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The role of the insurance contract in guaranteeing the risks facing the responsibility of the transporter of fuels

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Abstract:

The insurance contract was and still is at the forefront in solving most of the dilemmas and issues that may occur due to risks and threats, and the field of transportation is considered one of the most important areas that cannot do without the insurance contract, especially maritime transportation, as it faces great risks, whether for the ship or the goods being transported or even the liability of the carrier, and sometimes these risks may go to the marine environment and pollute it, which is difficult to face by the carrier, which makes him resort to insurance to repair these damages and from here we raise the following issue:

To what extent does the insurance contract contribute to guaranteeing the risks facing the liability of the fuel transporter ?

In order to answer this question, we addressed the following axes :

Axis I: Basic concepts about the insurance contract, fuel tanker liability and pollution of the marine environment

Axis II: The impact of the insurance contract on the responsibility of the fuel tanker

Keywords : Insurance contract ; Guarantee ; Responsibility ; Risks ; fuels

Introduction:

Marine insurance constitutes a necessary and important system for the prosperity and development of maritime trade. It is considered an effective tool in attracting capital and encouraging local and foreign investors, especially when it guarantees most of the risks that may be faced by those involved in maritime navigation. It also achieves a kind of reassurance and credit and provides protection for goods, ship hulls, and various liabilities arising from the failure of ship owners and carriers, whether tortious or contractual liability. Dean Rodier defined it as “a contract by which the insurer undertakes, in return for the payment of a premium, to compensate the insured for the damage incurred as a result of the potential occurrence during a specific maritime operation of one or more risks stipulated in the contract.”

The scope of marine insurance has expanded with the expansion of liability, which has led the maritime legislator to find special solutions for these types of liability in a way that balances the interests of the insured, the insurer, and the injured third party. It has no equivalent in other types of insurance, which are characterized by simplicity and flexibility. The Algerian legislator stipulated this type of

insurance in Article 145 of Ordinance 95-07, which states: "The insurance of the shipowner's liability aims to compensate for material and bodily damages caused by the ship to third parties or resulting from its operation. However, this insurance does not apply to damages caused by the ship to third parties that are guaranteed in accordance with the provisions of Article 132 above, unless it is shown that the amount insured in the ship's hull insurance policy is insufficient."

Among the risks that can be insured is the liability of the ship owner transporting fuel or oil for pollution that may be caused and harm the marine environment. This has increased significantly in recent years due to the growing number of ships and tankers. Marine pollution is considered one of the most complex and serious problems facing carriers and ship owners.

One of the most significant damages caused by ships at sea is pollution, which may be subject to insurance. This can result from the deliberate dumping of cargo and ship waste into the sea, or from the leakage of petroleum products and harmful chemicals into the sea, whether intentionally or unintentionally, such as due to a defect in the ship, a maritime accident, or loading and unloading operations.

Perhaps the first initiative to address this complex problem was the convening of an international conference in the United States of America in Washington in 1926, in which it was agreed to conclude an international agreement on dealing with pollution of navigable waters by oil, but the countries did not ratify it, which prevented this agreement from entering into force. After that came the International Convention for the Prevention of Pollution by Hydrocarbons, known as the London Convention of 1954, and after that the International Convention on Civil Liability for Marine Pollution by Hydrocarbons of 1969 was concluded. This agreement tried to overcome all the difficulties that were facing the owners of ships transporting oil. Algeria ratified this agreement because it exports these materials, as it owns a maritime fleet consisting of 38 ships, including 18 oil tankers for transporting petroleum products, liquefied gas and chemicals.

Insurance is also considered one of the approved mechanisms for compensating and redressing the grievances of carriers, but to what extent can an insurance contract contribute to confronting the risks that threaten the liability of owners of ships transporting fuels?

To answer this problem, we tried to divide this research into two parts. In the first part, we dealt with the legal scope of the liability of the owner of the ship transporting fuels (first), by going over the conditions for the realization of this liability (1), the legal nature of the liability (2), and the limits of the liability (3). As for the second part, we dealt with insurance as a mechanism to guarantee the risks of transporting fuels (second), by identifying the limits of this guarantee (1), the procedural rules for insuring the liability of the owner of the ship transporting fuels (2), and a conclusion in which we arrived at the results and some recommendations that we came up with from this research.

First: The legal scope of the liability of the owner of a ship transporting petroleum products

The international legislator took an interest in the problem of marine pollution originating from ships and included provisions regarding pollution and the responsibility of ship owners, especially after the well-known oil tanker incident of Torrey Canyon in 1967. Two important agreements were established in the

field of combating marine pollution in 1969: the Convention on Intervention on the High Seas, known as the Intervention Convention, and the Convention on Civil Liability for Oil Pollution (*The International Convention on Civil Liability for Marine Pollution from Hydrocarbons , 1968) (*The International Convention on Civil Liability for Marine Pollution from Hydrocarbons , 1968), which is the focus of our study.

Like the Algerian legislator, who also addressed this vital issue, the Algerian legislator included provisions in specific laws, such as the 2003 Law on Environmental Protection within the Framework of Sustainable Development (Law No 03-10, 2003). This law addressed the liability of ship owners for environmental damage by regulating one type of pollutant: fuel pollution. Section Five of Chapter Two is entitled "Liability of Ship Owners for Damage Resulting from Fuel Pollution." Regarding the provisions of this liability, the Algerian legislator referred to the aforementioned International Convention on Civil Liability (*Order No. 72-17 , , 1972), which Algeria has ratified, specifically concerning the amounts at which liability is determined, as stipulated in Articles 121 and 221 of the Algerian Maritime Code.

The International Convention on Civil Liability for Oil Pollution Damage has attempted to overcome most of the difficulties that victims of oil pollution may face, as it states in its preamble that it recognizes the risks of pollution resulting from the maritime transport of oil throughout the world and the need to provide appropriate compensation to those harmed by pollution caused by oil discharges. It also stipulates the provision of a uniform set of international rules and procedures for determining liability and paying the necessary compensation.

1- Conditions for establishing responsibility:

international and national laws stipulate three essential conditions for liability to be established: the pollution incident, the pollution damage, and the causal link.

A. The Pollution Incident:

The pollution incident is considered the first element of civil liability for oil pollution, beginning with its occurrence and ending with the resulting damage. The 1969 International Convention on Civil Liability for Oil Pollution Damage defines it as "any event or series of events of the same origin resulting in pollution." The 1992 Protocol amending this Convention, in Article 1, paragraph 8, defines it as "an incident is an event or series of events of a single origin that causes pollution damage or creates a serious or imminent threat of causing such damage." Article 147 of the Algerian Maritime Code defines it as "an incident meaning any event or series of events of the same origin resulting from pollution."

This incident must be related to a specific ship, and this incident must be due to the ship being exposed to a physical event that leads to the leakage of its fuels into the sea. The agreement also stipulated that the fuels must actually be transported. Article 1, Paragraph 5 of the 1969 Convention states that it means "all heavy fuels, especially crude oil, fuel oil, heavy diesel oil, lubricating oil and whale oil, whether transported on the ship as cargo or fuel in its engine rooms."

B- Pollution damage:

Damage is considered the basic element for establishing liability, as there is no liability without damage even if the fault that creates liability is present. It is the harm that befalls the person and it is required in order for it to be pollution damage according to the concept of the 1969 Convention that this damage occurs

outside the ship, on the one hand, and that its occurrence is due to pollution and not to any other reason, on the other hand (Al-Faqi, 2002, p. 80).

C- Causation:

The third condition is the existence of a causation relationship between the pollution incident and the damage. The ship owner's liability is negated if the causation relationship is absent due to an external cause, i.e., the pollution incident occurred not because of the ship owner but because of this external event, which cannot be foreseen or prevented, such as being the result of an act of war, etc (Kamal Kihal, 2009, p. 214).

2- The legal nature of the shipowner's liability for pollution damage:

Civil liability, as is well known, is divided into two main branches: contractual liability and tortious liability. The former is based on the breach of a contractual obligation, while the latter is based on the breach of a single, unchanging legal obligation: the obligation not to harm others. In contractual liability, the parties to the contract were bound by it before the liability arose, whereas in tortious liability, before the liability arose, the debtor was a stranger to the creditor. This aligns with liability in the field of marine pollution from oil spills, which is certainly tortious. When an oil tanker is involved in an accident resulting in pollution damage due to an oil leak, the shipowner, who is responsible for compensating for this damage, had no legal relationship with the injured party and was a stranger to them beforehand. It is generally accepted, according to traditional legal principles, that liability is based on the fault that must be proven. This requires the injured party to prove the fault of the party causing the damage, which is difficult in the field of marine pollution. The injured party may be deprived of or delayed in obtaining their right to compensation for the damage they suffered. For these reasons, the Civil Liability Convention for Pollution Damage adopted Article 3 of 1969.

The principle of objective liability (i.e., material liability based on damage to the shipowner) means that the shipowner is automatically liable to the victims of pollution for any damage caused by his ship, in the event that he did not commit any error or negligence that caused the pollution incident (Kamal, 2020, p. 845), because the goal is to protect the victims, and it is enough for them to establish a causal relationship between the damages they suffered and the incident caused by the ship in order to obtain compensation from the shipowner (Fatima, 2012-2013, p. 42).

Prior to the preparatory work for the 1969 Convention, determining the nature of liability for pollution was one of the most contentious issues: whether liability should be based on fault or solely on damage, regardless of fault. While some argued that liability based solely on fault was more effective and protective of those harmed by pollution, others hesitated to abandon the principle of liability based on fault, the traditional principle in maritime law, fearing it would stifle the growth of related activities. This was especially true given that oil tanker owners were strongly opposed to the principle of liability based on damage. Two main approaches emerged:

The first approach advocated for liability based on fault, with the burden of proof reversed.

The second approach argued for liability based solely on damage, without regard to fault.

Finally, the second approach was chosen, which is what was adopted by the 1969 Convention on the Civil Liability of the Shipowner. Article 3, paragraph 1, states that

the shipowner at the time of an accident, or when an accident consists of a series of events, is responsible at the time of the first event for any pollution damage resulting from the leakage or discharge of fuels from his ship following the accident. According to this Convention, the owner is considered responsible for the pollution damage that may occur due to the leakage or discharge of oil from his ship, even if he did not commit any fault. It is sufficient for the injured party to establish proof of the causal relationship between the pollution accident and the damage in order to obtain compensation.

This is what the Algerian legislator took, as it stipulated in Article 117 of the Algerian Maritime Law (Law No. 98-05 , 1998) the principle of substantive liability, and Article 58 of Law 03/10 stipulated that "every owner of a ship carrying a shipment of fuel that caused pollution resulting from a leakage or due to fuel from this ship shall be responsible for the damage resulting from the pollution in accordance with the conditions and restrictions specified in accordance with the international agreement on civil liability for damage resulting from pollution by fuel." (Law No 03-10, 2003)

Therefore, the shipowner is automatically liable to the victims of pollution for any damage that his ship was responsible for, even if he did not commit any error or negligence that caused the pollution accident to occur. He cannot evade responsibility unless he provides evidence that the pollution damage is due to one of the exemption cases stipulated in the 1969 Convention (Kamal, 2020, p. 845).

3-Cases of exemption from responsibility:

The Convention on Civil Liability of the Shipowner for Hydrocarbons exempts the carrier or shipowner in the event of damage under Article 3, paragraphs 2 and 3, in the following cases:

-Any act of war, hostilities, civil war or revolution

- Due to a natural phenomenon of an exceptional nature that cannot be avoided or resisted

- Due to a deliberate act or omission on the part of others with the intention of causing harm.

- Due to the negligence or other act of any government or other authority responsible for maintaining lights or other navigational aids.

-If the owner can prove that the pollution damage was caused partially or completely by the injured person or due to his negligence.

4- Limits of the shipowner's liability for marine oil pollution damage:

The 1969 Convention enabled the oil carrier to limit his liability to a total amount for the incident of 2,000 francs per ton of the ship's cargo, provided that the amount does not exceed 21 million francs in any case, regardless of the ship's cargo and the severity of the pollution damage. On November 10, 1976, a protocol was concluded to amend the Convention, which stipulates that the Special Drawing Rights will replace the franc, which is the currency in which the International Monetary Fund deals.

The 1992 Protocol raised the maximum liability of a shipowner for pollution damage to three million tonnage units (STUs) for vessels under 5,000 tons. For vessels exceeding 5,000 tons, an additional 420 STUs were added for each ton exceeding this amount, provided the total liability did not exceed 59.7 million STUs. This was further increased to 4,510,000 STUs for vessels under 5,000 tons, and 631 STUs for each ton exceeding 5,000 tons, provided the total liability did not exceed

89,770,000 STUs. This amendment was introduced following the sinking of the oil tanker Erika off the west coast of France on December 12, 1999. The amendment, which amended the 1992 Protocol (Kamal, 2020, p. 845), entered into force on September 1, 2003. The latter is based on the quantitative tonnage as the basis for calculating the limits of compensation, and this is what the Algerian legislator has adopted, as he explicitly stipulated in Article 121 of the Maritime Law that the liability of the ship owner is determined in the same way as defined by the 1969 Convention and its amendments.

Second: Insurance as a mechanism to mitigate risks in fuel transport

Undoubtedly, the emergence and spread of the insurance system has had a significant impact, causing it to shift from its previous position. Specifically, liability insurance has had clear repercussions on liability, evident in the reciprocal influence between the insurance and liability systems (Iman, 2017, p. 201). This insurance has consistently driven the evolution of the nature and scope of maritime carrier liability, particularly as it necessitates setting a maximum limit for this liability to ensure coverage by insurance payouts. Marine insurance is the most widespread branch of the insurance system, gaining importance and widespread adoption from its international character, unlike other insurance branches that are personal or regional in nature. It has become essential to maritime trade, an integral part of international sales and transport operations across various modes—sea, land, and air. It is among the oldest methods employed by humankind to alleviate or mitigate the burdens of disasters (Shukri, 2009, p. 19). The transport of fuels, in particular, involves a range of risks requiring specialized coverage, which is provided by insurance contracts. To elaborate further, we have divided this topic into two sections. The first addresses the mandatory nature of insurance (firstly), and the Second section discusses the relevant rules. Procedural (Second)

1.Mandatory Insurance:

International agreements and national laws stipulate mandatory liability insurance, obligating the shipowner to conclude a liability insurance contract. Article 7 of the International Convention on Civil Liability for Oil Pollution Damage of 1969, as amended, states:

"1. The owner of every ship registered in a Contracting State to this Convention and carrying more than 2,000 tons of bulk oil as cargo shall provide acceptable insurance or financial security to cover the liability arising from such cargo.

2. A copy of the liability insurance certificate shall be on board the ship."

The agreement has forced carriers to cover the risks they face with an insurance contract, similar to the Algerian legislator who obliged the ship owner to insure his liability, as stated in Article 130 of the Code: “The owner of a ship that transports more than 2,000 tons of fuel without arrangement as cargo is obligated to establish insurance or a financial guarantee such as a bank guarantee or a certificate issued by an international compensation fund for an amount determined according to the limits of liability stipulated in Article 121 above to cover liability for pollution damage in accordance with the provisions of this chapter.”

We note, according to the agreement, that the mandatory insurance only applies to owners of ships registered in contracting countries whose cargo exceeds 2000 tons of fuel in bulk as cargo. Therefore, ships that transport less than

this quantity are not subject to the text and obligation.

This is done by the shipowner joining what are called Protection and Indemnity Clubs by submitting an application for membership. This is also the approach adopted by the Algerian legislator, and it is considered an insurance contract between the shipowner and the insured. The purpose of the insurance is to cover damages incurred by the insured. Therefore, the insurance amount must not exceed the amount of the damage, unless the insured is unjustly enriched at the expense of the insurer.

The idea of mandatory insurance arose after considerable debate regarding its necessity during the preparatory work for the 1969 Convention. Those in favor argued that mandatory insurance is a fundamental and necessary measure to complement the system of strict liability, which serves as the basis for liability for oil pollution damage, and to guarantee compensation for the insured party. Those opposed argued that the insurance market is incapable of providing adequate coverage, that setting insurance conditions is difficult, and that the high cost of insurance makes it difficult to cover maritime risks. This dispute ended with the preference for mandatory insurance due to the inherent objectivity of the insurance contract (Smaïn, 2009-2010, p. 77).

The function of mandatory insurance is to cover a range of risks, which are the liabilities, damages, costs and expenses resulting from the spillage of oil or any hazardous material from the insured tanker. The cover also includes the costs of actions taken to avoid or mitigate pollution or actions to prevent an imminent risk of discharge or spillage from a tanker that is a member of one of these protection and indemnity clubs (Salima, 2007, p. 715).

A- Conditions that must be met to conclude an insurance contract:

The Civil Liability Convention for the Carriage of Hydrocarbons 1969 specified a set of conditions that must be met in compulsory insurance, which are:

1- The insurer must be the shipowner. Thus, the Convention excluded the ship's charterers, creditors, and the mortgagee, and also excluded ships owned by the state. This is due to the objective basis of liability, which is that the shipowner alone is responsible for concluding the insurance contract (Salima, 2007, p. 716).

2- The second condition is that the ship, as a marine vessel, is built and adapted to transport bulk oil as cargo, and therefore this insurance is mandatory. This does not apply to a ship sailing empty, or if it is carrying oil in barrels and not in bulk. Small coastal vessels and dry cargo ships are also excluded from this insurance, but this does not mean that they are exempt from liability in the event of oil spillage from their ships, as they are obligated to pay compensation to the injured party (Sakran, 2006, p. 161).

3- The third condition is oil. The agreement excludes oil used as fuel because its quantity may decrease during the voyage. Oil refers to any mineral hydrocarbon such as crude oil, diesel oil, and lubricating oil, whether carried on board as cargo or stored in the ship's fuel tanks.

4- Cargo: Article 7, Paragraph 1 of the agreement stipulates that ships must transport more than 2,000 tons of fuel oil. Therefore, mandatory insurance is required for ship owners whose vessels carry more than 2,000 tons of oil, excluding the quantity used as fuel. Ships carrying less than this quantity are not

required to provide a guarantee or financial insurance (Al-Faqi, 2002, p. 383).

The Convention allowed shipowners to provide alternative financial guarantees, such as a bank guarantee or a certificate issued by an international compensation fund (Salima, 2007, p. 718), instead of insurance. The amount of the insurance must not exceed the amount specified for the shipowner's liability; it must be equivalent to both. The Convention left this determination to the discretion of the contracting state in which the ship is registered.

B- State Supervision and Insurance Certificate:

The aforementioned agreement entrusted the contracting states with the right to supervise the extent to which the shipowner complies with and implements his obligation to provide insurance or any other financial guarantee. The features of this supervision are evident through the competent authority in the State of Registration, after verifying that the conditions stipulated in the first paragraph of Article 7 have been complied with, delivering or giving this ship in accordance with the conditions specified by an insurance certificate or financial guarantee that is valid and effective for its provisions (Al-Faqi, 2002, pp. pp372-373).

This certificate includes several details about the insured owner, the vessel, the port of registration, and the name and principal place of business of the insurer or guarantor. All this information must be written and translated into English or French. It must be present on board the vessel, along with any other documents it carries, and a copy must be deposited with the authority maintaining the vessel's registration record. The treaty also stipulates that the insurance must be valid for at least three months from the date the competent authority is notified of its expiry, to account for the possibility of the vessel's ownership being transferred to another person. The issuance of insurance or financial guarantee certificates by one of the contracting states entails their recognition and acceptance by the other contracting states, granting them the same legal force as those issued by the latter.

2- Procedural Rules Adopted to Guarantee Insurance:

Regarding procedural rules, the Convention and its amendments grant the party harmed by the consequences of pollution the right to:

A- The right of the party harmed by pollution to file a direct claim against the insurer of the shipowner or their guarantor:

Article 7, paragraph 7 of the same Convention stipulates the right of any party harmed by pollution to file a direct claim against the insurer or the other person who issued the financial guarantee. The provider of the financial guarantee has the right to limit their liability to the same amounts stipulated for the shipowner. This is an absolute right, meaning it could lead to the cessation of maritime transport of hydrocarbons, as the insurer would not accept insurance for unspecified damages.

owever, when the damages exceed these limits, the injured parties have no recourse but to seek compensation from the owner. Furthermore, the insurer may, in addition to the defenses the owner himself is entitled to raise, invoke the owner's intentional fault to be released from the incurred obligation. Conversely, the insurer cannot benefit from any other defenses, particularly those it has the right to raise in a lawsuit filed against it and the owner, such as the defense of the vessel's unseaworthiness.

The agreement also grants the insurer the right to request the insured owner to join the direct

lawsuit filed against it, as stipulated in Article 7, Paragraph 8 of the agreement.

It should be noted that with regard to the tonnage requirement stipulated by the treaty for the underwriting of an insurance contract that it exceeds 2000 tons, this tonnage is only a condition to obligate the owner to provide insurance or guarantee. Therefore, the person harmed by pollution can file a direct claim against the insurer or guarantor of the owner of the ship that transports less than 2000 tons of oil in bulk as cargo.

B- The court competent to hear the compensation claim and the deadlines for the right to compensation to lapse:

According to Article 9, paragraph 1, of the 1969 Convention on Civil Liability, when an incident causes pollution damage in a territory, including the territorial sea, of one or more contracting states, or when preventive measures are taken to avoid or minimize any pollution damage in such territory, including the territorial sea, a claim for compensation may only be brought before the courts of that contracting state or states, provided that the defendant is notified of such claim in a timely manner. The right to claim compensation lapses if no claim is brought before the courts within three years from the date of the incident, as stipulated in Article 8 of the same Convention (Kamal, 2020, p. 847).

Conclusion:

In conclusion, we say that despite the great efforts made by the International Convention on the Liability of Shipowners for Oil Damage to provide legal protection after the legal vacuum that existed at the time, and its attempt to achieve a balance between interests on the one hand and to guarantee compensation for those harmed by pollution, especially in cases that constituted real disasters, it was unable to reach the desired result, especially when it made the shipowner solely responsible for all damages and excluded the charterer, the creditor and others who may actually cause the damage, as well as excluding light oils from the scope of its application and leaving the latter to domestic laws.

Likewise, when it stipulated the determination of responsibility and set a ceiling for compensation, it was not successful in achieving a fair balance between the two parties to the dispute (the injured party and the ship owner), which is what the Algerian legislator did as well, as he did not violate this agreement.

While insurance contracts are designed to protect ship owners from risks, their exclusion of vessels with a tonnage of less than 2,000 tons has deprived owners of these vessels of coverage. Furthermore, the high cost of compensation has resulted in some victims waiting for extended periods without receiving their due compensation, thus undermining the value of these contracts. Therefore, it is necessary to:

*Establish a legal framework to ensure adequate protection for those harmed by this pollution.

* Establish a legal provision that guarantees a degree of equality and fairness in balancing the rights of victims and ship owners.

*Imposing preventive and deterrent measures to reduce the phenomenon of marine pollution, while highlighting its negative effects on the marine environment and on animal resources.

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