Sustainable and Efficient Transport

Incentives for Promoting a Green Transport Market

Edited by

Ellen Eftestøl-Wilhelmsson

Professor of Civil and Commercial Law, Faculty of Law, University of Helsinki, Finland and Visiting Professor, University of Oslo, Norway

Suvi Sankari

Adjunct Professor, Faculty of Law, University of Helsinki, Finland

Anu Bask

Senior Research Fellow in Operations and Supply Chain Management, Turku School of Economics, University of Turku, Finland

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Table 12.8 Theoretical desirable outcome vs. sector preferences

		Theoretical desirable outcome	Sector preferences	Match?
Membership rules	Sustainable?	Yes	Yes	-
	Open or closed	Open, but bigger share of profit for early adapters	Open, same share or benefit limited in time	- -
	Entrance and exit	Possible upon continued compensation to excluded partner, notification period or termination fee due from terminating partner	Possible, possibly notification period	- -
Operation	Daily management	No need for third-party management	Third-party manager	-
	distribution	Only distribution in case of managing partner or in case of gross imbalances	Idem	-
Liability	Damage during transport	Fault-based CMR	No liability or fault-based limited liability	- -
	Breach of other obligations	No obligation to wait in case of no show, but compensation due	No obligation to wait in case of no show, no compensation due	- -

A possible even bigger discrepancy exists between the theoretical desirable outcome and that preferred by the respondents. While respondents to the survey did address some of the concerns expressed in the theoretical models, on many points they desire too much flexibility and too little responsibility to realize the goal of providing certainty and elimination of potential adverse effects of cooperation on contractual rights and obligations while at the same time limiting transaction costs. This is evidenced by the preference for flexible membership rules, but even more by the choice of a knock-for-knock liability regime and the absence of a financial sanction for the non-performing partner.

While respondents thus seem to prefer liberty, the question is whether these choices do not provide too much liberty to get parties to effectively bind themselves to a successful platooning cooperation. In order to test whether the choice of these clauses also entails a choice for the operational consequences thereof, in the next stage, a new questionnaire will assess the evaluation of the outcomes of the chosen rules. The positive side of this voluntarism is that it evidences the willingness of industry players towards cooperation. While legal uncertainty and risk were named in the survey as the main constraints against cooperation, this research suggests that parties want predictable and workable rules, even more than the creation of the best regime for cooperation.

13. Who pays for oil pollution at sea? Some remarks on the interplay between certainty of the law and unpredictability[1]

Andrea La Mattina

INTRODUCTION

No 'sustainable and efficient' transport may exist without providing a system of liability of the transport operators which properly compensates damages for pollution generated by their activity. The case of oil pollution at sea is paradigmatic in order to understand the issues arising from the present regulation of this phenomenon and in particular the problems connected to the position of different kinds of operators.

1. THE 'CHANNELLING' SYSTEM OF LIABILITY FOR OIL POLLUTION AT SEA PROVIDED FOR BY THE 'CLC' AND ITS RATIONALE

The 1969 Brussels International Convention on Civil Liability for Oil Pollution Damage (the 'CLC', as amended in 1992)[2] aims to ensure adequate,

[1] Text of the speech delivered at the International Conference on '*Sustainable and Efficient Transport Systems – How to Integrate Transport in the transformation to a Circular Economy*', Helsinki, 20–21 April 2017. This chapter is based on an amended version of my article 'Judicial Developments in The Erika Case: Liability for Oil Pollution at Sea and Unpredictability', in *Diritto del commercio internazionale*, 2016, 651ff.

[2] On the CLC in general, see, among others, Jürgen Basedow and Ulrich Magnus (eds), *Pollution of the Sea – Prevention and Compensation* (Springer-Verlag Berlin, Heidelberg 2007); Sergio M. Carbone, 'Strumenti internazionalistici e privatistici-internazionali relativi al risarcimento dei danni provocati da idrocarburi all'ambiente marino' (2006) *Riv. dir. int. priv. e proc* 623ff.; Sergio M. Carbone and Lorenzo Schiano Di Pepe, 'Uniform Law and Conflicts in Private Enforcement of

prompt and effective compensation for damage to persons, property, costs of clean up and reinstatement measures and economic losses resulting from the maritime transport of oil.

In particular, CLC provides a 'channelling' form of strict liability against the registered shipowner that – in certain conditions – expressly excludes various others from damages claims arising from discharge of persistent oil from tankers.

In this sense, the relevant articles of the CLC, inter alia, read as follows:

- Article III.1: 'the *owner* of a ship at the time of an incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence, *shall be liable for any pollution damage caused by the ship as a result of the incident*'.
- Article III.4: '*No claim* for compensation for pollution damage under this Convention or otherwise may be made *against*:
  (a) the *servants or agents of the owner* or the members of the crew;
  (b) the pilot or *any other person who*, without being a member of the crew, *performs services for the ship*;
  (c) *any charterer* (how so ever described, including a bareboat charterer), manager or operator of the ship;
  (...)

unless the *damage resulted from their personal act or omission*, committed with the *intent to cause* such damage, or *recklessly and with knowledge that such damage would probably result*.'

The rationale of this system is the simplification of the liability claims for oil spills which should be focused only against the shipowner, who is considered

Environmental Law: the Maritime Sector and Beyond' in Jürgen Basedow, Ulrich Magnus and Rudiger Wolfrum (eds), *The Hamburg Lectures on Maritime Affairs 2007 and 2008* (Springer-Verlag, Berlin Heidelberg 2010) 21ff.; Michele M. Comenale Pinto, *La responsabilità per inquinamento da idrocarburi nel sistema della C.L.C.* (CEDAM, Padova 1993); Colin De La Rue and Charles B Anderson, *Shipping and the Environment* (2nd edn, Informa Law Routledge, London 2009); Sarah Fiona Gahlen, *Civil Liability for Accidents at Sea* (Springer-Verlag, Berlin, Heidelberg 2015) 19 ff. and 49 ff.; Gotthard Gauci, *Oil Pollution at Sea, Civil Liability and Compensation for Damage* (Wiley, Chichester 1997); Paolo Ivaldi, *Inquinamento marino e regole internazionali di responsabilità* (CEDAM, Padova 1996); Mans Jacobsson, 'The International Liability and Compensation Regime for Oil Pollution from Ships – International Solutions for a Global Problem' (2007) 32 *Tul. Mar. L.J.* 1ff.; Elisabetta G Rosafio, 'Profili di responsabilità e giurisdizione in materia di ambiente marino' (2014) *Il Diritto Marittimo* 358; UNCTAD, 'Liability and compensation for ship-source oil pollution' (doc. UNCTAD/DTL/TLB/2011/4, New York, Geneva 2012); Wu Chao, *Pollution from the Carriage of Oil by Sea: Liability and compensation* (Kluwer Law International, London, Boston 1996).

the person entity responsible for the circulation of a vessel which does not comply with the safety standards provided for by the applicable regulations.

2. THE '*ERIKA CASE*' AND THE 'UNPREDICTABILITY' OF THE CLC SYSTEM

2.1 The Casualty and the Criminal Proceedings

The CLC 'channelling' liability system is apparently clear, but the analysis of the transnational case law demonstrates that the answer to a fundamental question, such as: 'Who pays for an oil spill at sea?', could be unpredictable.

In this respect I would like to point out my attention to the '*Erika case*', which occurred on 12 December 1999 when the *Erika*, a Maltese flag single-skinned tanker that was carrying heavy fuel oil, broke into two and sank off the Brittany coast, causing severe pollution on the west coast of France.

The *Erika* was owned by a Maltese shipping company and chartered to the Panamanian company Total Transport Corporation for the carriage of heavy fuel oil from Dunkirk to Leghorn. The *Erika* was classified by RINA S.p.A. and managed by another Italian company.

On 15 December 1999, the investigating magistrate and public prosecutor from the Paris Tribunal de Grande Instance brought criminal charges ('*information judiciaire*') against 15 defendants (including legal representatives of Total S.A. – that is the oil major holding company, Total Transport Corporation, Total International Ltd, and the classification society RINA): (a) for endangering human life; and (b) for causing oil pollution at sea and deliberately failing to take measures to prevent a hazardous incident from occurring.

Around 120 civil parties claimed damages, for a total of more than one billion euros, including the French government (which claimed 150 million euros), the regional and local authorities of the coasts that suffered the pollution, and various associations, private companies and individuals.[3]

The *Erika* case gave rise to several decisions from French criminal courts which are a type of 'contradictory discussion' of the fundamental principles of liability for oil pollution at sea, especially with regard to the 'channelling' of liability to the shipowner and the extent thereof.

[3] The liability action regarding the *Erika* incident was brought before the French criminal courts: this choice was not considered the 'best path' by Pierre Bonassies ('Affaire Erika: Et si les victimes avaient agi devant les juridictions civile?' (2014) *Dr. mar. franc.* 103 ff.).

2.2 The Case before the French Criminal Courts and the Liability Claim

In this respect, the judicial developments in the *Erika* case before the French criminal courts demonstrate the intent of increasing the parties liable for oil pollution despite the provisions of the CLC. That is particularly clear considering the position of the classification society (that is RINA) and the actual charterer (that is Total).

(A) The liability of RINA (for 'certification' activities performed on behalf of the flag state)

With regard to RINA's liability, the issue turned on whether a classification society is excluded from liability under Article III.4 of the CLC – either as a 'servant or agent of the owner' under Article III.4, letter a, or as a 'person who performs services for the ship' under Article III.4, letter b.[4]

[4] As a preliminary issue, RINA claimed immunity from jurisdiction on the ground that its certification activities have to be qualified as acts in the exercise of the sovereign authority of the flag state because they were performed on behalf of the flag state (Malta).

The positions of the French criminal courts were not univocal on this point:

(a) The *Tribunal de Grande Instance de Paris* held that the immunity from jurisdiction does not apply to the classification societies which perform certification activities on behalf of the flag state because 'l'activité des sociétés de classification est d'ordre privé, réalisée à la demande du propriétaire, en exécution d'un contrat conclu avec lui'.

(b) The *Cour d'Appel de Paris* held, in contrast, that:
   (i) they are both '*activité*[s] *de service public*', namely: (*x*) 'certification' activities (that is, the issuance of statutory certifications attesting a ship's compliance with the safety standards under the current international regulations) performed by the classification societies on behalf of the flag state, and (*y*) 'classification' activities (that is, the issuance of certificates of class confirming that the requirements laid down in rules and standards established by a certain classification society were met during design and construction of a certain ship and are maintained during operation) performed by the classification societies pursuant to SOLAS and Load lines conventions;
   (ii) RINA, on the basis of the above, as a general rule, 'est ainsi investie d'une prérogative de puissance publique et doit bénéficier de l'immunité de juridiction'; but
   (iii) RINA waived immunity from jurisdiction, so it cannot be claimed because: (*x*) Malta (that is, the flag state) did not request immunity from jurisdiction in favour of RINA but in favour of the Malta Maritime Authority; (*y*) RINA did not claim immunity during the preliminary investigations carried out by the French public prosecutor; instead, it requested only the dismissal of the case and actively participated in the preliminary criminal proceedings; and (*z*) RINA tried to start a civil claim before Italian courts (which declared not to be competent to hear the case), seeking a ruling that it had no liability in the *Erika* case.

(c) The *Cour de Cassation* upheld the above ruling of the Cour d'Appel de Paris, also finding that RINA's participation in the preliminary criminal proceedings constituted conduct contrary to 'une éventuelle intention de se prevaloir de cette immunité'.

The French criminal courts took differing positions:

(a) The *Tribunal de Grande Instance de Paris* on *16 January 2008* held that the exclusion under Article III.4, letter b, does not apply to classification societies but rather only to persons who perform services for the ship directly participating in the nautical operation ('personnes qui, sans être membres de l'équipage, s'acquittent de prestations pour le navire en participant directement à l'opération maritime'). Although the court also ruled that the certification activity is of *private nature* ('*est d'ordre privé*'),[5] it did not consider RINA eligible for the exclusion under Article III.4, letter a, of the CLC.[6]

(b) The *Cour d'Appel de Paris* on *30 March 2010* held that activities performed by the classification societies are *public services* and, therefore, that Article III.4 of the CLC does not apply to them (in this respect the court does not distinguish the case considered in letter a from that considered in letter b of Article III.4).

(c) The *Cour de Cassation* on *25 September 2012* held that a classification society can generally obtain exclusion from liability under Article III.4 of the CLC (being of *private nature*), but that RINA acted recklessly (RINA's conduct was of 'faute de témérité au sens de la Convention CLC 69/92' nature and that 'prive nécessairement [RINA] de la possibilité d'invoquer un tel bénéfice').[7]

[5] See the text referred to in n 3.

[6] In this regard, see Carbone and Schiano Di Pepe (n 2) 33 affirm that classification societies might be covered by the exclusion pursuant to Article III.4, letter a, of the CLC, because they can be considered 'servants or agents of the owner', as they are independent contractors, which fall within the scope of such definition – as confirmed by the interpretation of the *Himalaya* clauses in the context of Article 4-*bis*, point 2, of the Hague-Visby Rules. Contra, see the New York District Court's ruling in the Prestige case: *Reino de Espagna v American Bureau of Shipping*, 2 January 2008, 528 F.Supp.2d 455 (S.D.N.Y. 2008), supported by the majority of legal scholars.

[7] RINA's 'faute d'imprudence' was established by the Tribunal de Grande Instance de Paris, 16 January 2008, cit., spec. 263 (that point not reversed by the following decisions) with reference to the renewing of the vessel's classification certificate in November 1999 notwithstanding the annotations regarding the substantial corrosion in a ballast tank of the *Erika*.

The Cour de Cassation was correct in ruling that classification societies benefit from the channelling provision under Article III.4, letter b, of the CLC, as 'any other person who, without being a member of the crew, performs services for the ship'.

Indeed, in practice, both the classification and certification activities carried out by classification societies can be considered services performed 'in the interest of the ship', because the ship cannot navigate without valid certificates and class documentation.[8] Furthermore, Article III.4, letter b, of the CLC:

- applies not only to natural persons, but also to legal persons;[9]
- refers not only to natural/legal persons who perform services similar to those of a pilot, but to '*any other* person', that is, without any requirement of a connection to a pilot (or a crew member);[10] and
- applies to natural/legal persons who perform services for the ship 'regardless of whether such services take place on a ship or on land'.

[8] See the first-instance decision in the Prestige case: *Reino de Espagna v American Bureau of Shipping*, 2 January 2008, 528 F.Supp.2d 455 (S.D.N.Y. 2008). In the same sense, see A. Cachard, 'Le sociétes de classification et la canalisation prévue à l'article III § 4 lettre (b) de la CLC 1992' (2014) *Dir. mar.*, 33–5; Carbone and Schiano Di Pepe (n 2) 33; Francesco Siccardi, 'Pollution Liability and Classification Societies: Is the System a Fair One?' (2005) *Dir. mar.* 691. Contra, see, among others (including De La Rue and Anderson (n 2)), F. Berlingieri, 'Sull'applicabilità dell'art. III.4 della CLC 1992 alle società di classificazione' (note to Court de Cassation, 25 September 2012, 1287 ss.), in particular, 1287–9 where the author states that the certification activities, being performed for a public interest and regarding security issues, cannot be considered 'services' for the ship performed on behalf of the shipowner. But in this respect, it should be noted that also the certification activities performed by the classification societies are normally regulated by a service agreement between the classification society and the shipowner. Furthermore, I cannot agree with Pierre Bonassies ('Réflections d'un juriste français sur le jugement 'Erika' (note to Tribunal de Grande Instance de Paris, 16 January 2008, cit., 254–5)) and M Lopez De Gonzalo ('La responsabilità delle società di classifica; dal caso "Nicholas H" ai casi "Erika" e "Prestige"', in *Scritti in onore di Francesco Berlingieri* (Genova, 2010, 713–14)) given that these authors hold that the services provided by the classification societies are services for the shipowner and not services for the ship. It seems to me that the certification (and – *sensu lato* – the classification) activities are services for the ship because they regard the navigation of the ship and – in any case – are provided in the individual interest of the ship.

[9] See the first-instance decision in the Prestige case: *Reino de Espagna v American Bureau of Shipping*, ibid. In the same sense, see Cachard (n 8) 33–5.

[10] Cachard (n 8) 35–7; Siccardi (n 8) 707. Contra, in the sense that Article III.4, letter b, of the CLC, refers only to natural/legal persons who perform services similar to those of a pilot; see Berlingieri (n 8) 1291–2; and Nicolai I Nagoni, *The Liability of Classification Societies* (Springer-Verlag, Berlin, Heidelberg 2007) 290.

[11] Carbone and Schiano Di Pepe (n 2) 34. In the same sense, see Cachard (n 8) 40–41. Contra, recently, Gahlen (n 2) 121ff., also for further references.

But in this case, notwithstanding the above dictum, the Cour de Cassation ruled that RINA could not benefit from the exclusion under Article III.4, letter b, because RINA acted recklessly (RINA's conduct was of 'faute de témérité au sens de la Convention CLC 69/92' nature).

It is pointless to 're-open' the trial, and there is no room here to delve into the matter of liability of classification societies.[12] But it seems to me that – apart from their reasoning – the French courts approached this case without fully assessing the *causal link* between the conduct of the classification society and the accident involving the *Erika* and – as already said – with the clear *intent of increasing the number of parties liable*, in disregard of the channelling provisions under the CLC.[13] As correctly pointed out by a distinguished legal scholar, the interpretation of the CLC given in this case has the effect of fragmenting the civil liability regime for oil pollution at sea, which is very disappointing given its purpose.[14]

[12] On this topic see, among others, Anthony M Antapassis, 'Liability of classification societies' in Katharina Boele-Woelki and Sjef van Erp, *General Reports of the XVIIth Congress of the International Academy of Comparative Law* (Eleven International Publishing, Brussels, Utrecht 2007) 631ff.; Jürgen Basedow and Wolfgang Wurmnest, *Third-Party Liability of Classification Societies* (Springer-Verlag, Berlin, Heidelberg 2005); Berlingieri (n 8); Francesco Berlingieri, *Alcune considerazioni sulla possibile responsabilità delle società di classificazione nei confronti dei terzi*, note to Court of Appeal of Genoa 18 July 2014 (2014) *Dir. mar.* 636ff.; P Boisson, 'The liability of classification societies' in J Lux, *Classification Societies* (London 1993) 3ff.; Bonassies (n 8) 254–5; Cachard (n 8); Carbone and Schiano Di Pepe (n 2); Michele M Comenale Pinto, 'La responsabilità delle società di classificazione di navi' (2003) *Dir. mar.* 3ff.; John Hare, 'Liability of classification societies – Current status and past CMI initiatives' in *CMI Yearbook* (CMI 2014) 323ff.; Henning Jessen, 'The liability of classification societies – Some practical issues' in *CMI Yearbook* (CMI 2014) 275ff.; Nagoni (n 10); and Lopez De Gonzalo (n 8); Siccardi (n 8).

Comenale Pinto (n 12) 41, underlines that the causal link between the activity of the classification society and the non-contractual liability for oil pollution is very difficult to prove – and this despite the obligation on the shipowner to maintain the seaworthiness of the ship; in this respect, also for further references, see Lagoni (n 10) 55ff.

[14] Tullio Scovazzi, 'Due recenti e divergenti sentenze in tema di risarcimento del danno all'ambiente marino da inquinamento da idrocarburi' (2009) 24(1) *Riv giur ambiente* 205, 208ff, who refers to the decision of the Tribunal de Grande Instance de Paris in its first ruling on the case. For another recent case where the court's decision had the effect of fragmenting the civil liability regime for oil pollution at sea see Italian Supreme Court Decision No. 902 of 16 January 2013, (2013) *Dir. mar.* 455 (with a comment by F.B[erlingieri]) and in (2015) *Dir. trasp.* 169 (with a comment by L Tullio).

(B) The liability of the Total Group (for vetting and having 'power of control' over the vessel)

Three companies belonging to the Total Group were involved in the *Erika* case: *(a)* Total S.A., which is the oil major that controls the Total Group and for which the vetting of the *Erika* was performed; *(b)* Total Transport Corporation (Panama), which was the voyage charterer of the *Erika*; and *(c)* Total International Ltd, which was the owner of the cargo shipped on the *Erika*.

The liability of these companies was initially established (then denied and in final instance re-established) not only under French criminal law, but also under the CLC. The French criminal courts had different views also in this respect:

(i) The *Tribunal de Grande Instance de Paris* held that: *(a)* the positive *vetting* on a 23-year-old vessel (which has always carried corrosive substances, has changed name eight times, has flown three different flags, and has been classified by four classification societies) is a 'faute d'imprudence' that establishes the criminal liability of the oil major (Total S.A.) on behalf of which the vetting was performed; and *(b)* the vetting and the inspections carried out on the *Erika* before the voyage demonstrate that the oil major exercised a '*power of control*' over the vessel. The court excluded liability of the charterer Total Transport Corporation (Panama), under Article III.4, letter c, of the CLC, but found the other Total group companies *not* protected under the CLC and, instead, liable under French criminal law.[15]

(ii) The *Cour d'Appel de Paris* held that: *(a)* the errors of Total S.A. (as the controlling entity of the Total Group) during the vetting, inspections and performance of the charter party imply that 'le représentant de cette société qui l'a commis avait conscience que, en agissant ainsi, il s'ensuivrait probablement un dommage par pollution'; and *(b)* Total S.A. (as the actual charterer of the *Erika* 'véritable affréteur à temps de l'*Erika*') is protected by Article III.4, letter c, of the CLC, because its errors do *not* demonstrate that it acted recklessly or knew that damage to the environment would probably result from its conduct.

(iii) The *Cour de Cassation* held that: *(a)* the *charterer* (that is, Total S.A., as an actual charterer), on behalf of which vetting was performed had the ability (and duty) to know of the condition of the *Erika*, so its conduct entailed a '*specific fault*' that resulted in liability under French criminal law for *voluntary pollution*; and *(b)* Total S.A. is *not* protected by Article III.4, letter c, of the CLC, because it acted recklessly and in the knowledge that damage to the environment would probably result from its conduct.

[15] On damages for oil pollution claims outside the CLC system in general, see Gahlen (n 2) 148–51.

The above confirms yet again that this sector lacks clear rules on the identification of the liable party/parties and that unpredictable rulings might be issued in similar cases. Also on this topic, I do not wish to express an opinion on the conduct of the liable party or the qualification by the French courts of its conduct. I merely want to raise a matter of interpretation of the CLC. Very briefly, it seems to me that:

- the court's ruling that Total S.A. was not protected by the channelling provision under the CLC, since it was not the *Erika*'s 'nominal' charterer is *incorrect* and – as pointed out by some legal scholars – was based on policy reasons;[16]
- on the contrary, the exclusion from liability under Article III.4, letter c, of the CLC, has to apply to more entities than the 'nominal' charterer, including the 'actual' charterer (that is, the natural or legal person that exercises a power of control over a chartered vessel without being officially given legal authority to do so); and
- no paradox results from the fact that a charterer's parent company will benefit from the exclusion above, as it is the 'actual' charterer (for example, because the corporate veil is pierced[17]), but that it will have no such benefit if there is no proof of a link of control with its subsidiary.[18] Of course, if no link exists, there is no liability and no need for limitation, as per the CLC; whereas if proof is given that the parent company is the 'actual' charterer and liability may occur, the exclusion pursuant to Article III.4, letter c, of the CLC does apply.

[16] Bonassies (n 8) 254; De La Rue and Anderson (n 2) 111.

[17] On this topic see the *Amoco Cadiz* case (US District Court, Northern District of Illinois (Eastern Division), 18 April 1984, *In re oil spill by the Amoco Cadiz*) and the relevant comment by F. Bonelli, 'La responsabilità della società controllante per gli illeciti delle proprie controllate' (1985) *Dir. mar.* 908ff. More generally on the subject of piercing the veil, see the recent analysis of Francesca Benatti, 'L'abuso del diritto societario: l'esperienza del piercing the veil', note to Trib. Reggio Emilia, 16 June 2015 (2016) II *Banca, borsa e tit. credito* 201.

[18] Gahlen (n 2) 115.

2.3 The Case before the Court of Justice and the Qualification of Hydrocarbons Spilled at Sea as 'Waste' under European Law

In 2000, the Commune de Mesquer initiated proceedings against the Total Group companies before the Tribunal de Commerce de Saint-Nazaire, seeking, among other things, a ruling that such companies are liable for the consequences of damage caused by the 'waste' spillage in the territory of the municipality.

The court dismissed the case,[19] ruling that *heavy fuel oil* did *not* constitute *waste* but merely combustible material for energy production manufactured for a specific use. The Cour d'Appel de Paris upheld the first-instance ruling, stating that although the heavy fuel oil that had spilled and mixed with water and sand had formed waste, there was no provision under which the Total companies could be held liable, since they could not be considered the *producers or holders of that waste*. The municipality appealed on a point of law to the Cour de Cassation.

As the case raised matters of interpretation of Directive 75/442 on waste,[20] when it came before the Cour de Cassation, that stayed the proceedings to refer several questions to the Court of Justice of the European union for a preliminary ruling.[21]

[19] On that decision, see Pierre Bonassies, 'Note Tribunal de Commerce de Saint-Nazaire', 16.2.2000' (2002) *Dr. Mar. Franç.* 43.

[20] Council Directive 75/442/EEC of 15 July 1975 on waste [1975] OJ L194/39. Article 11 states that:

> 'In accordance with the "polluter pays" principle, the cost of disposing of waste, less any proceeds derived from treating the waste, shall be borne by:
> - the holder who has waste handled by a waste collector or by an undertaking referred to in Article 8;
> - and/or the previous holders or the producer of the product from which the waste came.

[21] The following questions were referred to the Court of Justice:

1. Can heavy fuel oil, as the product of a refining process, meeting the user's specifications and intended by the producer to be sold as a combustible fuel, and referred to in [Directive 68/414] be treated as waste within the meaning of Article 1 of [Directive 75/442] as ... codified by [Directive 2006/12]?
2. Does a cargo of heavy fuel oil, transported by a ship and accidentally spilled into the sea, constitute – either in itself or on account of being mixed with water and sediment – waste falling within category Q4 in Annex I to [Directive 2006/12]?
3. If the first question is answered in the negative and the second in the affirmative, can the producer of the heavy fuel oil (Total raffinage [distribution]) and/or the seller and carrier (Total International Ltd) be regarded as the producer and or holder of waste within the meaning of Article 1(b) and (c) of [Directive 2006/12] and for the purposes of applying Article 15 of that Directive, even though at the time of the accident which transformed it into waste the product was being transported by a third party?

In brief, the Court of Justice ruled[22] that:

(a) *hydrocarbons accidentally spilled at sea* following a shipwreck that then mix with water and sediment *constitute waste* within the meaning of Directive 75/442 *when* the hydrocarbons can no longer be exploited or marketed without processing;

(b) the national court may regard the seller of hydrocarbons and charterer of the ship carrying them as the *producer* of that waste within the meaning of Directive 75/442, *if* that court concludes that the *seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur*, in particular if the seller-charterer failed to take measures to prevent such an incident, such as the choice of ship; and

(c) the '*polluter pays*' principle shall be *interpreted in a broad sense* in the context of an oil spill, extending the notion of '*producer*' of waste pursuant to Directive 75/442 substantially including the *oil major* involved in the relevant operation provided that such oil major contributed to the risk of pollution caused by the shipwreck and that irrespective from the CLC 'channelling' system.

As has been affirmed, the principle that liability for oil pollution shall be exclusively regulated by CLC has been significantly challenged by this decision, which seems to be a sort of 'warning' to all those involved in the sale and transport of oil (and – more generally – of noxious substances) with the purpose of enlarging the number of them who must pay for oil pollution damage at sea.[23]

I respectfully dissent from those who hold that the CLC concerns only matters of civil liability, when Directive 75/442 and the national administrative laws implementing the directive concern matters of *lois de police* and public duties.[24] As a matter of fact, the approach of the Court of Justice has a strong

[22] Case C-188/07, *Commune de Mesquer v Total France SA* and *Total International Ltd*, in *Report* [2008] I-04501.

[23] See Francesca Pellegrino, 'Introductory Remarks' (Carriage of Dangerous Goods by Sea: Maritime Education and Training, Messina, 10 July 2015); Francesca Pellegrino, 'I nuovi orizzonti della sicurezza marittima' in *Scritti in onore di Francesco Berlingieri* (Genoa, 2014) 793ff.; Francesca Pellegrino, 'La corte di giustizia europea si pronuncia sul caso dell'Erika', note to Court of Justice of the European Community (Grand Chamber), 24 June 2008, C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd* (2009) 1 *Dir. Trasp.* 133, 151. In the same sense, see Francesco Munari and Lorenzo Schiano di Pepe, *Tutela transnazionale dell'ambiente* (Il Mulino, Bologna 2012) 180; Frank Smeele, 'International civil litigation and the pollution of the marine environment' in Basedow, Magnus and Wolfrum (n 2), 86.

[24] Bonassies, 'Note Tribunal de Commerce de Saint-Nazaire' (n 19).

impact on the CLC channelling system, altering the balance of risk and liabilities provided for by the Convention and generating potential discriminations between the liable entities.[25]

3. MORE PENDING QUESTIONS THAN ANSWERS FROM THE COURTS: CERTAINTY OF THE LAW AS A VALUE AND THE ENCYCLICAL LETTER *LAUDATO SÌ* AS A GUIDELINE FOR THE FUTURE

The *Erika* case demonstrates the difficulty of precisely answering the question 'Who pays for sea pollution?'

The three levels of French criminal courts gave *opposing answers* to two fundamental issues of the three central questions: the immunity of jurisdiction of the classification society; the liability of the classification society; and the interpretation of the fundamental 'channelling' liability system under the CLC. Furthermore, the Court of Justice's ruling opened the door to a significant (and unpredictable) extension to the number of persons liable for sea pollution.

Unpredictability in court decisions is always unacceptable, albeit understandable in the *Erika* case given its peculiarity and complexity. But *'anger' can ever prevail over the law*: that would certainly be unjust. In a society where relativism is considered a fundamental parameter, certainty in the application of positive law by the courts is the one objective value to preserve, irrespective of any other considerations.[26]

Of course, a separate point to be taken into account concerns the limits and shortcomings of the current positive law and the possibility of amending it to better address the needs of people and the environment. The *Erika* case is the point of departure for discussions on a possible amendment of various aspects under international rules on the prevention of pollution at sea. In particular:

(a) the 'channelling' system of liability and its limits;
(b) the interplay between international rules, European Union law and national law; and
(c) the liability of the classification societies.

[25] See Munari and Schiano di Pepe (n 23) 181; and Gahlen (n 2) 162.

[26] See Salvatore Pugliatti, *Conoscenza e diritto* (Milan, 1961) 29ff., who quotes Piero Calamandrei ('La certezza del diritto e la responsabilità della dottrina' (1943) I *Riv. dir. comm.* 341ff.), Francesco Carnelutti ('La certezza del diritto' (1943) *Riv. dir. proc. civ.* 81ff.), and M.S. Giannini ('Certezza pubblica' (Milan, 1960) IV *Enc. dir.* 770).

The search for answers to these issues is beyond the bounds of this brief chapter, but it is essential to consider that any reasoning on the matters above cannot ignore policy concerns or the problem of sustainable development.[27]

In this respect, fundamental suggestions (and a sort of guideline for the future) can be found in Pope Francis' recent encyclical letter *Laudato sì*. Indeed, future discussions on a possible reform of the legislative framework considered in this paper should bear the Pope's warning in mind:

> [E]conomic powers continue to justify the current global system where priority tends to be given to speculation and the pursuit of financial gain, which fail to take the context into account, letting alone the effects on human dignity and the natural environment. Here we see how environmental deterioration and human and ethical degradation are closely linked. (...). As a result, 'whatever is fragile, like the environment, is defenceless before the interests of a deified market, which become the only rule'.[28]

[27] See, among others, S Marchisio, 'Is the European Environmental Policy Sufficient to the Principle of Sustainable Development?', in *Environmental Law in Europe*. Brussels, 10–11 May 1997, Dusseldorf, 1997, 84ff., and more recently, P Fois (ed.), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente*, Documents of the XI Congress of the Italian Society of International Law – SIDI-ISIL (Alghero 16–17 June 2006, Napoli, 2007, *passim*); Francesca Pellegrino (ed.), *Sviluppo sostenibile dei trasporti marittimi nel Mediterraneo* (Edizioni scientifiche italiane 2013).

[28] Pope Francis, 'Encyclical letter *Laudato si': on care for our common home*' (Vatican, 2015) point 56. For an analysis of this encyclical letter from a lawyer's point of view, see Alberto Toffoletto, 'Note minime a margine di Laudato si' (2015) *Le società* 1203ff.