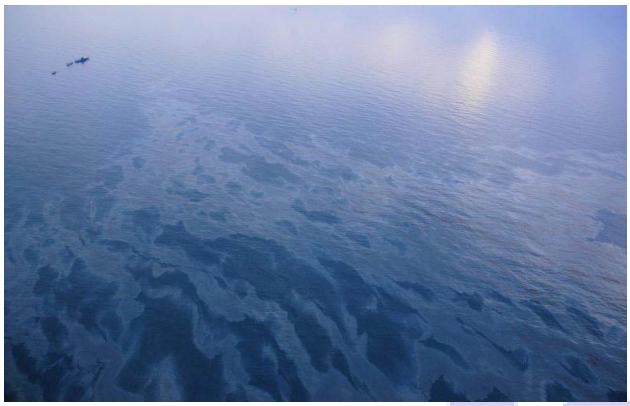
KISH P&I CLUB

KISH P & I LOSS PREVENTION CIRCULAR KPI-LP-80-2012
(Maritime Pollution Claims Management Guide)

"If anyone intentionally spoils the water of another…. Let him not only pay damages, but purify the stream or cistern which contains the water…" ***Plato***



►Introduction:
The Environment is a resource common to all. It is a primary task of both the polluter and the national authorities to avoid, limit and to reinstate any damaged environment as deemed necessary. In addition, the coastal states shall also recognise that their citizens should not have to pay for the costs of dealing with marine pollution incidents, and that the persons or bodies responsible for causing the incident should meet all the costs reasonably incurred, in accordance with the "polluter pays" principle.
Most maritime states have a policy of using their best endeavours to recover all of the costs that they reasonably incur in dealing with an actual, or threatened, pollution incident.
Dealing with pollution of the marine environment originating from whatever source affecting sea areas and coastlines will generally be a protracted and expensive business. Ideally those costs should be directly borne by the source of the pollution. As a consequence, it is strongly recommended here that the national authorities in charge of implementing the pollution response plans should engage immediately with the source of the pollution, and its advisors, to establish what part of the response they can and are willing to deal with directly. Agreements achieved in those circumstances may greatly alleviate the burden on the response authorities. Irrespective of this, the costs for preventive measures and clean-up operations initially fall on the authorities incurring them.

These guidelines seek to assist with the processes necessary to achieve a successful claim or cost recovery. There are many international and national legal instruments in place providing a framework for the process of cost recovery, however, the prime purpose of these guidelines is to seek to expand and advise on the practical usage of this legislation. It should be borne in mind that the international regimes currently in place do not seek to over-compensate damaged parties following a pollution incident at sea, however, they do seek to compensate those that have outlaid actual money in the response to the incident and those who suffer loss of earnings as a result of the incident (spill).
These Guidelines are for the use of national response organisations and their claims handlers, though some principles may be useful for other claimants.

►1- General description & Principles of claims management:
Dealing with marine pollution incidents can be a protracted and expensive business. Initially the costs of such operations fall on those undertaking them. Under most existing legislations, those incurring expenses as part of the response operation may later seek to recover them from those responsible for paying compensation.

A) Polluter Pays Principle:
The "polluter pays principle" is a dominating principle as regards marine pollution incidents in international environmental law. It is also a key principle of the European Union's environment policy in that the cost of preventing pollution or of minimising environmental damage due to pollution should be borne by those responsible for the pollution. Under this principle it is not the responsibility of a government to meet the costs involved in either prevention of environmental damage, or in carrying out remedial action because the effect of this would be to shift the financial burden of the pollution incident from the polluter to the taxpayer.

B) Coordination & record-keeping:
It is essential, from the outset of an incident, that a Financial or Claims Co-ordinator and a Record Keeper are designated and that all participants keep personal records of how, when and why, response measures are taken. These records are needed to support claims for cost recovery and to show that the actions taken were proportionate and reasonable for the threat from pollution and the risks to safety.
It is vitally important that financial systems are in place as part of contingency plans, in advance of an incident. There is pressure, frequently severe, to deal with new issues and problems and to relegate record keeping to a lesser priority. However, the importance of records cannot be over emphasised. It is simply not realistic to rely on memory to reconstruct events in a fast moving and possibly lengthy incident. Responders must therefore arrange to keep adequate records. The compilation of a photographic and video library, with all forms of media dated and time stamped would be of great assistance as a proof of activities. Record keeping is essential for good cost recovery. Documents compiled during incident response should clearly show information received, decisions taken, orders given, action taken and daily personal activity logs as well as all direct

financial expenditure. A photographic library and catalogue of all correspondence would provide an overview of essentials.

C) Appointment of salvors:
The first choice of many states would be for the polluter to directly appoint salvors and/or counter pollution resources, thereby not inflicting any costs on that state for those activities. However, if a ship-owner fails to comply with the legislation or an order given by the authority and therefore a state feels it necessary to deploy its own resources, it should bear in mind that government intervention may have a financial impact on the activities of every company involved in the response operation.

D) Cost recovery:
The aim of a state should be to recover the total costs expended in the response to mitigate damage caused by the incident (as far as these costs in full live up to requirements of the state national law and legislation). The claim should represent the real costs incurred.
It is believed that a state's incident response contingency plan is not complete unless it contains a clear policy line on how that state will seek to recover its costs. It is strongly recommended that claims management is conducted in accordance with clearly pre-defined procedures, reflected upon by the relevant stakeholders and familiarised by training. As far as possible lessons learned from each individual case need to be recorded and shared with other states.

E) Involvement of stakeholders:
Consulting with stakeholders (ship-owners, P&I Clubs, international institutions and Funds, etc) in the development of a framework policy on claims management, during non-incident related operations may increase the support of these stakeholders during a marine pollution incident. An example of this type of consultation could be to share with the stakeholders the method of calculation for hire rates of state resources.

►2-International legal framework & compensation funds:
Ship-owners are generally entitled to limit their liability in respect of claims arising from pollution damage caused by their ships11. The maximum liability of a ship-owner is calculated based on the gross tonnage of the ship involved in the incident, not on the amount of damage caused by the incident.
A number of Conventions, but not all, combine the legal concepts of "strict liability" and "limited liability". The first means that ship-owners are required to pay compensation, without the need for the claimant to prove recklessness, negligence or intention on the part of the ship-owner. The second concept means that the liability is limited to a determined level. Related provisions provide for a mandatory insurance of the ship-owner to cover his liabilities and for "direct action" against the ship-owner's insurer.
Depending on the convention, the liability limits can differ for claims arising from loss of life and personal injuries and for property claims. However, these Guidelines focus on material damage. Liability limits in International Maritime Organization (IMO) conventions are expressed in Special Drawing Rights (SDR). The SDR is an artificial monetary unit. The value of the SDR is calculated by the International Monetary Fund (IMF) on the basis of a weighted basket of four currencies: US dollar, euro, Japanese yen, and UK pound. The four currencies and their relative weightings are revised every five years.

►3-Overview of the International and European legal regimes:
The following is a brief description of the international legal instruments addressing claims generated by marine pollution incidents. However, the purpose is not to provide definitive legal advice since those instruments are generally complicated and not reflected in detail here. Claimants should seek their own legal advice.

A) Main European and International legal instruments are:
-Where persistent oil, carried by a tanker causes, or threatens to cause, pollution damage:

- ✓ 1992 Civil Liability Convention as amended.
- ✓ 1992 Fund Convention.
- ✓ 2003 Supplementary Fund Protocol.

-Where bunker oil, carried by any other type of ship causes, or threatens to cause, pollution damage:

- ✓ 2001 Bunker Oil Convention.

-Where a hazardous and/or noxious substance other than persistent oil, or bunker oil carried by a ship, causes, or threatens to cause, pollution damage:

- ✓ 1996 HNS Convention and its Protocol (not yet in force).

-Where the activities of an operator cause environmental damage (or the risk thereof) within some specific zones, not being covered by the three regimes outlined above:

- ✓ National legislation transposing the European Directive 2004/35/EC (Environmental Liability).

-Directive on the insurance of ship-owners for maritime claims:

- ✓ Directive 2009/20/EC12.

-Where a discharge of oil by an offshore facility causes pollution damage:

- ✓ No global regime of liability and compensation but the Offshore Pollution Liability Association Limited (OPOL) has been established to administer a voluntary strict liability compensation scheme.

B) Various Conventions that may be considered in parallel with previous legal instruments are:

- ✓ The Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971, giving priority to the application of some nuclear conventions in concurrence with maritime conventions.
- ✓ The Convention on Limitation of Liability for Maritime Claims 1976, including the 1996 Protocol, provides limitation to the ship-owners' liability.

C) The 1989 International Convention on Salvage and the 2007 Wreck Removal Convention (not yet in force) also

contain some provisions relevant for the management of marine pollution claims.

►4-Limitation of Liability for Maritime Claims (LLMC):

- ✓ The Convention on Limitation of Liability for Maritime Claims 1976 (1976 LLMC), including the 1996 Protocol, is another IMO instrument. The 1976 LLMC runs parallel with some of the international conventions mentioned above.
- ✓ Both "ship-owners" (owner, charterer, manager and operator of a seagoing ship or any other persons for whose activity the ship-owner is responsible) and "salvors" (any person rendering services in direct connection with salvage and/or recovery operations) may limit their liability. The liability limitation applies to general ship-sourced damage, discriminating between claims concerning loss of life or personal injury and property claims.
- ✓ -The 1976 LLMC as amended provides a system of limiting liability. LLMC declares that a person liable will be able to limit liability unless "it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result".
- ✓ It should be noted that Directive 2009/20/EC on the insurance of ship-owners for maritime claims, as adopted on 23 April 2009 and effective from 1 January 2012, obliges all EU Member States to require that the ships flying their flags should have liability insurance covering the claims subject to limitation in LLMC and up to the limits as calculated on the basis of LLMC. The same obligation lies on all ships entering any port of an EU Member State. Certificate confirming the existence of such insurance should be carried on board.
- ✓ The limits of liability are calculated on the basis of the tonnage of the ship. Different limits are foreseen for personal damage claims and for material damage claims.
- ✓ On 19 April 2012, the Legal Committee of the IMO adopted amendments to the Protocol to the Convention on Limitation of Liability for Maritime Claims. Under the amendments the limits of liability for loss of life or personal injury and for property claims were raised by 45%. According to the tacit amendment procedure the new limits should come into force 36 months from the date of adoption. This procedure automatically accepts an amendment unless within 18 months of adoption not less than one fourth of the State Parties, at the time of adoption, would communicate non acceptance to the Secretary General of the IMO.
- ✓ Competent court: Any person alleged to be liable may constitute a fund with the court or other competent authority in any state party in which legal proceedings are instituted in respect of claims subject to limitation.

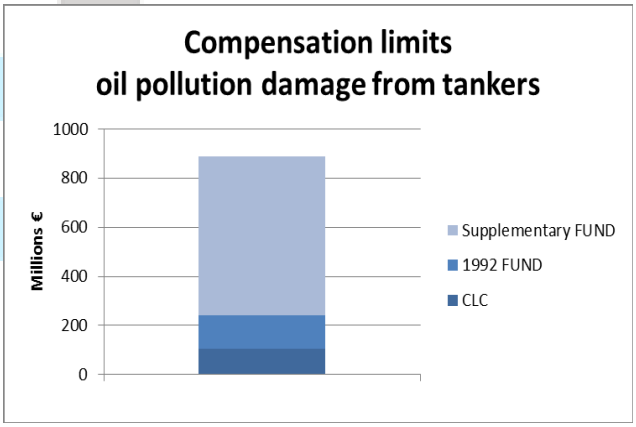
Entry into force:

- ➢ 1 December 1986: 1976 LLMC.
- ➢ 13 May 2004: 1996 LLMC Protocol.
- ➢ Expected 2015 amendments to 1996 LLMC Protocol.

More detailed information can be found at www.imo.org

►5-Pollution caused by persistent oil carried in tankers:
The international compensation regime for persistent oil pollution damage from tankers, developed under the auspices of the IMO, is a three tier system:

*First tier: the International Convention on Civil Liability for Oil Pollution Damage 1992 (the "1992 Civil Liability Convention" (CLC));
**Second tier: the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the "1992 Fund Convention" (1992 FUND));
***Third tier: the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the "2003 Supplementary Fund Protocol" (Supplementary FUND)).



- ➢ The 1992 Fund and the 2003 Supplementary Fund are financed by contributions paid by any person who has received, during the preceding calendar year, more than 150,000 tonnes of crude oil or heavy fuel-oil in a Party State after sea transport.
- ➢ The owner of a tanker has a strict, but limited liability. The owner of a tanker carrying more than 2,000 tonnes of oil in bulk as cargo is obliged to maintain insurance or other financial security (mostly through a P&I Club). Tankers must carry on board a State-issued certificate to attest that such financial security is in place.
- ➢ The pollution damage costs exceeding the first tier level should be claimed against the 1992 Fund and the 2003 Supplementary Fund where in force. In some rare cases, the Funds may meet '1st tier' claims (for example, if the claimant cannot identify the tanker owner, or if the tanker owner has no insurance cover and is insolvent).

The following costs of pollution damage are covered:

- Cost of clean-up operations at sea and on shore;
- Cost of reinstatement of the environment;
- Property damage;
- Economic losses by fishermen or those engaged in mariculture;
- Economic losses in the tourism sector;
- The costs of preventive measures, to prevent or minimize such damage.

One of the most essential criteria for establishing that a claim is eligible is the reasonableness of the measures taken, based on an assessment of the facts available at the time of the decision to take them. Claims are not accepted if the claimant could have foreseen that the measures taken would be ineffective in the particular circumstances of the incident. On the other hand, the fact that the measures prove to be ineffective should not in itself be a reason to reject a claim for the costs incurred. The assessment of the grave and imminent threat shall be made on actual facts and objective criteria at the time the decision is made.

*Entry into force:

- ✓ 30 May 1996: the 1992 Civil Liability Convention and the 1992 Fund Convention;
- ✓ 3 March 2005: the 2003 Supplementary Fund.

More detailed information can be found at www.imo.org and www.iopcfund.org (e.g. the IOPC Fund Claims Manual

►6-Pollution caused by oil carried as fuel in ships' bunkers:

The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 ("2001 Bunker Oil Convention"), also established within the IMO, is a single tier international compensation regime.
The ship-owner (registered owner, bareboat charterer, manager and operator of the ship) has strict but limited liability for pollution damage arising from bunker fuel. The owner of a ship over 1,000 gross tonnage must maintain insurance or other financial security. A State-issued certificate ("blue card") attesting that such a security is in force shall be carried on board the ship. The owner of the ship and the person(s) providing insurance or other financial security are entitled to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims (1976 LLMC) and its Protocol.

The following costs of pollution damage are covered:

- ✓ Cost of preventive measures and further loss or damage caused by preventive measures; Cost of clean-up operations at sea and on shore;
- ✓ Cost of reinstatement of the environment;
- ✓ Property damage;

- ✓ Economic losses such as:
  - those engaged in mariculture;
  - economic losses by fishermen;
  - economic losses in the tourism sector;
  - costs and losses for a harbour / harbour master.

Entry into force of the Bunker Oil Convention: 21 November 2008.

►7-Pollution caused by pollutants other than persistent oil carried in ships:

- The International Convention on Liability and Compensation for Damage in Connection with the Carriage by Sea of Hazardous and Noxious Substances 1996 and its 2010 Protocol ("1996 HNS Convention and its Protocol"), also set up within the IMO, is a two tier international compensation regime. When in force, this Convention will mirror the oil pollution compensation regime.
- Ship-owner (registered owner or, in the absence of a registered owner, a person actually owning the ship) has strict but limited liability for pollution damage in connection with the carriage by sea of hazardous and noxious substances (HNS). This liability is backed up by compulsory insurance or other financial security and a state-issued certificate attesting that such a security is in force shall be carried on board the ship. The limit of liability is calculated on the basis of the tonnage of the ship.
- In addition to this first tier, a second tier will be formed by the International Hazardous and Noxious Substances Fund (HNS Fund), contributed to by receivers of HNS after sea transport in all State Parties. The 1996 HNS Convention does not address the potential concurrence of the HNS regime and the LLMC regime. The overlap is addressed by a Protocol of 1996 to the Convention on Limitation of Maritime Claims, 1976, stating that any State may, at the time of signature, ratification, acceptance, approval or accession, or at any time thereafter, reserve the right to exclude claims for damage within the meaning of the 1996 HNS Convention and its Protocol.

The following costs are covered:

- loss of life or personal injury on board or outside the ship carrying the hazardous and noxious substances caused by those substances;
- loss of or damage to property outside the ship carrying the hazardous and noxious substances caused by those substances;
- loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;
- the costs of preventive measures and further loss or damage caused by preventive measures.

The HNS Convention is not yet in force.
More detailed information is available at www.imo.org and www.hnsconvention.org

►8-Pollution caused by nuclear substances:

The simultaneous application to nuclear damage of some maritime conventions dealing with ship-owners' liability and some conventions specifically dealing with nuclear incidents urged the IMO to host a Conference in 1971 on this issue. In co-operation with the International Atomic Energy Agency (IAEA) and the European Nuclear Energy Agency of the Organization for Economic Co-operation and Development (OECD), a Convention to regulate liability for damage arising from the maritime carriage of nuclear substances has been adopted. It should be noted that nuclear damage is usually not covered by the liability insurance provided by the P&I Clubs.

The Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material provides that a person otherwise liable for damage caused in a nuclear incident shall be exonerated from liability if the operator of the nuclear installation is also liable for such damage under:

- the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy;
- the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage;
- national law which is similar in the scope of protection given to the persons who suffer damage.

Entry into force:

- ✓ 15 July 1975: Convention relating to Civil Liability in the field of Maritime Carriage of Nuclear Material;
- ✓ 1 April 1968: Paris Convention on Third Party Liability in the Field of Nuclear Energy;
- ✓ 12 November 1977: Vienna Convention on Civil Liability for Nuclear Damage.

More detailed information is available at www.imo.org, www.iaea.org or www.nea.fr

►9-Wreck Removal:

- The gap in the international legal framework as regards the liability for the removal of wrecks beyond the territorial sea but within the EEZ or equivalent led to the adoption of an IMO convention on this topic in 2007. The Nairobi International Convention on the Removal of Wrecks ("2007 Wreck Removal Convention") shall provide a legal basis for State Parties to remove, or have removed, shipwrecks potentially affecting adversely the safety of lives, goods and property at sea, as well as the marine environment. This Convention principally applies to the zone beyond territorial sea, but an optional clause enables State Parties to apply certain provisions to their territory, including their territorial sea.
- The Convention gives regulations on locating, marking and on the removal of wrecks. The registered owner of the ship that became a wreck and that constitutes a hazard, is liable to remove the wreck. In particular, the ship-owner is liable for the costs related to locating, marking and removal of the wreck carried out by relevant body of the State Party.

The owner is not liable if it is proven that the casualty which caused the wreck:

- ✓ resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;
- ✓ was wholly caused by an act or omission done with intent to cause damage by a third party;
- ✓ was wholly caused by the negligence or other wrongful act or any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

- The owner of a ship over 300 gross tonnages is required to maintain insurance or provide other financial security to cover the liability under the Convention. A State-issued certificate attesting that such a security is in force shall be carried on board the ship.
- The owner and the person(s) providing insurance or other financial security is entitled to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims (1976 LLMC) and its Protocol unless disallowed by national legislation. Liabilities that would otherwise be in conflict with other IMO Conventions are excluded under the 2007 Wreck Removal Convention.
- This Convention has not yet entered into force. It will enter into force twelve months following the date on which ten States have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the IMO Secretary General.

►10-Environmental damage, not covered by the aforementioned international compensation regimes:
The Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage is also applicable at sea, although the main focus is on land.
This Directive establishes an administrative system to prevent and/or remediate environmental damage caused by an operator of the economic activity in question (which can include ship-owners). The operator shall take the relevant preventive and/or remedial measures.
Some operators of hazardous activities, listed in an annex to this Directive, are strictly liable; all other operators have been assigned with a fault liability.
Fault liability is a type of liability in which the claimant must prove that the polluter has been at fault or negligent

Environmental damage, as defined by the Directive, comprises of:

- damage to protected species and habitats (based on the Habitats15 and Birds Protection16 Directive);
- water damage (based on the EU Water Framework Directive17);
- land damage.

Some of the damage types mentioned in the previous paragraph may occur at sea (namely 'damage to protected species and habitats' and 'water damage').
However, this Directive is not applicable to incidents falling within the scope of the following international compensation regimes, as far as in force in the Member State concerned:

- the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;
- the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;
- the International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;
- the Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.

The operator maintains the right to limit his liability in accordance with national legislation implementing the 1976 LLMC and its Protocol.
This Directive was implemented on 30 April 2007.

►11-Pollution caused by offshore installations:

- ✓ The responsibility for meeting claims from pollution caused by offshore installations rests solely with the operator, however, in the event that the operator is unable to meet its liabilities, for whatever reason, the oil industry has developed the Offshore Pollution Liability Agreement (OPOL) to ensure that claims for pollution damage are met and the cost of remedial measures reimbursed. Under this Agreement operating companies have agreed to accept strict liability for pollution damage up to a maximum of US $250 million per incident.
- ✓ Operators under the OPOL Agreement must provide evidence of financial responsibility for a certain amount, but the Agreement does not preclude claimants from seeking redress in the courts for losses incurred. If an operator fails to meet its obligations to claimants under the Agreement, then the remaining operators have agreed to guarantee payment of claims up to a certain maximum amount.
- ✓ The OPOL Agreement covers not only fixed installations and pipelines but also production facilities such as Floating Production Storage and Offloading vessels (FPSOs) and Floating Storage Units (FSUs) while being used in the production process, as well as when temporarily removed from their normal station for any reason whatsoever.

More detailed information is available at www.opol.org.uk

►12-International Convention on Salvage:

The International Convention on Salvage, 1989, introduces a "special compensation" (Article 14) to be paid to salvors who have failed to earn a reward on the basis of the "no cure, no pay" rule. This special compensation takes into account maritime pollution and creates an incentive for a salvor to undertake an operation which has only a minor chance of success. For calculating this special compensation, a special clause (SCOPIC) has been included in the Lloyds Open Form (LOF 2011 contract). If SCOPIC is invoked, a SCR (Special Casualty Representative) has a duty to report, observe and consult with the Salvage Master and produce reports.
Entry into force: 14 July 1996
More detailed information is available at www.imo.org and marine-salvage.com

►13-Pollution from an unidentified source:

Generally, claimants can only obtain compensation if they know the precise source of pollution. However, there is one exception to this. The IOPC Fund pays compensation for pollution damage if the claimant can prove (for example, by sophisticated chemical analysis) that the pollution resulted from a spill of persistent oil from a tanker in a signatory State.

►14- Maritime Insurance & Protection and Indemnity (P&I) Clubs:
A) What are P & I Clubs?
Ships have two different types of insurance for their general activities, Hull and Machinery insurance (property insurance) and P&I insurance (liability insurance). Furthermore normally the cargo of a ship and sometimes the freight are insured as well by the cargo owners or cargo receivers (cargo insurance). It is worth mentioning here that container vessels could have many different cargo insurers and in the event of an incident they could all send representatives to the scene.
P&I insurers were originally formed when hull underwriters first extended the policies of insurance to include collision

liability when they limited the cover available to three quarters, the intention being that the ship-owners should be their own insurers for the remaining quarter. In the 1850s and 1860s ship-owners joined together to form mutual protection associations to share the risk of the remaining quarter collision liability and also other risks, such as death and injury claims by passengers, liabilities to seamen and damage to docks and shore installations. In the 1870s the increase in the number of instances where ship-owners were held liable for losses of cargo led to the establishment of mutual indemnity associations to share these liabilities, and within a few years the similarity of the risks covered resulted in the emergence of the combined "Protection and Indemnity Associations", or P&I Clubs as they are known today.

The P&I Clubs have a set of rules which differ somewhat between themselves but this type of insurance generally covers:

- Personal injury, illness and death of seamen;
- Personal injury, illness and death – to persons other than seamen;
- Repatriation and substitutes expenses (repatriation of seamen in the event of illness or the illness of a close family member);
- Stowaways, deserters and refugees;
- Loss of and damage to the personal effects of seamen and others;
- Collision liability (if not covered in hull policies);
- Loss of or damage to property;
- Pollution (absolute maximum of US $1,060,000,000 each incident);
- Liabilities under towage contracts;
- Liabilities resulting from wrecks.

Looking specifically at the pollution liability that Clubs cover:

- Loss, damage, or contamination;
- The cost of any measures reasonably taken for the purpose of preventing, minimizing and or/cleaning up pollution;
- The cost of any measures reasonably taken to prevent an imminent danger of the discharge or escape from the insured vessel of oil or any hazardous substance;
- The costs or liabilities incurred as a result of compliance with any order or direction given by any government or authority for the purpose of preventing or reducing pollution, or the risk of pollution, provided that such compliance is not recoverable under the hull policies.

B) The "Pay to be paid" clause:
P&I cover is provided on an indemnity basis. This means that the Club reimburses the insured ship-owner for what he has paid out to the person or body claiming against him. However, the Club will pay directly when it has given a guarantee that it would do so, for example in the form of a blue card under the CLC and Bunkers Convention where in force, or in the form of a Letter of Undertaking. The CLC and Bunkers Convention provide that the liabilities arising under the Conventions may be enforced directly against the P&I insurer of the ship-owner. In this regard, the only defences available to the ship-owner's insurers are those provided within the relevant Convention itself, namely the ship-owner's own defences and, in addition, the "wilful misconduct" of the ship-owner.

C) TOPIA & STOPIA:
Note: the following paragraphs are added for information only. Claimants do not need to be aware which agreement is being used as the IOPC Fund administration will manage the process on their behalf.
Two voluntary agreements have been entered into by tanker owners in respect of vessels entered mutually in Group Clubs, the Small Tanker Oil Pollution Indemnification Agreement 2006 (STOPIA 2006) and the Tanker Oil Pollution Indemnification Agreement 2006 (TOPIA). The agreements reflect the desire of ship-owners and the Clubs to ensure the continuing success of the current international pollution compensation regimes, established under the CLC and the Fund Convention.

*STOPIA 2006 provides a mechanism by which small (low tonnage) tankers will in effect pay more for pollution damage occurring in a State Party to the Fund Convention, than the amount calculated in accordance with the CLC compensation regime. The net result is that whatever the tonnage of a tanker, it will not contribute less than SDR 20m in respect of any pollution damage. Under CLC, tankers of 5,000 GT or less can limit their liability to SDR 4.51m.

*TOPIA is a mechanism by which ship-owners and their P&I Clubs will pay an increased contribution to funding compensation for oil pollution (again in a Fund Convention state only), by in effect contributing 50% of compensation payments made under the Supplementary Fund, that is payments in excess of SDR 203m(the Fund Convention maximum), up to SDR 750m (the Supplementary Fund maximum). The remaining 50% paid under the Supplementary Fund will be paid by oil receivers. All payments made by ship-owners and oil receivers in respect of pollution damage will be reviewed in 2016 and thereafter every five years to establish the approximate proportions paid by each party. If there is an imbalance, appropriate measures can be taken to maintain approximately the 50/50 sharing.
Although the Clubs are not party to either STOPIA or TOPIA, all Club members of the International Group have amended their Rules to provide ship-owners with the cover to meet their payment obligations under STOPIA 2006 and TOPIA.

►15- Work Preparation:
Claims management should not be considered as the final step in overall incident management but at an early stage in every incident. It is strongly believed that the good management of a claim, which leads to maximum cost recovery will be an extra incentive for the ship-owner to take all necessary measures to prevent incidents. It is also believed that a State's incident response contingency plan is not complete unless it contains a clear policy on how that State will seek to recover its costs.
Claims management should be given due regard in State contingency plans and it is important that this part of the plan is tested and evaluated regularly. It is strongly recommended that claims management is conducted in accordance with clearly pre-defined guidelines, reflected upon by the relevant

stakeholders. As far as possible lessons learned from each individual case need to be recorded and shared.

►16-Defining Strategies:
Management of every claim compilation and settlement exercise requires an investment in time and financial and logistics resources. However, some claims are too limited to justify an extensive investment of time and resources, while other claims are too extensive to justify the dismissal of the case. It is for each Member State to determine whether they will pursue cost recovery in every case, or determine whether some cases are too small to warrant the human resource investment. It is necessary to bear in mind that the "polluter pays" principle applies equally to small incidents as it does to the major ones.
In anticipation of the occurrence of a maritime incident, the claims management plan should be regularly reviewed by the sharing of best practices with national and international colleagues, and the organisation of table top exercises.

►17- Financial Security:
A) Requiring the security:
For any State affected by a threat of pollution, it is vital to obtain financial security for the money that that State is paying to take counter pollution measures. It should be borne in mind that shipping is an international industry and the liable party may not be under the legal jurisdiction of the State that is threatened. Obtaining a form of financial security and establishing the legal jurisdiction early in an incident provides a level of comfort for the future dealings with the polluter.
It is for each individual State to decide on the level and form of financial security, on a case by case basis. However it is strongly recommended that some form of security is discussed with the ship-owner's representatives during day one or, at the latest, day two of the incident.
When an incident occurs it is essential for notice of the incident, reporting all details available, to be given promptly to the insurers and owners of the casualty. Experience shows that this is generally achieved verbally by telephone from the scene of an incident. This can be achieved by contacting the principle ship/insurance representative and stating your intention to make a claim and requesting security for the money that the affected State is committing.
This financial security can take several forms but in many cases will be a blue card or a P&I insurer's Letter of Undertaking (LOU).

Letter of Undertaking or a Bank Draft require a figure of money to be included in the document. A Rotterdam Guarantee Form 2000 is an internationally accepted guarantee form, well-known by maritime insurers, and can, in some cases, be used as well. This is where the daily use of an electronic spreadsheet is helpful to estimate the level of financial exposure. It is necessary here to include a prediction for how many days the incident is likely to last for. Include an estimated figure for equipment to be returned to its storage site and any necessary refurbishment or cleaning.
It is strongly recommended that an element of uplift is included in the level of security requested from the P&I Club. The reason for this is there are very often expenses incurred which the Claims Management Team does not learn of until after the physical incident has closed. Most P&I representatives are experienced personnel and are well aware that the estimation of costs at this stage is not an exact science but it helps later negotiations on the claim if the figure given here exceeds the quantum of the final claim.
To reinforce the financial security many States may wish to forward a letter to the ship-owner / insurers' representative stating the intention to file a claim, clearly stating the legal basis for this action.

B) Possible Options Should a Request for Financial Security Fail:
In the event that a liable party is unwilling to provide the financial security requested by the affected Member State, there are further options which could be pursued.
The following paragraphs briefly outline some of the possible options:

*Detention:
Ports and statutory authorities have statutory powers under which they can detain a ship and sell it in order to secure the repayment of monies owed to it. The debt must have arisen in specific circumstances, such as from port dues or expenses incurred in removing a stranded or abandoned vessel, as set out in the relevant national legislation.

*Arrest:
A ship can be arrested and held as security for monies owed to the arrestor and it cannot be traded whilst it is under arrest. The action is commenced against the ship and often serves to identify the actual ship-owner so an action can be commenced against them. It should be considered whether another ship of the same owner can be arrested.

*Injunction
An injunction either prevents someone doing something or compels them to do something. It is an action brought against the owners of a ship and is usually used for preserving matters pending trial to resolve the issues in dispute. In order to obtain an injunction, the claimant must establish a good arguable case before a judge will grant the injunction. An injunction can be obtained in an emergency, outside of normal court hours and it is possible to secure a worldwide freezing injunction against the ship owners.

►18- Common Pricing concepts included in claims:
The activities and equipment to be included in a claim depend on the incident itself, however, the items often included are expanded upon below:

- Maritime assets: tugs, work boats, oil recovery vessels, patrol boats, etc;
- Aerial assets: helicopters, surveillance aircraft, etc;
- Contract personnel: working hours, daily allowances, hotels, flights, etc;
- Staff personnel and associated costs;
- Subcontracted companies;
- Equipment: booms, skimmers, anchors, containers, power packs, etc;
- Vehicles: cars, trucks (owned and rented);
- Sample analysis: laboratory analysis, sample collection equipment;
- Satellite images;

- Documentation: videos, pictures, etc;
- Numerical spill modelling;
- Environmental impact assessment;
- Environmental damage (if applicable);
- Capture, cleaning and rehabilitation of wildlife;
- Cleaning, repairing or replacing property;
- Charge for the navigational aids (e.g. cost for navigation buoys);
- Special weather reports;
- Expert advice outsourcing (technical, legal, claims handling consulting, etc.);
- Waste management (storing and disposal);
- Telecommunication expenses;
- On site office set up, electricity, etc;
- Mail expenses;
- Miscellaneous.

►19- Compiling a file for drafting the claim:

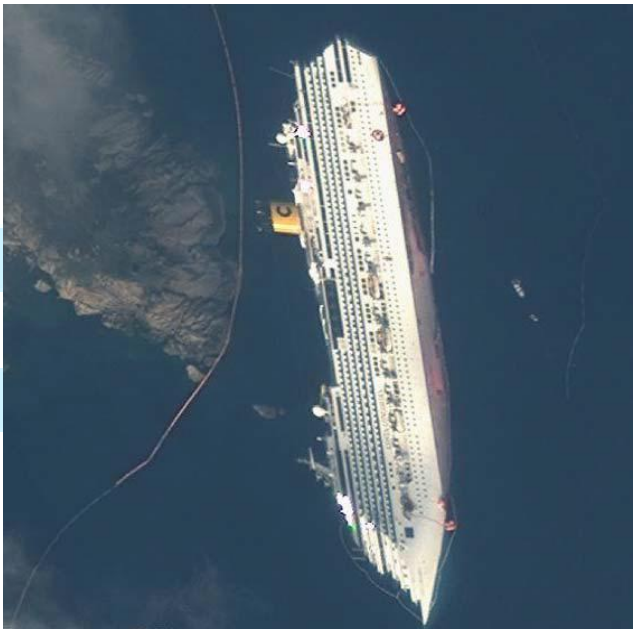
A) Some general principles of good practice that may be adopted are:

- Identify the source of pollution involved in the incident;
- Record name and address of the claimants and of any representative;
- A summary of events – together with why the working methods or courses of action were selected is very useful (maintain a narrative of the incident);
- An expense must have been incurred and third party invoices provided;
- Response measures must be deemed to be reasonable and justifiable – proportionate;
- Investigate rates quoted for all hired in equipment – prove investigation if feasible;
- Keep a record of dates on which work was carried out at every site – date and timed photographic evidence;
- Keep a record of the number and categories of response personnel, regular / overtime rates of pay and who is paying them – names;
- Keep a record of travel, accommodation and living costs for response personnel;
- Calculate hire rates for response equipment in use and standby;
- Keep a record for all equipment costs for every site:
  a. Type of equipment;
  b. Rate of hire;
  c. Costs of purchase – remember residual values;
  d. Quantity used of each piece of equipment;
  e. Period of use – (in use and standby);
  f. The name of the contractor.
- Photograph any damaged equipment – if possible get assessed by an independent body (ship surveyor, expertise Bureau, Special Casualty Representative) prior to repair or replacement;
- Do not bring equipment of a better state than at the commencement of the hire (no betterment);
- Keep a record of consumable materials – get responders to sign out consumables and say which site the item will be used on;
- Keep a record of waste disposal quantities, routes and costs.

B) Record Keeping:

It is not possible to specify the precise form of records, as this varies with the circumstances; however, there are two principal points to keep in mind:

- The records serve a variety of purposes and are the source material for much information drawn;
- Since responders cannot know the particular purpose that records will serve in advance, record keeping should err on the side of too much rather than too little detail.



It is necessary to acquire supporting documentation of all the vessels' activities as well as the invoice. A full specification of every vessel is needed to justify the expenditure. For example, if applicable, this documentation may include:

- Capacity of tanks, including heating, pumping capacity;
- Oil pollution response equipment;
- Crew size and whether included in the charter rate, considering possible crew changes and associated travel costs;
- Research into rate offered – investigate whether rates had previously been published;
- Condition at start of charter – photograph;
- Condition at end of charter – photograph;
- If oil recovered – daily quantity/volume recovered and how disposed of;
- Daily activity log of every vessel;

- Daily assessment of use of vessel during oil recovery activities;
- If an oil recovery vessel, check whether charges for the equipment on board were included in the agreed charter rate;
- Full contact details for the owner – and who they reported to;
- Copy of invoices for any harbour dues, fuel and lubes;
- Whether bunkers were included in the charter party agreement;
- Daily activity log of vessel movements;
- Fuel consumed;
- Passenger list;
- Specification of the vessel;
- Voyage route.

►20- Settlement:
The final action for is to reach a financial agreement with the liable party or parties for the response measures taken. An amicable settlement on the reimbursement of costs or a court trial are options, both of these possible outcomes have positive and negative aspects to be considered.
The precise methodology for settlement of claims is quite variable. In most cases, by noting the co-operation from the liable parties during the incident response, it is possible to have an awareness of whether amicable settlement is likely.
Despite the financial security obtained during the early days of an incident, be it a bank guarantee (a fixed amount of money deposited in a bank) or a P&I Club Letter of Undertaking, it does not necessarily follow that the reimbursement for costs is imminent. In most cases, it will not simply be a case of sending an invoice and receiving payment, even though, some cost recovery cases have been achieved in this manner.
Securing payment requires further input from representatives from the claimant. However, if many of the recommendations from this document on preparatory work have been followed, this claim justification phase should be reasonably simple.

*Arbitration:
Arbitration is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound. It is a settlement technique in which a third party reviews the case and imposes a decision that is legally binding for both sides. Arbitration is most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions. Arbitration is an instrument to settle costs or awards in salvage disputes, but is not very well known in claims resulting from a pollution incident. Amicable settlement or court proceedings are the two options used. However it is worth considering to appoint arbiters to find a solution for the dispute. More details in Lloyds Standard Salvage and Arbitration Clauses (the LSSA Clauses).
Parties, being the authorities and the polluter, might seek to resolve their disputes through arbitration because of a number of perceived potential advantages over judicial proceedings. At least a part of the subject is highly technical as it concerns the response measures taken including the equipment deployed then arbitrators with an appropriate degree of expertise can be appointed (as one cannot "choose the judge" in litigation). Arbitration is often faster than litigation in court and arbitration can be cheaper and more flexible for businesses. However, if the arbitration is mandatory and binding, the parties waive their rights to access the courts and have a judge or jury decide the case and rule of applicable law is not necessarily binding on the arbitrators, although they cannot disregard the law. Unlike court judgments, arbitration awards themselves are not directly enforceable. A party seeking to enforce an arbitration award must resort to judicial remedies, called an action to “confirm” an award.

SUMMARY:

A) Specific Elements:
Every shipping incident is a unique event and has specific elements that may not have been experienced during another incident. National and international legislation remain the same although the applicability of legislation may vary per incident. It is therefore recommended that scenarios are prepared describing the types of incidents and related topics. The process for incident response planning, cost recovery planning and overall review for lessons learned fits into a management tool named The Plan-Do-Check-Act cycle. Authorities learn lessons from every incident they respond to, not only from the effect of their response measures but also from the claims management issues that may arise many months later.

B) The PCDA Cycle:
The Plan-Do-Check-Act cycle philosophy is applicable to Claims Management, because in the process of handling incidents right from the first hour until settling the claim, involves:

- Plan: Make a plan, include the objectives aimed for
- Do: Execute the plan (act accordingly)
- Check: Compare the results with the objectives
- Act: Secure the results or apply corrections to meet objectives defined in the Plan

B1) Preparation (Plan): Some examples of a typical Plan for pre-incident work is given below, however, this list is not exhaustive.

- Develop a pricing structure for State owned resources and methods of calculation;
- Develop a system of record keeping and a method of ensuring that all responders understand that this is the responsibility of everyone;
- Draft an overview of what costs will be charged, including statements on annual costs for storage and maintenance of equipment;
- Define fees/costs in concurrence with wear and tear of equipment; new for old (replacement cycle);
- Develop personal daily reporting and registration forms;
- Describe the organisation handling the compilation of the file leading towards compiling the claim for cost recovery;
- Develop a strategy with regard to relatively small incidents (small claims) and large scale accidents;

whether or not to contract-in a service to collate the file and prepare the claim;
- Describe government to government assistance and related cost recovery;
- Define way to deal with legal interest23. The claimant and polluter can agree to limit the time period of the legal interest because of the time required to compile the claim. However the claimant is entitled to have the entire period charged;
- Define type of financial security / guarantee that satisfies the need of your State.

B2) Do: Some examples of typical Actions for incident claim work is given below, however, this list is not exhaustive.
- In the event of an incident of sufficient magnitude to require the compilation of a claim, the Plan outlined above will need to be activated. It is highly recommended that an individual be appointed to run the process and ensure the completion of daily reports. The person needs to be meticulous.
- The appointed individual needs to pursue those involved in the response operation in whatever way, ensuring that all documentation and records are compiled and secured to justify the subsequent claim.
- Impress on all response staff the necessity to maintain a narrative of activities and hours worked, kilometers traveled or equipment purchased and that all these investments are sufficiently justified.

B3) Check: Some examples of typical Review criterion regarding claim compilation work is given below, however, this list is not exhaustive.
- Apply planned methodology as agreed in the preparative phase and behave accordingly with regard to tariffs and fees;
- Include supportive invoices for rented services; annex photographs of deployed response equipment;
- When special arrangements have been made with the casualty or ship-owner's representative outside of the revised tariffs, ensure that the arrangement is clearly noted and signed by an authorised person;
- In compiling the file it is recommended to adopt a systematic method e.g. by date or by subject.

B4) Act: Some examples of typical Actions for claim compilation work is given below, however, this list is not exhaustive.
- The preparative phase of the cycle should be reviewed regularly, at least every third year;
- Tariffs, fees and other fixed costs need to be up-dated on an annual basis;
- Record and review lessons learned from every claim settlement. Share lessons and experience with other Member States.

C) Specific steps in the process of handling the incident:
The following step by step guidance could be used or adapted by States to fit in with their national policies.
- Make the captain/ship-owner's representative of the casualty aware of their liability through a letter of Liability in accordance with national law;
- Request and agree for a first demand bank guarantee or P&I Club letter with the captain/ship-owner's representative;
- Ensure that all individuals playing a role in responding to the incident fill out their daily log sheets;
- Compiling the file (dossier) in preparation for drafting the claim commences;
- Collate the supporting evidence, e.g. photographs, invoices, reports;
- Describe the results of the measures taken, both successes and failures. Analyse the failures;
- Regularly inform owners/representatives on evolving costs; consider a request for a down payment;
- For the larger scale incidents, both in time and complexity, arrange for meetings with representing experts from owners;
- Consider the need for a dedicated claims management office and add costs to claim;
- On completion of the response operation and closing the incident file, prepare the draft claim and meet with owners to explain structure of the claim, the various items and the method of calculation;
- Send final claim;
- Start process of negotiations, considering amicable settlement; or
- Go to court.

D) Information to be gathered:
An example of the type of documentation that may be necessary to substantiate a claim:
- letter of liability;
- description of the incident (initial assessment);
- outline of environmental threat;
- report on sample analysis;
- copies of oil spill / chemical spill modelling;
- copies of risk assessments for all operations;
- report on results of collected satellite imagery and aerial remote sensing operations;
- response plan and options including justification for selecting measures;
- copies of relevant weather reports;
- time sheets of staff hours worked (on a daily basis);
- copy of annually defined hire rates on State owned equipment etc,
- daily progress reports;
- copies of minutes of meetings, clearly stating who participated and their role;
- invoices relating to procured equipment and services or contracted companies and the justification report for these actions;
- coastline impact, coastline clean-up; costs for temporary storage; transport and waste treatment;
- report on reinstated cleanliness inspection of the coastline;
- overall report on the response measures to the incident;

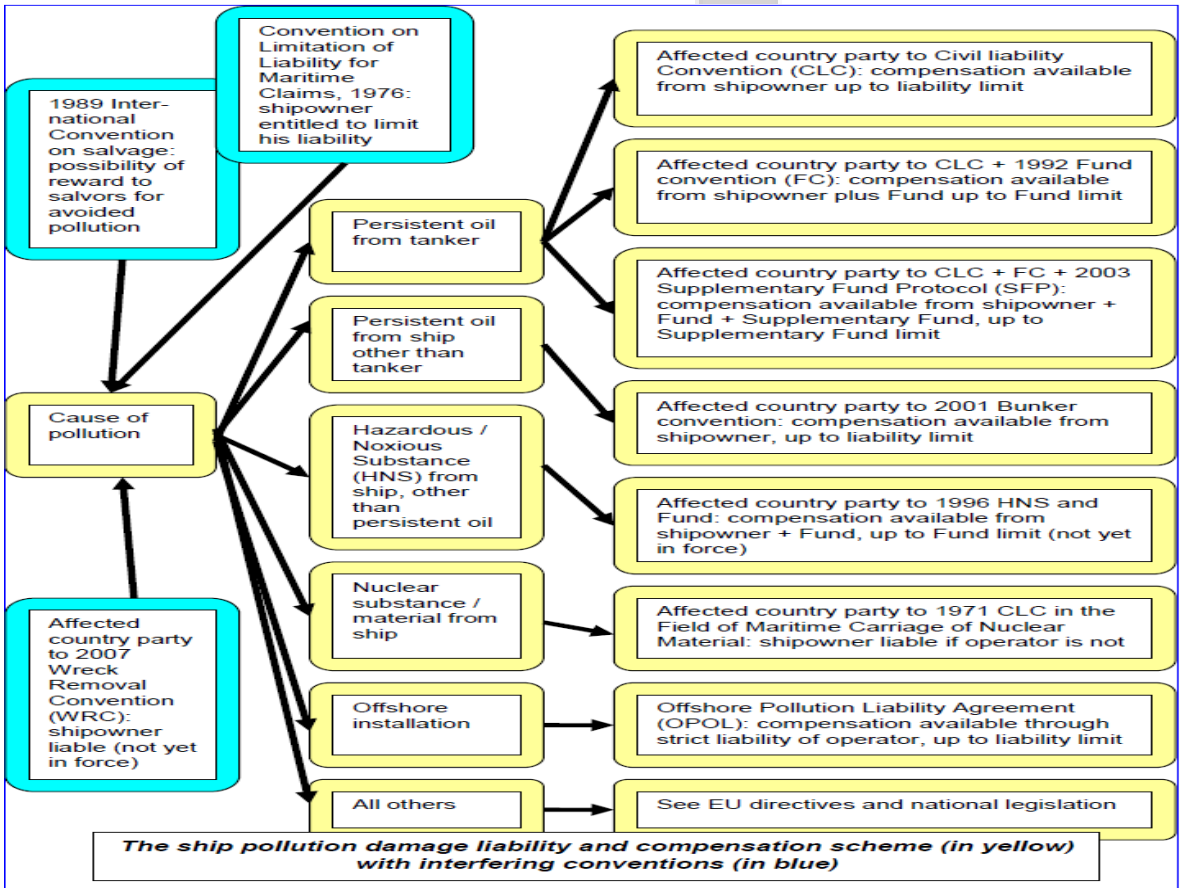
- report and invoice on cleaning of equipment; repair and/or additional maintenance of the equipment;
- catalogued photographs of activities;
- Environmental impact;
- Report and cost of primary restoration;
- Report and cost of wildlife response actions.

E) Lessons to be Learnt:

The need for a "lessons learned" session following a claim is vitally important. It is necessary to understand those aspects of the process that raised concern, that were thoroughly debated and that required the highest level of justification. Compilation and presentation of a claim, providing the justification for the expenses and proof of the reasonableness of specific parts of the claim and – most importantly – the narrative should also be reflected in a lessons learned session.

Lessons learned is not a descriptive presentation of the figures and facts of the response measures, but it is to make the claims management experts aware of the relevant aspects of a claim that were profoundly disputed in the settlement with the representative of the polluter.

Pollution Damage Liability & Compensation Scheme



The ship pollution damage liability and compensation scheme (in yellow) with interfering conventions (in blue)