

## 'On this watery planet, seafarers deserve more careful treatment from lawmakers'

**A top legal specialist is urging a new international approach to break the logjam of increased shipowner liabilities, writes James Brewer**

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SHIPOWNERS may be getting close to breaking point under a tremendous burden of responsibility. They are more than ever the butt of the blame game.

As a whole series of civil liability issues faces them on top of potentially huge sanctions for violating laws — intentionally or otherwise — protection and indemnity insurers are being put to the test.

Chao Wu, legal director at Thomas Miller P&I, puts it bluntly. "How much can shipowners endure if legislations penalise them both civilly and criminally and at national, regional and international levels?" she asks.

Dr Wu identifies at least 20 main liability risks hanging over shipowners, some of them still to come to maturity in the next four years.

In cost terms, many of them are alarming.

The search among nations and among industry bodies for a fair solution to all this must go on, Dr Wu says. Risks beyond a reasonable level of the liable party should be borne by society as a whole, as society profits from the carriage of goods by sea, and on a national or regional basis, through taxation.

Dr Wu is as close as anyone to the dilemmas facing shipowners, operators and charterers, as a key official in the management of the world's largest shipowner liability insurer, UK P&I Club.

She declares: "The shipping industry is indispensable to society. It has become even more so with the globalisation of the world economies.

"My message is therefore that we professionals on the insurance side should support and strive to contribute to the healthy growth of a diligent and responsible shipping industry, and we hope lawmakers are considerate to this industry in regulating it coherently, reasonably and effectively, so it can attract good people, and continue to grow healthily."

Dr Wu says that now is the time to look at the problem from the global viewpoint, and indeed from a perspective beyond the maritime prism.

Society as a whole, which naturally includes shipping interests, should appreciate the whole picture of worldwide shipping liability legislation. That is, at international level (for example Civil Liability Conventions, the Athens Convention, the Hazardous and Noxious Substances Convention, and the Bunker Convention); regional level (European directives on environmental liability and on criminal sanctions for pollution offences etc); and national level (where Dr Wu cites as recent examples new French pollution laws, a Spanish decree on ports of refuge, the Argentina contingency plan requirements, the Panama Canal Shipboard Oil Pollution Emergency Plan requirements, the Turkish environmental code on pollution and fines, and US oil pollution laws including the freedom of individual US states to lay down even more wide-ranging liability).

Dr Wu, who spent seven years in the US until August 2003 managing Thomas Miller's environmental section, is a leading expert on US pollution laws, which she feels imposes an excessive burden on shipowners, managers, masters and crew members.

For instance, the right of limitation under the US Oil Pollution Act — which for starters, landed shipowners with an estimated 15% increase in costs to comply with its requirements — is subject to such strict conditions that it is very easy to incur unlimited liability.

Shipowners can lose the right to limitation under the US Act if any of a series of individuals including agents and people with whom the shipowners have a contractual relationship, is found to have transgressed.

This is serious enough — but Dr Wu is keen that this worry be addressed as part of the wider look at the problem.

"It is important to know the detail," she says, "but not to lose sight of the whole picture. Now is the time for the legislators to be more gentle, more co-ordinated and therefore more effective."

She is especially concerned as to how the strictures translate to everyday practice at sea. From the point of view of the master, or crew member, the law is becoming more and more complex, with more and more documents to follow. These requirements may be contradicting each other.

"If the professionals in law have to struggle so hard to understand the law and incorporate it into their decisions, how can you expect the people on the ship to absorb so much that is required in a vessel response or contingency, ISPS and all the other plans?" she asks.

"Is that going to be productive, or does it create a risk that attention to traditional shipboard duties is lessened by the time taken to deal with paper and regulation? It is important to get the balance right."

In addition to her duties of giving general legal advice at Thomas Miller, assisting on legal aspects of P&I club documentation, and legal aspects of cover for the contractual arrangements of members, Dr Wu is responsible for the Environmental Encyclopaedia, a Thomas Miller guide which is aimed at helping club members keep up with a very complicated legal situation. As the panoply of rules and laws becomes more voluminous and more layered, "the challenge is to understand what is going on".

To grasp the scale of liability provisions choking the lawbooks, she recommends an examination of the past five years — and then the five years ahead.

In a relatively short timespan, limits for pollution damage have risen in the civil liability convention, while exposure of the shipowner or operator to criminal liability has worsened dramatically.

In some regimes, criminal liability can be established on a strict basis, by the mere fact of spilling oil. The maximum penalty can reach as high as twice the civil damages, as in the US, or two to three times the value of the cargo carried for accidental spills, as in France. Criminal liability has multiplied in type: there is now vicarious and criminal liability for the conduct of master or crew, who may face prison terms for violations of Marpol and for accidental spills. Shipping professionals can become criminals merely because of the business they are engaged in.

"It is ironical to see what can be offered to people of high diligence, expertise and professionalism, people that this industry so much needs," muses Dr Wu. "Is there not a conflict between laws that create ever increasing levels of complexity in what is required of shipboard personnel, and laws that discourage good people from taking up a shipboard career?!"

The industry faces defence costs that can be "astronomical", and class action in pollution and asbestosis claims has encouraged lawsuits.

The trend towards different strata of legislation has had a psychological and economical impact on the shipping industry — the typical example being the increasing involvement of the European Union in legislating and regulating the industry.

Under the European environmental liability directive — the first EU law based on the 'polluter pays' principle — the definition of environmental damage is very wide, with the potential to create additional liabilities for shipowners. Approved in March 2004, member states have three years in which to implement this in their national laws. The latest draft European directive on ship-source pollution and on the introduction of sanctions for pollution offences, which Dr Wu says is in contravention of the Marpol spirit, has been agreed to criminalise accidental pollution.

In the US, natural resource damage claims have become increasingly expensive, and an assessment is conducted in almost all US spills. Assessment methods make possible "abstract, exaggerated and huge figures" as admissible damages, says Dr Wu. This has amounted to a "horizontal increase in the overall liability of shipowners for pollution damage" (as opposed to a vertical increase in the limits of liability).

In the US, spill clean-up costs have increased by more than 10 times since the Exxon Valdez years.

Under new Spanish laws, the deposit of a bank guarantee, which can be very large, is required for a ship in trouble to gain access to a port of refuge. Rules on everything from ballast water management plans to terrorism prevention mean dearer planning costs, and often uncertain liability exposure. An increased duty of care leads to increased negligence exposure.

The International Ship & Port Facility Security Code brings more costs for compliance, and tougher port state control measures threaten potential detention and other losses.

In 2006, the Hazardous and Noxious Substances Convention is expected to enter into force, which will mean

strict liability of up to Special Drawing Rights100m (\$146m) for shipowners, and clubs are expected to provide certificates to cover the liability.

The Bunkers Convention with strict liability and higher limits will affect all types of vessel, and the issuance of the convention certificate will create a huge administrative burden on the clubs.

Another, and in the passengership sector very serious, increase in limits will stem from the Athens Convention.

Under the Civil Liability Convention (CLC), clubs have proposed a voluntary increase of small tanker owners' limits of liability to balance the financial burden laid on the oil companies by the supplementary fund protocol. The proposed increase of the minimum limit, to SDR20m from SDR 4.51m for tankers up to 30,000 gt, in states that are parties to the supplementary fund protocol, amounts to a further financial burden on the shipowners.

Nor is this all: in response to the Erikaand Prestige spills, the right of limitation in the CLC system is under discussion at a working group of the International Oil Pollution Compensation Fund, says Dr Wu. If the right of limitation were weakened, one could expect more litigation, and more costs and liabilities.

In general terms, the tendency of courts to focus on the role of management in shore operations in casualties may erode the shipowner's right of limitation.

The EU, and some individual countries including Italy and Brazil, have challenged the non-admissibility (where no quantifiable economic losses were incurred by any party) of pure environmental damage under the CLC (and potentially under the Hazardous and Noxious Substances and Bunker Conventions). Dr Wu says the issue has been addressed by the IOPC Fund working group through revised guidelines on claims handling.

Further discussion on the admissibility of this type of damage is inevitable, Dr Wu points out. "Greater admissibility amounts to increased horizontal liability."

The 1996 Protocol to the 1976 Limitation of Liability for Maritime Claims has recently entered into force, with an increased liability limit.

Amid all this, shipowners should not lose hope and should have their voice heard through joint efforts of the industry organisations and by direct talks with legislators. Dr Wu calls for a better understanding on the part of legislators of the importance of the shipping industry to all of society.

"We live on a watery planet, so global trade, with all the jobs it brings in its wake, depends hugely upon maritime transport. Those who work, ashore and afloat, in this industry, deserve more careful treatment from lawmakers."

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