The progressive increase of maritime transport, and in particular oil transport, has inevitably increased the risk of pollution of maritime areas. Indeed, among the various substances that represent a risk for the marine environment, oil is the one which may cause serious pollution most frequently and with particularly harmful effects. Such a circumstance, so significant as to leave no room for uncertainty, emerged on the occasion of the incident involving the oil tanker Torrey Canyon in 1967. It is not surprising that, as a consequence of that event, intense action was taken in order to adopt an international treaty regime aimed at regulating the various aspects of the phenomenon at hand, which until then had only been timidly addressed at an international level.

Accordingly, in the last decades of the Twentieth century, steps were taken to adopt various measures aimed at preventing accidents causing oil marine pollution or at reducing the harmful effects thereof, and at encouraging and rationalizing forms of cooperation among states to control oil transport and to adopt emergency plans in case of pollution. But above all, uniform law rules on civil liability for oil pollution damage relating to the marine environment have been updated. It is mainly the latter aspect which is dealt with in the following pages.

In this sense, the International Convention on Civil Liability for Oil Pollution Damage (CLC), whose original version was adopted in 1969, will first be considered as well as the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the so-called Fund Convention), whose original text was approved in 1971, in order to complete the rules of the CLC. The purpose of the latter Convention, in fact, is basically to integrate the amount of compensation payable to victims of pollution damage caused by oil transport, in case such victims are not satisfied with the amounts provided by the CLC and to guarantee, in any case, the relative payments.

The liability regime contained in these Conventions is quite simple, being based on the principle of liability channelling solely towards the shipowner; the latter, however, is liable only up to a specific amount for which compulsory insurance is required. Should that amount be insufficient to cover the cost of compensation for damage caused by the incident, it is the Fund established by the above-mentioned Fund Convention that shall provide compensation up to the maximum amount determined by the Fund Convention itself.

Thus, the states who took part in the drafting of the above-mentioned Conventions intended to adopt a legal regime able not only to adequately compensate, with specific guarantees, damage caused by oil transport, but also to fairly distribute all deriving costs between the maritime transport industry and the oil industry. In fact, while the former, on the one hand, shall cover the costs chargeable to shipowners within the limits of the strict liability imposed on them, the latter, on the other hand, shall contribute to the payment of additional costs incurred in connection with the functioning of the Fund, as well as damages not compensated by the shipowner as a consequence of the operativeness of the limits, especially quantitative, that are provided by the CLC. In fact, compensation payable by the Fund is financed only by the oil import industry’s contributions. Moreover, each state that is party to this Convention must communicate to the International Oil Pollution Compensation Fund – the body provided for by and
established on the basis of this Convention – the names of the oil importing companies registered on its territory. These companies shall provide the payments so as to ensure the Fund’s functioning, to be determined according to the quantity of oil imported by them on a yearly basis.

It was difficult, however, to achieve a degree of expansion of the above-illustrated legal regime throughout an adequate number of states so as to ensure its significant and certain ambit of application, which is inter alia necessary for the purpose of international uniformity as well as for the acquisition of the basic resources that are needed for the functioning of the Fund. On the other hand, the qualitative and quantitative limits originally set forth regarding both the shipowners’ liability and the additional compensation payable by the Fund turned out to be unsuitable, since the first years of application of the conventional system, to fully satisfy persons harmed by oil transport incidents. This is evidenced by the fact that even after the entry into force of the 1969 CLC, the mutual-compensatory system (Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution, TOVALOP), created on a voluntary basis immediately after the Torrey Canyon incident by companies owning oil tankers, was not discontinued. This system had originally been set up to address the incumbent pressure of public opinion calling for an effective instrument providing for effective pollution compensation even before the entry into force of the CLC and, in any case, in situations where the application of the CLC was excluded (e.g. because the pollution damage was caused by oil tankers while in ballast) or with regard to costs that are not included in the CLC regime (e.g. the costs of preventive measures taken to avert the threat of pollution damage). Likewise, the CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for oil pollution) system, adopted on a voluntary basis immediately after the entry into force of the 1971 Fund Convention with the purpose of increasing the compensation limits provided by the TOVALOP and/or the CLC systems in cases in which such limits turn out to be insufficient. CRISTAL was subsequently protracted, even after the entry into force of the 1971 Fund Convention, until the compensation limits of the CLC and the Fund Convention had been adequately increased and both entities were functioning in a sufficiently large number of states (in other words, up until May 1996 when the 1992 Protocols entered into force). In fact, the TOVALOP/CRISTAL system was revoked only as of February 1997.

As already mentioned, the financial inadequacy provided for in the original 1969 CLC and 1971 Fund system was immediately perceived. Directly following its entry into force, negotiations began which aimed to increase, at least, the quantitative compensation limits provided therein. Already in 1976, a first Protocol was approved and entered into force, followed by a second Protocol in 1984 that aimed to considerably modify both the CLC and the Fund Convention by increasing the maximum amount of compensation. However, the entry into force of the second Protocol was subject to the condition that the United States agree to comply with the compensation system. Without any particular sacrifice on the part of the other participants in the Fund, the adhesion of this country to the CLC/Fund system would have made it possible to increase available financial resources and, consequently, the limit of compensation payable by it. However, the US did not accept to enter into this system and decided to keep pursuing an autonomous policy in this field. Such policy, confirmed and codified by the unilateral rules adopted in the interim (in the form of the Oil Pollution Act of 1990), provided for a liability that tended to be unlimited on the part of the subject who caused the pollution. Many aspects of these rules were even incompatible with those of international uniform law.

Therefore, contracting states decided to adopt the 1984 Protocols to the CLC and to the Fund Convention, further integrated, without making their entry into force subject to the condition of US participation. These Protocols, updated and approved in 1992, among other things, provide for a considerable increase in the quantitative limits originally set out in the CLC and in the Fund Convention. This updating did not, however, modify the original equilibrium of the proportion between the shipping industry’s contribution and the oil industry’s contribution to the compensation for damage caused by incidents during the carriage of oil by sea. Furthermore, it did not change the principles underpinning the regime of strict liability imposed on the owner of the vessel involved in the incident (with exception of some entirely marginal aspects).

10.4.2 The updating of the Convention system

The 1992 CLC/Fund system, updated in the above-mentioned way, came into force in May 1996 and, among other things, led to an increase in the limit of the shipowner’s liability to: 3 million SDR (Special Drawing Rights) for ships not exceeding 5,000 units of gross tonnage; 420 SDR per gross ton (above 5,000 t) up to 140,000 t; to 59.7 million SDR for ships in excess of 140,000 units of gross tonnage. Even the
new limits turned out to be inadequate with respect to the effects of increasingly serious incidents, which occurred immediately after the entry into force of the international instruments that had set out the limits themselves. As of 18 October 2000, the Legal Committee of the International Maritime Organization (IMO) adopted a resolution in conformity with art. 33, para. 7, of the 1992 Fund Convention. The legal effects of this resolution were automatically produced on 1 November 2003 as a result of the special mechanism of tacit acceptance (provided by art. 33, para. 7, of the 1992 Fund Convention and by virtue of the decisions adopted by the Legal Committee), according to which the limits indicated in the 1992 Protocols were further increased by 50%.

Moreover, another Protocol was adopted during the Diplomatic Conference held on 16 May 2003, providing for the establishment of a Supplementary Fund (2003), which entered into force on 3 March 2005. It was designed to operate in cases of marine pollution caused by the carriage of oil by sea, only in areas of the sea under the control of industrialized states or, at any rate, those with highly developed economies. Indeed, it is reasonable to believe that only the latter are interested in abiding by the Supplementary Fund’s rules and shouldering the consequent burden of the additional financial contributions (to those required by the 1992 Fund Convention), required in order to finance the Fund itself. Only within the ambit of such states’ maritime areas, as a matter of fact, marine oil pollution damages did exceed the limits that are compensable by the Fund. As a result, the value of the Supplementary Fund was set by the IMO at 750 million SDR, also including the amounts due under the CLC and the Fund Convention updated according to the above-mentioned terms.

It follows that, among other things, the intent was to reply to the criticism deriving from several quarters (in particular, the Commission of the European Union) that the amounts of compensation payable by both the owner of the ship that caused the incident and by the Fund were inadequate. At the same time, however, problems concerning the re-establishment of an equilibrium between the contributions made by the shipping and oil industries to compensate for damages in a way to render it fairer than that determined by the CLC/Fund system were left unaddressed. Ultimately, criticism concerning the imbalance and disproportion between the oil industry’s and shipping industry’s contribution to compensation for damage was neglected. This was also the case regarding criticism of the interdependence of the CLC/Fund system and the mutual benefit insurance system of the Protection and Indemnity Insurance (P&I) Clubs, by whose characteristic self-imposed rules the CLC/Fund system continues to be strongly conditioned, although such criticism has been shared in several quarters and supported with very consistent arguments.

In this respect, it has been pointed out how the interdependence between the CLC/Fund system and the P&I system, and the disproportion between the costs paid by the oil industry and those paid by the shipping industry may jeopardize not only the natural evolution of the criteria adopted for determining liability, but also their correct application, especially in relation to the safeguarding of public interest related to the protection of the marine environment. On the other hand, greater transparency in the cooperation and participation of the various economic sectors involved when an accident occurs has been strongly advocated, as has the increase in incentives to use ships of better quality. Moreover, through the operation of the Supplementary Fund, which for the above-mentioned reasons is actually financed only by the industrialized countries, an attempt has been made to reply, at least partially, to developing countries’ criticism, according to which it would not be fair to further increase the compensation paid by the Fund if the parameters for calculating developing countries’ contributions and for calculating industrialized countries remain identical. It has been correctly noted that the criteria for calculating compensation for damage and the consequent amounts payable do, in fact, permit a greater degree of compensation, if such damages have been caused to the citizens and environments of industrialized countries than if caused to developing countries.

At any rate, it is beyond dispute that also the new regime, in force since November 2003, and the further integration brought to it by the 2003 Protocol (Supplementary Fund) do not overcome all the above-indicated criticism. Indeed, the shipping industry’s greater share of the costs of compensation payable by the Fund is counter-balanced by the additional burden that the Supplementary Fund has placed on the oil industry. Although the burdens involved in constituting and operating the Supplementary Fund are destined to weigh on the enterprises in industrialized countries, the developing countries highlighted that the imbalance disadvantageous to them is not being reduced, but is simply not being increased. Therefore, the disproportion with respect to contributions between the two areas, while not being enlarged, has not, however, been corrected. Above all, this new regime leaves serious problems unresolved, such as the rules applicable to incidents in the maritime areas of states that do not participate in the CLC/Fund system. Indeed, their solution remains assigned to voluntary
agreements, which largely depend on the decisions by the P&I Clubs. Often it is conditioned by the circumstance that the shipowner has no other resources, or by the fact that the ship flies a flag 'of convenience' and the state involved in the incident has neither efficient legislative or jurisdictional instruments nor an administrative apparatus suitable to obtain payment of adequate compensation, in its favour and in favour of its own citizens, for the damage caused by the incident.

As already mentioned, notwithstanding the amendments to the original CLC/Fund system, the principles underpinning its functioning remain substantially unchanged and are based on strict liability channelled towards the owner of the ship that caused the incident, who is liable for all the damages caused by marine pollution. Therefore, the relative liability has nothing to do with the owner's fault, as it depends on the sole circumstance that the pollution was caused accidentally by the oil carried on a ship owned by the individual. Only completely exceptional events allow the owner to be exempted from such liability. These exceptions, therefore, are admissible within the strictest limits of the criteria usually adopted with respect to the other rules of uniform law inspired by the same principles of strict, channelled liability. In the system at issue, the only cases able to constitute a cause for exemption are those in which the damaging event has been caused by: war, other situations comparable to war or natural events of an exceptional, inevitable and irresistible nature; intentional acts by third parties wilfully to cause the damage; negligence of government or other authorities responsible for the maintenance of lights and other navigational aids.

According to the principles of strict liability, the sole presence of one of the conditions indicated above is not enough, in itself, to produce the effects of exemption. For that purpose, the shipowner must prove that the circumstance invoked in this connection had such an important bearing on the matter as to exclude, with certainty, the causal link between the dangerous activity of carrying oil and the damaging event. Therefore, similar proof cannot be considered adequate if one of the situations exempting the shipowner of his strict liability was only one contributing factor causing the damage, becoming part of a dangerous situation brought about, for example, by the lack of preventative measures and/or measures to reduce its effects.

Therefore, one is still faced with a liability regime that, because of the narrowness of the exempting events and the strictness of the probative regime required in order to take advantage of it, makes the shipowner always liable for the damaging event caused by the carriage of oil. Such is the case even if only within the above-mentioned quantitative limits, and subject to the conditions of the sphere of application of the uniform law that can reduce or even exclude its functioning (depending on the maritime areas in which the incident or the resulting pollution occurred). Third parties that have been harmed can thus take advantage of this regime, even if only within the limits indicated herein. Among other things, they are protected by the corresponding compulsory insurance that the shipowner is obliged to have and by the possibility of having their rights respected directly vis-à-vis the insurers, the only exception being represented by some marginal cases.

### 10.4.3 Criticism of the Convention system and the relevance of insurance coverage

With respect to such a system of strict liability, the International Oil Pollution Compensation (IOPC Fund, i.e. the Fund Convention and its additional Protocols) steps in, as already mentioned, to integrate liability limits in all cases in which: the limit to the shipowner's liability is quantitatively inadequate with respect to the entity of damages caused; for whatever reason the shipowner and its insurer are not capable of meeting the financial obligations imposed on them by the CLC; one of the exceptional situations has occurred which does not permit those involved to take advantage of the strict liability that the CLC imposes on shipowners. Criticism of the CLC/Fund system has not subsided, despite the ever more significant quantitative increase in the limits of shipowners' liability and the certainty of further compensation guaranteed by the IOPC Fund, integrated by the Supplementary Fund.

Indeed, it has been pointed out that the increases provided for during recent years have not produced any real positive effect in terms of reducing the number of cases of marine pollution and improving safety with respect to the transport of oil by sea. Further, it has been observed that the Supplementary Fund is destined to produce effects that will even clash with such objectives: while it is true that it accords greater satisfaction of victims' claims possible, it is equally true that the further contribution required is financed exclusively by the oil industry. Therefore, this circumstance will enable a further decrease of the liability of shipowners and of those operating the ships precisely because they in primis will have to guarantee that conditions of maximum safety for the carriage by sea of oil are fulfilled.

In particular, it has been highlighted that the functioning of the Supplementary Fund actually
represents a further protection with respect to the liability and possible fault of shipowners and of shipping companies in matters concerning the safety and operating standards of ships. In order to avoid, at least to some extent, such effects and to preserve a certain equilibrium between the oil shipping by sea industry and the oil industry, as far as their participation in the compensation for oil pollution damage in connection with the carriage of oil by sea is concerned, it has been proposed to further raise the limit of the shipowner’s liability, leaving aside, at least in part, the ship’s tonnage, or to have the shipping industry contribute to the costs of the Supplementary Fund. In this regard, it has been pointed out that such disproportion is still greater in accidents caused by small ships, the polluting effects of which are often comparable or even greater than those produced by large ships.

On the contrary, the insurance circles of the P&I Clubs and of the states that are particularly attentive to the safeguarding of shipping interests (among which, above all, the United Kingdom) point out that the actual application of the current regime of the 1992 Protocol has appeared to be, and must be considered to be, adequate to meet the needs of the practical requirements and duties of the marine insurance sector. Any further increase in the liability of shipowners and shipping companies would cause, among other things, the depletion of the insurance market’s available resources, with consequential devastating effects on its functioning and on the entire system. Moreover, should the global amounts concerning shipowners’ liability be further increased, insurers of the shipowners will have to increase premiums to such a level as to make the relative costs practically unsustainable by the shipping industry.

The only constructive solution in the direction that is indicated by the oil industry has been represented by the increase of the liability limit (from 4.5 million to 20 million SDR) for small tankers (those not exceeding 5,000 units of gross tonnage), invocable only in the case of incidents involving states that have acceded to the Protocol concerning the Supplementary Fund. Therefore, this approach is substantially in line with the content of the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) proposed by the P&I Clubs. It provides only that the rules, originally conceived as contractual in nature, be incorporated into the body of uniform law rules thereby guaranteeing greater legal certainty and a precise sphere of reference. The sole alternative declared acceptable by the oil shipping industry and marine insurance circles was the start of negotiations with a view to updating the 1992 CLC for the purpose of imposing liability on shipowners up to a determined amount, regardless of the size of the tanker involved in the oil spill, yet still within the maximum limits currently in force.

Above all, taking due account of the previous considerations, the essential impossibility of raising the global limit of shipowners’ liability set out in the 1992 CLC and the subsequent updates, therefore, remains confirmed. Also, the introduction of forms of punitive damages (see below) to be paid by shipowners who fail to fulfil their obligations to guarantee the seaworthiness and safety of their ships is to be considered insufficient. Therefore, the original set-up of the rules on the limitation and channelling of shipowners’ liability has not been modified, nor can changes be foreseen within a reasonable period of time, despite the strong criticism expressed in this respect in various quarters and, inter alia, shared in the sphere of the European Union. In particular, the European Commission, on the basis of economic analysis of law arguments, did not hesitate to affirm that the system of limitation of liability, per se, is discouraging with respect to the adoption of preventive measures with regard to maritime incidents and/or measures designed to improve navigational safety. This system is even considered to clash with the principle that the individual having caused the pollution should pay full compensation for damage caused to him.

In fact, it has even been affirmed (in the Commission’s Communication to the European Parliament and to the Council of 20 December 2002 following the accident involving the tanker Prestige) that the CLC/Fund system guarantees true, actual immunity not only to shipowners but also to those who in various ways share in the risks of shipping, even though they are specifically required to fulfil precise and strict obligations with respect to maintaining the ship’s safety (for example, charterers, managers, etc.). Regarding the latter, only the shipowner and the Fund can claim compensation (CLC, art. 3, para. 5, and the Fund Convention, art. 9, paras. 1-2). In connection with the above, some states have declared that compensation can be claimed, from time to time, on the basis of criteria that are not always considered rigorous on account of various circumstances and/or political assessments, or purely legal considerations. The latter includes, for example, the limitation period, uncertainty with respect to the competent court, the difficulty in collecting adequate information as well as the time required, the uncertainty and excessive costs of the relative legal proceedings – the outcome of which is often rendered irrelevant on account of the insolvency of the person liable that has come about in the meantime.

Moreover, it has been observed that unlimited liability of the shipowner can easily be eluded by
means of adequate techniques, such as the normal practice of constituting a single ship company. Therefore, the certainty that the shipowner is financially capable of covering its liabilities must be dependent on and guaranteed by insurance coverage. It is to be underlined that the insurance system is also capable of easily overcoming the legal obstacles posed by single ship companies, by virtue of the treatment that these companies receive for insurance purposes. In fact, according to the rules generally adopted within the sphere of the P&I Clubs, they are considered as belonging to a single group and, therefore, a single fleet when insurance premiums are calculated and jointly liable for all the obligations they have individually assumed and/or that can be attributed to each individually.

The actual fulfilment by the shipowner of its obligations to pay compensation is thus linked to an efficient, reliable insurance system. The estimates of precise quantitative limits are absolutely inevitable in this perspective. Within such limits, also the proposal to introduce punitive damages payable by those responsible for maritime incidents must, therefore, be placed. In fact, it can operate effectively only by means of the conventional mechanisms of mutual benefit insurance. But above all, it has been pointed out that the system of channelling liability towards the shipowner only, within precise quantitative limits, is the only system consistent with the shipowner’s strict liability as “it would be inconsistent with the concept of strict liability for a second party to be liable outside the Convention in addition the statutory party”, as observed during the preparatory work. Moreover, such a system has the advantage of avoiding harmful and possibly contradictory duplications of proceedings with relative increases, among others, of the legal and insurance costs.

In the perspective just indicated, however, it is not surprising that the shipowner’s insurance coverage used in the transport of oil is considered obligatory (CLC, art. 7, para. 1) and must be duly certified and provided by a reliable insurance system. In fact, it constitutes the only real evidence of the shipowner’s capacity to pay compensation under the terms of the CLC. Nor is it surprising that pollution victims are guaranteed by the possibility of claiming compensation for the damage they have suffered directly from whoever provided either the insurance coverage or the corresponding financial guarantee (CLC, art. 7, para. 8), the compulsory detailed content of which is provided for in uniform law regulations (CLC, art. 7, para. 2). In fact, the purpose of the CLC regime is to guarantee the payment of the compensation for oil pollution damage in connection with the carriage of oil by sea on the basis of strict liability channelled to the shipowner, which is easily avoided in the absence of adequate guarantees.

10.4.4 The progressive confirmation of the criterion of the shipowner’s strict liability and its limits

The last considerations were also confirmed on the occasion of the revisions leading to the CLC and Fund Conventions of 1992 and to their further updates. They are still being shared, although with greater uncertainty, which was apparent with the recent innovations adopted in IMO Resolutions in 2000 and 2003. The critical remarks and objections made in this connection, briefly recalled above, did not receive on those occasions adequate response, for prevalently pragmatic reasons. Therefore, neither doubt nor uncertainty mars their consistency with the indications that are currently prevailing in the international community and interested circles regarding the system of strict liability channelled to the shipowner. They are covered by compulsory insurance and completed by the integrating intervention of the International Oil Pollution Compensation (IOPC) Fund and of the Supplementary Fund, based on the principle that where liability under CLC ends, the IOPC Fund’s liability begins; moreover, with the specification, however, that the IOPC Fund and the Supplementary Fund are obligated to pay compensation also in the exceptional cases in which the shipowner’s liability is excluded according to the CLC. This happens, as already specified, when the damage has been provoked by war or natural calamity, by the intentional conduct of a third party or by the negligence of one or more states in maintaining lights or other navigational aids.

Greater doubts have been expressed, as apparent from the above and from the debate both within Europe and the appropriate international organizations (above all within the IMO) on: the maintenance of absolutely unbreakable limits of liability with respect to shipowners whose behaviour has been seriously negligent, but not serious enough to violate the rules currently in force; the possibility for victims to obtain compensation for damage from other persons who may be responsible for failing to maintain the ship’s seaworthiness and its safety; the extension of the notion of compensable damage with particular reference to environmental damage. In fact, these are matters that have always been discussed. At present, these issues are governed by the consolidated rules of the 1969 and 1992 CLC, as well as the 1971 and 1992 Fund Conventions, along with a parallel and equally
significant body of case law that has confirmed, and in no way marred, the original set-up of the CLC/Fund system (apart from some appropriate adjustments and the increase in the amounts of the limits of shipowners’ liability and of the amount of compensation paid by the Fund).

With reference to what has been observed under above, the evolution of the body of rules has progressively reinforced the substantially unbreakable nature of the maximum amounts provided with respect to the shipowner’s liability. In fact, following the modifications still in force and adopted by the 1992 CLC, it is provided that the limit of the shipowner’s liability can be increased only through proof that the shipowner had committed a “wilful or reckless action or omission”; that is to say, by means of the proof that the damage resulted “from his personal act or omission with the intent to cause such damage or recklessly and with knowledge that such damage would probably result” (1992 CLC, art. 5, para. 2).

Therefore, the evolution of the body of rules, faced with the progressive above-mentioned increase in the quantitative limits of the shipowner’s liability, has led to the adoption of greater strictness in proving circumstances that permit such limits to be exceeded. In fact, it is no longer sufficient to prove actual fault or privity on the part of the shipowner in order to exclude the operation of the limit of liability, as under the 1969 CLC. However, it is necessary to prove that the shipowner’s conduct was intentionally damaging or at least reckless, with disregard for the potential consequences even if the damaging event had been expected. In this regard, attempts to specify and extend this concept of recklessness, for the purpose of including at least cases in which the incident is caused by a structural defect of the vessel, have resulted completely unsuccessful until now. It seems unreasonable to consider the current wording of art. 5, para. 2, of the CLC as permitting a broad interpretation in the sense indicated herein. Furthermore, an interpretation aimed at putting the shipowner to the test in providing negative proof of such circumstance in order to avoid the accusation of intentional recklessness does not seem possible.

The system relating to the limit that the 1992 CLC poses to the shipowner’s liability, to the exceptional circumstances permitting that limit to be broken and to the operation of the burden of proof, has therefore turned out to be a substantially unbreakable limit, introduced precisely to avoid the risk that broad interpretations of the notion of actual fault or privity put forward in some jurisdictions when the 1969 CLC was in force could have excessively penalizing effects on the shipowner, and at the same time create uncertainty and lack of uniform application. Moreover, the Fund itself openly admitted the above-highlighted circumstance in a specific study (containing a collection of the most important judicial and administrative practices) conducted as early as the 1980s. Therefore, as already mentioned, it was preferred to increase, within the possible limits accepted by the insurance market, the maximum amount to which the shipowner is liable. At the same time, the aim was to guarantee greater certainty, seriousness and uniformity of application with respect to the subjective situations that permit exceeding the amount. However, such an evolution has made it ever more difficult (indeed, practically impossible) to obtain compensation beyond the quantitative limit indicated herein since the circumstances that permit exceeding the limit are increasingly exceptional and restrictive, and the burden of proof on the victims is increasingly onerous.

From this perspective, and in order to discourage the use of inadequately built ships with respect to the best safety standards, the most reasonable measures proposed seem to be, rather than the interpretative efforts aimed at broadening the concepts of wilful or reckless action or omission that could have negative effects also with respect to the extension of insurance coverage, a series of specific actions aimed at introducing, with reference to some categories of ships (defined as sub-standard with respect to the optimum criteria of safety according to objective criteria), not only greater limits to the liability of their owners but also greater contributions to both the Fund and the Supplementary Fund by the cargo owners who have taken on the risk of using them.

Upon confirmation of the usefulness of the system of channelling liability to the shipowner alone, any possible action by victims against other individuals involved in the management of the ship or in activities concerning its operation, whose negligence may have contributed to causing the damage, has therefore been excluded. The arguments traditionally adduced in defence of such a system have been repeatedly and successfully asserted, showing, above all, that liability channelling, together with strict liability, of the shipowner constitutes a sufficient and economically suitable guarantee of certainty, clarity and speed in obtaining compensation for those who have suffered damage. In that sense, these considerations have not been overtaken by the lively and increasingly frequent criticism of the system.

Indeed, the modifications introduced by the 1992 CLC to the 1969 CLC further strengthened the underlying principles of channelling liability exclusively to the shipowner. They extended the consequent immunity regarding the claims of third parties that have suffered harm to a wider range of
persons liable with respect to what was originally provided. One should think, for example, of the individuals who collaborate in various ways with the ship or provide its services. Originally (in the 1969 CLC), the exemption introduced in this connection, as regards to any claim for compensation for pollution damage by third parties who have suffered damage, was provided only for the servants and agents of the owner. Subsequently (in the 1992 CLC), however, it was extended to the benefit of any “person who, not being a member of the crew, performs services for the ship” (1992 CLC, art. 3, para. 4, b). Therefore, the directives originally formulated by the Legal Committee of the IMO are shared. Those directives are even more relevant and significant if, as it appears to be the case, the persons referred to in the provision cited are understood to include not only natural persons, but also legal entities who in various capacities provide services to the ship (as the provisions of the CLC, and in particular the other provisions of art. 3, para. 4, already mentioned, seem to confirm).

Notwithstanding the clarifications just made, serious uncertainties still remain with respect to its implementation and to the conditions and limits according to which such rules can operate. For example, with specific reference to what has been indicated in connection with the persons providing services to the ship, it is still uncertain whether some of them, in particular ship classification societies, fall within this category of entities for the purposes of art. 3, para. 4. Moreover, it is also uncertain whether, in general, an action of recourse brought against them can be based exclusively on a contract, with all the possible limitations and exemptions provided in this regard, or whether the action of recourse can be of an extra-contractual type. In favour of the first solution is the case law of the United States, Spain and the United Kingdom, which clearly excludes actions of recourse regardless of whether they are based on a contractual or at least ‘quasi contractual’ relationship. In particular, British case law takes an approach that offers guarantees and is very strict, with specific reference to the proof of the liability of those providing services, among them classification societies. Instead, some decisions on the merits handed down in France and in Italy adopt a somewhat different approach.

Therefore, it appears clear how, despite the progressive elaboration of rules, not only does some uncertainty still exist with respect to important, even if apparently secondary, aspects of legislative policy to be followed at the international level, but there is also a serious divergence in application of uniform law rules, as well as significant displays of case law that highlight how substantially identical situations are treated differently (for example, in the sphere of those providing services to the ship). This presents the risk of potential, serious defects in the legislation at stake also from the constitutional point of view, should such unevenness of treatment in fact emerge and be successfully invoked in appropriate instances.

This does not mean, however, that the providers of services to shipowners can enjoy such a treatment as to lead to absolute exemption from liability even if their negligence caused or contributed to causing the incident. In fact, if that is the case, it is quite true that third parties who have suffered damage will not be able to take action against them. Moreover, it is equally true that the shipowner and the Fund, should it intervene to integrate the shipowner’s limit of liability, will be able to bring a recourse action against them (1992 CLC, art. 3, para. 5).

At any rate, the strict liability of the shipowner does not operate if such persons or entities had acted with the intent to cause the damage; the above extends, in general, also to any other person against whom an action may not be brought by third parties who have suffered damage under circumstances that justify the channelling of liability to the shipowner according to the Article under consideration. Therefore, they will be considered liable with respect to third parties who have suffered damage and who can bring an action directly against them in the absence of any provision of the CLC or of the Fund Convention.

10.4.5 The concepts of compensable damage and ship for the purposes of the application of the international rules

Also with reference to the concept of compensable damage, the evolution of the 1992 CLC/Fund system has aimed at better specifying some uncertain normative contents by progressively amplifying their material scope of application, in conformity with the indications put forward.

First of all, in fact, it has been clarified (1992 CLC, art. 1, para. 6) that pollution damage is intended to refer not only to the ‘physical damage’, caused by an oil spill, as affirmed by the 1969 CLC, but also refers to any other type of damage, and in particular environmental damage, for which the extent of compensation is limited only to “costs of reasonable measures of reinstatement actually undertaken or to be undertaken” and to the “costs of preventive measures and further loss or damage caused by preventive measures”. Impairment to the environment has,
It is a matter, in particular, concerning cases in which oil spills come from constructions possessing all the characteristics of a ship for carrying oil, but are temporarily used as a floating oil recovery and separating unit. The position expressed in this connection by the Fund aims at including these cases within the concept of ship and, therefore, at extending to them the rules under consideration, based on a functional interpretation that permits a broad application thereof. Thus, the intention is to guarantee to the greatest extent both the certainty of compensation for damage to the victims of marine pollution caused by oil spills, and the payment of compensation due to those who contributed to prevent its effects. However, it must be a spill of oil from cargo tanks that may be used for the transport of oil by sea, regardless of whether during the oil spill such ships were being used not for transport, but only as a receiving and separating unit.

A fortiori, the above-mentioned functional interpretation is applied in cases of cargo tanks that, while staying in port and after having terminated the discharge operations, still contain residues of the transported oil. In fact, this situation presents even greater danger of possible effects deriving from the risk of pollution with respect to those in the carriage by sea phase. In this case, moreover, the ship is located in vital and particularly sensitive regions of the marine environment, such as port areas. Analogous considerations have been formulated not only by the Director, but also by the Executive Committee of the Fund. The latter, precisely on that occasion, recalled in this connection its function as authoritative (if not even authentic) interpreter of the international regime (as recognized by Resolution 8 of May 2003), from which contracting states, and in particular their courts and administrative organs, cannot derogate.

10.4.6 The Bunker Convention

The above-mentioned question related to the concept of ship, relevant for the purpose of the application of the 1992 CLC, is likely to be superseded to a large extent when the 1992 CLC system will be shared by an adequate number of states that are also parties to the International Convention on Liability for Bunker Oil Pollution Damage (the so-called Bunker Convention), adopted by the IMO in March 2001, and thus permitting its entry into force. In fact, such Convention governs liability and compensation criteria for damage caused by oil spills from all ships that do not adhere to the CLC, according to principles and criteria analogous to those adopted by the CLC. Thus, the two Conventions, oriented according to
substantially coinciding rules, are mutually exclusive and complementary. As such, they are suitable to regulate the effects of any situation of an oil spill from any type of ship, as well as the consequent liability based on the same principles adopted in the corresponding legal rules applicable from time to time depending on the circumstances of the case.

The Bunker Convention has taken into account the need to provide adequate rules also in the presence of legal uncertainty with respect to spills from ships that are not designed to carry oil (according to the 1992 CLC). In fact, such incidents are much more frequent and, at least in their globality, just as serious as those caused by the carriage of oil. Indeed, in some cases, it has been observed that marine pollution damage caused by bunker spills is even more serious since, on account of its physical characteristics, oil used as a combustible is more resistant to clean-up treatments than crude oil. In fact, some states have long since assimilated, by virtue of unilateral rules, the legal regime governing liability for spills from oil tankers to spills caused by any other ship (this occurred, for example, as early as the 1980s in the United States when the Oil Pollution Act was adopted).

The Bunker Convention confirms, therefore, the criteria of channelled and strict liability of the shipowner also with respect to bunker spills caused by the latter. Moreover, the exceptional causes of exemption that can be invoked in this regard are indicated according to particularly strict criteria in the same logic of the CLC and the analogous uniform rules on liability for carriage of hazardous goods by sea (International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, known as the 1996 HNS Convention).

Therefore, strict liability is not channelled exclusively to the shipowner (registered owner), but is extended also to the bareboat charterer, manager and operator of the ship, according to the position of some states, who hope that this modification should come about also in the ambit of the CLC, expecting in this connection that in all cases in which there are several persons liable “their liability shall be joint and several” (art. 3, para. 2). This solution was inspired by the United States’ model and under European pressure for a greater involvement in liability for marine pollution of the persons just indicated. Above all, it has been justified by the absence of a Convention complementary to the Bunker Convention, analogous to the Fund Convention with respect to the CLC. Moreover, statistically, the damages caused by bunker spills are more closely linked to the way in which a ship is operated, in particular by the charterer or manager, rather than to the structural shortcomings of the ship, for which the shipowner is liable also with respect to charterers. Therefore, it was natural and more appropriate not to depart, in favour of the victims, from the direct involvement of those entrusted with the ordinary management and daily running of the ship (namely, operator, charterer and manager of the ship). It is true that the solution envisaged presents considerable application disadvantages and can cause duplication of insurance costs as well as conflicts among insurers in sharing the compensation. It also has to be considered that uniform rules do not directly provide for the application of the joint liability regime, according to the different situations and degree of involvement in the pollution of those jointly liable. It is reasonable, therefore, to maintain that the applicable rules in this regard will be those established on the basis of the provisions of the lex fori, though with evident uncertainty and divergent application.

This diversity, moreover, will potentially occur also with reference to responder immunity, which, as already mentioned in connection with the 1992 CLC, in principle, is destined to operate in favour of those who intervene during rescue and/or clean-up operations, and more generally in favour of the servants or agents of the various persons considered liable according to jointly channelled, strict liability criteria. The extent of responder immunity is not, however, exactly delineated in the uniform law rules. Therefore, it is reasonable to maintain that, once again, the domestic rules will have to be applied, and it is hoped that a specific, express indication is made in this connection by the different states when depositing their instrument of ratification, as expressed in a resolution adopted on this matter within the IMO.

On the other hand, even greater uncertainty is caused by the recourse to domestic laws with regard to the regime instituted by the Bunker Convention, also with specific reference to the liability limits for those who must respond for damage caused by a bunker spill. In fact, the Bunker Convention deliberately refrains from establishing a specific limitation to liability, let alone specific values for this purpose. The Convention’s aim is not to prevent the application of the liability limits determined according to the national or uniform legal regime in force in the lex fori (Bunker Convention, art. 6), as the application of this regime is explicitly referred to. Such regime can, therefore, be provided by uniform rules on limitation of liability for maritime claims (and in particular by the 1957 and 1976 Conventions), or by the 1992 CLC in those states that have extended the regime to also include bunker spills (e.g. the United Kingdom and Canada), or one specifically providing for an ad hoc regime for bunker spills (such as the one adopted in
the United States), or (as in China) a regime in which there is no limit to compensation for pollution.

It is evident that the Bunker Convention does not contribute to the establishment of uniform rules concerning quantitative limits of compensation for damage caused by bunker spills. It is hoped, as reasoned within the CLC system, that states will aim to adopt the same limit for the Bunker Convention as is provided in the CLC. This would also serve to guarantee a continuity of rules that would overcome potential distortions that still exist in the notion of ship, as mentioned above, which is an important matter for the purposes of establishing the sphere of application of the CLC.

This is even more true if one considers that recourse to the 1957 and 1976 Conventions’ uniform legislation on limitation of liability with respect to maritime claims may be inadequate (at least in the current state of play), since such legislation contains an exhaustive list of the only claims that can benefit from the liability regime. In addition, it is not easy to identify among such claims those that allow all the various aspects of pollution damage caused by bunker spills to be recovered: only compensation for physical damage and for costs caused by such spills can be included in the lists provided in the Conventions indicated herein.

10.4.7 The relationship between the Bunker Convention and the rules on limitation of liability for maritime claims

At present, there is a risk that, in states that are parties to the 1957 and 1976 Conventions, pollution damage caused by bunker spills not included in these categories must be completely compensated. This risk can only be eliminated by the entry into force and the effectiveness in the ambit of the lex fori, of the 1996 Protocol to the above-mentioned 1976 Convention on Limitation of Liability for Maritime Claims. In fact, the above Protocol expressly provides for the limitation of liability with respect to the various aspects of pollution damage, even if related to bunker spills.

States are aware of such possibilities; nonetheless, they have permitted and encouraged recourse to the general legal regime on limitation of liability for maritime claims to reduce the constitution of additional funds to those already provided for in the 1992 CLC/Fund Conventions concerning compensation for damage. Indeed, the very rules on limitation of liability for maritime claims in the 1976 Convention and 1996 Protocol provide for the establishment of different funds based on the type of maritime claim, according to the nature of the damage or the various events that have provoked such damage in the context of a voyage by sea. In this perspective, the solution adopted appears reasonable if the Bunker Convention operates simultaneously or after the entry into force of the 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims; thus, when both instruments are in force at the same time.

The amounts due, at least within the limits that have just been indicated, should be accompanied by adequate insurance coverage or financial security as established in art. 7, para. 1, of the Bunker Convention. Only the registered shipowner (and not the other subjects that are made jointly liable) is required to have such insurance, to be integrated by a certificate issued by the state whose flag the ship is entitled to fly if that state is a party to the Bunker Convention or, on its own initiative, by a state party to the Convention (if the state whose flag the ship is entitled to fly is not party to the Convention), and such certificate states that insurance or other financial security is in force (Bunker Convention, art. 7. para. 2). Thus, it is possible to invoke the intervention of the state that issued the certificate for the purpose of correcting situations in which it seems that the insurer or provider of financial security is not in a position to fulfil its obligations (Bunker Convention, art. 7, para. 9).

It goes without saying, the level of liability that must be secured by insurance or financial security is the same that is applicable to the limit (and to the criteria for distributing such a sum with respect to other possible competing creditors), to be determined according to the rules in force in the state in which the damage has occurred, with the uncertainties mentioned above. Therefore, the relative provisions of domestic law of the state in which the ship that has caused the bunker spills is registered will be applicable only in the case that: the uniform rules on limitation of liability for maritime claims are not operative, the rules of lex fori are not applicable and the rules of private international law refer to the law of the state whose flag the ship is entitled to fly.

The same model certificate adopted by the Convention is thus limited to guaranteeing that the insurance policy is valid and in force, as well as capable of responding to the characteristics described in the applicable rules in conformity with art. 7, para. 1, of the Bunker Convention, while not indicating a precise amount nor a specific applicable rule. At any rate, the maximum amount that can be requested from the insurer or provider of financial security cannot exceed the value of the specific property fund provided for in the above-mentioned 1996 Protocol to
the Convention on Limitation of Liability for Maritime Claims (Bunker Convention, art. 7, para. 1). Moreover, within the above-mentioned limits and according to the same principles adopted with respect to the CLC, victims of damage can make their claims directly to the insurance company or to the provider of financial security that has issued the financial guarantee. In that case, however, said insurance company or financial security provider can exercise all the defences that the shipowner can invoke, with the exception of situations caused by a proceeding for insolvency, brought against the shipowner, although if the pollution damage was caused by wilful misconduct, it is possible to exclude the obligation to pay compensation insured or secured.

From a different perspective, it is also hoped that the techniques offered by the development of technology will be used with greater intensity to prove the shipowner’s wilful or reckless behaviour, and that the possibilities offered by the insurance system for piercing the corporate veil of the single ship companies will be exploited. The use of the techniques indicated herein appears essential in particular when holding a specific ship responsible for bunker oil spills and the relative penalties must be made applicable and the liability determined.

In any event, in order to complete the system under consideration, there must also be public intervention in the direction that has just been indicated, aimed at guaranteeing and strengthening the effectiveness of the rules and standards for safe navigation, on a case-by-case basis, above all by coastal states or port states. Techniques of moral suasion with respect to the voluntary adoption of best practices, according to the opportune certifications required by the most qualified organisms, also by virtue of the states’ specific mandates can be considered equally important. From this standpoint, it is advisable to provide incentive for those ships proving to follow best practices through various privileged treatments, such as more economic and better operativeness in the territorial sea and ports in whose markets they are most interested.

10.4.8 Conclusions and prospects for the evolution of the system

Notwithstanding the criticism of some aspects of the relative rules, the legal regime for liability for marine oil pollution damage created by the uniform law system described above appears, at present, difficult to modify, at least with respect to its underlying principles. This is particularly true since any modification aimed at exceeding shipowners’ liability limits in the presence of alleged, grossly negligent behaviour ought to make provision for insurance coverage and the relative joint liability (of charterers, managers, etc.), which inevitably leads to a notable increase in the price of oil products for consumers. Clearly, such an effect is hoped to be avoided.

Therefore, it is a matter of preventing incidents in the ambit of the rules currently in force through adopting a stricter and truly uniform system to regulate the market for the carriage of oil by sea, and in addition to safety and relative controls, to encourage a sense of social responsibility in all undertakings involved for any reason in this sector. Furthermore, at the private law level, appropriate codes of conduct ought to be adopted and it should be possible (according to the techniques permitted in the insurance field) to verify that those codes of conduct are actually applied by providing sanctions for violations, also by piercing the corporate veil. To that aim, there should be an increase in punitive measures and at least deterrents with respect to shipowners who create conditions that risk marine oil pollution by not adopting the best suitable practices. Therefore, the shipowners’ obligation to acquire adequate insurance according to the CLC would need a stricter regime for them as well as insurance premium costs that are more closely linked to the potential risk created by using ships which are not the best.

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