

Contents

Abbreviations	XV
Introduction	1
A. The aim of the research.....	3
B. The scope of the research.....	3
C. Methods used for the research	5
Chapter 1: Pollution from Ships’ Bunkers and the Advent of the Bunkers Convention	7
A. A brief history of the development of the oil spill civil liability system.....	7
I. TOVALOP and CRISTAL.....	8
II. International Conventions	10
B. The need for the Bunkers Convention	13
I. The scope of earlier conventions	13
II. National legislation and the background work on the Bunkers Convention.....	14
III. Risk and technical considerations	18
IV. The birth of the Bunkers Convention.....	20
C. Overview of the Bunkers Convention.....	20
I. Categories of ships	20
1. “Ship”	20
2. Does the Bunkers Convention apply to oil tankers?	20
3. “Warships”	21
II. “Oil”	22
III. Scope of application	23
IV. Liability established by the Bunkers Convention	26
1. Liable parties	26
2. Channelling of liability.....	27
3. Shipowners’ liability is joint and several	29
4. The basis of liability and exonerating circumstances.....	30
5. Limitation of Liability	32
V. Compulsory insurance and direct recourse	33
1. Three prerequisite factors	34
a) “Registered owner of a ship”	34
b) “Gross tonnage” – insurance threshold.....	35

- c) “In an amount equal to the limits of liability...” – amount of limitation..... 38
- 2. Insurance certificate and its recognition 39
- 3. Direct action against the insurer 40
- 4. Time limit for bringing an action..... 41
- VI. Jurisdiction, recognition and enforcement 42
- VII. Other matters..... 44
- VIII. Adopted resolutions 45
- D. Concluding remarks 47

Chapter 2: The Birth of Compulsory Insurance for Oil Pollution Liability..... 49

- A. Introduction..... 49
- B. The concept of compulsory insurance..... 50
 - I. Development of the concept of compulsory insurance..... 50
 - II. The system of insurance..... 52
 - 1. Compulsory insurance as defined in international civil liability conventions 52
 - 2. Insurance or other financial securities 53
 - III. The need for compulsory insurance for bunker-oil pollution liability 53
- C. Possible insurers..... 55
 - I. The types of marine insurance and their coverage 55
 - 1. Cargo insurance and its coverage 56
 - 2. Hull insurance and its coverage 57
 - 3. Freight insurance and its coverage..... 59
 - 4. Protection and Indemnity Insurance 59
 - a) Brief introduction..... 59
 - b) The main risks covered by the P&I Club 60
 - c) Insurance contract between the shipowner and the Club..... 62
 - d) The International Group of P&I Clubs..... 64
 - II. The insurers offering coverage for oil-pollution liability 65
 - 1. The P&I Clubs 65
 - a) Pollution liability clause..... 66
 - b) Limitation of liability terms 67
 - c) The role of the P&I Club with regard to an oil-pollution incident 68
 - aa) Oil-pollution liability insurer 68
 - bb) Measures for an oil-pollution incident taken by the Clubs 69
 - (1) Clean-up or salvage operation 69
 - (2) Source of funding 70
 - (3) Providing legal advice 70
 - d) Interaction with other international organisations..... 71

aa)	The legal framework of the IMO conventions	71
bb)	Cooperation with the IOPC Fund	72
cc)	Technical assistance from the ITOPF	72
2.	Other insurers offering OPA insurance	73
a)	Financial responsibility requirement in the OPA 90	74
b)	The concerns of the P&I Clubs to be the guarantors	76
c)	Some alternative ways of meeting financial responsibility requirements	77
D.	Concluding remarks	79

Chapter 3: Strict Liability and Insurance 81

A.	Introduction	81
B.	The basis of liability in the Bunkers Convention	82
I.	The difficulties in applying the common law of torts	82
1.	Trespass	83
2.	Nuisance	83
3.	Negligence	84
II.	Fault-based liability leads to unfair results for pollution victims	86
III.	Strict liability and its application	88
C.	The main reasons for introducing strict liability	90
I.	Ensuring protection of and compensation for victims	90
II.	The impact on the industry	91
1.	The industry bears the cost of pollution damage	91
2.	Incentive to improve prevention of marine pollution	92
D.	Distribution of liability and exceptions to liability	93
I.	Who shall be liable?	93
1.	Provisions in the CLCs	94
a)	Liability of the cargo interest	94
b)	Liability of the ship	95
c)	The second-tier liability of the cargo-owner	96
2.	Liability rule under the Bunkers Convention	97
II.	Exceptions to liability	97
1.	Types of exceptions in general	98
2.	Exceptions available to the shipowner in the Bunkers Convention	99
III.	Channelling of liability	103
E.	Implementation of liability: insurance	105
I.	Proposals during the preparatory work of the Convention	105
II.	Two alternative means	107
1.	Separate insurance policies	107
2.	Co-assurance under one policy	108
F.	Concluding remarks	109

Chapter 4: Insurance and the Quest for Adequate Compensation.....	111
A. Introduction.....	111
B. Certification of insurance.....	111
I. Basic requirements in the Bunkers Convention.....	111
II. Administrative burden corollary to the issuance of the certificate.....	112
1. The administrative burden of the flag States.....	113
2. Port State control regarding the certificate.....	118
III. Electronic means for the certificate	118
IV. The validity of the certificate	119
C. Availability and capacity of insurance for bunker-oil spill liability	121
D. Other related issues	123
I. “Polluter pays” principle.....	123
II. The significance of Art. 7(8) and financial standing of providers of insurance or financial security.....	125
III. Mutuality.....	128
1. The meaning of mutuality	128
2. Role of mutuality.....	129
a) The ability to absorb large claims	129
b) Possible motivation for risk minimisation.....	130
E. Liability insurance and compensation fund	131
F. Adequacy and other types of compensation	132
I. The willingness of P&I Clubs to increase their coverage limit	133
II. The compensation paid by the cargo interests	134
III. Compensation paid by other jointly liable persons.....	136
1. “Joint and several liability” rule in relation to the compensation purpose	136
2. Bareboat charterer	137
a) “Demise charterer” or “bareboat charterer”?	137
b) The insurance of the bareboat charterer	137
IV. Operator and manager.....	139
V. Liability as the time or voyage charterer	140
1. Definitions	140
2. Compensation paid by the time or voyage charterer.....	140
VI. State liability and contributions	141
G. Concluding remarks	143
 Chapter 5: Limitation of Liability and the Limit of Insurance.....	 145
A. Introduction.....	145
B. The global limitation of liability system in relation to ships.....	146
I. Limitation of liability rule in general.....	146
II. The 1957 Convention, 1976 LLMC and its 1996 Protocol relating to tanker-oil pollution liability.....	150

C. Limitation rules in the Bunkers Convention.....	152
I. Pollution damage eligible for limitation	153
1. Pollution damage arising from a bunker-oil spill.....	153
2. The claims subject to limitation under the 1976 LLMC and its Protocol.....	154
II. The amount of the funds available under the LLMCs	157
III. Other aspects relevant to claims for bunker-oil spill liability under the 1976 LLMC and its Protocol	159
1. Conduct barring the right to limit.....	159
2. Constitution and distribution of the limitation fund.....	160
D. The right to limit liability.....	161
I. The reasons for maintaining the right to limit.....	161
II. Unsatisfactory outcome of the limitation regime.....	162
E. The relation of limitation of liability and insurance	164
I. The insurability and limitation of liability	164
II. The possibility to have a unlimited liability.....	166
F. Concluding remarks	169

Chapter 6: Direct Action against the Insurer and its Limited Effect

Effect	171
A. Introduction.....	171
B. Rights of a third party to claim on the insurance policy.....	172
I. Assignment.....	172
II. Direct-action statutes.....	174
1. English law	175
2. United States legislation.....	177
C. The limited effect of direct action under P&I insurance	178
I. Coverage and exclusions of P&I insurance	179
II. P&I insurance is one of indemnity.....	179
III. “Pay to be paid” rule	181
IV. Other defences of a Club against the claim from a third party	182
D. Direct-action right under the Bunkers Convention.....	182
I. “the defences ... which the shipowner would have been entitled to invoke”.....	184
II. Meaning of the phrase “wilful misconduct of the shipowner”	185
1. Interpretation of “wilful misconduct” in relation to limitation of liability.....	185
2. Interpretation of “wilful misconduct” in insurance law	188
a) The determination of a competent court.....	188
b) “Wilful misconduct” in P&I insurance.....	188
3. “Wilful misconduct” in Article 7(10).....	189
E. Scope of the claim: pollution damage.....	190
I. The uncertain nature of liability for pollution.....	190
II. “Pollution damage” in tanker-oil spill incidents	191
1. CMI guidelines on oil-pollution damage.....	192

- 2. The policy adopted by the IOPC Fund..... 193
- 3. Viewpoint of the P&I Clubs..... 195
- III. Pollution damage under the Bunkers Convention 195
- F. Recourse action..... 196
- G. Concluding remarks 198

Chapter 7: Outlook on Insurance and Compensation for Bunker-Oil Pollution Liability 199

- A. Introduction..... 199
- B. Main interests in the insurance system 200
 - I. Victims: “Loss of cover” and full compensation..... 200
 - 1. Loss of cover 200
 - 2. “Small ship” issue 201
 - 3. Adequate compensation 201
 - II. The P&I Clubs: maintaining their sustainable development 203
 - III. Shipowners: the central actor..... 203
- C. The comparison of the insurer’s exposure to the CLCs and the Convention..... 204
 - I. The types of ships involved 205
 - II. The number of ships involved..... 205
 - III. The limitation of liability 205
- D. Concluding remarks 206

Summary of Study..... 209

- A. The concept of compulsory insurance and its compensation purpose..... 211
- B. Other features of the Bunkers Convention and their interrelations with compulsory insurance 213

Bibliography 215

- Literature 215
- Documents 223

Appendix: Text of the Bunkers Convention 227

Index 239