Civil Liability For Marine Pollution Damage Pursuant To Carriage Of Hazardous Cargo In Ships: Some Alarming Trends

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The international regime of civil liability for marine pollution damage from ships carrying hazardous and dangerous cargo evolved as a response to various hurdles in claiming compensation which were governed by the ordinary principles of civil law. The scheme offered the victims of pollution damage to pursue and contest financial claims against ship owners, the cargo industry and producers or manufacturers of hazardous cargo like petroleum products, hazardous substances likes acids, chemicals and other noxious substances. The evolving and contested parameters of civil liability for accidental pollution damage set by the international pollution liability conventions needs a critical analysis in this context.

The international liability scheme adopted by the International Maritime Organisation (IMO) is often much-admired for its reasonable contemplation of claims for pollution damage of the seas. At the same time the liability regime appears to be restricted due to constricted approach towards the concept of pollution damage under the scheme.[1] Under the entire scheme, claims for environmental pollution damage remains a challenge. The absence of clear and specific norms to determine the scope of reinstatement of pollution and endangerment to ecology makes the framework vulnerable to criticism. Notwithstanding the quest for an internationally acceptable scheme to address liability and compensation issues, the marine community endures to face the divide that exist between approaches followed in states like USA and that is followed in the rest of the world propagated by presence of diverse liability standards, limits and parameters to determine marine pollution damage.[2] Recent trends further emphasise that European community is also to drift away from the international schemes. This calls for a review of the entire scheme to understand and have a deep analysis scheme of civil liability and to work towards an international regime that is acceptable to all stakeholders.

[1] Michael Mason, "Civil Liability For Oil Pollution Damage: Examining the Evolving Scope for Environmental Compensation in the International Regime", 27 *Marine Policy*, (2003),pp. 1–12

[2] Inho Kim, "*A comparison between the International and US Regimes Regulating Oil Pollution Liability and Compensation"27 Marine Policy*, (2003), pp 265–279 at p.265

Regulatory Mechanism Underlying Civil Liability For Marine Pollution Damage

The IMO laid the foundation for evolution of an international scheme to deal with issues related to liability and compensation arising out of marine pollution damage from ships. Since carriage of oil as cargo in ships and the resultant pollution of the seas was first to raise consciousness at international level measures, the IMO addressed pollution caused by carriage of oil in ships. The measures adopted by IMO mainly consisted of the International Convention on Civil Liability for Oil Pollution Damage, 1969[3] and the International Convention on the International Fund for Compensation for Oil Pollution Damage, 1971.[4] The Civil Liability Convention, 1969 placed liability for pollution damage caused by Oil on the registered owner of the vessel which is the source of escape or discharge of oil while it is carried through sea. By introducing this scheme the IMO applied the principle of strict liability to address oil pollution damage. The liability for compensation for oil pollution damage is also subjected to limitation of liability, which further is guaranteed by the financial instruments to ensure its effective satisfaction by avoiding the risk of non availability of funds.[5] This scheme which initially was devised to deal with recovery and compensation for marine oil pollution damage later was tailored to address similar issues arising out of carriage of other hazardous substances through sea in ships like Hazardous and Noxious Substances,[6] Hazardous waste,[7] and Nuclear substances. [8] For instance, the Basel Convention to deal with transboundary movement of hazardous waste adopted in 1989 prescribed for a liability and compensation regime for Hazardous waste carried through sea. Analogous schemes were later adopted for Hazardous and Noxious Substances, and radioactive substances.

However, the stance of states like United States and certain advances within states of the European Union upset the International civil liability regime. The United States sustains a stand in disparity with the international scheme. In United States, the *Exxon Valdez* Incident of 1989, marked a turning point to study the adequacy of the international scheme and the need for a more strong mechanism under U.S. Law. The United States instead of treading the path laid by the international community decided to follow a unilateral stand. The United States by adopting the Oil Pollution Act, 1990[9] came out with a scheme which is significantly dissimilar to the international regulatory trend. The diversity was noticeable with regard to

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3 International Convention on Civil Liability for Oil Pollution Damage, November 29, 1969, 973 U.N.T.S. 3 (hereinafter called The Civil Liability Convention). The Convention entered into force on June 19, 1975.

4 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, December 18, 1971, 1110 U.N.T.S. 57 (hereinafter called The Fund Convention). The Convention entered into force on October 16, 1978.

5 *Supra* n.2

6 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (hereinafter called the HNS Convention), (1996) . The text of the convention printed at 35 ILM 1406.

7 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Liability Protocol) UNEP/CHW.1//WG.1/9/2

8 Two international regimes can be identified that deal with civil liability for radioactive pollution damage The first regime collectively referred to as the Paris regime, is regionally linked to European countries, and it comprises the 1960 Convention on Third Party Liability in the Field of Nuclear Energy (1960 Paris Convention), as amended by the 1964, 1982 and 2004 Protocols, and supplemented by the 1963 Supplementary Convention The second regime, the Vienna regime, rests on the 1963 Convention on Civil Liability for Nuclear Damage (1963 Vienna Convention) as amended by the 1997 Protocol.

9 The Oil Pollution Act, 1990 hereinafter called OPA , Pub. L. No. 101-380, 104 Stat. 484 (1990)

conceptual understanding of liability for pollution damage, the limits of liability, responsible persons and Compensation for pollution damage.

Since its formation the European Community, had been following a policy of strict adherence to international norms related to shipping. However, certain marine pollution incidents of early 20th century that occurred in EU waters like the *ERIKA*,(1999) and *Prestige* (2002), prompted the European Community turn a precautionary eye towards regulation of shipping in EU waters.[10] Un satisfied with the adhoc and piecemeal approach towards environmental damage laws, the European Community agreed on an Environmental law directive with focus on creating a collective agenda for alleviating marine environmental pollution damage. Working towards the same, European Union announced criminal punishment for pollution discharges from ships pursuant to carriage of hazardous cargo in ships in to its waters.[11]

International Scheme of Civil Liability for Marine Pollution Damage

The discussion below discuss the various Pros and Cons of the present scheme in an attempt to evaluate the merits and demerits of the scheme.

Application of Common Law Principle to Incidents of Marine Pollution Damage

Marine pollution damage caused to marine environment from sea borne carriage of hazardous cargo through sea was dealt by applying ordinary principles of civil law. Civil law addressed claims for compensation for pollution damage based on tortious principles of nuisance, negligence and trespass. In all cases of marine pollution damage, under the tortious principles remedy was allowed only if there was fault allowed remedy only if there was fault on the part of the responsible party. Therefore, it was not at all practically feasible to prove such fault considering exigencies of maritime carriage e and the difficulty with adducing of evidence since most incidents of pollution occur far from the coast and in to the seas.

Moreover, the traditional principles of common law were more suited to deal with personal and property damage and not tailored to address peculiar nature of environmental pollution damage. Additionally, jurisdictional uncertainty attached to the very nature of shipping with its international nature meant that many of those who suffered damage by pollution was left without any remedy. This situation paved the way for new scheme of civil liability and compensation to deal with issues related to marine pollution damage.

Strict Liability Principle as the Governing Principle

[10] After *The Erika Incident (*1999), and *The Prestige Incident* (2002) EU introduced higher limitations limits and lobbied for the same among its member states.

[11] See Environmental Law Directive dtd., 21 April,2004, Directive 2004/35/CE. It came in to effect on 30 April 2007. See also O.G Anthony `Criminalization Of Seafarers for Accidental Discharge of Oil: Is there Justification in International Law for Criminal Sanction for Negligent or Accidental Pollution of the Sea?' 37 *Journal of Maritime law and Commerce*,(2006),p 226. Directive 2005/35/EC and Framework Decision 2005/667/JHA imposes criminal sanctions for accidental discharges.

The present civil liability scheme is noteworthy because of quite a lot of far-reaching and ground breaking features in its application to shape responsibility for marine environmental pollution damage. The most remarkable feature of the scheme is that the central principle underlying the CLC, 1969 is one that of application of strict liability as the basis of liability for marine pollution damage. According to the scheme, the registered owner of the ship from which oil escapes is strictly liable for oil pollution damage.[12] The liability is strict in the sense that once the claimant has demonstrated that damage was suffered as a result of the spill,[13] there is no further burden on the claimant to prove fault on the part of ship owner. Furthermore, there is no necessity to prove the ship owner's negligence.

Jurisdiction and Scope of the Scheme : Some Critical Insights

A major difficulty that has been done away with by the current scheme is the endeavour to draw all litigations related to an oil pollution incident to a place where the pollution incident actually occurred is another remarkable development brought under the new regime. [14] The goal of this provision is to make it easier to provide victims of damage in any contracting state's territory, including the territorial sea and EEZ, with fast and equitable compensation payments.[15] In regard to geographical scope, the prosions of international scheme has been followed by the Oil Pollution Act, 1990 (U.S.A.) also.[16] This solidifies, at the very least, a widespread acceptance of a common standard for maritime pollution responsibility laws for oil contamination harm. However, there are several concerns with the geographical criteria used here.

The scheme's restricted geographic reach encourages misunderstanding when it comes to how to apply the idea of marine protected areas. Marine protected area designation has acquired significant traction in light of the global push to protect marine environment pollution from ships under UNCLOS, MARPOL, and numerous other IMO programmes.[17]Additionally, despite differences in geographic boundaries, certain international conventions permit coastal states to declare such regions. In this regard, it is necessary to

[12] *Supra* n.13, Art. 3.

[13] *Ibid*

[14] Article 2 deals with the geographical scope. Initially under the 1969 CLC it was limited to territorial waters. At that time there was no international consensus as to limit of territorial waters . The 1992 conventions both CLC and Fund Convention extended it to EEZ. At the 1984 IMO London conference on maritime liability and compensation, developing states successfully lobbied for an amendment to the oil pollution liability conventions to recognize the EEZ rights accorded to coastal states by the LOS Convention, 1982 Moreover, Article 56(1) (b)(iii) of the Law of the sea convention recognized for the first time coastal state jurisdiction in the EEZ over protection and preservation of the marine environment. This broadened the geographical scope of the liability conventions at the 1984 conference extending it to EEZ which stood accommodated to 1992 protocols also.

[15] Churchill RR, & Lowe AV, *The Law of the Sea*, Manchester University Press, Manchester, (1999), pp. 160-161

[16] *Supra* n.14

[17] See UNCLOS, 1982, Art. 211(6), The International Convention for the Prevention of Pollution from Ships (MARPOL), Annex I. The United Nations Environment Programme, and the Regional Seas Programme allows coastal states to designate special areas allowing them to prescribe particular standards in protected marine areas through protocols to its East African, Mediterranean, South-East Pacific and Caribbean Conventions. IMO initiative to designate Particularly Sensitive Sea Areas (PSSAs)-marine protected areas established to protect recognized ecological or socio-economic or scientific values also need attention here. The 1992 United Nations Conference on Environment and Development (UNCED), notably the Convention on Biological Diversity and Chapter 17 ('Protection of the Oceans') of the sustainable development programme, and Agenda 21. UNCED Rio Declaration also endorses the concept.

reevaluate the geographic breadth of the pollution liability and compensation scheme as well as the economic impact of the idea on this scheme, which calls for expensive pollution damage reinstatement costs.[18]

Yet another notable feature of marine pollution liability framework is its limited scope to pollution damage occurring in areas beyond national jurisdictions like the high seas. The relevance of this scheme is that attempts on the high seas to reduce the impact of an oil spill would, in principle, be considered for compensation only if they succeed in preventing or reducing pollution damage within the territorial sea or EEZ of a contracting state.[19] As a result the impact of these provisions is that it limits the usefulness of the present scheme to pollution damage that create impact on national interests and eliminates the encouragement for acquiescence with pollution prevention norms in common spaces like the high seas. Moreover this immensely goes against the general international trend in protecting the marine environment of the high seas from pollution from ships as reflected in the United Nations Convention on the law of the Seas ,1982, Convention on Intervention in to maritime Casualties, 1969 and International Convention on Prevention of Marine Pollution, 1973[20] Hence in current era, where transnational environmental liability is keeping on expanding, the present framework of civil liability scheme for pollution damage will be questioned if it limits itself to damage occurring within coastal maritime zones.

Limitation of Liability for Marine Pollution Damage

The liability is additionally made subject to limitations on liability. If the occurrence was caused by the owner's "actual fault or privity," claimants are permitted to go above that cap and sue for more. If the person in charge can show that the harm to the environment was caused by one of the recognised exceptions, such as war, the involvement of a third party, or the negligence or other wrongdoing of a government body performing its duty to maintain navigational aids, they are generally released from liability.[21] The concept remains followed for other hazardous substances also, but with slight variations as to the policy underlying them, parties liable for pollution damage, and liability limits.[22]

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[18] Wonham J., "Agenda 21 and sea-based pollution: opportunity or apathy?" 22 *Marine Policy* ,(1998), pp.375–91.See also De La Fayette L, "The Marine Environment Protection Committee: The conjunction of the Law of the Sea and international environmental law*",* 16 *International Journal of Maritime and Commercial Law* ,(2001), pp.155–238.

[19] For a discussion see Micheal Mason, "Civil Liability for Oil Pollution Damage: Examining the Evolving Scope for Environmental Compensation in The International Regime", 27 *Marine Policy*, (2003), pp.1-12

[20] See UNCLOS, 1982, Art. 221(1). It affords coastal states the right of intervention on the high seas in the case of maritime casualties threatening harmful pollution Article 218 (1) dealing with the right of port states to take legal proceedings against visiting vessels alleged to have illegally discharged oil outside the state's own maritime zones, including the high seas. See also Keselj T., "Port state jurisdiction in respect of pollution from ships: the 1992 United Nations Convention on the Law of the Sea and the memoranda of understanding",30 *Ocean Development and International Law* ,(1999), pp. 127–60.

[21] The Civil Liability Convention, 1992, Art.10.

[22] See The Civil Liability Convention, 1992 Art. 5(2), Basel Protocol, Art. 5, Environmental Protocol Annex 6, Art. 9(3). The person responsible may change depending on the substance. In the case of Hazardous waste responsibility is thrust on importer. But basic policy remains same.

Criminal Sanctions for Marine Pollution Damage : An Emerging Practice

States do not follow the existing international regime establishing civil liability equally. In the European community and nations like the United States, there is a tension between the criteria developed to determine criminal liability for marine pollution damage and liability for accidental pollution damage. Shortly after *ERIKA* and *Prestige* incidents acknowledging that international civil liability scheme lacks deterrence to check pollution of marine environment and imposed criminal penalties for pollution discharges in to its waters.[23]

The U.S. Approach Towards Criminal Sanctions- A Disturbing Trend ?

The United States has a protracted history of criminal sanctions for violation of pollution standards.[24] At this juncture it is worth remembering that that there is no legal basis for imposing criminal sanctions for accidental pollution damage under international law. In order to address this issue, international mechanisms like MARPOL and UNCLOS that regulate pollution discharge standards may be considered. Under MARPOL 1973/78, there are restrictions on both intentional and unintentional marine environment pollution from ships, as well as accidental marine environment pollution brought on by oil and other dangerous substances.[25]

Under certain conditions, MARPOL generally forbids the discharge of polluting substances. In all other cases, breaking MARPOL rules might result in penalties. But when it comes to unintentional contamination, MARPOL takes a different tack. The majority of unintentional spills violate rules that forbid oil spills or the release of dangerous materials, and are therefore potentially illegal. However, those restrictions shall not apply when a discharge is conducted to protect a ship or marine life from harm or when a ship or its equipment is damaged.[26]

In the case of accidental pollution damage, the MARPOL Convention, lift the prohibitions in relation to discharges of oil and other harmful substances. In such circumstances reasonable precautions must have been taken after occurrence of the discharge or the damage for preventing the pollution by the owner or the master. They must not have in those cases acted with intent to cause damage or recklessly and with knowledge that damage would probably result. Hence accidental spill is not a discharge prohibited under the MARPOL. With regard to nature of sanction the MARPOL did not specify what form the penalty has to be imposed for violation of pollution discharges apart from merely stating that it must be severe enough as to be

[23] See European Community Directive 2005/35/EC and Framework Decision 2005/667/JHA supplementing this Directive provide for criminal penalties.

[24] Statutes such as the Refuse Act of 1899 and the Clean Water Act as amended by OPA, 1990 provide criminal penalties for pollution of navigable waterways in the U.S. In the matter of , the *M/T World Prodigy oil spill* , 1989 , *Exxon valdez,1989* etc., criminal penalty was imposed on ship owner and master of ship violation for violating Clean Water Act, the Refuse Act, the Migratory Bird Treaty Act , the Ports and Waterways Safety Act , and the Dangerous Cargo Act.

[25] See MARPOL, 1973, Annex I , Regulations 9 and 10. It prescribes discharge prohibitions in relation to oil in special areas as specified in MARPOL. Similar restrictions apply in the case of Noxious liquid substances carried in bulk under Annex II Regulation ,5.

[26] *Ibid*, Annex I, Reg.11, and Annex II, Reg. 6(b)

commensurate to the act of violation, and to discourage future occurrence. But MARPOL, no where says that it needs to be criminal.[27]

The UNCLOS, 1982 and Scope for Criminal Sanctions

The United Nations Convention on the Law of the Sea,19082 also adopt similar approach. Apart from the Port State's enforcement jurisdiction, there are no other means through which penal sanctions can be imposed, as it can only adopt reasonable measures to compel, induce compliance, or impose sanctions for non-compliance with applicable laws, regulations, or enforceable judgments, using administrative or executive action or judicial proceedings.[28] While both MARPOL and the UNCLOS III grant enforcement jurisdiction for the arrest and detention of vessels, nowhere is it explicitly mentioned that criminal sanctions and deprivation of individual liberty can be imposed, except in instances of a "willful and serious act of pollution in the territorial sea." [29] In addition to this, the UNCLOS III explicitly states that only monetary penalties can be imposed for violations of national laws, regulations, or applicable international rules and standards regarding the prevention, reduction, and control of marine environmental pollution, committed by foreign vessels beyond the territorial sea. .[30]

UNCLOS III primarily aims to restrict sanctions to monetary penalties for the breach of pollution discharge standards. However, in instances of a "willful and serious act of pollution in the territorial sea," criminal sanctions may be applied. In such cases, there must be clear evidence of deliberate and intentional actions by the accused. This provision explicitly excludes situations of accidental pollution. Therefore in the current international regime civil liability is the accepted norm for accidental pollution damage.

The conflicting stance under the EU Directive imposing criminal sanctions with that was against international norms was addressed before the courts also. A case was filed by a group of organisations within the shipping industry before the Queen's Bench in the U.K.,[31]alleging that the EU's unilateral action introducing criminal penalties for intentional and accidental pollution departed from the international rules on enforcement of pollution discharge standard. The court noted that the directive could potentially hinder the right of Innocent Passage and create varying obligations between EC law and the international regime, leading to legal ambiguity. However, the court referred the case to the European Court of Justice for a final decision. Upon reference, the European Court of Justice ruled that the directive is valid, as it aligns with the

27 Anthony, Olagunju G. "Criminalization of Seafarers for Accidental Discharge of Oil: Is There Justification In International Law For Criminal Sanction For Negligent Or Accidental Pollution Of The Sea?." Journal of Maritime Law and Commerce, (2006), p 143 For the article see http://www.highbeam.com.Site accessed on 11 Mar. 2010.

28 *Ibid.*

29 *Ibid.*

30 UNCLOS,1982, Art. 230(1)

31 See *In the matter of The International Association Of Independent Tanker Owners (INTERTANKO), The International Association Of Dry Cargo Shipowners (INTERCARGO, The Greek Shipping Co-Operation Committee Lloyd's Register The International Salvage Union and The Secretary Of State For Transport*, [2006] EWHC 1577 (Admin).

MARPOL Convention and does not contravene the UNCLOS Convention.[32] But these decisions are rendered by judicial organs inside the European community and represents a constrained attitude not allowing them being a member of the EC to be incompetent to invalidate its directives.

The EU is strongly obligated to adhere to the well-established mandate of the IMO (International Maritime Organization) under the existing civil liability and compensation framework for pollution damage. Throughout UNCLOS, the emphasis is on upholding internationally accepted standards for safeguarding the marine environment from hazardous substance pollution. It is worth noting that the imposition of criminal penalties primarily targets individuals and can potentially have negative impacts on international trade. This trend also poses a risk to the goal of maintaining uniform standards, as maritime trade requires the movement of ships between countries. Having divergent standards would disrupt the balance of trade as well.

Conclusion

The scope of international liability regime to address the ability issues arising out of international carriage of hazardous substances through the sea. No doubt the scheme of civil liability has become a success in terms of its wide acceptance for addressing liability and compensation issues relating to pollution damage from seaborne movement hazardous substances. A number of treaties that are not implemented or complied with respect to other hazardous substances like radio active substances and hazardous waste reveal inconsistency between actual state practice and the international scheme. The state practice also questions the credibility of international civil liability as the most appropriate means for redressing claims for pure environmental damage.

The issue of civil liability for marine pollution damage resulting from the carriage of hazardous cargo in ships is of paramount importance in safeguarding the marine environment and ensuring fair compensation for affected parties. Throughout this article, we have explored several alarming trends that have emerged within this domain. These trends call for immediate attention from policymakers, stakeholders, and international organizations to mitigate the potential consequences they pose.

One concerning trend is the potential conflict between European Union (EU) directives and international conventions, such as the International Convention for the Prevention of Pollution from Ships (MARPOL) and the United Nations Convention on the Law of the Sea (UNCLOS). The clash between these legal frameworks has led to legal uncertainties and inconsistencies, creating challenges for the effective enforcement of civil liability and compensation schemes. It is crucial that harmonization efforts take place to ensure that these directives and conventions work cohesively, without impeding the objectives of each other.

Another distressing trend is the ambiguity surrounding the liability of various actors involved in the carriage of hazardous cargo. The shifting responsibilities and obligations among shipowners, operators,

32 *In the matter of International Association of Independent Tanker Owners & Ors* (Environment & consumers)[2007]EUECJC308/06_(20Nov.2007)Report of case available at URL:http://www.bailii.org/eu/cases/EUECJ/2007/C30806_O.html

charterers, and cargo owners have created confusion in determining the party liable for pollution damage. The lack of clarity often results in protracted legal battles, delayed compensation, and ultimately, a compromised response to environmental harm. It is imperative to establish clear guidelines and allocation of liability to facilitate a fair and efficient claims process.

Furthermore, the emergence of criminal penalties as a means of deterrence for pollution-related offenses raises concerns. While criminal sanctions can act as a deterrent, there is a risk that they may disproportionately penalize individuals and hinder international trade. Striking a balance between environmental protection and the smooth functioning of maritime commerce is crucial to ensure that punitive measures are proportionate, effective, and promote compliance with international standards.

The need for uniformity in international standards is also evident. Inconsistencies in regulations, reporting requirements, and liability regimes among different countries pose significant challenges for the maritime industry. It not only hampers the effective prevention and control of pollution but also disrupts the balance of trade. Collaborative efforts between nations, international organizations, and industry stakeholders are imperative to establish and uphold universally accepted standards for the carriage of hazardous cargo.

In conclusion, the trends outlined in this article highlight the urgent need for comprehensive reforms and concerted international cooperation in addressing civil liability for marine pollution damage resulting from the carriage of hazardous cargo in ships. Harmonization of legal frameworks, clarity in the allocation of liability, proportionate use of penalties, and the establishment of uniform international standards are key factors in effectively addressing these challenges. Failure to address these issues may lead to continued environmental degradation, protracted legal disputes, and hindered international trade. By taking proactive measures, we can ensure the protection of our oceans, the fair compensation of affected parties, and the sustainability of the maritime industry for future generations.