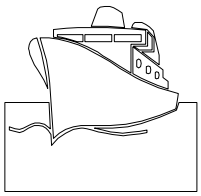


Briefing on Maritime Oil Pollution Claims

By
Corbett Haselgrove-Spurin
Presented By
Sharifah Mariam Syed Ibrahim
Managing Director NADR (M) Sdn Bhd

"The Legal Regime Governing Maritime Oil Pollution Claims"

Contents : **Page**

OUTLINE OF THE PROCESS FOR MAKING A CLAIM FOR COMPENSATION TO RECOVER COSTS INCURRED IN DEALING WITH A POLLUTION INCIDENT AFFECTING THE MALAYSIAN COASTLINE

There are 2 sources of compensation :-

1) The Ship Owner (supported by his insurers and assurers viz Policy & P&I).
2) The International Oil Pollution Convention Fund 1971 in London.

There are 3 stages to the process which must be followed in chronological order

a) **Civil Liability Convention 1969 based claim to Malaysian Court**. The claimant must commence his action with a claim before the local court, where the damage was suffered, in this case a Malaysian Court. The claim is founded in Tort *(more specifically it should be a Statutory Strict Liability Tort assuming Malaysia has fully implemented the requirements of the Civil Liability Convention 1969 and introduced domestic legislation which makes it compulsory for ship owners to compensate victims of maritime oil pollution for the costs of cleaning up the pollution and for direct physical loss to legal interests such as fishing nets and consequent loss of income.)* The Malaysian Court will make an award of damages or compensation that the owner and his backers must pay the claimants.

b) **CLC 1969 based Limitation of Liability request to Malaysian Court.** Following the award above there will be an application by the ship owner for the benefit or privilege of Limitation of Liability. Limitation places a Threshold Cap on the amount of money awarded by the court that the ship owner has to pay.
   i) If the award is less than the Limitation Threshold the ship owner pays the entire award of damages – providing he is not bankrupt.
   ii) If the award is above the Limitation Threshold the ship owner will only pay up to the Limitation Threshold leaving the claimants short of money.

   Note that the court will take into account not only its own award but also all other awards made by foreign courts related to the same incident, so that in this case the critical figure will be the sum total of all monies awarded by the Malaysian, the Singaporean and the Indonesian Courts.

c) **IOPC 1971 Fund Application in London** : If the claimants are unable to recover all of the award made by the Malaysian Court because
   i) the ship owner has successfully claimed limitation of liability *or because*
   ii) the ship owner is bankrupt **and** the insurers have succeeded in avoiding some or all elements of the insurance policy, thereby escaping liability for the ship owner's wrongdoing *or because*
   iii) the Fund is prepared to pay for things that cannot be recovered under Malaysian Law,

   then the claimants can apply to the Fund in London to cover the shortfall.

The Parties To The Claim

The Malaysian Government Agency + Private Claimants eg fishermen

AGAINST

The ship owner supported by his P&I Legal Team.

BACKGROUND TO THE LAW AND CLAIMS PROCESS.

GENERAL PRINCIPLE : THE POLLUTER PAYS

The overriding principle governing maritime oil pollution is that the polluter should pay damages to cover the costs of cleaning up pollution and the polluter should "sue and labour" to minimise pollution.

The polluter includes the ship owner's insurers & assurers, who will provide cover up to a given sum of money. The insurance and assurance is not unlimited. The owner should have a Hull Insurance Policy and P&I Club mutual indemnity. The P&I cover provides for both the losses of, and the legal liabilities of, the owner that are not covered by The Hull Policy and any other policies the owner might have taken out. It is common for insurance policies to contain an excess clause preventing the owner recovering the first part of any claim. Assuming $10M cover & a 5% excess clause:-

a) The owner will pay the first part of any claim himself, in this example 5% of $10M is $500,000 or proportionately less where the claim is less than the global cover.
b) The underwriters and the P&I Club will pay any validated claims from $500,000 up to $10M.
c) After that the owner must pay out of his own funds so if the claim is for $15M the owner would pay $0.5M excess himself, the Underwriters and P&I would pay $9.5M and the owner would then pay the remaining $5M.

BACKGROUND TO LIMITATION OF LIABILITY BY SHIP OWNERS

The law has long recognised that if ship owners were to be held legally responsible for the total amount of all claims against them they would not be able to secure insurance cover because the risk for insurers would be too great. Without insurance ship owners could easily be bankrupted and driven out of business by a disaster. If ship operators were to be driven to bankruptcy on a regular basis this would produce instability in the industry, threatening trade and the livelihood of mariners. To solve this problem ship owners were given a legal privilege. Provided the disaster was not the fault of the ship owner, the owner was only required to pay the first £4M of any claim. The victims had to bear the additional losses themselves. Since insurance cover for third party claims was limited to £4M the underwriters were willing to take the risk because it was manageable. This meant that there was a guaranteed £4M available for claimants.

Whether the claims above were $10M or $15M, assuming limitation of liability was granted, the owner's liability would be reduced to £4M.

a) The owner would pay the 1st 5% excess i.e. £200,000 and
b) The insurers / P&I Club would pay the remaining £3.8M.
c) The victims would have to bear the outstanding losses from £4M-$10M or £4M-$15M themselves. This might seem unfair but that is the law.

If the ship owner did something wrong, which contributed to the disaster, the underwriter may avoid the policy and the owner could lose the right to limit liability as well. In that case the owner would have to pay the entire $10M or $15M himself.

SHIP OWNERS LIMITATION OF LIABILITY UNDER THE CIVIL LIABILITY CONVENTION 1969.

With the costs of cleaning up maritime pollution running into hundreds of millions of pounds it became clear in the 1960'ies that the £4M cap on liability was inadequate. Governments were left to pay for the cost of cleaning up.

Private individuals such as fishermen and holiday resort owners could not recover sufficient money to clean up after incidents.

Meanwhile the oil industry was making massive profits but was not helping to clean up for the problems that the industry was causing.

Governments wanted to introduce strict liability so that oil companies had to pay for the pollution they caused. However because the industry was, and still is, fragmented into many owners from different countries, targeting individual companies was impractical. Whilst some large multi-national companies such as Exxon, Shell and BP could afford to pay, many small shipping companies (particularly one ship companies) could not afford, on an individual basis, to pay all the costs of a disaster.

Traditional marine insurance and P&I assurance could not or would not provide cover at that time. Besides, land based oil companies who did not own or operate ships were not being asked to share the burden. A new solution was required.

The limitation cap governed by the old s502/3 Merchant Shipping Act 1894 was scrapped for Oil Pollution and replaced by the Civil Liabilities Convention 1969 which introduced a new system based on the size and carrying capacity of the vessel.

However, just as with the old MSA 1894, limitation continues to be a privilege not a right. The privilege can be denied by the court. If the owners of the vessel intentionally or recklessly caused the loss the right to limitation could be lost and the owner would be liable for the entire claim.

Initially, even where the owner was held liable for the absolute ceiling of $14M, insurance only provided cover for about £4M or $6M US. The ship owners had to pay the difference themselves. P&I Clubs eventually raised cover up to the new limitation level.

Even so, $14M is simply not enough to pay the costs of a large clean up operation. If clean up costs are $30M* who will pay the additional $16M* ? An even bigger problem was that if the owner goes bankrupt the victims cannot recover their losses. A new solution was required. Hence the introduction of the 1971 IOPC FUND.

LIMITATION OF LIABILITY

In relation to a mid-sized incident, the current cap is approximately $12M. It may be a little more or a little less, depending on vessel size and vale. Exact specifications are needed to provide a totally accurate figure. The range is likely to be between $11.5M - $14M for a vessel with minimum 70,000 tonne carrying capacity.

THE FUND INTERNATIONAL OIL POLLUTION CONVENTION 1971
THE IOPC FUND 1971

The idea behind the fund is that the oil companies in each country must pay a sum of money into a global fund linked percentage wise to the amount of oil business that they carry out annually. The FUND is available to cover the costs of pollution caused by a vessel from a signature state, which **EXCEED** the CLC Limitation of Liability Cap or where the owner is not insured and has cannot pay, perhaps because he goes bankrupt. Thus the Fund would pay the $16M* additional costs outlined above if the vessel came from a signatory state. If the underwriter were to avoid the policy and the ship owner had no money – e.g. a one ship company, where the vessel causing the pollution becomes a total loss, the Fund could even pay the entire $30M.

Before the Fund will pay certain things are required :-

1) The claimant state must be a member of the CLC *(Malaysia is a member)*
2) The claimant state must have introduced laws providing for strict liability of the pollution vessel and providing for jurisdiction over foreign vessels so that the courts can process the claim and recover the first $14M in the claimant state. These legal actions must take place before going to the Fund.
3) The vessel must have come from a signatory state.

THE CREATION OF TOVALOP AND CHRISTAL

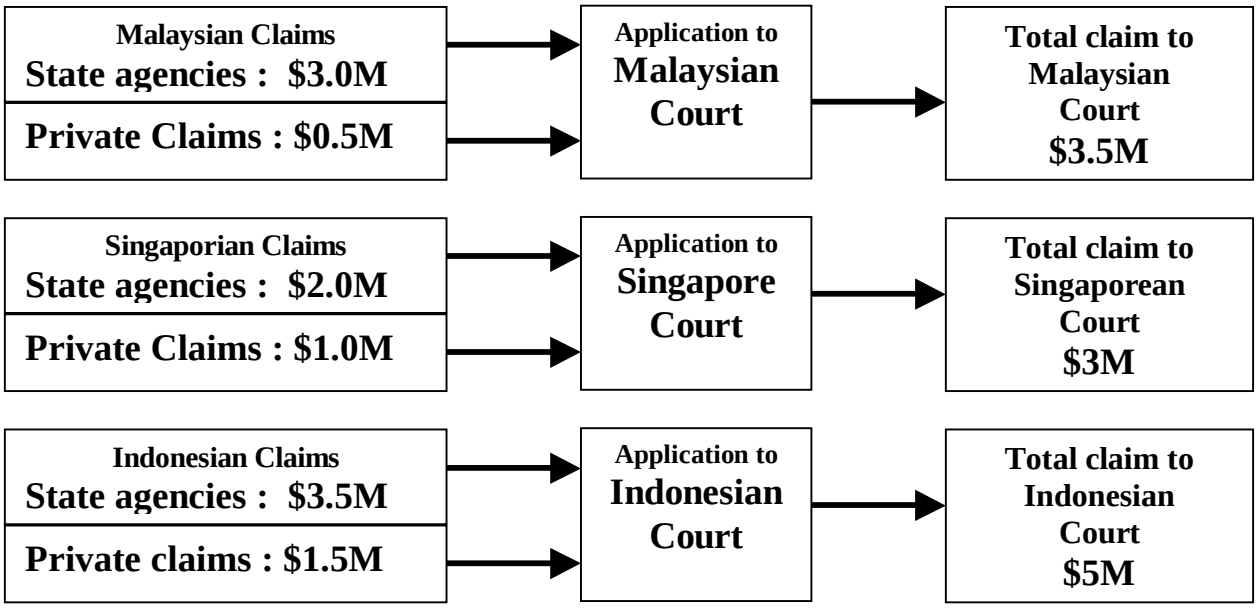
It soon became clear that the 1969 FUND was not able to cope with all the claims being made against it. The fund had insufficient monies and was forced to declare that it would only pay out a percentage of the monies claimed to each victim – a bit like the way the court pays out a percentage in a bankruptcy claim – e.g. 50 cents in the $1. There were allegations that the oil industry was still getting away lightly and to deflect criticisms two new private industry funds, TOVALOP and CHRISTAL were introduced. TOVALOP was operated by the International Tanker Owners Pollution Federation Ltd (ITOPF) and this fund helped to ease the pressure on the IOPC FUND. Even with this additional assistance there was still not enough monies available to pay all the clean up costs. It was decided to introduce a new larger Fund and a new system to govern the limitation cap.

THE 1992 FUND AND CLC AND DEMISE OF TOVALOP AND CHRISTAL

The new FUND only applies to signatory states. The new FUND will pay out money for OIL PREVENTION and ENVIRONMENTAL DEPRECIATION which was not and is not covered by the old fund. Many states, Malaysia included, still belong to the old 1971 FUND, and have not joined the new FUND yet. When a country joins the new FUND it stops paying money into the old FUND. The amount of money available under the old FUND is now very limited. The higher levels of contribution made to the new FUND and the higher levels of money paid out by the FUND resulted in TOVALOP and CHRISTAL being wound up in 1997. They no longer exist, so no money can be claimed from these funds any more.

SEQUENCE OF EVENTS FOR THE NATUNA SEA CLAIMS : STAGE 1

Every claimant must make claims in their own country. There will be three streams of claim in Malaysia, Singapore and Indonesia. If the total amount award by all three courts is less than $12M that will be the end of the matter – the ship owner and his insurers and club will pay everyone their money through the local courts e.g. :-



Total Claims paid out by out by courts $11.5M – end of matter – no CLC : no Fund. Note that this will include legal costs of making the claims and will cover all consultancy costs as well that are approved by the court's taxing master.

The $11.5 will be paid out by the shipowner and his insurers as follows :-

a) The ship owner will pay the excess himself perhaps 5% ie $575.000.
b) The underwriters will pay up to the extent of cover under the Hulls Policy which might for example come to about $1,425,000
c) The P&I Club will cover the rest in this example $9.5M.

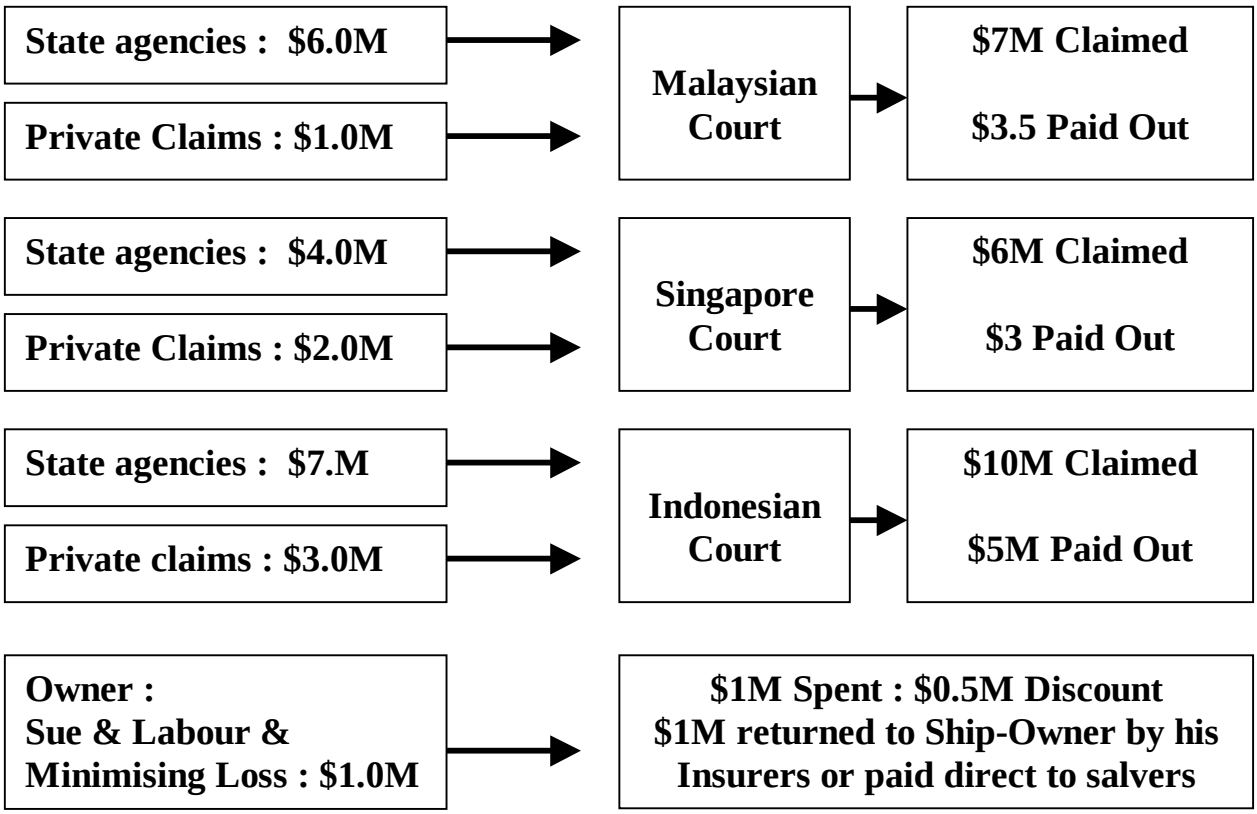
UNINSURED, BANKRUPT SHIP OWNERS : If the underwriters can avoid the policy for non-disclosure, unseaworthiness, unlawful deviation etc the ship owner will have to pay all the money himself, in this example, the whole $11.5M. Underwriters regularly try to escape liability and sometimes succeed. If the insurance policies are avoided and the ship owner then successfully files for bankruptcy there will be no money to pay any of the claims. The claimants will not be able to recover any money. This is NOT a hypothetical problem. It has happened many times before.

If this happens then there may be an alternative claim against the IOPC 1971 FUND in London for the whole amount.

However, all claimants must go through the local courts first ! Claimants cannot go direct to the FUND and attempt to bypass the local courts. This is strictly forbidden.

SEQUENCE OF EVENTS FOR THE CLAIMS STAGE 2

If the total claims exceed £12M the ship owner will seek to limit his liability. The local courts will then award a percentage of the claims to each of the claimants. Note that in seeking limitation the ship owner will be able to include in the calculations for limitation any monies that he has already paid out for cleaning up or minimising the loss. e.g. :-



Total Claims $24M : Paid out by out by court $11M + allowance for $1M to owner
Outstanding monies must now be recovered from Fund under Stage 3

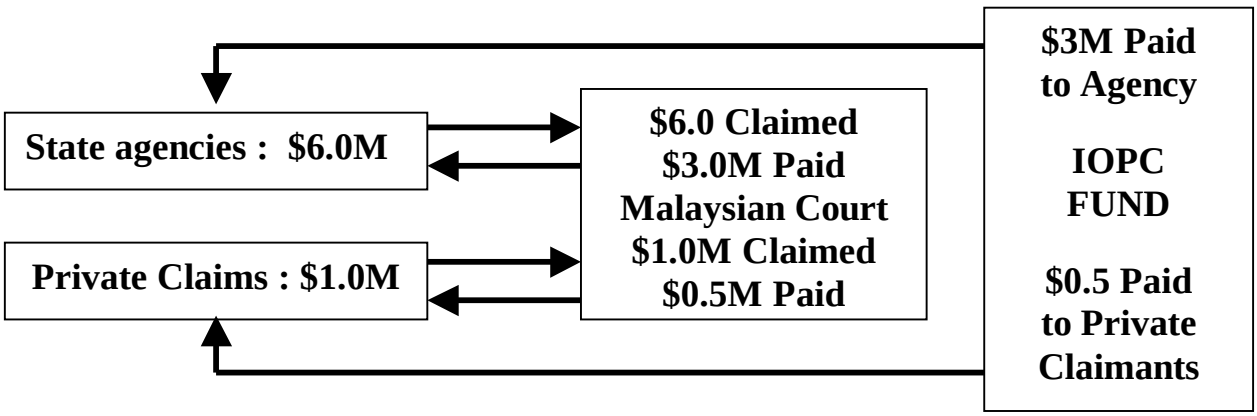
The $12M will be paid out by the ship owner and his insurers as follows :=

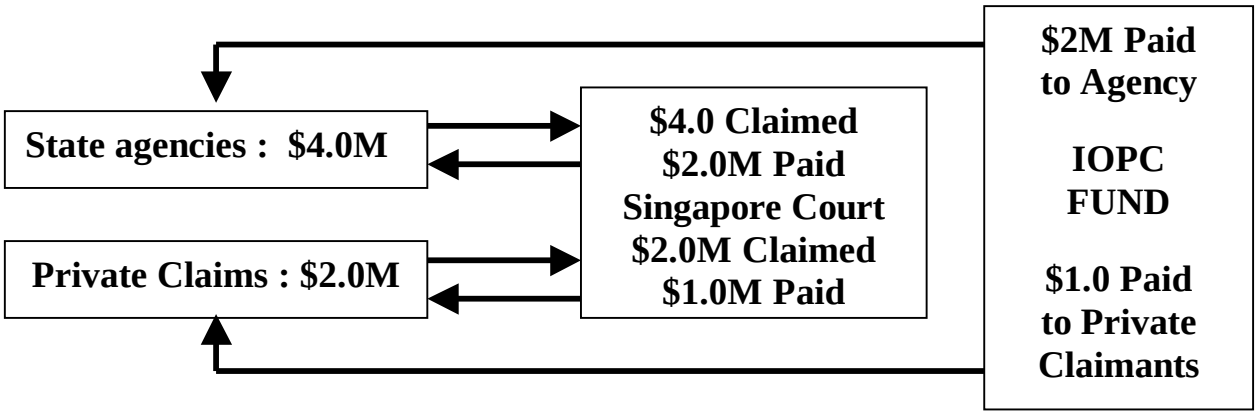
a) Ship owner will pay the excess himself perhaps 5% ie $575.000.
b) The underwriters will pay up to the extent of cover under the Hulls Policy amounting perhaps to $1,425,000 to cover sue & labour expenses
c) The P&I Club will cover the rest in this example $10M.

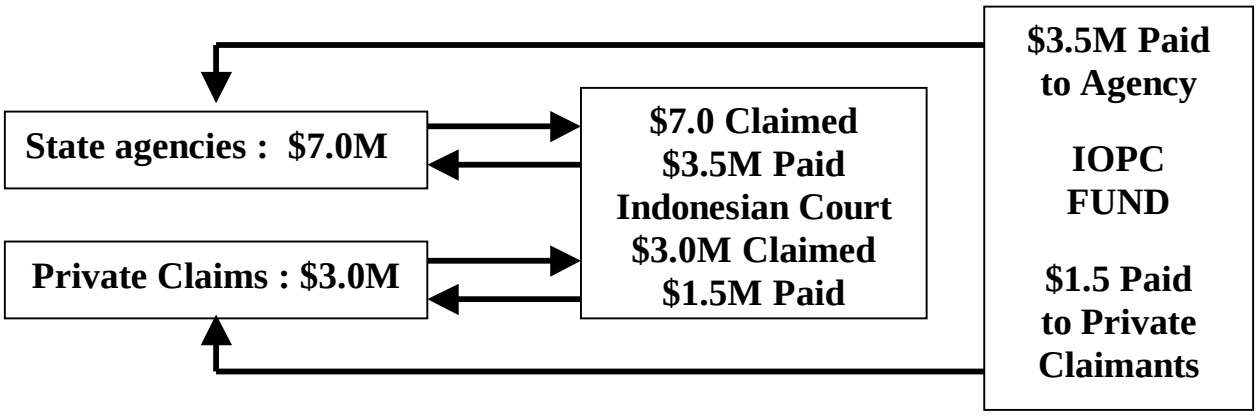
However, if the underwriters can avoid the policy for non-disclosure – unseaworthiness, unlawful deviation etc then the ship owner will have to pay all the money himself i.e. the whole $11M and will not recover his $1M sue and labour. If the ship owner files for bankruptcy and this is granted and the insurance policies are avoided there will be no money to pay any of the claims. The claimants get nothing at all from the courts. If this happens then the claimants will have to seek to recover the entire £24M against the IOPC 1971 FUND. Again Local Court Actions are a pre-requisite to going to the Fund for unrecovered damages.

SEQUENCE OF EVENTS FOR THE NATUNA SEA CLAIMS STAGE 3(a)

The claimants are 11.5M short of funds and the ship owner is $0.5M short. Each of the claimants will seek to recover this $12M from the fund. If there is sufficient monies in the 1971 FUND to pay out against all claims for that financial year the scheme will be as follows :-



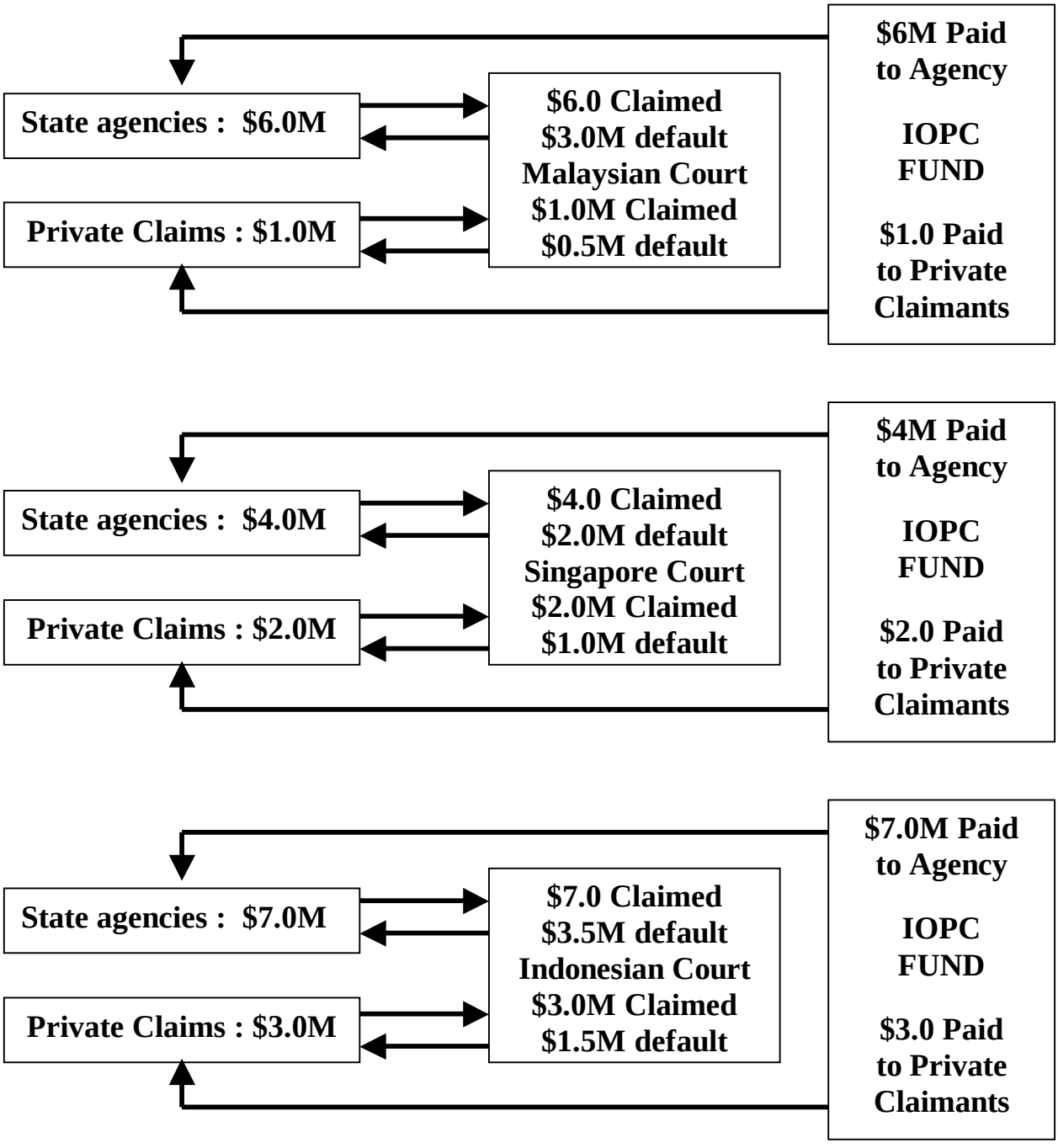




Ultimately everyone gets paid everything that is owed to them provided the ship is registered in a signatory state of the fund. If not, the IOPC will not pay and none of the sums allocated to the FUND above will be paid out. The claimants would then have to bear the losses that would otherwise have been paid by the FUND, themselves. There is no other way to recover this money.

SEQUENCE OF EVENTS FOR THE NATUNA SEA CLAIMS STAGE 3(b)

The claimants are 11.5M short of funds and the ship owner is $0.5M short. The insurance policies are avoided and the owner is bankrupt without funds. Each of the claimants will seek to recover the full $24M from the fund. If there is sufficient monies in the 1971 FUND to pay out against all claims for that financial year the scheme will be as follows :-

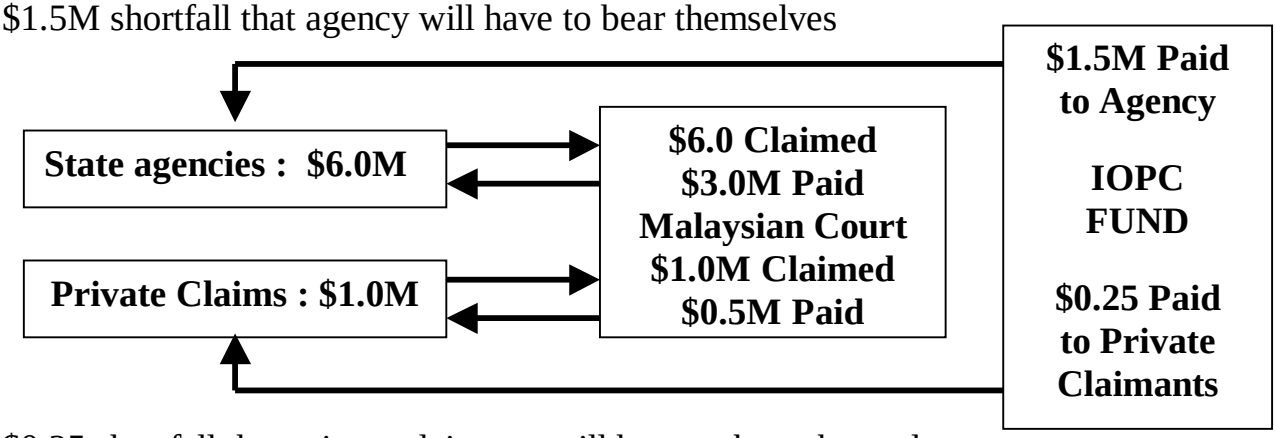


Ultimately everyone gets paid everything that is owed to them by the FUND provided the ship is registered in a signatory state of the fund. If not the IOPC will not pay and the claimants would then have to bear the entire losses for everything themselves There would be no other way to recover any of this money.

SEQUENCE OF EVENTS FOR THE NATUNA SEA CLAIMS STAGE 3(c)

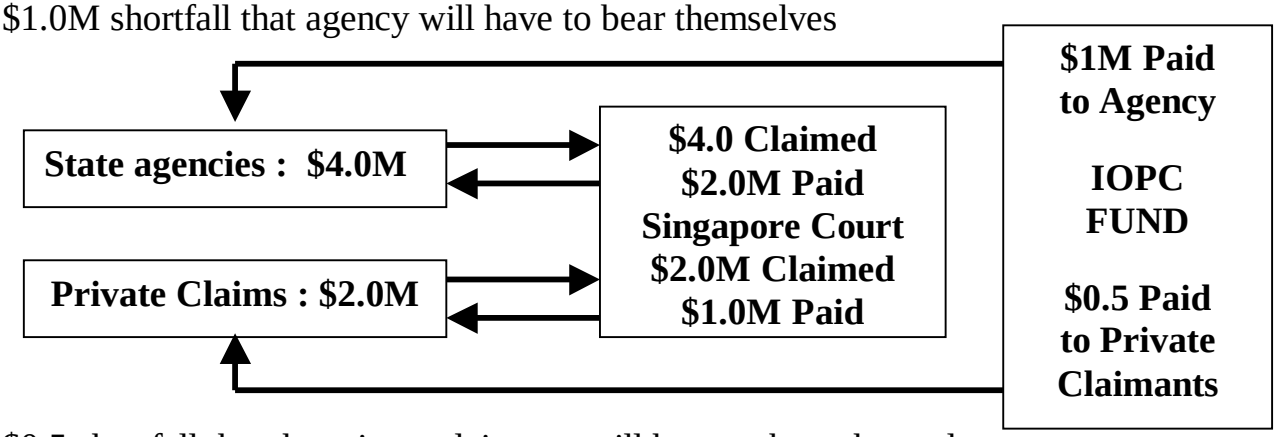
The claimants are 11.5M short of funds and ship owner is $0.5M short. Each claimant will seek to recover this $12M from the fund. If there is insufficient monies in the 1971 FUND to pay out against all claims for that financial year each claimant will receive a percentage. Assuming that the fund will only pay out 50% of all claims the scheme will be as follows :-

$1.5M shortfall that agency will have to bear themselves



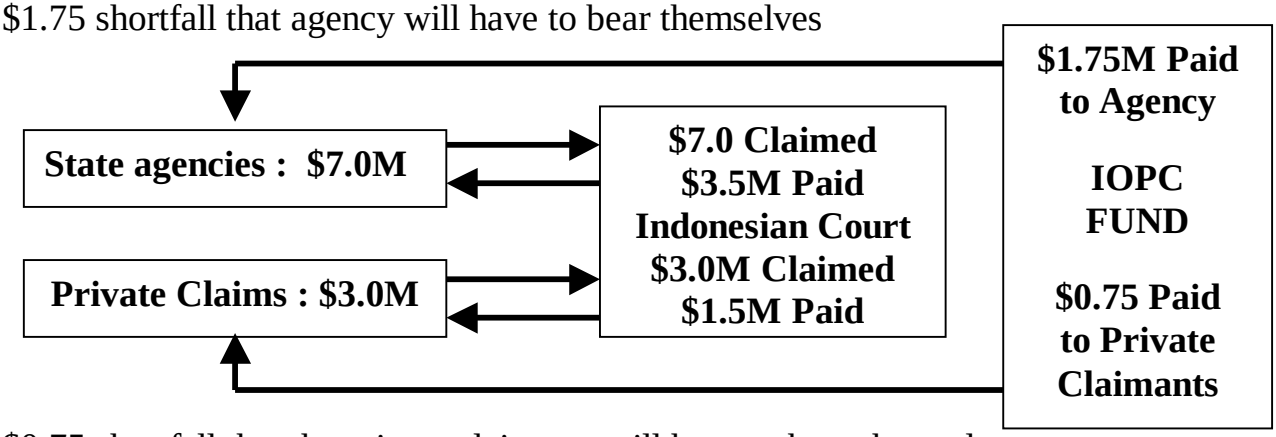
$0.25 shortfall that private claimants will have to bear themselves

$1.0M shortfall that agency will have to bear themselves



$0.5 shortfall that the private claimants will have to bear themselves

$1.75 shortfall that agency will have to bear themselves



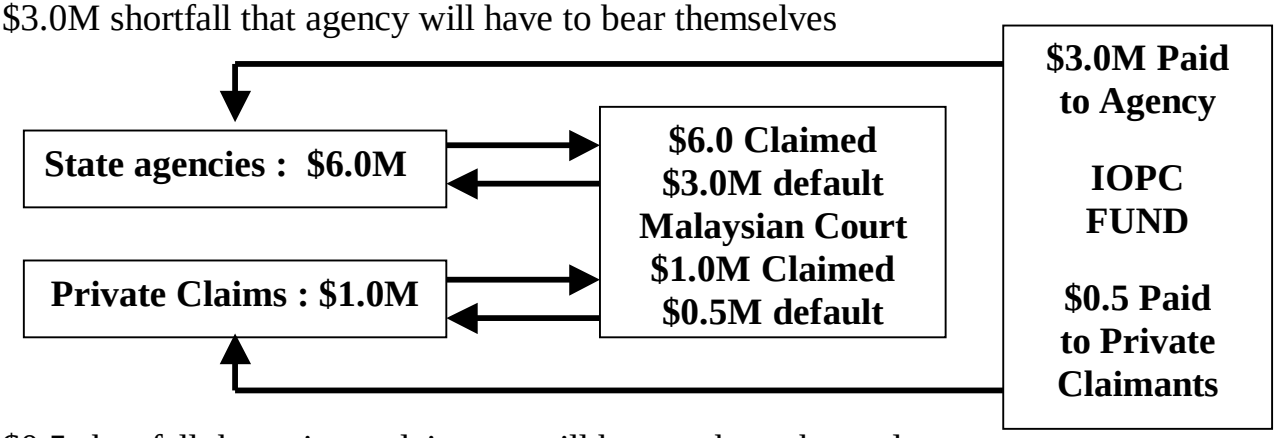
$0.75 shortfall that the private claimants will have to bear themselves

Globally the claimants are left $6M + out of pocket – Lawyers get fully paid first.

SEQUENCE OF EVENTS FOR THE NATUNA SEA CLAIMS STAGE 3(d)

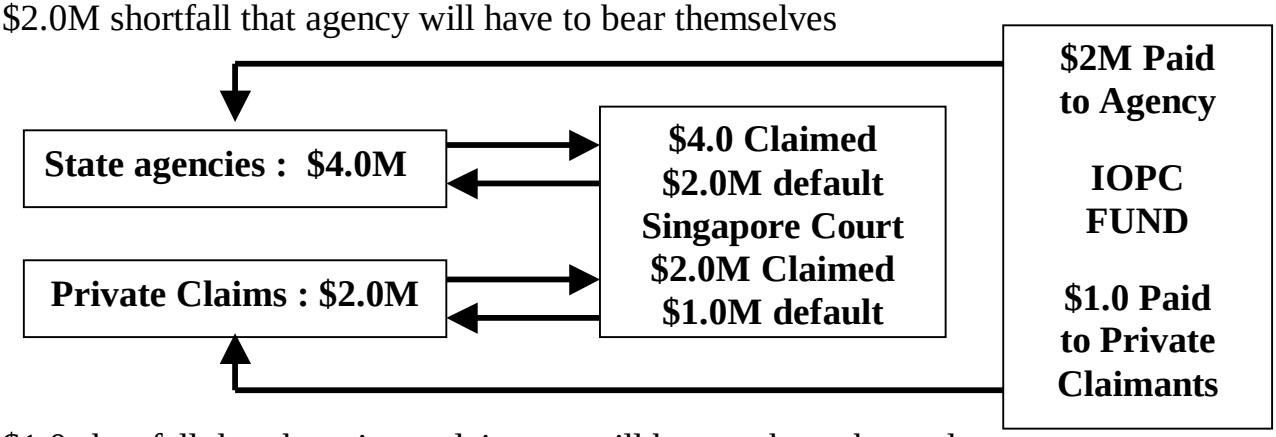
The claimants are 11.5M short of funds and the ship owner is $0.5M short. The insurance policies are avoided and the owner is bankrupt. The claimants will seek to recover the full $24M from the fund. If there is insufficient monies in the FUND to pay out against all claims that year each claimant will receive a percentage. Assuming that the fund will pays out 50% of all claims the scheme will be as follows

$3.0M shortfall that agency will have to bear themselves



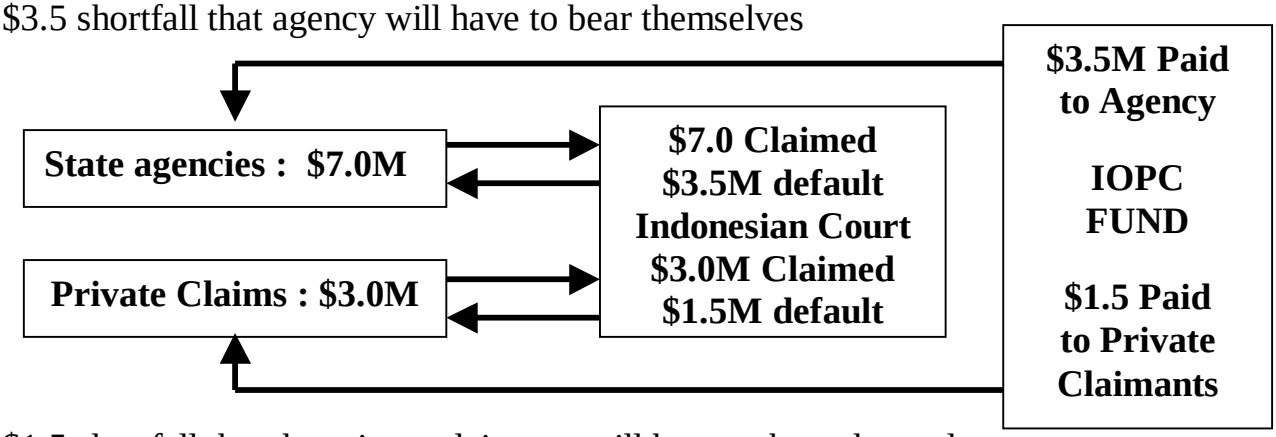
$0.5 shortfall that private claimants will have to bear themselves

$2.0M shortfall that agency will have to bear themselves



$1.0 shortfall that the private claimants will have to bear themselves

$3.5 shortfall that agency will have to bear themselves



$1.5 shortfall that the private claimants will have to bear themselves

Globally the claimants are left $12M + out of pocket – Lawyers get fully paid first.

SUMMARY AND CONCLUSIONS

STAGE 1 : VENUE – MALAYSIAN COURT

Claimants submit Tort Claims to the local Court in Malaysia. Liability is strict. There is no need to establish duty of care but

Claimants must submit certified accounts of expenditure and prove :-

1) The alleged pollution came from the defendant's vessel
2) Justify the actions taken to deal with the problem and
3) That the amount of money was reasonable

The ship owner will try to prove that claims are excessive and unjustified to reduce the amount of money he has to pay out. The court will award damages to each claimant for each legitimised claim.

STAGE 2 : VENUE – MALAYSIAN COURT

The ship owner will seek to secure the right to limit liability and thereby avoid having to pay out any monies, if any, over and above the Limitation Threshold. All awards from Malaysian, Singaporean and Indonesian Courts will be taken into account to establish whether the Threshold has been passed or not.

The claimants can resist limitation by proving to the court that the ship owner was at fault. If successful claimants will get all the money from Malaysian Court.

The ship owner will seek to preserve the privilege of limitation by proving that he was not at fault. If the ship owner is successful the owner will not have to pay all of the award. The claimants will only a receive percentage of their awards.

The claimants will then be left with a short fall that must be claimed under Stage 3.

STAGE 3 : VENUE - LONDON

The claimants will individually or as a co-operative venture, apply to the Fund Board in London for money to cover any unrecoverable award due to Limitation of Liability, lack of insurance cover and bankruptcy. All the documentation presented to the Malaysian Court will have to be represented in London to prove the claims.

Stage 4 : VENUE – COURT OR ARBITRATION IN LONDON

If the application fails the claimants may arbitrate or appeal to the courts.

NOTE ON CURRENCY REFERENCES

Reference is made in this briefing to £ Sterling and to US$. Whilst this might seem at first sight to be confusing and inconsistent, the apparently logical alternative of converting all statistics to a uniform currency introduces a degree of artificiality into the statistics and has accordingly been deemed inappropriate.

ORIGINS OF LIMITATION

The privilege of Limitation of Liability was firmly entrenched in British Legislation early in the 19th century. The Threshold Figures were quite naturally expressed in £ Sterling in the UK and the Commonwealth. As other countries introduced domestic Limitation Provisions the local currency was used in each country. However Sterling was the most common and universal. General applications for limitation before the UK Courts continue to be expressed in £ Sterling. Presumably an application for limitation in Malaysia would be expressed in RM.

INTERNATIONAL CONVENTIONS

During the mid 20th Century, as a range of international conventions such as the Hague Rules started to introduce Limitation Provisions, the Gold Franc was adopted as a universal standard. Subsequently International Conventions including the CLC have adopted International Monetary Fund (IMF) Special Drawing Rights or SDRs as the universal standard replacing the Gold Franc. Since an SDR is meaningless without conversion to a known currency most current statistics, charts and guides on The Fund Threshold and on contributions to the FUND tend to be expressed in US $.

CURRENCY USED WHEN MAKING A CLAIM OR APPLICATION

When an application is made for Limitation or an application is made to the Fund calculations will have to be made converting all claims into the relevant currency using SDR's as the base point. The result will vary from time to time depending on the level at which a currency is set relative to the SDR at the time of the claim.

CONCLUSION REGARDING GENERAL STATISTICS AND CHARTS

In the meantime exact conversions would detract from the aim of producing a chart which is easy to read and to decipher. Converting the round figures of £4M to US $ or $12M to sterling would produce complicated, dated, inaccurate fractions.

Accordingly, references in this briefing to the old UK Limitation figures is still expressed as £4M – whereas modern CLC figures are quoted as $12M US etc. It is assumed that the reader can easily comprehend these generalisations and will have little difficulty in instantly converting these rounded up figures into RM.