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LEGAL LIABILITY FOR MARITIME OIL POLLUTION: *THE PRESTIGE* CASE

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ABSTRACT: The article analyses *The Prestige* case and the latest developments between British interests in protecting the shipping and insurance industry, which relies on arbitration of the London courts in its contracts, and the interests of those affected in being able to make a legal claim in the place where the damage occurred. In particular, it looks at the judgment of 6 October 2023 of the High Court of Justice of England and Wales, which restrains enforcement in the United Kingdom (the domicile of the P&I Club of *The Prestige*) of the order of the Provincial Court of A Coruña of 1 March 2019 which sentenced the insurer to pay EUR 855 million. This restraint of the Spanish order in the United Kingdom is contrary to the response given to the reference for a preliminary ruling submitted by the same High Court to the Court of Justice of the European Union. If the United Kingdom had remained in the European Union, the British insurers would not have been able to oppose the extension of the arbitration clause to the injured third parties. It is proposed to raise the compensation limits of the 1992 Civil Liability Convention.

Keywords: Oil pollution; Civil Liability; Marine Insurance; P&I Club; IOPC Funds

1. INTRODUCTION

Since the environmental disaster caused by the oil tanker *The Prestige* in November 2002, there has been a succession of Spanish, English and EU court rulings and arbitration awards on the legal liability arising from the incident. The latest is the judgment of the English High Court of 6 October 2023, which restrains the enforcement in the United Kingdom of the order of the Provincial Court of A Coruña of 1 March 2019. This order enforces the sentence imposed by the judgment of the Spanish Supreme Court of 14 January 2016 on the ship's insurer, The London P&I Club, and quantifies the amount payable at EUR 855 million.

The Spanish State, without having been declared civilly liable for keeping *The Prestige* away from the coast, has assumed a large part of the direct costs of compensation with public funds, subrogating itself to the rights of those affected. As a result, part of the compensation has been paid to the injured parties. Nevertheless, between direct damages and advances to those affected, the cost to the treasury has been EUR 2,355 million, and the Spanish State is clearly determined to prosecute the only entity that could pay above the international compensation limits, namely the ship's civil liability insurer, the P&I Club.[1]

[1] The claim against the classification society of *The Prestige*, American Bureau Shipping (ABS), was also unsuccessful. The United States Court of Appeals for the Second Circuit in New York, by judgment of 29 August 2012, dismissed the appeal brought by the Kingdom of Spain against ABS. The claim was for more than US$1 billion in damages caused by the sinking of the tanker. The Court of Appeal considered that, in view of the evidence submitted, the Kingdom of Spain had not sufficiently established a breach of any

2. FACTS, LEGAL PROCEEDINGS AND REFERENCE FOR PRELIMINARY RULING

2.1. Spanish court case: insurer ordered to pay EUR 855 million

In November 2002, the Bahamas-flagged, single-hulled vessel, insured by The London P&I Club, sailed from St Petersburg to Gibraltar, where it was to continue on to Singapore or another Asian destination. It was carrying around 76,000 metric tonnes of fuel oil on board. Near Cape Fisterra (Galicia) it suffered damage and sought refuge. The authorities made the decision to keep the damaged vessel away from the Spanish coast, an order that was later proven in court to have been disobeyed by the captain. The situation worsened and rescue attempts were unsuccessful, and the ship finally broke in two and sank, spilling some 63,000 tonnes of oil onto the Spanish and French coasts. The Court of Concurbión in A Coruña then started criminal proceedings.

In 2010, after the completion of the investigation before the Court of Concurbión, criminal proceedings were initiated before the Provincial Court of A Coruña. The master, the ship's first officer and the Director General of the Merchant Navy were held criminally liable for crimes against the environment and damage to protected natural areas, as well as, in the case of the captain and the first officer, serious disobedience of authority.

At the same time, civil actions were also brought together with the criminal proceedings. These were mainly against the master of *The Prestige*, its owner, the P&I Club and the IOPC Fund. The P&I Club was summoned to court as a civil liability defendant, but did not appear. However, under the P&I policy taken out by the insured party, it provided legal defence for the ship's master. The main civil liability claimant was the Spanish State, with part of its claim being for compensation advanced to those affected.

The trial concluded with the judgement of the Provincial Court of A Coruña of 13 November 2013.[2] It acquitted the captain, the first officer and the Director General of the Merchant Navy of the crimes against the environment and damage to natural areas, also acquitting the first officer of the crime of disobeying orders. However, the master was found criminally responsible for the offence of serious disobedience to authority.

The judgement of the Provincial Court of A Coruña of 13 November 2013 does not contain any mention of the civil liability of the P&I Club. Immediately after the incident, the P&I Club deposited a compensation fund of EUR 22,777,986 with the Court of Concurbión. This amount is the result of multiplying the tonnage of *The Prestige* by the units of account laid down in the International Convention on Civil Liability for Oil Pollution Damage, 1992 (hereinafter, the "1992 Civil Liability Convention"). In addition, the injured party could take direct action to claim an amount up to the compensation limit from the insurer or guarantor of the owner's liability (Art. VII.8). In this case, it was the P&I Club, as insurer, which deposited the compensation fund so that the insured could limit the compensation according to the above-mentioned Convention.

The reporting judge was aware of the very low limits of the 1992 Civil Liability Convention and the fact that it was being applied to a case involving catastrophic damage.

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obligation which ABS could assume towards Spain. The Court of Appeal thus upheld the District Court's judgment to the same effect.

[2] In *Cendoj* 15030370012013100477.

However, he applied it "*even if many do not accept its restrictive implications, which are evident and binding, from the mere perspective of the principle of legality, since an international rule incorporated into Spanish law is immediately and strictly applicable.*"[3] The plaintiffs, including the Spanish State, appealed in cassation.

The judgement of the Supreme Court, 2nd Chamber, Criminal Division, of 14 January 2016,[4] reversed and partially annulled the judgement of the Provincial Court of A Coruña of 13 November 2013. With regard to criminal liability, it declared the master of the vessel to be responsible, without the concurrence of circumstances that modified the criminal liability, for the offence of recklessness against the environment in the aggravated form of catastrophic deterioration. With regard to civil liability, it decided that:

(1) The master is liable without limitation for the damage caused. It is not known whether the master has been able to pay any compensation.

2) The shipowner is held to have subsidiary civil liability. Neither are we aware that this company has paid any compensation.

3) The P&I Club holds direct civil liability *"up to the limit of the policy taken out*." The legal article taken as the basis to sentence the P&I Club above the limits of liability envisaged in the 1992 Civil Liability Convention and up to the sum insured in the policy is Art. 117 of the Spanish Penal Code: "*Furthermore, we cannot forget that we are dealing with a civil liability, which in turn derives from a criminal liability, in relation to damage caused in areas subject to the jurisdiction of the Spanish Courts, and that Article 117 of the Penal Code expressly declares the liability of the insurer who has assumed the risk of the pecuniary liabilities derived from the use or exploitation of the property or activity when, as a consequence of an act foreseen in the Code, the event that determines the risk occurs. And this has been the case here."*

The Supreme Court's decision contrasts with Art. VII.8 of the 1992 Civil Liability Convention. This provides that, in the case of a direct claim against the insurer, "*In such a case the defendant may, even if the owner is not entitled to limit his liability in accordance with Article V, paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1*."

4) The IOPC (International Oil Pollution Compensation) Funds are liable up to the limit laid down in the 1992 Fund Convention. They have paid, in addition to the P&I Club's compensation fund, an amount of EUR 147.9 million over time.[5] The 1992 Fund Convention arose from the desire to guarantee an additional, second amount of compensation to that previously paid by the shipowner and his insurer or guarantor when the latter does not guarantee full compensation for maritime oil pollution damage. To this end, several States created an entity recognised as a legal person, the IOPC Fund. It is

[3] P. 56 of the *Cendoj* version of the judgement of the Provincial Court of A Coruña.

[4] In *Cendoj* 28079120012016100001. On this judgment, *see* M Alba and J L Gabaldón, `Affaire du Prestige: Le capitaine est condamné pour délit d'imprudence contre l'environment et ne peut beneficier, tout comme l'armateur et en presence d'un "soupçon de dol", de la limitation de responsabilité` (2016) 779 *Le Droit Maritime Français*, 338-351; A Betancor Rodríguez, *Responsabilidad y aseguramiento por daños ambientales. El caso Prestige* (BOE 2018); J L García Pita y Lastres, `Las sentencias "Prestige" último acto (¿una gloriosa primavera, un breve estío o el invierno de nuestro descontento?)´ (2016) 17 *Revista de Derecho del Transporte: Terrestre, marítimo, aéreo y multimodal*, 11-57; and, E Sierra-Noguero, *El seguro de responsabilidad civil derivada de la navegación de buque* (Fundación Mapfre 2016), 233-236.

[5] See IOPC Fund website, https://rb.gy/pcccm, accessed 20 November 2023.

financed by contributions from the oil companies located in each Member State and in proportion to the import of oil by sea into their territory.

The judgment of the Spanish Supreme Court of 14 January 2016 does not establish what each injured party is to be paid by each defendant, nor how the deposit of EUR 22.7 million is to be distributed. It only sets out the criteria for calculating the compensation due in respect of civil liability. The exact amount to be paid by each liable party and the compensation due to each injured party is the subject of the enforcement proceedings before the Provincial Court of A Coruña.[6] There have been several rulings in this executive process. However, the main decision in the Spanish enforcement proceedings is the *order of the Provincial Court of A Coruña of 1 March 2019*.[7] It quantifies the compensation owed to those affected by the pollution caused by *The Prestige* incident: the Spanish State, EUR 2,355 million; the French State, EUR 61 million; the Galician Government, EUR 1.8 million; and numerous smaller amounts of compensation in favour of fishing and tourism companies, as well as French municipalities and provincial councils.

The order of the Provincial Court of A Coruña of 1 March 2019 also quantifies the amount of the monetary sentence to the P&I Club, which is pending payment: EUR 855,493,575.65. This corresponds to the conversion into euros of US$ 1 billion. The compensation fund already deposited by the P&I Club under the 1992 Civil Liability Convention (EUR 22.7 million) was subtracted.

2.2. English arbitration and court proceedings: exoneration of the insurer from paying anything above the international limits of indemnity and the rule of pre-payment of indemnity by the insured.

With the declaratory process of civil and criminal liability begun in 2010 underway before the Provincial Court of A Coruña, with the P&I Club in default, the Club pursued a *procedural defence strategy* aimed at hindering the possible future conviction against it in the Spanish judicial process.[8] It had two phases, one arbitral and one judicial.

1. Arbitration phase. In January 2012, the P&I Club applied to the competent English court under the English Arbitration Act 1996 for the appointment of an arbitrator in two arbitration proceedings in London, one against the Spanish State and the other against the French State.[9] These were the two main civil liability claimants in the ongoing proceedings before the Provincial Court of A Coruña. The basis of the P&I Club's claim was the London arbitration clause included in the P&I insurance rules contracted with the insured. The P&I Club considered that both States had breached their obligation to submit their monetary claim against the insurer to arbitration in London. It considered that these

[6] On the enforcement process, in greater detail, *see* E Sierra-Noguero, `Proceso de ejecución de la sentencia del tribunal supremo frente al club P&I del buque <Prestige> en el Reino Unido´ in P Girgado and J P. Gonzáles Bustos (coords.), *Transparencia y competitividad en el mercado asegurador. Insurtech, distribución, protección del cliente, seguro marítimo y pandemia* (Comares 2021) 457-480 and E Sierra-Noguero, `Valorisation judiciaire du montant des dommages et intéréts résultant du naufrage du Prestige´ (2019) 816 *Le Droit Maritime Français*, 687-696.

[7] *Cendoj* 15030370012019200616.

[8] This strategy is also noted in M Gómez Jene, `Prestige y arbitraje europeo: a propósito de la sentencia London Steam-ship del TJUE (asunto C-700/20)´ (2022) 14 *Cuadernos de Derecho Transnacional* 2, 1090.

[9] In contrast, the P&I Club does not claim in arbitration against the other claimants in the Spanish proceedings. This is important, as they are not bound by the English proceedings.

States, as third parties to the P&I insurance contract, were bound by the arbitration clause in the insurance contract concluded between the insurer and the company that owned *The Prestige*.

The competent English court granted the P&I Club's request and appointed a sole arbitrator for both arbitration proceedings against the Spanish and French States, respectively. Both states refused to participate in the respective arbitration proceedings. The arbitrations in London ended with very similar awards, against the Spanish State (13 February 2013) and against the French State (3 July 2013). The sole arbitrator accepted in full the terms requested by the P&I Club:

1) The claim of the Spanish and French States against the P&I Club should be submitted to arbitration under the P&I insurance arbitration clause.
2) The P&I Club should not be liable above the limit of indemnity established in the 1992 Civil Liability Convention. Alternatively, its liability should not exceed the limit of the sum insured in the P&I insurance rules for oil pollution damage, i.e. US$ 1 billion.
3) For claims above the limits of the 1992 Civil Liability Convention ("non-CLC claims"), the "pay to be paid" clause of the insurance rules applies. P&I insurance is set up as an effective indemnity insurance. According to the "pay to be paid," "pay first," "right of recovery" or other clauses, the P&I Club as insurer need only pay the indemnity to the liable insured, and on condition that the insured proves that it has previously paid the injured third party.[10] The insurance rules include contractual exceptions whereby the P&I Club is obliged to directly pay the injured third party, even if its insured shipowner has not already paid the indemnity. This is precisely the case for civil liability arising out of oil pollution damage under the 1992 Civil Liability Convention. In compliance with the international standard and the P&I insurance contract, the P&I Club is obliged to pay directly to the injured third party *up to the limit of the compensation* ("*CLC claims*"). The arbitrator points out that, above this limit, the pre-payment clause is enforceable against the injured third party who tries to collect the indemnity directly from the P&I Club.

2. Judicial phase. After the arbitral awards in favour of the P&I Club were rendered in March 2013, the P&I Club applied to the competent High Court for the two arbitral awards rendered respectively to be recognised as judgments under section 66 of the English Arbitration Act 1996. With the permission of the court, the award could be enforced in the same way as a court decision, and the competent court could issue a decision in the same terms as the award. The Spanish and French States appeared before the High Court to oppose the P&I Club's claim.

In his High Court judgment of 22 October 2013,[11] the Judge accepted the P&I Club's application. He granted the permission of section 66 of the English Arbitration Act and the awards in favour of the P&I Club were jointly recognised in his judgement.[12] The judicial motivation was as follows.

[10] For example, rule 3.1 of the P&I Insurance Rules, 2023-2024 edition of The London P&I Club.

[11] *The London Steam-Ship Owners' Mutual Insurance Association Ltd v. The Kingdom of Spain and The French State* [2013] EWHC 3188 (Comm). Available at https://rb.gy/su6hx, accessed 20 November 2023.

[12] See M Alba and J L Gabaldón (4) 349-351.

1) Spain and France lost state immunity by appearing in the English proceedings to oppose the enforcement of arbitral awards.
2) The direct action by the injured parties was in substance "contractual,"[13] as the claimants were exercising a right to enforce a contract. It was not an independent right of recovery. When a third party to the insurance contract makes a claim based on the insurance contract and this contains an arbitration clause, and such a claim is contradicted by the insurer, the claimant becomes obliged to refer the dispute to arbitration in accordance with the arbitration clause of the contract whose performance he seeks. Although not the original party to the arbitration clause, the claimant becomes a party by novation or by legal transfer of the rights and obligations of the agreement. He is not a party in all respects, but he is bound by the arbitration clause for the purposes of the law, he concludes.
3) The *lis pendens* rules of Regulation (EC) 44/2001 in favour of the Provincial Court of A Coruña, as the first court to hear the civil liability claim, do not require it to stay the proceedings initiated or to restrain the enforcement of arbitral awards in accordance with section 66 of the English Arbitration Act. The judicial enforcement of an arbitral award is not a judicial proceeding falling within the scope of Regulation (EC) 44/2001. The subject matter "arbitration" is excluded in Art. 1(2)(d) from its scope of application. Therefore, "*the non-Regulation nature of the s.66 proceedings allows the Court to ignore the mandatory stay imposed by the Regulation*" (paragraph 192).
4) The forced enforcement in the United Kingdom of the awards against Spain and France is motivated by a *criterion of utility* for the P&I Club: to hinder the future judgement of the Spanish court which first heard the dispute concerning the civil liability arising from *The Prestige* incident, by considering that the judicial decision on the enforcement of awards is irreconcilable with the future Spanish judicial decision. It would expressly "*assert the status of having issued a Regulation judgment in order to trump the judgment of the Court first seised*" (paragraph 192); "*there is a clear utility in granting judgment and the Regulation regime is not a good or sufficient reason for preventing the Club from seeking to realise the full benefit of their awards*" (paragraph 194).

The Spanish and French States appealed against the High Court judgment of 22 October 2013. However, on 1 April 2015, the Court of Appeal[14] upheld the decision. Moreover, it expressly maintained that the Spanish and French States had lost state immunity by submitting to the English courts to oppose the enforcement of the arbitration awards rendered.

2.3. Reference for a preliminary ruling before the Court of Justice of the European Union: obligation to enforce the Spanish ruling in the United Kingdom

Despite the finality of the Spanish judgments, the P&I Club persisted in default and did not comply with its obligation to pay the EUR 855 million imposed on it by the order of

[13] This is also the majority position on direct action in Spanish case law.

[14] *The London Steamship Owners' Mutual Insurance Association Ltd and (1) The Kingdom of Spain (2) The French State, The "Prestige"* [2015] EWCA Civ 333, available at https://bit.ly/3cTxCvO, accessed 20 November 2023.

the Provincial Court of A Coruña of 1 March 2019. As a result, the Spanish State commenced enforcement in the United Kingdom, the location of the insurer's registered office. The legal basis for the enforcement of a judgment of one European Union State in another is Regulation (EC) 44/2001 (*Brussels I*). Although it had then been repealed,[15] it was applicable as it was the rule in force at the time the legal action was brought (Art. 66.1).

The Spanish State applied to the competent High Court for enforcement of the order of the Provincial Court of A Coruña of 1 March 2019, and the judge issued a search warrant.[16] The P&I Club opposed its enforcement in the UK according to Art. 34(3) Regulation (EC) 44/2001, which states that "*A judgment shall not be recognised: (...) (3) if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought*." The order of the Provincial Court of A Coruña was irreconcilable with the aforementioned judgment of the High Court of 22 October 2013. It was also contrary to Article 34(1) of Regulation (EC) 44/2001: "*A judgment shall not be recognised: (1) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.*" In particular, the enforcement of the order of the Provincial Court of A Coruña in the United Kingdom infringed English law, in particular the rule of *res judicata*.[17]

The Spanish State responded and asked the High Court to submit a reference for a preliminary ruling to the Court of Justice of the European Union so that, as the highest interpreter, it could determine how Regulation (EC) 44/2001 should be interpreted. After deliberation with both parties, the Judge agreed and, on 20 December 2020, referred a question to the Court for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. It is important to note the date on which the question was referred for a preliminary ruling: *20 December 2020*, eleven days before the consummation of Brexit and the withdrawal of the United Kingdom from the European Union. According to Article 86 of the Brexit Withdrawal Agreement of 19 October 2019, the Court of Justice of the European Union would retain jurisdiction on a transitional basis for cases arising *until 1 January 2021*. Accordingly, the question was referred for a preliminary ruling in due time and, Brexit notwithstanding, the United Kingdom is bound by the decision of the Court of Justice of the European Union.

In essence, the Judge was asking the Court of Justice of the European Union whether a judicial decision for the enforcement of an award under section 66 of the English Arbitration Act is a "decision" for the purposes of Article 34(3) of Regulation (EC) 44/2001 and whether it can prevent the enforcement of the decision of another EU State in the State in which enforcement is sought (first and second questions). And whether the public policy of the State in which recognition is sought can be invoked for the recognition and enforcement of a judgment of another EU country, pursuant to Art. 34.1 Regulation (EC) 44/2001, on the grounds of *res judicata* and/or irreconcilability of judgments (third question).

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[15] *Official Journal of the European Communities*, L 12/1 of 16 January 2001.

[16] *The London Steam-Ship Mutual Insurance Association Limited and The Kingdom of Spain, M/T 'Prestige'* [2021] EWHC 1247 (Comm), *introduction*, paragraphs 32 and 33.

[17] It also alleged a breach of the P&I Club's human rights. This argument was subsequently rejected by the Court of Appeal, which held that there had been no breach of those rights in *The London Steam-Ship Mutual Insurance Association Limited and the Kingdom of Spain, M/T 'Prestige'* [2021] EWHC 1247 (Comm), at https://bitly.ws/XJqp, accessed 20 November 2023.

On 5 May 2022, the Advocate General submitted his Opinion on the Request for a preliminary ruling from the High Court of Justice.[18] He proposed considering that a judgement entered in the terms of an award under section 66 of the English Arbitration Act 1996 *can* constitute a relevant "judgement" of the Member State in which recognition is sought for the purposes of Article 34(3) of Regulation (EC) 44/2001, even though it does not fall within the scope of that Regulation under Article 1(2)(d) of Regulation (EC) 44/2001. The fact that the judgment is for the enforcement of an award and that arbitration is excluded from its scope does not preclude it from being considered a judgment for the purposes of Regulation (EC) 44/2001.

The judgment of 20 June 2022 of the Court of Justice of the European Union does not share the view of the Advocate General.[19] It accepts that a judgment given in a Member State of enforcement of an arbitral award *can* be considered a judgment for the purposes of Regulation (EC) 44/2001 because of the broad definition of the concept of "judgment" given in Article 32 of Regulation (EC) 44/2001 (paragraphs 48 and 49). The exclusion of a matter from the scope of Regulation (EC) 44/2001 does not prevent a judgment relating to such a matter from being covered by Art. 34(3) Regulation (EC) 44/2001. Moreover, a judicial decision enforcing an award may preclude the recognition of a decision given in another Member State with which it is irreconcilable (paragraphs 51 to 53).

However, paragraphs 54 to 73 of the judgment of the Court of Justice of the European Union completely disagree with the High Court judgment of 22 October 2013, on the following grounds:

1) A judgment enforcing an award may constitute a judgment within the meaning of Regulation (EC) 44/2001, but "*the position is different where the award in the terms of which that judgment was entered was made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision falling within the scope of that regulation*" (paragraph 54).
2) It warns of infringement of the principles of "*free movement of judgments*," "*predictability as to the courts having jurisdiction*," "*legal certainty for litigants*," "*sound administration of justice*," "*minimisation of the risk of concurrent proceedings*" and "*mutual trust in the administration of justice*" (paragraph 56). It also refers to the "*right to an effective remedy*" recognised in Article 47 of the Charter of Fundamental Rights of the European Union (paragraph 58).
3) The enforcement of an award could not have been the subject of a judicial decision falling within the scope of Regulation (EC) 44/2001 "*without infringing two fundamental rules of that regulation concerning, first, the relative effect of an arbitration clause included in an insurance contract and, secondly,* lis pendens" (paragraph 59). As regards *lis pendens*, the Court of Justice of the European Union states that, when the arbitration proceedings were commenced in the United Kingdom, that is to say on 16 January 2012, "*proceedings were already pending before the Spanish courts between, amongst others, the Spanish State and the London P&I Club"* (paragraph 64). Given that Article 27(1) of Regulation (EC) No 44/2001 refers to "*proceedings [...] between the same parties,*" without

[18] Case C-700/20, available at https://rb.gy/os88d, accessed on 20 November 2023.

[19] Judgment of the Court (Grand Chamber) of 20 June 2022. London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain. Reference for a preliminary ruling from the High Court of Justice (England & Wales), Queen's Bench Division. Case C-700/20, available at https://rb.gy/53yzu, accessed 20 November 2023.

requiring effective participation in the proceedings in question, it must be concluded that the same parties were involved in the proceedings referred to (paragraph 66). Both had the same subject matter and the same cause of action (paragraph 67).

4) As regards the relative effect of an arbitration clause included in an insurance contract, the Court of Justice of the European Union states that jurisdiction clauses agreed between an insurer and an insured party cannot be invoked against a victim of insured damage. Where national law so permits, the injured party may bring "*an action directly against the insurer, in tort, delict or quasi-delict, before the courts for the place where the harmful event occurred or before the courts for the place where the victim is domiciled*" (paragraph 60).[20] The Court of Justice of the European Union adds that, in order not to infringe this right of the injured party, "*a court other than that already seised of that direct action should not declare itself to have jurisdiction on the basis of such an arbitration clause,*" in order to guarantee the objective pursued by Regulation 44/2001: to protect injured parties vis-à-vis the insurer concerned (paragraph 61).
5) Finally, the Court of Justice of the European Union concludes that to allow such a judgment to prevent recognition of a judgment given in another Member State following a direct action for damages brought by the injured party may deprive the injured party of effective compensation for the damage suffered (paragraph 63).

2.4. Refusal of the British courts to enforce the EUR 855 million judgment against the insurer in the United Kingdom. Claim for civil liability of the Spanish and French States for breach of the arbitration agreement.

In our opinion, the submission of the aforementioned reference for a preliminary ruling by the High Court in charge of enforcing the order of the Provincial Court of A Coruña in the United Kingdom constituted an obstacle in the procedural defence strategy of the P&I Club. At precisely at the beginning of the Brexit transition period, the High Court submitted a reference for a preliminary ruling that affected the foundations of the protectionism of London arbitration. This was the understanding of the P&I Club, which lodged an appeal against the submission of the reference for a preliminary ruling.

The judgment of 1 March 2022 of the Court of Appeal accepts the P&I Club's request and obliges the High Court to withdraw the reference for a preliminary ruling.[21] It justifies this by stating that the decision to refer a question to the Court of Justice of the European Union for a preliminary ruling is not a purely discretionary matter, as the judge must first be satisfied that a legal test of its "necessity" has been met. It is a condition precedent which arises prior to exercising discretion as to whether or not to make a reference for a preliminary ruling. Moreover, it can be reviewed by the Court of Appeal. The judge's discretion to make a reference only arises once the test of necessity has been satisfied. It considers that the High Court applied the wrong test in considering the question of necessity.

[20] In this regard, the Judgment of the Court of Justice of the European Union (Eighth Chamber) of 13 July 2017 is cited.

[21] *The London Steamship Owners' Mutual Insurance Association Ltd and The Kingdom of Spain, M/T "Prestige" (No. 5)* [2022] EWCA Civ 238, available at https://rb.gy/o71p4, accessed 20 November 2023.

The Spanish State sought permission to bring an appeal for cassation before the Supreme Court. The purpose was to argue that the Court of Appeal had erred in imposing the withdrawal of the reference for a preliminary ruling. However, on 28 October 2022, the Supreme Court notified that permission for the Spanish State to appeal was refused, because "*the application does not raise an arguable point of law*."[22] It did not enter into the merits of the case, but simply dismissed the appeal.

Once the case was referred back to the High Court, by judgment of 6 October 2023, the Judge (the same Judge who was responsible for registering the enforcement of the Spanish order in the United Kingdom and who, at the time, raised the question of a preliminary ruling before the Court of Justice of the European Union) admitted the P&I Club's appeal against the enforcement of the order of the Provincial Court of A Coruña of 1 March 2019 on the grounds that:

1) He does not consider himself bound by the judgment of the Court of Justice of the European Union in the preliminary ruling, which he himself had referred (paragraph 89). He considers that in paragraphs 54 to 73 he ruled on matters which were not the subject of the question referred for a preliminary ruling (paragraphs 205, 209, 214, 224). He notes that he did not ask about the irreconcilable nature of the English and Spanish decisions. He points out that he rejected the Spanish State's invitation to include the issue of the irreconcilable nature of the two decisions in the question referred for a preliminary ruling (paragraph 36). Moreover, the Judge is supported in this regard by the Advocate General, who pointed out that the issue of the irreconcilability of the English and Spanish decisions was not included in the question referred for a preliminary ruling (paragraph 103).
2) He considers that, in accordance with Article 34(3) of Regulation (EC) 44/2001, the order of the Provincial Court of A Coruña of 1 March 2019 is irreconcilable with the English judgment of 22 October 2013 under section 66 of the English Arbitration Act (paragraph 102).
   The English decision applies the "pay to be paid" rule to the claim of both countries against the insurer. For any claim above the limits of compensation provided for in the 1992 Civil Liability Convention ("non CLC-claims") the "pay to be paid" rule applies. In this case the shipowner and insured company has not made any payment to the injured parties, so there is no direct payment obligation on the insurer either. This contrasts with the Spanish decision which obliged the insurer to pay EUR 855 million. The Judge concludes that these two judgments cannot coexist in the English legal order and are irreconcilable (paragraphs 96 and 97).
3) Enforcement of the Spanish decision would be contrary to English legal principles of *res judicata* created by arbitral awards.

In addition, the High Court judgment contains information and pronouncements on another defence strategy opened by the P&I Club after the order of the Provincial Court of A Coruña of 1 March 2019. In anticipation of enforcement being sought against the club's assets in the UK, Spain or elsewhere, it initiated two arbitration proceedings against Spain and France on the basis of the P&I insurance arbitration clause and the loss of state immunity. In summary, in two separate arbitrations, the P&I Club sought declarations

[22] Information taken from paragraph 36 of the judgment of the High Court of Justice Business and Property Courts of England and Wales Commercial Court (KBD) of 6 October 2023, [2023] EWHC 2473 (Comm), available at https://bitly.ws/X8WK, accessed on 20 November 2023.

that the Spanish and French States had breached their obligations not to pursue non-CLC claims other than by way of London arbitration. The insurer was also seeking interim measures and an order that the Spanish and French States would pay to the P&I Club any sums it might be ordered to pay to these States in any jurisdiction in which the order of the Provincial Court of A Coruña of 1 March 2019 is recognised or enforced, as well as compensation for its costs in defending non-CLC claims in Spain. So far, only the Spanish State (and not the French State) has sought enforcement of the order of the Provincial Court of A Coruña of 1 March 2019 in the United Kingdom.[23]

The arbitrators recognised the P&I Club's right to financial compensation from Spain for seeking to enforce the Spanish judgment in the UK in breach of the P&I insurance contract arbitration clause. It is also entitled to recover from the Spanish or French States any amount that these obtain from the enforcement of the Spanish judgment in any place, as well as reimbursement of the costs and expenses of the proceedings in Spain. The High Court granted the States the right to appeal these decisions pursuant to section 69 of the English Arbitration Act. The civil liability of the Spanish and French states is therefore *sub judice*.

On the other hand, the High Court considered that the arbitrators did not have jurisdiction to issue an anti-suit injunction against the Spanish and French states, which, in the exercise of their discretion, they had not done, deciding that it was appropriate for damages to be awarded instead. The High Court held that the arbitrator had had no power to issue an injunction against Spain, because the court could not have done so by virtue of s. 13(2) of the State Immunity Act, and s. 48(5) of the Arbitration Act did not confer a wider power on the arbitrator. Therefore, indemnity could not be awarded instead.

3. CRITICAL ANALYSIS

3.1. Inadequacy of international oil pollution compensation limits

We believe that the 1992 Civil Liability Convention should update its compensation limits payable by the shipowner and the compulsory civil liability insurer for maritime oil pollution. They are insufficient to cover even a relevant part of the requirement of Art. 235.3 of the United Nations Convention on the Law of the Sea, which sets out the objective of "*assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in [...] development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds*."

The environmental disaster caused by the massive oil spill has been judicially quantified at around EUR 2.5 billion. Most of the injured parties have received no or only partial compensation for damages and recovery of expenses and economic losses. The P&I Club, as the ship's liability insurer, promptly fulfilled its obligation to pay the limits of compensation of the 1992 Civil Liability Convention, in other words, EUR 22.7 million resulting from the calculation of the tonnage of the damaged ship. The IOPC Fund has also fulfilled its obligations under the 1992 Fund Convention and has paid the EUR 147.9 million corresponding to the compensation limit under that Convention. The sum of both amounts is EUR 170 million, which represents only 6.8% of the EUR 2.5 billion of legally

[23] As reported in paragraph 4(8) of the High Court judgment The French State and The London Steamship Owners' Mutual Insurance Association Ltd [2023] EWHC 2474 (Comm), 8-9 August 2023, available at https://bitly.ws/XL8M, accessed 20 November 2023.

established damages. In short, the limits of compensation set in favour of the shipping and insurance industry by the 1992 Civil Liability Convention and in favour of the oil industry by the 1992 Fund Convention are the main obstacle to full compensation of the injured parties.

The latest update to the limits of compensation under the 1992 Civil Liability Convention was adopted by the Legal Committee of the International Maritime Organisation (IMO) on 18 October 2000. It is therefore 23 years since the States within the IMO took the decision to improve the compensation coverage. Not even *The Prestige* incident in 2002 has prompted an update to the compensation limits set for the shipping and insurance industry for maritime oil pollution risks.

The failure to update the limits of compensation in the 1992 Civil Liability Convention is due to the lack of decision by the Member States of the International Maritime Organisation, in particular those on its Legal Committee. As it did for the last update in 2000, according to Art. 15.4 of the 1992 Civil Liability Convention, the Legal Committee must approve any amendments to the limitation amounts. According to Art. 15.7, these amendments are deemed to have been accepted within eighteen months of their notification, unless, before that date, not less than one quarter of the States which were Contracting States at the date of the adoption of the amendment by the Legal Committee have informed the Organisation that they do not accept them. An amendment deemed to have been accepted shall enter into force eighteen months after its acceptance (Art. 15.8).

Article 15.5 of the 1992 Civil Liability Convention states that "*When acting on a proposal to amend the limits, the Legal Committee shall take into account the experience of incidents and in particular the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance*."

With regard to the "*cost of insurance*," the International Maritime Organisation relies on information that can be provided directly by the International Group of P&I Clubs (IGP&I).[24] This is a non-governmental organisation with advisory status to the IMO.[25] IGP&I operates as the industry's representative and lobby group in defence of the interests of its member P&I Clubs. Equasis statistics show that most of the oil and chemical tankers with a gross tonnage of over 500, which are those engaged in international shipping, are insured by one of the thirteen P&I Clubs that are members of the IGP&I. For smaller vessels, the market is shared more evenly with insurers outside the IGP&I,[26] while extra-large vessels are almost always insured by an IGP&I member.[27] Of the thirteen, eight P&I Clubs are based in the UK, two are Norwegian, one American, one Japanese and one Swedish. The London P&I Club, which insured *The Prestige*, is a member of the IGP&I. None is Spanish and, with the exception of The Swedish P&I Club, no insurer is domiciled in the European Union.

Each P&I Club member of the IGP&I is an independent insurer. However, they have common practices in the conditions regarding covered and excluded risks. One only has to compare the rules of each P&I Club to see the similarities in coverage. Moreover,

[24] See https://www.igpandi.org/, accessed 20 November 2023.

[25] See IMO website at https://bit.ly/3HWkGnr, accessed 20 November 2023.

[26] There is an alternative market to the IGP&I P&I clubs, but their insurers do not have as much coverage and solvency capacity.

[27] Equasis, `*The 2021 world merchant fleet. Statistics from Equasis´* (Equasis, 2022), available at https://bitly.ws/XMEP, accessed 20 November 2023.

through this association of insurers, the member P&I Clubs also act jointly in certain respects by virtue of contracts to which they are signatories. Thus, they pool certain risks so that in the event that one of the member clubs is required to pay a large claim, it can claim a solidarity share from the others. In addition, the IGP&I facilitates the taking out of collective reinsurance contracts for all member clubs. The European competition authorities examined the IGP&I[28] and its compliance with European competition law. After several exemptions, they found the association to be compatible with EU law. In addition, the European Union considered it to be an organisation of public interest, as this cooperation enables the member P&I Clubs to offer the insurance market comprehensive cover for large claims.

The question arises as to which insurer would be willing to pay for the incident if they have agreed the foundations of the business with their competitors and the States themselves have not made any move to update the limits of compensation, which are outdated after not having been modified for 23 years. Between the compensation limits of the 1992 Civil Liability Convention according to the tonnage of the damaged ship (22.7 million in the case of *The Prestige*) and the US$1 billion sum insured in the P&I insurance rules for oil tankers,[29] there is ample room to reconcile the interests of insurers and injured third parties. The proactive work of the States within the International Maritime Organisation will be essential in this proposed regulatory change.

3.2. The extension of the maritime civil liability insurance contract arbitration clause to injured third parties

Rule 43 of the P&I Insurance Rules 2023-2024 of The London Steam-Ship Owners' Mutual Insurance Association Limited, trading as The London P&I Club, provides as follows:[30]

> *"These Rules and any contract of insurance entered into by the Association shall be governed by and construed in accordance with English law*."
>
> "*If any difference or dispute shall arise between an Assured (or any other person) and the Association out of or in connection with these Rules, or out of any contract between the Assured and the Association, or as to the rights or obligations of the Association or the Assured thereunder, or in connection therewith, or as to any other matter whatsoever, such difference or dispute shall be referred to arbitration in London in accordance with the Arbitration Act 1996 and any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Rule. The arbitration shall be conducted in accordance with the London Maritime Arbitrators' Association (LMAA)."*

[28] See E Sierra-Noguero, `El grupo internacional de clubes de protección e indemnización´ in M V Petit Lavall and F Martínez Sanz (dirs.) and A Puetz (coord.), *La nueva ordenación del mercado de transporte*, (Marcial Pons 2013) 789-807.

[29] For example, Rule 11.3 of the P&I Insurance Rules 2023-2024 edition of The London P&I Club provides that if the aggregate amount of claims against an insured for oil pollution liability per incident exceeds *U.S. Dollars One Billion*, the association shall not be liable for the payment of any amount for such claims in excess of this limitation of coverage.

[30] Available at https://bitly.ws/XMMf, accessed 20 November 2023.

This is the P&I Club which insured the civil liability of the ship *The Prestige*. At the time, the P&I insurance clause of the London P&I Club had a slightly different wording, but the same purpose: submission to arbitration in London and the selection of English law to settle disputes between the insured and the P&I Club as insurer. The sensitive and contentious issue is the subjective extension of the P&I insurance arbitration clause to the third party bringing a direct action against the P&I Club for financial compensation for the insured shipowner's or charterer's liability.

The Court of Justice of the European Union restrains the subjective extension of the usual P&I insurance contract arbitration clause to the injured third party who directly claims compensation from the P&I Club. According to its consolidated case law in the Assens Havn (2017)[31] and *The Prestige* (2022) cases, for Regulation (EC) 44/2001 it establishes that the injured third party is not bound by the arbitration clause in the marine insurance contract between the insurer and the insured who is liable for the damage. This rule of not being bound by courts other than those resulting from the application of the repealed Regulation (EC) 44/2001 applies both to courts of law (the Assens Havn case) and to arbitration tribunals (*The Prestige* case). The same conclusions must be drawn from the current Regulation (EU) 1215/2012. The CJEU holds that the rules on the distribution of jurisdiction in the Brussels regime take precedence in favour of the injured third party and over the insurance arbitration clause. This leads to the progressive reduction of the scope of arbitration in favour of the jurisdiction criteria of the Brussels I and Brussels I bis Regulations. This is one of the effects of the exclusion of arbitration from the scope of application of these Community Regulations, according to the current Article 1.2.d) of Regulation (EU) 1215/2012, which excludes arbitration from its scope of application, as the 1968 Brussels Convention and Regulation (EC) 44/2001 previously did in the same sense.

According to Art. 11 of Regulation (EU) 1215/2012, an insurer domiciled in the European Union may be sued in its own domicile. Article 12 provides that "*In respect of liability insurance (...), the insurer may in addition be sued in the courts for the place where the harmful event occurred*." Art. 13.1 adds that "*In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.*."

This position of the CJEU contrasts with English law, which includes several precedents that provide a positive answer to the question raised on the third-party effectiveness of the P&I insurance contract arbitration clause. Its courts understand that the third party, by claiming directly against the insurer on the basis of a foreign law that allows him to do so, exercises a contractual right on the basis of the P&I contract. All the terms of the contract apply to him, including the arbitration clause. The English courts consider that when a direct action is brought to enforce the P&I insurance contract, the aggrieved third party is consenting to arbitration.

Furthermore, pursuant to section 66 of the English Arbitration Act 1996, an award made on the basis of arbitration proceedings against a third party to the P&I insurance contract can be enforced in court with the same effects as a judgment in the United Kingdom. This judicial decision constitutes a British shield against the enforcement of foreign judgments on the same dispute against UK-domiciled P&I Clubs, as happened in *The Prestige* case. The UK has a strategic interest in ensuring the effectiveness of arbitration clauses in

[31] Judgment of the Court (Eighth Chamber) of 13 July 2017. *Assens Havn v Navigators Management (UK) Limited*. Case C-368/16, available at https://bitly.ws/XN4J, accessed 20 November 2023.

favour of the London seat. UK marine insurers centralise their claims there, even though their insured shipowners and charterers sail all over the world. Competition for maritime arbitration is fierce, and the UK has a proven track record in ensuring that shipowners and insurers may remain confident that London arbitration clauses in marine and insurance contracts will be respected. The standard maritime contracts approved by the shipowners' association called the Baltic and International Maritime Council (BIMCO) include the Law and Arbitration Clause 2020, which replaces the Dispute Resolution Clause 2017. Versions are available for four designated places of arbitration: London, New York, Singapore and Hong Kong.[32] However, London is the main seat of maritime arbitration, primarily through the London Maritime Arbitrators Association (LMAA).

English case law includes a collection of court cases on the protectionism of the shipping and insurance industry, as well as the effectiveness of arbitration clauses in maritime contracts in favour of London as the seat of arbitration. *The Prestige* case is the latest expression of this arbitration-friendly British judicial policy. There are two precedents that relate to issues dealt with in *The Prestige* case: *The Fanti* and *Padre Island* (no. 2) cases[33] on the P&I insurance contract "pay to be paid" clause; and the West Tankers v. Allianz case[34] on the enforcement of arbitral awards that serve as a British shield against the enforcement of foreign judgments in the UK. The most recent such case is that of *The Prestige*.

As regards Spanish law and whether or not the usual arbitration and applicable law clauses of P&I insurance contracts are enforceable against the injured third party, the Spanish Supreme Court considers them enforceable when the P&I Club interposes a declinatory plea of jurisdiction before the Spanish court hearing the case. The Spanish judicial precedent is *The Seabank* case decided by the Supreme Court on 3 July 2003. Faced with a direct action, it declared its lack of jurisdiction to hear the action against the P&I Club on the basis of an arbitration clause included in the charterparty and the P&I insurance contract. Spanish case law consistently cites *The Seabank* case[35] as a precedent for admitting lack of jurisdiction and submission to arbitration, even after the entry into force of Spanish Law 14/2014 of 24 July on Maritime Navigation (LNM).

The basis of *The Seabank* judgment is the non-application of Spanish law to the direct action brought against the P&I Club by the injured third party. The Supreme Court invoked the contractual obligations of Art. 10.5 CC to refer to the law of the contract (which includes submission to English national law) and exclude the application of Spanish law. The submission to English law and, in the event of a dispute, the application of English law with arbitration in London determines both that the Spanish courts do not have jurisdiction and that Spanish law does not apply. The question of the applicable national law and the submission to arbitration in P&I insurance contracts explains the scant judicial effect of the recognition of the direct action of Art. 465 LNM and the nullity of arbitration clauses in maritime contracts if they have not been individually and separately negotiated in Art. 469 LNM. The Spanish courts simply do not consider

[32] See Bimco website at https://bitly.ws/XiCU, accessed 20 November 2023.

[33] *The Fanti and the Padre Island* [1991] 2 AC 1.

[34] *West Tankers v Allianz* [2012] EWCA Civ 27, available at https://bitly.ws/XiFo, accessed 20 November 2023.

[35] *See* SSTS 6 February 2003 (*Cendoj* 28079110012003102108) and 3 July 2003, *Seabank* case (*La Ley* 2609/2003).

Spanish law applicable to direct action against the P&I Club if the latter disputes the jurisdiction.

On the other hand, Spanish case law affirms the contractual nature of the direct action, so that the third party who wishes to claim payment of compensation under the P&I contract is subject to the applicable law clause. This implies that Spanish law does not govern the direct action against the P&I Club when the contract with its insured party is subject to a foreign law. The direct action, whether it exists and its terms, is subject to such law because it has been agreed by the original parties and this extends to the third party who seeks to benefit from the contract and collect the insurance indemnity.

However, in other cases in which the P&I Club does not dispute jurisdiction and does not plead the arbitration agreement, the Supreme Court has declared its jurisdiction to resolve the matter, as in a judgment of 14 April 2009 and in the judgment of 14 January 2016 in *The Prestige* case. The Supreme Court did not change *The Seabank* precedent, it simply did not consider it applicable, as the P&I Club had not appeared in court and had declined jurisdiction by submission to arbitration. The judge may not assess the arbitration agreement ex officio, but may plead it to anyone interested in its application (Art. 11.1 of Law 60/2003 of 23 December on arbitration and Art. II.3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958).

In view of the case law of the Court of Justice of the European Union, the rule to be followed in Spanish law must be to consider arbitration agreements drawn up by insurers domiciled in the European Union to be unenforceable against third parties. However, this doctrine is not, in principle, applicable to insurers located in third countries.

4. NEVER AGAIN?

The Prestige incident has led to two relevant legal changes in EU and international law.

Firstly, in December 2003, as a consequence of the accident, the International Maritime Organisation adopted new amendments to rule 13G of the International Convention for the Prevention of Pollution from Ships (MARPOL) to accelerate the schedule for the *phase-out of single-hulled oil tankers* such as *The Prestige*. These amendments entered into force on 5 April 2005. A new regulation on the prevention of oil pollution from oil tankers carrying heavy grade oil prohibits their carriage in single-hulled oil tankers of 5,000 tonnes deadweight and above after the date of entry into force of the regulation (5 April 2005), and in single-hulled oil tankers of 600 tonnes deadweight and above but less than 5,000 tonnes, at the latest on the anniversary of the date of delivery of the ship in 2008.[36]

Secondly, in view of the inadequacy of the legal system of limitation of liability consisting of the 1992 Civil Liability Convention and the 1992 Tanker Disaster Fund Convention, some States adopt the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, signed in London on 16 May 2003, and to which Spain is a party.[37] This Supplementary Fund Protocol provides a *third tier of compensation* by establishing an International Oil Pollution Compensation Supplementary Fund (the Supplementary

[36] On the website of the International Maritime Organisation, see http://bitly.ws/J3rUm, accessed 20 November 2023. See also M García Pérez and J Sanz Larruga (coords.), *Seguridad marítima y medio ambiente* (Netbiblo, 2016) 19.

[37] *Boletín Oficial del Estado*, no. 28, 2 February 2005.

Fund). Membership of the Supplementary Fund is optional and open to any State which is a Member of the 1992 Fund. The maximum amount payable for any one incident is 750 million units of account, including the amount payable under the 1992 Civil Liability Convention and the 1992 Fund Convention. The Supplementary Fund is financed in a similar way to the 1992 Fund, by contributions from States Parties based on the import of oil into their territory. The Protocol entered into force on 3 March 2005 and applies to incidents occurring on or after that date. Since its establishment, it has not been used.

Statistics published by the International Oil Pollution Compensation Fund (IOPC Fund) show that since *The Prestige* incident there have been no spills of a similar catastrophic nature. The incidents in which the IOPC Fund has been involved have related to spills of less than 1,000 tonnes of oil, compared to the 63,000 tonnes spilled by *The Prestige*.[38] If another incident similar to *The Prestige* were to occur again, the civil liability insurer would enjoy the same limits of compensation under the 1992 Civil Liability Convention. The same would apply to the IOPC Fund. The difference is the validity of the above-mentioned 2003 Supplementary Fund, which should not yet have been used, as there has not been a maritime disaster in the States Parties.

However, if this Supplementary Fund had been in force at the time of *The Prestige* incident, it would not have allowed for *restitutio in integrum* either, as it was insufficient. The Supplementary Fund covers up to 750 million units of account which, at the current exchange rate for Special Drawing Rights, is some EUR 915 million. Compare this with the damage of more than EUR 2.5 billion in *The Prestige* incident and you will see that the international legal system does NOT offer any way of providing full compensation.

Those affected in States not party to the 2003 Supplementary Fund are worse off. The amount of compensation payable by the IOPC Fund will be higher if a maritime disaster affects the waters of a State signatory to the Supplementary Fund. However, in the event that the State is not a party to the Supplementary Fund, but is a party to the 1992 Fund, for the same maritime disaster in its waters, the compensation payable by the IOPC Fund will be significantly less, as was the case for *The Prestige* incident when the Supplementary Fund was not in force.

The unlimited liability of the master of the ship or of companies owning tankers (many have the ship as their only assets and operate under flags of convenience, so that they are dissolved after the incident) makes it illusory that compensation will be paid, even if there are court rulings to this effect.

[38] Available at https://bitly.ws/XMWQ, accessed 20 November 2023.