The BOW JUBAIL – a case of providing too limited proof for the desired limited liability

By Mr. Richard van 't Zelfde, Caland Advocaten Rotterdam

Prior voyage

Prior to the below described incident of 23 June 2018 in Rotterdam, the 23,196 GT oil/chemical product tanker BOW JUBAIL had sailed from Houston (USA) via Antwerp (Belgium) to Rotterdam (Netherlands). During her voyage the BOW JUBAIL transported eight different persistent oils as referred to in the International Convention on civil liability for oil pollution damage 1992, divided over eighteen cargo tanks (2DS, 2WP, 2WS, 8CP, 9WP, 9WS, 10CP, 10WP, 11CP, 11WP, 11WS, 12C, 12WP, 13CS, 13WS, 13WP, 14WS, 14WP). Cargo tanks 9C and 13CP contained a cargo of blended pyrolysis pitch, a black asphalt-like substance, (believed to be) also covered by the definition of oil within the meaning of the CLC Convention (1992).

The BOW JUBAIL arrived in Antwerp on 06 June 2018 where she discharged cargo from 07 to 12 June 2018 at various terminals. In Rotterdam, where she arrived on 14 June 2018, she discharged cargo from 15 to 17 June 2018 at 2 terminals. After unloading she first sailed to sea and then on 18 June 2018 back to Rotterdam to a repairyard (in the Waalhaven) for repair work on cargo tanks 6C and 6WP.

On 23 June 2018 the BOW JUBAIL proceeded to the Third Petroleum Harbour within the Rotterdam Port Area to load cargo.

The Incident

On 23 June 2018, whilst on her way to her assigned berth for loading, the BOW JUBAIL collided with a jetty and ruptured her hull causing a spill of about 217 tons of Heavy Fuel Oil (HFO) from the vessel into the Third Petroleum Harbour subsequently spreading throughout the Rotterdam Port Area. The spilled HFO had not been carried as cargo, but concerned the vessel's own bunkers.

The HFO spill led to damage in many forms. Other vessels in port became heavily polluted, necessitating cleaning operations and leading to extra port costs and loss of time whilst on hire, loss of hire, etc. The water, port facilities and shores became severely contaminated. Wildlife, in particular hundreds of protected birds, fell victim to the oil pollution among which more than 500 swans.

The total damage caused by the incident is stated to surpass EUR 80,000,000.

Maritime incidents

Not seldom, regrettable maritime incidents like the subject can lead to (severe) damage for many parties and the environment. They are often met by public outrage against the shipping industry and individual shipowners and charterers.

It must be realised however that such incidents – and their consequences – are desired by no-one, not in the least by Owners, charterers and involved underwriters. In public debates following a maritime incident, there is often too little eye for all that the shipping industry does to try to avoid maritime incidents and their consequences.

The Bunker Convention 2001 and the CLC 1992

In the Netherlands, civil law liability for oil pollution by vessels can be governed by two treaties to which the Netherlands are a party, viz.:

A. the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (further: "the Bunker Convention 2001"), and
B. the International Convention on civil liability for oil pollution damage 1992 (further: the "CLC 1992").

The Bunker Convention 2001 does not have an own provision as to limitation of liability but refers (in art. 6) to the Convention on Limitation of Liability for Maritime Claims 1976 (further: the "LLMC 1976") as amended by its 1996 Protocol.[1]

The BOW JUBAIL's limited liability under the LLMC 1976 and its 1996 Protocol amounts to SDR 14,312,384.

The CLC 1992 does have own provisions as to limitation of liability (art. 5 CLC 1992) under which the Owners' limited liability amounts to the higher figure of SDR 15,991,676.

The 1992 Fund Convention and the Supplementary Fund Protocol 2003

It must be noted however, that the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (further: "1992 Fund Convention"), which is supplementary to the CLC 1992, establishes a regime for compensating victims where compensation under the CLC 1992 is not available or inadequate, namely the International Oil Pollution Compensation Fund 1992 (further: the "1992 Fund"). This 1992 Fund pays out compensation when:

- the damage exceeds the limit of the shipowner's liability under the CLC 1992, or
- the shipowner is exempt from liability under the CLC 1992, or
- the shipowner is financially incapable of meeting his obligations in full under the CLC 1992 and the insurance is insufficient to pay valid compensation claims.

The maximum compensation payable by the 1992 Fund is SDR 203,000,000 for incidents occurring on or after 1 November 2003, irrespective of the size of the ship. For incidents occurring before that date, the maximum amount payable is SDR 135,000,000. These maximum amounts include the sums actually paid under the CLC 1992.

In May 2003, a Protocol to the 1992 Fund Convention (Supplementary Fund Protocol) was adopted. This provides a further third tier of compensation by establishing an International Oil Pollution Compensation Supplementary Fund (further: "Supplementary Fund"). The maximum amount payable for any one incident is SDR 750,000,000. The Supplementary Fund Protocol entered into force on 03 March 2005 and applies to incidents occurring on or after that date.

[1] Art. 6 LLMC 1976: Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

Small Tanker Oil Pollution Indemnification Agreement (STOPIA)

The website of the *International Oil Pollution Convention Funds* mentions that the BOW JUBAIL Owners were insured with Gard P&I (Bermuda) Ltd. and were a party to the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006 (as amended in 2017).

The STOPIA is a voluntary agreement between owners of small tankers (i.e. 29 548 GT or less) and their insurers, under which the maximum amount of compensation payable by owners of small tankers is increased to SDR 20,000,000. It applies to all small tankers entered in a P&I Club that is a member of the International Group, and reinsured through the pooling arrangements of the Group. As stated above, the BOW JUBAIL had a gross tonnage of 23,196 GT.

Therefore, where:

- the Bunker Convention 2001 applies to the BOW JUBAIL case, under the LLMC 1976 and its 1996 Protocol, the Owner's limited liability amounts to SDR 14,312,384;
- the CLC 1992 applies to the BOW JUBAIL case, under the CLC 1992 the Owners' limited liability in principle amounts to SDR 15,991,676, but claimants can rely on a pay-out from the 1992 Fund, whilst the Owners are held to reimburse the 1992 Fund up to a limit of SDR 20,000,000.

Limitation application to the Rotterdam Court

On 06 July 2018 the BOW JUBAIL Owners applied to the Rotterdam Court for limitation of liability as per the Bunker Convention 2001 in conjunction with the LLMC 1976 and its 1996 Protocol.

They requested to be allowed to secure the limitation fund in the amount of SDR 14.312,384 through a Letter of Undertaking issued by guarantor Gard P&I (Bermuda) Ltd.

Decision of the Rotterdam Court of 09 November 2018

In its decision of 09 November 2018 (ECLI:NL:RBROT:2018:9174) (judge Mrs. P.A.M. van Schouwenburg-Laan) the Rotterdam Court considered *inter alia* that:

- the subject case in principle fell withing the scope of the Bunker Convention 2001, as the matter concerned '*loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship*' as meant in art. 1 (9) Bunker Convention 2001;
- for cases to which the CLC 1992 apply, limitation cannot be limited as per the Bunker Convention 2001 since art. 4 Bunker Convention 2001 provides that it '*shall not apply to pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention'*;
- for it to apply, the CLC 1992 requires that '*loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship*' is concerned on the territory of a Contracting State;
- other than the Bunker Convention 2001, the CLC 1992 does not concern only (pollution by) bunker oil but has a wider definition of 'oil' as: '*any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship*';

- the CLC 1992 defines 'ships' as '*any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.*'
- it was not in dispute that the BOW JUBAIL was a seagoing vessel that could carry '*oil*' as meant in the CLC 1992 and also other cargoes. The CLC 1992 applies to the BOW JUBAIL on moments that '*it is actually carrying oil in bulk as cargo'* and '*during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.*'

Letter dated 18 July 2018

In their application to the Rotterdam court the BOW JUBAIL Owners had not mentioned the possible applicability of the CLC 1992.

On 18 July 2018 the Rotterdam Court sent a letter to the BOW JUBAIL interests in which the court asked *inter alia* the following question:

> *You qualify the incident as an incident within the meaning of art. 1 paragraph 8 Bunker Convention 2001.*
>
> *Does the incident, in your view, also qualify as an incident as meant in art. 1 paragraph 8 CLC 1992?*
>
> *If not, why not? If so, should, in view of art. 4 paragraph 1 Bunker Convention 2001, the CLC 1992 then not prevail and should the Bunker Convention 2001 then not apply?*

Following this letter in respect of the possible applicability of the CLC 1992, the Owners took the position that the BOW JUBAIL did not qualify as a '*ship*' within the definition of the CLC 1992 stating that at the time of the HFO spill, the vessel did not have oil cargo or residues of such carriage of oil in bulk aboard.

'Ship' as meant in art. 1 (1) CLC 1992

Needless to say, the case subsequently evolved about the question whether the Owners (who had the burden of proof) had sufficiently proven that the BOW JUBAIL did not have oil cargo or residues of such carriage of oil in bulk aboard. The Owners tried to prove their standpoint, *inter alia* by submitting survey reports from maritime surveyors they had instructed and further documents.

In its decision, the Rotterdam court considered *inter alia* that:

- the submitted documents '*did not provide a sufficiently complete and clear picture in order to be able to establish that the BOW JUBAIL did not have residues of carriage of oil in bulk on board at the time of the incident*';
- in an application procedure such as the subject one, in which an application must lead to a decision with effect against any potential interested party '*the applicant must provide sufficient factual information to enable the court to decide on the application and the legal framework to be applied to it. Furthermore, an applicant may generally be expected to substantiate his request in such a timely manner, clearly and sufficiently that the defendants, interested parties and the court can conduct a sound and well-prepared debate on it at the hearing and the court can then decide on it*';

- the Owners '*had already been given an explicit opportunity to supplement its position by the letter from the court of 18 July 2018. The court will not support one (or more) adjournments until the Owners have conclusively demonstrated that the CLC Convention (1992) does not apply. After all, this would just as much interfere with the system in which decisions are taken quickly in the initial phase and further debate is conducted in appeal or appeal*';
- *'it is also important that no time limit is attached to the filing of an application for limitation of liability. It happens that such a request is filed only years after the damage-causing incident. (…) As the applicant, the Owners could therefore have taken all the time it needed to prepare and substantiate its request with documents. Moreover, even if it only realized after the submission of its request that the CLC Convention (1992) would be examined, it could have asked for the hearing to be adjourned or could have withdrawn its request to resubmit it after supplementation. The Owners have not done so either.*';
- *'For these reasons, the Rotterdam court left the remaining incompleteness of the documentation and the lack of clarity about the presence or absence of residues of oil within the meaning of the CLC 1992 for the account of the BOW JUBAIL Owners and the court did not grant the Owners additional opportunity to supplement its position';*
- *In this state of affairs, the court must assume that the BOW JUBAIL qualifies as a ship within the meaning of the CLC 1992, so that the Owners cannot invoke the Bunker Convention 2001.*

The Owners' application to limit liability as per the Bunker Convention 2001 in conjunction with the LLMC 1976 and its 1996 Protocol was denied and an order for costs was given against the Owners.

Decision Court of Appeal The Hague of 27 October 2020

By application dated 07 December 2018 the BOW JUBAIL Owners appealed to the Court of Appeal (further: the "CoA") in The Hague.

In its decision on appeal of 27 October 2020 (ECLI:NL:GHDHA:2020:2055) (Magistrates Mr. J.M. van der Klooster, Mrs. D.A. Schreuder and Mr. F.G.M. Smeele) the CoA upheld the decision of the Rotterdam Court. Several of the CoA's considerations are noteworthy and below I will quote some of them:

> Consideration 6.1.2.:
>
> *The context to be taken into account in this case therefore includes that both the CLC 1992 and the Bunker Convention 2001 may apply to pollution caused by bunker oil spills. In other words, it is not the nature of the pollutant – bunker oil – that determines which of these Conventions is applicable in the present case. This applicability depends on the answer to the question whether the ship from which the polluting bunker oil has escaped is a ship within the meaning of the CLC 1992. Thus, the applicable limited liability – that of the CLC 1992, or that of the LLMC - also depends on whether the ship in question is a CLC 1992 ship.*
>
> Consideration 6.2.:
>
> *Because the oil / chemical tanker BOW JUBAIL prior to the incident carried persistent oils as referred to in art. 1 paragraph 5 of the CLC 1992 as bulk cargo, it is a ship within the meaning of (the second part of) art. 1 (1) of the CLC 1992, except in the case of the above-mentioned exception, i.e. in the absence of residues of those oils transported.*

In the context of the present limitation request, it is up to the Owners to state facts and to demonstrate on the basis of which it can be established that (the Bunker Convention 2001 applies because) that exception occurs. If the Owners succeed, then (after all) the CLC 1992 does not apply, but the Bunker Convention 2001.

Consideration 6.8.:

For a successful invocation of this exception provision, (…)in a case such as the present one, it is necessary, but also sufficient, that it is substantially stated, and in the event of a substantiated denial, it is proven, or at least sufficiently made plausible, that at the time of the incident (i) either no residues were present at all, or (ii) at most a negligible amount. The Owners have not succeeded in this. The following serves as an explanation.

The CoA then comes with the following relevant considerations on the onus of proof.

Consideration 7.1.2.:

First of all, it is established that there is no internationally accepted standard procedure for determining when a ship – which can serve as both an oil tanker under the CLC 1992 and as a non-CLC 1992 chemical tanker under the Bunker Convention – ceases to be a CLC 1992 ship.

Consideration 7.1.3.:

However, the starting point may be that in principle it is not sufficient for the ship owner or ship's crew to declare that the ship is "clean"; this should preferably (i) be explained / confirmed by an independent and capable expert, or (ii) it must be possible to establish it in any case on the basis of a contradictory survey, due to party surveyors on both sides having had the opportunity to go on board the ship as soon as possible after the incident in order to be able to observe whether relevant cargo residue is still present there or not. (…).

Consideration 7.1.4.:

That the burden of proof with regard to the ship and her tanks being "clean" can be (particularly) hard, has been recognized in the context of the formation of the treaty. See IMO document LEG / CONF.6 / C.2 / SR.18 of 14 August 1986, containing a report of a meeting of 18 May 1984. This shows that - prior to the vote on the exception - a participant drew attention to the fact that 'it appeared [...] to be extremely difficult to provide proof that there was no residue of oil on board [...].' It also follows from the IOPC documentation. Compare the following quote from the conclusion in IOPC document 92FUND / WGR.27 of 31 August 2000: "He (…) noted, however, that concerns had persisted regarding the applicability of the definition to dedicated crude oil tankers and that the majority of the delegations which had intervened in the discussion were of the view that the Convention should always apply to such tankers. However, the Chairman noted that in view of the fact that it would be rare that such tankers would have no persistent oil residues on board, the assumption should always be that such residues were present and that it would be open to the shipowner to prove otherwise."

It is no different for a tanker such as the BOW JUBAIL, with which persistent oils were transported immediately before (and also after) the incident.

Consideration 7.1.5.:

The interests of the opponent party of the person invoking the exception provision also make that, as a starting point, high requirements may be set for the substantiation / provision of evidence. In the present case, this applies all the more since a successful reliance on the exemption provision can lead to the liability for the alleged pollution damage of more than EUR 80,000,000, to the detriment of the many claimants, being limited to more than EUR 17,000,000.

The above considerations leads the CoA to consider as follows.

Consideration 7.1.6.:

(…).

More concretely, this means that – with a view to the legal consequence intended by the Owners: limitation via the Bunker Convention 2001 – it is up to the Owners to state (motivated) and in where this is denied (substantiated) to prove that the ship was 'clean', i.e. that she had no (relevant quantities) of residues on board, in which case the Bunker Convention is applicable.

It is against the above considerations that the CoA considers what the BOW JUBAIL Owners have done (appointing own surveyors, submitting survey reports from their own surveyors, submitting statements from own crew, refusing the request by a claimant to have its surveyor board the vessel to perform a survey) with what they could / should have done:

Consideration 7.2.:

Against the background of the starting point stated above in 7.1.3, it would have been obvious that the Owners would have applied to the court immediately following the incident with the request for the appointment of a (maritime) surveyor for an independent investigation, or would at least have organized a contradictory survey.

However, they only brought their own surveyor on board (…) and ignored a repeated request by another surveyor acting on behalf of a claimant to be allowed to co-view.

Consideration 8:

Following the foregoing, the conclusion must be that the substantiation / evidence submitted by the Owners in the context of its invocation of the exception clause is essentially no more than its own, not always consistent, statement and the reports from her own surveyor, who relied on the information provided by the Owners.

The certificates submitted by the Owners do not sufficiently demonstrate the stated 'clean condition' of the ship at the time of and shortly after the incident. There is no confirmation of that 'clean state' from an independent and capable source. Insofar as this confirmation could have been available at all, it comes for the account of the Owners that it is not there, because they have prevented an independent / joint survey of the tanks, or at least have not organized this, while immediately following the incident there was every reason and opportunity to do so.

It is now no longer possible to objectively determine whether all tanks of the ship were "clean" (…) to establish the absence of residues.

(…) it is not enough to state that there are no residues on board the ship. For the practice, it would be the wrong signal if this was accepted anyway, also in those cases where the ship owner could have fulfilled the obligation that rests on him to provide information / burden of proof in an objective manner.

The CoA upholds the decision of the Rotterdam Court and also rejects the Owners application to limit liability via the Bunker Convention 2001 under the LLMC 1976 and its 1996 Protocol.

Concluding remarks

At the time of writing this article (01 November 2020) the BOW JUBAIL Owners can still appeal against the decision of the CoA to the Dutch Supreme Court (further: the "DSC"). Normally the time limit within which to lodge an appeal to the DSC is 3 months, but in limitation of liability proceedings the time limit is much shorter: 4 weeks (art. 642y paragraph 2 Dutch Civil Code of Procedure).

The BOW JUBAIL illustrates that a party that wishes to limit liability in the Netherlands in an oil spill case as the subject one, must be able to objectively prove that at the time of the oil spill, the ship does not fall within the definition of ship of art. 1 (1) CLC 1992.

Therefore the Owners need to be able to objectively prove that at the time of the incident (a) there were no residues present at all, or (b) at most a negligible amount was present.

It would benefit Owners to have this established either by a maritime court surveyor appointed by the Rotterdam Court or through mutual surveys performed on board by own appointed surveyors with surveyors instructed by claimants.

In this regard, the CoA comes with the following recommendation:

Recommendation

The following is added. Above it has been found that there is no generally accepted standard procedure for determining when a ship, which can serve both as an oil tanker under the CLC Convention (1992) and as a non-CLC Convention (1992) chemical tanker under the Bunker Convention 2001, ceases to be a CLC Convention (1992) ship.

It appears desirable that the parties involved in the Oil Fund consider the design of such a standard procedure, which can then be followed with a view to invoking the exception provision of art. 1.1 CLC Convention (1992). The ship owners and their P&I Clubs as well as the IOPC funds and those who contribute to them have an interest in this.