The 1999 *Erika* Oil Spill in France. Can the cargo-owner be held liable for the damage caused?

EDWARD H.P. BRANS*

Introduction
In December 1999 the Maltese tanker *Erika* broke in two some 40 miles off the coast of Brittany in France. The tanker was carrying over 30,000 tons of heavy fuel oil of which about 10,000 tons of oil leaked into the ocean. The remaining cargo sank to the bottom of the sea with the *Erika*. The spill has polluted more than three hundred kilometers of coastline. Due to the characteristics of the oil – a heavy fuel oil with limited capabilities to disperse naturally – and the weather conditions, the spill appears to have caused significant environmental damage. Over 34,000 oiled birds were collected of which two-thirds have died. NGOs have calculated that as many as 195,000 birds were actually oiled. Because some of the impacted birds are migratory birds, NGOs fear that the spill will have an impact on the population of a certain bird species in the Wadden Sea (the Netherlands). Apart from the direct environmental consequences, the spill has also had serious economic consequences for those who depend for their income on the affected environment. Not only have the public authorities imposed a ban on fishing and shellfishing thus impairing the earning capacity of local fishermen and others, but the oil spill will also have a negative impact on the local tourist industry.

Who is Liable for the Damage Caused?
The *Erika* oil spill is covered by the 1992 International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention) and the 1992 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage (Fund Convention). The Civil Liability Convention establishes a regime of strict liability for the shipowner and provides for a system of compulsory insurance. The shipowner's liability is limited to an amount that is linked to the tonnage of the ship (in this case about $12 million). However, the shipowner is not entitled to limit his liability if it is proved that the loss resulted ‘from his personal act or omission, committed with the intent to cause such damage, or recklessly and with the knowledge that such loss would probably result’. Additional compensation of up to approximately $173 million is available from the Fund that has been established under the Fund Convention.

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* Lecturer in Law, Faculty of Law, Free University Amsterdam

Liability under the international oil pollution conventions is thus directed to the shipowner. No claim for compensation for damage may be made against the owner otherwise than in accordance with the conventions. The oil pollution conventions also explicitly stipulate that claims cannot be made against the owner’s servants or agents, the charterer of the ship, or against a few other specified persons. The only exceptions are if the claimant proves that the damage resulted from their personal act or omission, was committed with the intent to cause the damage, or was committed recklessly and in the knowledge that such damage would probably result. The oil company TotalFina was not only the owner of the cargo, it also chartered the vessel. If the French public authorities and others can prove that the damage resulted from such conduct, TotalFina – in its capacity as charterer – can be held liable for the damage caused and be forced to pay compensation for the damage caused.

Liability of the Cargo-Owner and the Classification Society

Shortly after the incident, a report was published on the causes of the accident. From this report it appears that inspections held in 1997 and 1999 revealed serious corrosion of the tanker (OSIR, 13 Jan. 2000). Despite these disturbing facts the classification society allowed the tanker to sail. It has also been suggested that the cargo-owner (TotalFina) knew about the state of the ship. Given these facts, one might ask whether the classification society and the cargo-owner can be held liable for the damage caused. This issue is especially relevant because it is expected that the $185 million available under the international oil pollution conventions will be inadequate to cover the damage.

As noted earlier, various parties are excluded from liability in these conventions, which in principle prevents damages from being recovered from those parties. Interestingly, however, there is no reference in the conventions to the cargo-owner or the classification society. The international oil pollution conventions therefore do not preclude claims from being brought against these parties. In fact, there are a few cases where legal action was taken on the basis of national law against a range of persons not excluded from liability. In the Tanio case for instance – a case concerning a 1980 oil spill incident in France – the French central and local governments and certain private parties took legal action under French law in a French court against the classification society and the shipyard that repaired the tanker Tanio. The action was based on the unseaworthiness of the ship, the faulty repairs and the failure to check the quality of the repair work. An out of court settlement was reached resolving most of the claims.

So claims against other parties than the shipowner or its insurer are not unprecedented. Provided that the earlier mentioned report is correct on the causes