

# POLLUTION AT SEA

## LAW AND LIABILITY

EDITED BY

PROFESSOR BARIŞ SOYER  
AND  
PROFESSOR ANDREW TETTENBORN

SARCHI CHAIR LAW

**informa**

LONDON

2012

Informa Law  
A trading division of Informa UK Ltd  
Registered in England and Wales number 1072954  
Registered Office:  
37-41 Mortimer Street, W1T 3JH

© 2012 Informa UK Ltd,

*British Library Cataloguing-in Publication Data*  
A catalogue record for this book is available from the British Library

ISBN-13: 978-1-84214-541-8

Reprinted material is quoted with permission. Although every effort has been made to ensure that all owners of copyright material have been acknowledged in this publication, we would be glad to acknowledge in subsequent reprints or editions any omissions brought to our attention.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, unless with the prior written permission of Informa Law.  
For reprints and permissions contact Informa Law.

Product or corporate names may be trademarks or registered trademarks and are used only for identification and explanation without intent to infringe.

This book contains information from reputable sources, and although reasonable efforts have been made to publish accurate information, the publisher makes no warranties (either express or implied) as to the accuracy or fitness for a particular purpose of the information or advice contained herein.

The publisher wishes to make it clear that any views or opinions expressed in this book by individual authors or contributors are their personal views and opinions and do not necessarily reflect the views/opinions of the publisher.

Lloyd's and the Lloyd's crest are the registered trade marks of the Society incorporated by the Lloyd's Act 1871 by the name of Lloyd's.

Orders may be sent to: Informa Law, Sheepen Place, Colchester, Essex CO3 3LP, UK  
Telephone: +44 (0)20 7017 6682

Email: [Books@Informa.com](mailto:Books@Informa.com)

Informa Law website: [www.informaprofessional.com](http://www.informaprofessional.com)

Informa website: [www.informa.com](http://www.informa.com)

Typeset by Exeter Premedia Services Pvt Ltd, Chennai, India  
Printed and bound in Great Britain by  
MPG Books, Bodmin, Cornwall, UK

## TABLE OF CONTENTS

	<i>page</i>
<i>Foreword</i>	v
<i>Preface</i>	vii
<i>Authors' Biographies</i>	xvii
<i>Contributors</i>	xix
<i>Table of Cases</i>	xxv
<i>Table of Legislation</i>	xxxii

### PART 1: VARIOUS LIABILITY REGIMES: INTERNATIONAL, REGIONAL AND NATIONAL

#### CHAPTER 1: "TORREY CANYON", 45 YEARS ON: HAVE WE SOLVED ALL THE PROBLEMS?

*Patrick Griggs CBE*

Introduction	3
The <i>Torrey Canyon</i> Incident	3
Liability	4
Claimants: Rights of Action	4
Jurisdiction	5
Limitation of Liability	5
International Response to the <i>Torrey Canyon</i> Disaster	5
Liability	6
Rights of Action	6
Jurisdiction	6
Limitation	7
Problem Solved?	7
Sidestepping	7
Other Historic Oil Pollution Cases and Conclusion	9

#### CHAPTER 2: LIABILITY FOR POLLUTION FROM SHIPS' BUNKERS

*Colin de la Rue*

Introduction	11
The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001	12
Legal Framework	12
Scope of Liability	12
Parties Liable Under the Convention	13
Liability Incurred Independently of the Convention	14
Limitation of Liability	15
Compulsory Insurance and Certification	16
The Period since Entry into Force of the Convention: Issues Encountered in Practice	17
Certification Issues	17
Limitation of Liability for Bunker Pollution Clean-Up Costs	18
Interpretation of Article 2.1(a)	19



TABLE OF CONTENTS

Practice of States	20
Conclusion	21
Amount of Liability Limits: The Pacific Adventurer	22
Summary and Conclusion	22
<b>CHAPTER 3: THE HNS CONVENTION AND ITS 2010 PROTOCOL</b>	
<i>Måns Jacobsson</i>	
Introduction	23
Historical Background	23
Main Features of the Regime Applying to Tanker Oil Spills	25
Overview of the HNS Convention	26
Substances to which the HNS Convention Applies	26
Geographical Scope of Application	27
Ships Covered by the Convention	28
Other Exclusions	29
Contracts of Carriage	29
Social Security Schemes	29
Concept of Damage	29
Types of Damage Covered	29
Pollution Damage Caused by Persistent Oil	30
Bunker Oil	30
Preventive Measures	30
Consequential and Pure Economic Loss	31
Environmental Damage	32
Damage Caused by Hazardous Substances and Other Factors	32
The Shipowner's Liability	32
Limitation of Liability	34
Channelling of Liability	36
Compulsory Insurance	36
Insurance Certificates	38
The HNS Fund	40
The HNS Fund's Obligations	40
The HNS Fund's Defences	41
Subrogation and Recourse	42
Time Bar	42
Jurisdiction and Enforcement of Judgments	43
Operation of the HNS Fund	44
General Remarks	44
Contributions	45
Operation of Special Accounts Postponed or Suspended	46
Difference between the HNS Fund and the 1992 Fund Contribution	
Systems in Respect of Major Incidents	46
Concept of Receiver	47
Special Contribution Issues Relating to Oil	48
Cargoes in Transit	48
Entry into Force Conditions	49
Preparations for the Entry into Force of the 1996 HNS Convention	49
Elaboration of a Draft Protocol to the HNS Convention	50
The 2010 Diplomatic Conference	50
Packaged Goods	50
Liquefied Natural Gases	51
Non-submission of Reports on Contributing Cargoes	51
Substances to Which the Convention Applies	52

TABLE OF CONTENTS

20	Tacit Acceptance Procedure	53
21	Entry into Force Conditions	53
22	Adoption of the 2010 Protocol	53
22	Preparations for the Entry into Force of the 2010 HNS Convention	54
	Relationship between the HNS Convention and the EU Directive	
	Environmental Liability	54
	Concluding Observations	55
23		
23	<b>CHAPTER 4: COMPENSATION FOR POLLUTION DAMAGE RESULTING FROM</b>	
25	<b>EXPLORATION FOR AND EXPLOITATION OF SEABED MINERAL RESOURCES</b>	
26	<i>Professor B. Soyler</i>	
26	Introduction	59
27	Current Legal Regime and Potential Problems	60
28	Limits and Recoverability of Claims Under OPOL	62
29	Applicability of National and International Regimes and Problems Emerging	63
29	Limitation of Liability for Oil Rigs	64
29	Application of the CLC and Fund Conventions 1992 to Offshore Crafts	69
29	Recoverability of Pure Economic Loss Claims	71
29	The Way Forward	72
30	Extending the Scope of the CLC and Fund Regimes	72
30	Devising a New International Liability Regime	74
30	Political and Practical Difficulties	74
31	The Key Features of a Global Solution	76
32	Concluding Remarks	78
32		
32	<b>CHAPTER 5: PROPOSALS FOR LEGISLATIVE REFORM FOLLOWING</b>	
34	<b>THE DEEPWATER HORIZON OIL SPILL</b>	
36	<i>Charles B. Anderson</i>	
36	Introduction	81
38	Initial Reform Proposals: 111th Congress	82
40	Removal of OPA-90 Limits of Liability	83
40	Certificates of Financial Responsibility	84
41	The Oil Spill Liability Trust Fund	85
42	Natural Resource Damage Assessment	86
42	Limitation of Liability Act	88
43	Jones Act and Death on the High Seas Act	89
44	Pending Proposals on Punitive Damages: 112th Congress	90
44	Conclusion	93
45		
46	<b>CHAPTER 6: "TO THE GREAT DAMAGE AND COMMON NUISANCE OF ALL LIEGE</b>	
46	<b>SUBJECTS OF OUR LADY THE QUEEN": OIL POLLUTION CLAIMS AND PUBLIC</b>	
46	<b>NUISANCE</b>	
47	<i>Simon Rainey QC</i>	
48	The Criminal Offence of Public Nuisance	95
48	A Typical Example of an Oil Pollution Incident: The "Sea Empress" Casualty	96
49	The Development of the Tort of Public Nuisance	99
49	Public Nuisance Distinguished from Private Nuisance	104
50	Why does the Tort of Public Nuisance Matter in the Context of Modern	
50	Oil Pollution Claims?	107
50	The Recoverability of "Pure Economic Loss" in Public Nuisance	107
51	A More Favourable Burden of Proof for the Claimant?	115
51	The Four (or Five?) Necessary Elements of the Tort of Public Nuisance	123
52	Is there a Public Nuisance?	124



TABLE OF CONTENTS

Has the Claimant Suffered Particular Injury or Damage?	12
Is the Particular Damage Direct and Not Merely a Consequential Damage?	13
Is the Particular Loss or Damage a Foreseeable Consequence of the Nuisance?	13
Is the Particular Damage of a Substantial Character?	13
Conclusions	13
CHAPTER 7: AVOIDING INTERNATIONAL LEGAL REGIMES: THE <i>ERIKA</i> EXPERIENCE	
<i>Luc Grellet</i>	
Introduction	14
Administrative Sanctions ( <i>Contravention De Grande Voirie</i> )	14
Reliance on Waste Disposal Laws in Lieu of the International Regime for Oil Pollution	14
Criminal Law	14
The Legal Regime Applicable to the Pollution Offence	14
The Lack of Competence in the Criminal Court to Compensate the Damage caused by the Pollution from the <i>Erika</i>	15
CHAPTER 8: MARITIME LIABILITY AND COMPENSATION IN EU LAW	
<i>Dr Henrik Ringbom</i>	
Introduction	15
Implementing the International Liability Rules	15
The Relevant International Liability Conventions	15
Ratifying the International Conventions	15
Implementing Provisions of the International Conventions	16
Complementing the International Liability Rules	16
Complementing with General EU Environmental Law	16
Complementing with Criminal Liability	16
Complementing by "Improving" the International Rules on Particular Issues	16
Places of Refuge	16
Passengers	16
Other EU Law Implications	16
Jurisdiction and Recognition and Enforcement of Judgments	16
EU Waste Legislation	16
Concluding Observations	16
PART 2: POLLUTION LIABILITIES AND THIRD PARTIES	
CHAPTER 9: ENVIRONMENTAL SALVAGE: TIME FOR A CHANGE?	
<i>Archie Bishop</i>	
Introduction	175
Current State of Law	175
Reasons for Change and the Proposed Changes	176
Article 1 (d) of the Salvage Convention 1989	177
Article 13 of the Salvage Convention 1989	177
Revised Article 14 of the Salvage Convention 1989	178
Conclusion	180
CHAPTER 10: RECENT DEVELOPMENTS IN P&I COVER FOR POLLUTION: TERRORISM, PIRACY AND SANCTIONS	
<i>Luke Readman</i>	
Introduction	181
The Traditional Role of the P&I Clubs as Oil Pollution Insurers	181

TABLE OF CONTENTS

128	Developments in P&I Cover	183
133	P&I and War Risks	183
138	P&I Cover and Terrorism	184
138	P&I Cover and Piracy	186
139	P&I Cover and Sanctions	187
<b>CHAPTER 11: THE LIABILITY OF CHARTERERS FOR MARINE POLLUTION</b>		
<i>Professor Richard Williams</i>		
	Introduction	191
141	The Direct Liability of Charterers to Third Party Claimants	192
142	International Conventions	192
143	CLC 1969 and CLC 1992	192
147	The 2010 HNS Convention	195
149	The Bunkers Convention	195
	National or Regional Statutes	197
151	US Federal and State Statutes	197
	Federal Statutes	197
	State Statutes	198
	EU Directives	199
155	Traditional Common Law or Civil Law Principles	199
156	Criminal Liability	200
156	The Right of Shipowners and Charterers to Claim Indemnities <i>Inter Se</i>	
158	for Liabilities that they may have Incurred to Third Party Claimants	201
160	Shipowners' Claims Against Charterers	201
161	Charterers' Claims Against Shipowners	202
161	Conclusion	203
163	 	
165	<b>CHAPTER 12: MARINE POLLUTION: UNORTHODOX SUITS AND UNORTHODOX</b>	
165	<b>DEFENDANTS</b>	
166	<i>Professor Andrew Tettenborn</i>	
166	Introduction: Pollution Liability, Channelling and Unorthodox Defendants	205
166	The Scheme of the Argument	207
168	The Law of Negligence	207
169	Cargo Interests	207
	Other Ship Interests	208
	Other Negligence Defendants	209
	Negligence: Two Special Cases	209
	Negligence: The Losses Compensable	211
	The Place of Public Nuisance	213
175	Claims in Private Nuisance	217
175	Other Liabilities	218
176	A Final Matter: Exclusions	219
177	 	
177	<b>PART 3: PUBLIC LAW ASPECTS</b>	
178	 	
180	<b>CHAPTER 13: MARITIME POLLUTION AND STATE LIABILITY</b>	
	<i>Simon Baughen</i>	
	Introduction	225
	International Law	226
	Customary International Law and State-to-State Claims for Transboundary Pollution	226
181	International Conventions and Places of Refuge	228
181	The 1982 UN Convention on the Law of the Sea	229



TABLE OF CONTENTS

Customary International Law and the Rights of Vessels in Distress	21
Customary International Law as a Cause of Action for Private Parties	21
Liability Under Domestic UK Law	21
Sovereign Immunity	21
Breach of Statutory Duty	21
Negligence	21
Public Nuisance	24
Liability of Port Authorities	24
Statutory Liability of the SOSREP	24
Schedule 3A, Paragraph 1	24
MSA, Schedule 3A, Paragraph 2	24
MSA, Schedule 3A, Paragraph 3	24
MSA, Schedule 3A, Paragraph 4	24
Power to Establish a Temporary Exclusion Zone	24
Offshore Installations	24
MSA, Schedule 3A, Paragraph 14: Compensation	24
MSA, Schedule 3A, Paragraph 15: Recovery of Costs Incurred in	24
Complying with a Direction	24
State Liability and the CLC, HNS and Bunkers Conventions	24
Limitation by Public Bodies Under the LLMC 1976	24
Three Recent Developments	24
The IMO Guidelines	24
EU Law and Ships in Distress	24
Article 20a. Plans for the Accommodation of Ships in Need of Assistance	24
Article 20b. Decision on the Accommodation of Ships	24
Article 20c. Financial Security and Compensation	25
Article 20d. Examination by the Commission	25
The CMI Draft Instrument on Places of Refuge 2009	25
Conclusion	25
CHAPTER 14: WHATEVER HAPPENED TO EUROPEAN DIRECTIVE 2005/35/EC? EUROPE'S AMBIVALENT APPROACH TO THE FIGHT AGAINST MARINE POLLUTION AND ITS CONSEQUENCES FOR SEAFARERS	
<i>Professor Marc A. Huybrechts</i>	
Prologue: The <i>Erika</i> and <i>Prestige</i> Disasters and their Legal Consequences	255
The Overall Tenor of Directive 2005/35/EC	256
The Annulment of the 2005 Framework Decision	257
Criticism of the 2005 Directive	258
Conflict between the 2005 Directive and UNCLOS and MARPOL	258
Other Difficulties with the 2005 Directive	259
Violation of UNCLOS	259
The Assault on the 2005 Directive	260
The Decision of the European Court on the Legality of the 2005 Directive	260
Some Critical Comments on the <i>Intertanko</i> Decision	262
The Consequences of <i>Intertanko</i>	264
Amendments Introduced by the 2009 Directive	265
The Promised and Expected Fair Treatment of Seafarers	266
The IMO Guidelines on the Fair Treatment of Seafarers	266
The French <i>Erika</i> Decisions	267
Later French Penal Developments	267
An Actual Assessment with Reference to the Treatment of Seafarers	268
Conclusion	268



TABLE OF CONTENTS

231	<b>CHAPTER 15: IMPACT OF PORT STATE CONTROL ON POLLUTION AT SEA</b>	
234	<i>Dr Oya Ozcayir</i>	
236	Oil Pollution Generally	271
237	What is Port State Control?	275
238	Emergence of PSC	276
239	Basic Principles of all Regional MOUs	278
240	Rules Governing PSC Inspections	278
240	The IMO Resolution A. 1051(27), Procedures for Port State Control, 2011	278
242	Regional MOUs and Annexes	279
242	The EC Directives on PSC	279
243	PSC Inspections	280
244	Detention	281
244	Recent Changes Under the PSC System	282
244	“Relevant Instruments” Related to Marine Pollution	284
244	The International Convention for the Safety of Life at Sea, SOLAS 1974	
245	and Subsequent Protocols	285
246	International Convention for the Prevention of Pollution from Ships, 1973,	
246	as Modified by the Protocol of 1978 Relating Thereto, MARPOL 73/78	286
247	International Convention on Standards of Training, Certification	
247	and Watchkeeping for Seafarers (STCW)	288
248	Conclusion	289
248		
248	<b>APPENDICES</b>	
249	1. International Convention on Civil Liability for Oil Pollution Damage, 1992	
249	(Civil Liability Convention 1992)	291
250	2. International Convention on the Establishment of An International Fund for	
250	Compensation for Oil Pollution Damage, 1992 (Fund Convention 1992)	299
250	3. International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001	
252	(Bunker Convention 2001)	315
	4. International Convention on Liability and Compensation for Damage in Connection	
	with the Carriage of Hazardous and Noxious Substances by Sea, 1996	
	(HNS Convention 1996)	325
	5. Protocol of 2010 to the International Convention on Liability and Compensation	
	for Damage in Connection with the Carriage of Hazardous and Noxious	
255	Substances by Sea, 1996	355
256	6. Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for	
257	and Exploitation of Seabed Mineral Resources (CLEE) 1977	369
258		
258	<i>Index</i>	377
259		
259		
260		
260		
262		
264		
265		
266		
266		
267		
267		
268		
268		