

CLIENT ADVISER

INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS' GUIDANCE CLARIFYING THE DEFINITION OF A "SHIP"

The International Oil Pollution Compensation (IOPC) Funds held their annual assemblies in April, 2016. One of the main topics on the agenda was to agree upon a guidance intended to further clarify which vessels the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 CLC) applies to.

In 2011, a working group was set up by the IOPC Funds. This working group was tasked with considering which vessels fall clearly within or outside the definition of "ship" under Article I(1) of the 1992 CLC, thus determining whether the registered owner of the vessel will have strict liability for "pollution damage" under the 1992 CLC and be entitled to limit their liability in accordance with the 1992 CLC. As the IOPC Funds' conventions – which include the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1992, and its 2013 Protocol – rely upon the definition of a "ship" under the 1992 CLC to determine whether or not the IOPC Fund(s) will contribute compensation to incidents, the publication of this guidance will impact the distribution of the Fund.

The decision to seek clarity was in response to a ruling from the Greek *Areios Pagos* in 2006 in the *Slops* case, in which the 1992 Fund rejected claims arising from a spill from a waste oil reception facility (*Slops*), formerly a tanker, which was anchored permanently with its engine deactivated. The court, however, made the decision that *Slops* falls within the definition of a "ship" under the 1992 CLC and therefore triggered compensation to be paid by the IOPC Funds over the registered owner's limit of liability under the 1992 CLC. Following the ruling, it became apparent that "there was a serious risk of unequal treatment as a result of courts in some, but not all, Member States applying the definition of "ship" in accordance with the 1992 Fund's [then] policy."

The new guidance that has been developed seeks to provide clarity and certainty for shipowners with regard to their liability for oil pollution damage and their need for insurance.

In October 2015, the recommendations of the working group were accepted and, as a conclusion to the working group's findings, a guidance was prepared by the IOPC Funds' secretariat and released to the member states on March 24, 2016 for their consideration (IOPC/APR/16/4/1). At the April 25, 2016 meeting, the guidance was approved with minor editorial corrections, and, on October 12, 2016, it was formally published on the IOPC Fund's publications page <http://www.iopcfunds.org/publications/>.

The guidance sets out a "hybrid approach" to be used as a tool in deciding whether a vessel falls within or outside the definition of a "ship". Firstly, it contains two illustrative lists of vessels either falling clearly within or outside the 1992 CLC definition. Then it contains the concept of the maritime transport chain, which is to be used on a case-by-case basis when it is not clear from the illustrative lists whether a vessel falls within or outside the definition of a "ship".

The owners of vessels that fall clearly within the definition of "ship" according to the guidance, and which carry more than 2,000 tons of oil in bulk as cargo, are required to maintain insurance or another form of financial security to cover their liability for pollution damage under the 1992 CLC. Vessels or craft which do not fall within the definition of a "ship" do not have this requirement (under the 1992 CLC but may, of course, be required the same under local laws) and are not required to hold a CLC certificate. Therefore, some owners may no longer need to pursue their protection and indemnity (P&I) insurer to issue the relevant Blue Card, which forms the basis of the flag state's CLC certificate.

Attention should be given to crude oil storing units, in particular, as to where they fall within these definitions.

According to the guidance, the following offshore oil and gas vessels or craft are within or outside the definition of "ship":

| WITHIN (EXTRACT OF PARAGRAPH 3.1 OF THE GUIDANCE) | OUTSIDE (EXTRACT OF PARAGRAPH 4.1 OF THE GUIDANCE) |
|---|--|
| 5) Offshore craft ^{<2>} that have their own independent motive power, steering equipment for seagoing navigation, and seafarer onboard so as to be employed either as storage units or carriage of oil in bulk as cargo and that have the element of carriage of oil and undertaking a voyage; and | Vessels or craft involved in: (a) Exploration, for example, jack-up rigs or mobile offshore production units (a jack-up platform whether or not it carries oil, gas and water separation equipment); or (b) The production or processing of oil, for example, drill-ships, FDPSOs, and FPSOs, including separation of water and gas, and its management. |
| 6) Craft that are originally constructed or adapted (or capable of being operated) as vessels for carriage of oil, but later converted to FSOs, with capacity to navigate at sea under their own power and steering retained and with seafarer onboard and that have the element of carriage of oil and undertaking a voyage. | |

^{<2>} The term "offshore craft" could be a floating drilling production storage and offloading unit (FDPSO), floating production storage and offloading unit (FPSO), floating storage and offloading unit (FSO) or floating storage unit (FSU) whether purpose-built, or converted or adapted from seagoing vessels constructed for the carriage of oil.

To address remaining "grey areas" and situations, an Annex to the guidance provides the following example of when the maritime transport chain commences:

EXTRACTS FROM EXAMPLE 2 LOADING OIL FROM A UNIT WHICH RECEIVED OIL FROM AN OFFSHORE SOURCE

A logical explanation of when the maritime transport chain commences for scenarios where oil is produced offshore, is when oil is loaded into a vessel other than the one which received the oil directly from the subsea well to which it was connected.

In the case of the FSO, if it was a purpose-built FSO or craft as mentioned in paragraph 3.1 (5) or (6) of the Guidance document, the question would be whether the FSO or the craft was also carrying oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate. If so, the FSO itself would also be classed as a ship under the ... 1992 CLC, as well as the receiving vessel. However, the FSO would fall outside the scope of the 1992 Conventions when it leaves the offshore field for operational reasons or simply to avoid bad weather.

As the above extracts highlight, the guidance excludes vessels involved in the exploration, production, or processing of oil from the definition of a "ship." Accordingly, these vessels would have no liability, nor would they have the right to limitation under the 1992 CLC. Needless to say, strict liability for (oil) pollution in the offshore oil and gas sector arises under the field license/national law. The contract between the field operator and the FPSO/FSO/

FSU contractor would typically impose a similar responsibility on both parties for any pollution from their respective properties and sometimes beyond.

It remains to be seen whether courts in various jurisdictions take the advice of the IOPC Funds and use their definition of a "ship" when ruling on cases. As is widely experienced in the relevant circles, FPSO/FSO/FSU owners are occasionally required to maintain CLC

Blue Cards, which their P&I insurers, depending on circumstances, have normally agreed to issue. Whether the guidance will affect this practice is uncertain, but it would appear unlikely. The International Group of P&I Clubs, which was heavily involved with the consultation at the IOPC Funds, may comment further on the matter moving forward.

The guidance marks a significant milestone, concluding more than five years of consultation on the subject. At the IOPC Funds' April 2016 meeting, the guidance was even supported by member states who had either been doubtful as to its usefulness or were previously objecting the work undertaken. Nevertheless, as a guidance document, it is not an authoritative interpretation of the relevant international conventions. A competent court in a member state may or may not give weight to the contents of the guidance; therefore its actual usefulness to the industry is yet to be seen, perhaps not before a significant oil pollution incident from an offshore vessel or craft occurs.

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