

8 As noted in document LEG 107/17, the co-sponsors are of the view that the absence of such guidance can also result in conflicting and contradictory approaches in cases where such pollution damage has occurred in different States Parties. Such different approaches are inconsistent with the Bunkers Convention's objective of providing uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases. The co-sponsors believe that the development of a dedicated Bunkers Convention Claims Manual could greatly assist in ensuring that the Convention's objectives are achieved.

Analysis of the issue

9 There has been broad agreement already in the discussions to date that the IOPC Funds' Claims Manual would provide an appropriate starting point for a Bunkers Convention Claims Manual. Document LEG 107/17 noted that the definitions of "pollution damage" and "preventive measures" in the Bunkers Convention are identical to those in the 1992 CLC and the 1992 Fund Convention (save for the reference in the Bunkers Convention to "bunker oil" rather than just "oil"). The co-sponsors have also noted that the drafters of the Bunkers Convention intended the scope of pollution damage in the Convention to be in line with the scope of pollution damage as governed by the 1992 CLC. The co-sponsors reference paragraph 6 of document LEG 78/5/2 which states that, "in line with a clear decision at LEG 77, the text [of the Bunkers Convention] now confines the coverage of the proposed Convention to pollution damage in line with the 1992 CLC".

10 Notwithstanding, the co-sponsors recognize that the nature of a Bunkers Convention Claims Manual will necessarily be different in parts from that of the IOPC Funds' Claims Manual. The IOPC Funds' Claims Manual is a manual agreed by the Funds' governing bodies, describing its practice to claimants and published by the IOPC Funds, the inter-governmental organizations established by the 1992 Fund Convention and the 2003 Fund Protocol to provide compensation for oil pollution damage arising from spills of persistent oil from tankers. In contrast, a Bunkers Convention claims manual would be a guidance document drafted by the Legal Committee and published in the name of the Organization, which does not have the same purpose and function as the IOPC Funds' Claims Manual, with the objective to assist and guide national courts, claimants, shipowners and insurers in their interpretation of the Bunkers Convention.

11 While such a claims manual may describe the type of claims that may reasonably be considered as falling within the scope of the Bunkers Convention, the co-sponsors recognize that such a claims manual cannot be definitive and that ultimately the admissibility of claims will be determined by the national courts as the final arbiters in States Parties on matters of interpretation. This should be made clear in a claims manual and should be seen as a guidance document rather than prescribing a definitive position on admissibility of claims.

12 From this viewpoint, the co-sponsors note that certain elements of the IOPC Funds' Claims Manual may be inappropriate for a Bunkers Convention Claims Manual. In a number of areas where the Funds' Claims Manual seeks to provide specific guidance, it may in fact be preferable to leave such issues of evidence and fact-finding to national jurisdictions and their courts to determine. Further examination will consequently be required as to whether it is appropriate to incorporate certain provisions of the Funds' Claims Manual into a Bunkers Convention Claims Manual.

13 The co-sponsors also recognize the comments made at LEG 107 on the need for careful drafting of a claims manual since, on the one hand, it should not create inconsistencies with the Funds' Claims Manual but, on the other hand the 1992 CLC and 1992 Fund Convention regime is different and such differences should not be overlooked. A Bunkers Convention Claims Manual would need to address pollution damage arising from different ship

types and different oils (persistent and non-persistent) and it should recognize that, unlike the 1992 CLC and 1992 Fund Convention regime, Bunkers Convention claimants cannot access a second tier of compensation provided by receivers of persistent oil. Although the Funds' Claims Manual would provide an appropriate starting point, a careful review of each item of the Funds' Claims Manual may be necessary in the development of a Bunkers Convention Claims Manual.

Analysis of implications

14 This proposal does not seek to amend the Bunkers Convention. The output of this proposal will not impose any legislative or administrative burden on the maritime industry.

15 The co-sponsors have completed the checklist for identifying administrative requirements as contained in the annex to this document.

Benefits

16 The benefits derived from a manual dedicated solely to an explanation of how claimants should prepare and submit claims for pollution damage covered by an IMO liability and compensation Convention has long been demonstrated by the IOPC Funds' Claims Manual. The Funds' Claims Manual has been developed over the 43 years since the entry into force of the 1971 Fund Convention and guides potential claimants in understanding the basic principles of admissibility of claims, how to prepare and submit claims and how claims will be reviewed and assessed. The manual does not aim to explain the 1992 CLC and 1992 Fund Convention in detail or in legal terms, although it is often used as guidance in incidents falling under the scope of the Bunkers Convention given that the scope of coverage of pollution damage is the same under the two regimes.

17 The IOPC Funds' Secretariat has confirmed that having a single guidance document has been invaluable in guaranteeing uniformity of treatment of claims throughout the world and has helped in clarifying the applicability and scope of the 1992 CLC and 1992 Fund Convention. The manual also provides useful guidance to loss adjustors and technical experts in order to facilitate a uniform approach to the assessment of claims, in particular with regard to what is admissible for compensation under the 1992 CLC and 1992 Fund Convention.

18 The Funds' Claims Manual describes and details general principles of admissibility, as well as specific admissibility criteria for the most common types of claims whether they are for costs incurred in responding to a spill and conducting clean-up operations or for losses incurred as a consequence of pollution damage. The Claims Manual has dedicated sections for each of the most common types of admissible claims, with detailed information on how to prepare and submit a claim, including what information will be needed in support of claims and how to describe the claim itself to maximize the accuracy of the assessment.

19 The Funds' Claims Manual therefore provides a tried and tested foundation on which to develop a manual specifically for claimants under the Bunkers Convention and that would provide claimants with a similar level of information irrespective of whether the pollutant is persistent oil carried as cargo or any hydrocarbon mineral oil carried as ship's fuel or for the operation of the ship. Aligning the scope and the parameters for claims for pollution damage under the Bunkers Convention with claims under the Fund Convention offers several advantages, such as a uniform application of claims guidance to a wider variety of oil spills and greater consistency in the treatment of claimants. With the variety of ships afloat, claimants will expect to receive consistent guidance and treatment irrespective of the type or source of the oil and the prevailing Convention. While the principles of the Funds' Claims Manual may be considered as general and universal and are often applied in Bunkers Convention cases, it

does not and cannot provide a dedicated guidance for claims arising from ship sourced pollution damage outside of the scope of the 1992 CLC and 1992 Fund Convention.

20 A dedicated, simple and user-friendly claims manual developed specifically for the Bunkers Convention would have the benefit of filling this gap and maintaining the principle of equal treatment across the spectrum of the IMO liability and compensation Conventions (an HNS Convention Claims Manual is also being developed within the forum of the 1992 IOPC Fund Assembly), while recognizing the inherent differences in the Bunkers Convention and the 1992 CLC and 1992 Fund Convention.

21 The co-sponsors also recognize the importance of such a claims manual in providing information to claimants on the owner's right to limit liability given that this could determine the amount of compensation available in the event of a bunker spill. Article 6 of the Bunkers Convention preserves the rights of shipowners to limit their liability under any applicable national or international regime, such as the 1976 LLMC Convention or its 1996 Protocol. While the co-sponsors agree that a claims manual cannot, and should not, seek to provide detailed guidance on any such right that may exist in each and every State Party to the Bunkers Convention, the co-sponsors are of the view that a claims manual should at least explain that such a right exists, what that may entail for claimants and where to obtain the necessary information as to whether such a right applies in their State, whether that is in accordance with national law, the 1976 LLMC Convention or its 1996 Protocol and how to determine the financial limit of liability for claims subject to limitation, in accordance with such a right.

22 The co-sponsors are of the view that it would be worth reiterating at this stage that the International Conference on Liability and Compensation for Bunker Oil Pollution Damage, 2001, adopted a conference resolution that urged all States that have not yet done so to ratify or accede to the 1996 LLMC Protocol. This was on the basis that clear rights to limitation of liability are desirable and to enable shipowners to take out effective insurance cover at reasonable cost. The co-sponsors also reference the preambular paragraph of that resolution that provides "that limitation amounts must be sufficiently high to permit the payment of full compensation for eligible claims in normal circumstances", i.e. by means of the 1996 LLMC Protocol.

Industry standards

23 Although the IOPC Funds' Claims Manual is often used as a reference in the context of claims arising from ship sourced pollution damage that fall under the scope of the Bunkers Convention, there is presently no prescribed and dedicated Claims Manual for the Bunkers Convention.

Output

24 It is proposed that the Committee include a new output on the 2022-2023 biennial agenda for the development of a Claims Manual for the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

Urgency

25 It is estimated that two sessions will be required for the Committee to complete the output item and it is proposed that this output should be placed on the 2022-2023 biennial agenda. The proposed date for completion is 2023.

Action requested of the Committee

26 The Legal Committee is invited to:

- .1 take note of the information provided in this document; and
- .2 agree to include a new output in the 2022-2023 biennial agenda on the development of a Claims Manual for the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

ANNEX

CHECKLIST FOR IDENTIFYING ADMINISTRATIVE REQUIREMENTS

This checklist should be used when preparing the analysis of implications required in submissions of proposals for inclusion of outputs. For the purpose of this analysis, the term "administrative requirements" is defined in resolution A.1043(27), as an obligation, arising from a mandatory IMO instrument, to provide or retain information or data.

Instructions:

(A) If the answer to any of the questions below is **YES**, the Member State proposing an output should provide supporting details on whether the requirements are likely to involve start-up and/or ongoing costs. The Member State should also give a brief description of the requirement and, if possible, provide recommendations for further work (e.g. would it be possible to combine the activity with an existing requirement?).

(B) If the proposal for the output does not contain such an activity, answer **NR** (Not required).

(C) For any administrative requirement, full consideration should be given to electronic means of fulfilling the requirement in order to alleviate administrative burdens.

1. Notification and **NR** Start-up
reporting? Ongoing
Reporting certain events
before or after the event has
taken place, e.g. notification
of voyage, statistical
reporting for IMO Members

Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes)

2. Record-keeping? **NR** Start-up
Keeping statutory Ongoing
documents up to date, e.g.
records of accidents,
records of cargo, records of
inspections, records of
education

Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes)

3. Publication and **NR** Start-up
documentation? Ongoing
Producing documents for
third parties, e.g. warning
signs, registration displays,
publication of results of
testing

4. Permits or applications? **NR** Start-up
Applying for and Ongoing
maintaining permission to
operate, e.g. certificates,
classification society costs

Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes)

5. Other identified **NR** Start-up
requirements? Ongoing

Description of administrative requirement(s) and method of fulfilling it: (if the answer is yes)
