Internationalrechtliche Studien. Beiträge zum Internationalen Privatrecht, zum Einheitsrecht und zur Rechtsvergleichung 57

Civil Liability for Bunker Oil Pollution Damage

Bearbeitet von
Dan Malika Gunasekera

1. Auflage 2010. Buch. 332 S. Hardcover
ISBN 978 3 631 60460 1
Format (B x L): 14,8 x 21 cm
Gewicht: 600 g

Introduction

In 1995 the waters of the sea off the coast of Tasmania experienced one of the most disastrous effects of bunker oil spill.[1] The *Iron Baron*, bulk carrier which ran aground spilling three hundred tonnes of bunker fuel oil[2] affecting fifteen kilometres of shoreline and large number of living and non-living resources of the nature set a huge response cost of ten million Australian Dollars.[3] This dramatic incident opened up the eyes of the Government of Australia and especially the international legislators dealing with liability and compensation for maritime pollution, in taking prompt initiatives to fill the gap that existed in international maritime law aftermath the entry-into-force of the International Convention on Civil Liability for Oil Pollution Damage 1992[4]. Subsequently, two years later, a fuel tank of the *Kure*[5], wood chip carrier broke out in Humboldt Bay, California spilling one hundred and five barrels of bunker fuel oil costing a total of twenty million US Dollars, marking a record for the most expensive oil spill ever in terms of dollars per barrel.[6] These incidents are only a few to name among massive bunker spills that have occurred in different parts of the oceans and seas up to this date.

Comparing to oil spills from tankers that have taken centre stage in national and international contexts, one might consider oil spills resulting from the escape or discharge of fuel oil from the bunkers[7] of dry cargo ships as a negligible event.[8] Although, it is reasonable to ascertain, the real effects of such incidents would not allow such thought to proceed longer. In justification, it can be shown that many bulk carriers and container ships which carry more than ten thousand tonnes of

1 Australian Government, Australian Maritime Safety Authority, Marine Environment Protection (July 10, 1995), available at http://www.amsa.gov.au/Marine_Environment_Protection/Major_oil_spills_in_australia/Iron_Baron/index.asp
2 See Fuel Oil, http://en.wikipedia.org/wiki/Fuel_oil
3 For details see, Lloyds' Casualty Reports of 21 July – 11 August, and December 1995
4 See http://www.imo.org/Conventions/contents.asp?doc_id=660&topic_id=256
5 http://www.dfg.ca.gov/ospr/spill/nrda/nrda_kure.html
6 See *Trade Winds*, 3 April 1998
7 The term "bunkers" is used in modern days due to its usage in the past with regard to coal-burned steam turbines that have been replaced by fuel engines operating with marine fuels carried in the so-called bunkers of a ship in its bottom part.
8 See Regulation Impact Statement, http://www.aph.gov.au/House/committee/jsct/28march2006/treaties/bunkers_ris.pdf

bunker fuel form much bigger quantity than many tankers carry as cargo. Considering the types of modern merchant ships that are in use in maritime activities at present, one may not disregard even minor spills of bunker oil that can pose considerable danger to the marine environment.[9] Especially, concerning residual oils, which have high viscosities and persistent natures, could cause immense damage.[10]

According to various sources such as the International Oil Pollution Fund (IOPF)[11] and P & I Clubs[12], majority of oil pollution and compensation claims concern bunker spills, and some claims even rise up to around forty percent of the insured value.[13] Potentially, bunker spills could occur in many instances, such as during bunkering operations, i.e. oil transferring process from shore-to-ship and ship-to-ship, in maritime accidents and wilful and operational discharges. One of the major problems encountered around the issue of facilitating compensation for bunker spills, is the lack of international uniform rules in this area of concern. Apart from compensating damage caused by bunker oil used in tankers in events of tanker disasters via CLC regime, an international regime for pure bunker oil pollution damage was a highlighted absentee for a long period of time. The only tools in addressing such issue were available at national level, and these differing laws created much of the set-back for a common effective strategy prior to the entering into force of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001[14] which came into operation on November 21, 2008.

Prior to such international instrument, many jurisdictions used different strategies at respective domestic level in addressing the subject. The first category of such States can be found having no distinct rules or regime to tackle the problem, rather considering bunker oil pollution incidents within the legal regime on torts and remedial actions for tortuous liability. They seem to apply different tools depending on the type of legal system, i.e. either common law or civil law which is applicable to such State, and opt to apply some tool which provides much satisfactory ends. The second category of States tend to extend the application of the CLC regime to bunkers as well with some changes or modifications. The English

9 See Int'l Maritime Org. [IMO], Maritime Knowledge Centre, International Shipping and World Trade, Facts and Figures, (updated November 2008), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D23754/InternationalShippingandWorldTrade-factsandfigures..pdf, pp 23 – 27

10 An extensive illustration is provided in Chapter 1.

11 http://www.iopcfund.org

12 See http://www.igpandi.org

13 See UK Clubs Analysis of Major Claims, 1993, available at http://www.ukpandi.com/ukpandi/infopool.nsf/html/LP_Init_AnalyMajorClaims

14 See http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=666

Merchant Shipping Act[15] is a quite an example for a domestic law of that nature.[16] The third category of States is the jurisdictions which have a distinct legal instrument at national level to address the issue, such as the Oil Pollution Act 1990 of the United States. Having a diversified situation to address one important area of concern such as this would in no way bring fruitful results. Therefore, it is important to create a harmonized situation in achieving positive outcomes for a much needed issue at hand that affects the whole international legal order.

Public International Law v. private interests

The issues concerning the protection of marine environment as well as determination of liability at international context derive primarily from public international law through customary rule *pacta sunt servanda*. Although, the latter is much closer to private international law due to its relationship with private maritime interests, its emergence is closely linked to international customary law on sea related matters as well as the rules laid down by the United Nations Convention on Law of the Sea 1982 (UNCLOS)[17] and other various instruments that deals with environmental aspects. At present, marine environmental law in general consists of all these traditional sources, namely, customs, treaties, and general principles of law, case laws and works of prominent legal experts. As a result many both hard-law and soft-law instruments have been designed at international level for the protection of the marine environment as well as to facilitate the smooth functioning of private maritime interests. In order to protect both these aspects, large numbers of treaties have come into existence with the initiatives of the International Maritime Organization (IMO)[18] and under the Regional Seas Programme of the United Nations Environmental Programme (UNEP)[19]. Apart from such multilateral approach, regional organizations such as OSPAR[20] and HELSINKI[21] Commissions have contributed immensely towards the subject matter.

Customary international law on the other hand has helped evolve the development of the area concerned. Especially, the Third United Nations Conference

15 See http://www.opsi.gov.uk/ACTS/acts1995/ukpga_19950021_en_1
16 See Merchant Shipping Act (1995), Chaps. II – IV
17 United Nations Convention on the Law of the Sea, Dec 10, 1982 available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf
18 Int'l Maritime Org. [IMO], Home Page, http://www.imo.org
19 For more details see http://www.unep.org/regionalseas
20 See OSPAR Commission [OSPAR], Home Page, http://www.ospar.org
21 See Helsinki Commission [HELCOM], home Page, http://www.helcom.fi

on Law of the Sea[22] outlined the importance of marine environmental protection and urged States to carry out their undertakings in good faith and further develop binding rules on important issues such as responsibility and liability, in this context, through specialized international and regional arrangements. Furthermore, customary law has evolved to create rule-making concepts through State practice and *opinio juris*. In doing so, it requires States to execute due diligence by way of taking necessary steps to protect the natural environment and minimize harm.[23] Such steps could only be effective when minimum standards are guaranteed and enforcement is carried out accordingly, for example by way of port-State controls, issuance of certificates to ships and co-operation with other Sates. In addition, customary law was instrumental in creating new concepts such as "precautionary principle"[24] and "polluter-pays principle"[25], which operate as primary foundations of the present subject matter.

General principles of law forms another important aspect, which upholds the idea of State responsibility, which is a vital element concerning liability issues both at public as well as private levels. Hence, it paves way for the acceptance of the idea of reparation for damage including the principle of *restitutio in integrum*[26] and more modern concepts of cleaner seas and oceans[27].

These aforementioned sources of law have immensely contributed towards the development of both public and private international laws concerning the protection of the marine environment and especially the effects posed by private maritime interests. In addressing issues of bunker oil pollution damage with the view of creating international rules on the subject, it is highly relevant to pay much attention to the aforesaid. Upon being derived from public law perspec-

22 For more reference on the work of the third United Nations Conference on Law of the Sea and related work, see B. H. Oxman, The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980) available at http://www.questia.com/PM.qst?a=o&d=79271683 and G. Plant, The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United Nations Law Making, Int'l and Comparative Law Quarterly (1987), 36:525–558 Cam. Uni. Press available at http://journals.cambridge.org/action/displayAbstract;jsessionid=00FF63431474917003A43416528AEF9D.tomcat1?fromPage=online&aid=1512780

23 Much detailed provisions have been made by the UNCLOS in facilitating the desired objectives in its Part XII

24 See L. Gundling, "*The Status in International Law of the Principle of Precautionary Action*", IJECL (1990) pp. 23–29.

25 See OECD: OECD and the Environment, Paris 1986, at p. 24. See also OECD Recommendation of 14 November 1974 on the Implementation of the Polluter Pays Principle, C (74) 223

26 See also *Chorzow Factory Case* (Indemnity) (Jurisdiction), PCIJ Ser. A, No. 8/9, (1927), p.31.

27 See *Supra* n.18 at 4

tives, the IMO which chiefly concerns shipping interests, has taken into consideration the importance of the protection of the marine environment and has created effective rules on liability and compensation for pollution damage under its competence throughout the past decades. Before turning to the main topic of this work, it would be interesting to analyse some of its past work in this regards.

Role of the IMO and the historical development of the area of concern

Since it inception as the specialized organization attending to maritime affairs, the IMO as it is known today and its predecessor IMCO have carried out tremendous piece of work. Initially, the Organizations' primary concerns were connected to matters relating to safety of shipping and the prevention of marine pollution.[28] But since the event of *Torrey Canyon* disaster[29] in 1967, it has paid huge amount of attention towards liability and compensation issues concerning various kinds of damage including that of pollution damage, caused by ships. Its first initiatives on oil pollution regulations date back to 1954, during which the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) was adopted.[30] This Convention which imposed regulations dealing with prevention of pollution by oil was effectively managed through its Maritime Safety Committee followed by a Subcommittee on Oil Pollution. Understanding the effects of crude oil washing process involved in routine ship operations of most ships, the provisions of the Convention prohibited the dumping of oily waste within a certain distance from land and in 'special areas' where the danger to the environment was especially acute. The destructive consequences of the *Torrey Canyon* disaster and growing interests of commercial exploitation of the shipping industry led to the belief of many States as well the IMO that the OILPOL

28 For more about the relevant work of the IMO see *Supra* n. 18 at 4 then follow "ABOUT IMO" hyperlink

29 See also S. Casey, *Set phases on stun, and other true tales of design, technology, and human error* (1998), Santa Barbara, Aegean Publishing Co., 2nd edition, pp 40–58; R.A. Cahill, *Strandings and their causes*, London, Fairplay Publications Inc., (1985), and also available at http://www.lboro.ac.uk/departments/hu/ergsinhu/aboutergs/lasttrip.htm; R. Petrow, *In the wake of the Torrey Canyon*, New York, David Mackay Co, (1968); R.A. Cahill, *Strandings and their causes*, London, Fairplay Publications Inc., (1985), and also available at http://www.lboro.ac.uk/departments/hu/ergsinhu/aboutergs/lasttrip.htm

30 The Conference for the adoption of this Convention was organized by the United Kingdom together with the Conference for the institution of the IMO itself. The OILPOL Convention came into force in 1958. A brief analysis is available at http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#3

is inadequate to handle pollution incidents any longer. As a result, the existing Subcommittee was given a wider scope of powers to attend to marine pollution in general, but later transformed it to the Marine Environment Protection Committee (MEPC) with a mandate to deal with all matters relating to marine pollution.

In 1973, the Diplomatic Conference of the IMO incorporated much of the OILPOL 1954 provisions and its amendments with certain modifications as an annexure to a newly constructed convention, named, International Convention for the Prevention of Pollution from Ships, commonly known as MARPOL 1973. The creators of this Convention took into consideration of the growing industrial concerns, increasing sizes of tankers used for transportation, chemicals that were carried at sea and more specially the growing concern over global environment. Due to certain technical problems as to the ratification of the incorporation of OILPOL into MARPOL, many States showed lack of desire to ratify and accept this Convention as binding on them. During this period between 1976 and 1977, there existed of practical difficulties in enforcing MARPOL, including the series of tanker accidents that took place in adjacent waters of the United States. These occurrences led to the reconsidering of stringent rules to combat accidental and operational oil pollution incidents.[31] The 1978 Protocol to MARPOL was a more successful attempt, which absorbed the parent Convention and made stringent requirements for tankers to be upgraded to levels of protecting environment from being polluted.[32] These measures were further supplemented through the adoption of the 1978 Protocol to the International Convention for the Safety of Life at Sea (SOLAS) 1974. The importance of the adoption of the parent document and the Protocol were not felt greatly by States concerned till the lessons learned after the stranding of *Amoco Cadiz*[33], which was one of the gravest oil spills that affected the French coastal and marine environment.[34] As a result of all such incidents, MARPOL was finally ratified by the sufficient number of States by October 1982, upon which the MARPOL 1973/78 Convention later entered into force on October 2, 1983.

Paralleled to the aforementioned process at the IMO, rules on liability and compensation issues were developing at a greater pace. In order to attend to legal

31 For example the Agro Merchant ran aground off Massachusetts in December 1976 carrying 27, 000 tons of oil which caused a huge public concern over the threat of oil being flowed to the fishing fields of New England and Georges Bank.

32 Full texts of the Conventions and Protocols available at *Supra* n. 1 at 1, http://www.amsa.gov.au/Marine_Environment_Protection/Revision_of_Annexes_I_and_II_of_MARPOL_73–78/index.asp

33 Details of the incident is available at http://www.incidentnews.gov/incident/6241

34 Amoco Cadiz ran aground off Brittany losing its entire cargo consisting of 223,000 tons of crude oil leaving 130 beaches under a 30 cm. thickness

issues arising out of the *Torrey Canyon* incident, the Organization created an *ad hoc* Legal Committee which soon became a permanent subsidiary organ of its Council.[35] It was entrusted with the functions of determining international legal rules on liability and compensation for oil pollution damage. Establishing legal regimes with regard to the prevention of environmental pollution caused by oil during transportation by maritime means was alone incapable to address the liability and compensation issues that were erupted after many disasters. One may correctly point out this situation as such oil pollution incidents not only affects the losses to the respective ship and cargo, but ultimately becoming responsible for third party claims. This was the primary issue at the face of the Legal Committee when the matter was taken up for discussion for the creation of a new legal regime for liability and compensation. Apart from the general question as to who is liable in such an incident, there existed of number of other sensitive issues that had to be resolved prior to the drafting process, *inter alia* the basis of liability, level of compensation, quantification of damages and limits of liability. Considering the enormous damages that took place in several disasters, the prevailing international law on maritime claims could not be taken as a method for settlement of claims as to their incapability to deal in such situations and insufficiency as to the maximum compensation that could be awarded under such regimes. As a result, the IMO in 1969 adopted a convention dealing with the civil liability of the shipowner for pollution damage caused by such incident, known as the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC 69).[36] The foremost objective of this Convention was to ensure that adequate compensation is paid to victims. Furthermore, a supplementary convention on settlement of claims which exceeds limits under the previously mentioned convention was created, known as the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1971 (FUND 71).[37] The Fund is made up of contributions from oil importers, who import oil to their designated destination by ships, although they are not in anyway responsible for the incidents as in the case of the shipowner. Both these Conventions were further amended with the primary intention of increasing limits of compensation due to the growth of the industry and rapid increase of the financial character of damages that caused to oil pollution victims in 1992, came into being as the CLC 92 and FUND 92. The

35 At present the IMO consists of six main bodies. The Assembly and the Council are the main organs with four main Committees, namely, the Maritime Safety Committee, Marine Environment Committee, Legal Committee and the Facilitation Committee.

36 A brief introduction of the convention and its adoption is available at http://www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=660

37 For a summary of the convention and its amendments see http://www.imo.org/Conventions/mainframe.asp?topic_id=256&doc_id=661

new regimes substituted their predecessors after coming into force in 2003, and further led to the denunciation of the said former regimes.

The IMO was also responsible for the creation of the Convention on Limitation of Liability for Maritime Claims, 1957, 1976 and Protocol of 1996.[38] This was an essential move to introduce limits of liability on the part of the shipowner as a matter of protecting commercial interests of the trade and subsequent amendments ensured an up to date revision of financial limits based on the international economic structure and ever increasing costs of response and clean-up.[39] Apart from above mentioned treaties, the IMO also adopted the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances 1996[40] (HNSC 96) dealing with compensation for accidents involving substances so mentioned in that Convention.

'Run' to the 'Bunkers'

Understanding the gravity of the problems connected with bunker oil pollution and its adverse effects that lead to damage, the IMO persuaded chiefly by the Government of Australia and several others convened the Legal Committee to draft a new international liability and compensation regime to attend to such damage. As a result, in 2001 it adopted the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001[41] (Bunkers Convention) consisting of 19 Articles together with an Annex.[42] It also adopted three resolutions dealing with connected issues that are assumed to be of vital importance for the effectiveness of the main regime.[43] The Convention is basically modelled on the CLC 69/92 and has cited certain provisions with reference to the HNSC 96. Unbelievably, the Convention was ratified by the required number of States understanding its importance and came into force with overwhelming support on November 21, 2008 opening new horizons in liability and compensation concerns.

38 For a summary of the convention and its amendments see http://www.imo.org/Conventions/contents.asp?doc_id=664&topic_id=256

39 See also P Griggs, "Limitation of Maritime Claims: The Search for International Uniformity", Lloyds Maritime and Commercial Law…, 1997 – Lloyds of London Press

40 A brief introduction of this convention is available at http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=665

41 For a summary of the convention see http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=666

42 The Annex deals with "Certificate of Insurance or other Financial Security in respect of Civil Liability for Bunker Oil Pollution Damage"

43 LEG 83/11, 6 September 2001

The foregoing work of this research concentrates on relevant aspects that have been covered in this new instrument with respect to 'liability issues',[44] but before illustrating those discussed contents in introduction, it would be beneficial to emphasise one of the main important strategies used in the on-going discussion in analysing substance of the Convention and relevant principles that are involved.

Interpretation of the text

Pursuant to the provisions laid down in the Vienna Convention on the Law of the Treaties 1969[45], the present Convention in question is expected to be interpreted at first sight. This would mean that both international public law and international private law rules play an important role in interpretation of this Convention, as they form the foundation for the establishment of the rules of the present Convention. In substance, the relevant Convention would be interpreted according to Article 31 of the Law of the Treaties dealing with general rule of interpretation at first sight. Secondly, approaches towards supplementary means would take effect pursuant to Article 32 of the said law. In doing so, the *travaux préparatoires* and other related aspects would be dealt with, as the most appropriate and applicable tools. Using such an approach is inevitable in a Convention of this nature, which is indeed modelled or referred to as under another similar regime, such as in this case, the CLC and HNSC regimes.

Introduction to the relevant Chapters

The basic idea being the evaluation of the effectiveness of civil liability as established under the Bunkers Convention, the foregoing research is based on its application in maritime liability and compensation regime with regard to its implementation as gap filler. Therefore, the present study is mainly focused on liability issues, while especially concentrating on its practical aspects towards attributing liability on the responsible party and ways of obtaining compensation. In view of attaining these goals, the Chapter 2 deals with the basic elements of the Con-

44 The relevant work of the author does not deal with the insurance aspect. This is purely confined to liability issues and establishment of liability under the Bunkers Convention as a means of gap filler to the present context of liability and compensation for oil pollution damage, as the title suggests

45 United Nations, *Treaty Series*, vol. 1155, p 331, Vienna, May 23, 1969, entered into force January 27, 1980. Full text available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

vention and its importance in the entire regime, while Chapter 3 focuses on its scope of application.

Chapter 4 outlines the status of liable parties and victims, covering a broad spectrum of entities that fall within the ambit of the conventional meaning. Once these aspects have been properly discussed, the foregoing work concentrates on issues pertaining to institution of action and mode of adjudication. Though, it might sound strange for some readers who expect to find the relevant analysis at the latter stage, it is the idea of the author to include that aspect in Chapter 5 due to its importance in a discussion based on practical aspects, as mentioned before. Upon the realization of jurisdictional competency through the said Chapter, the discussion on requirements for the establishment of liability would be taken up in the next. Thereafter, Chapter 7 deals with issues concerning available defences on behalf of the liable party accompanied with limitation aspect that is dealt in Chapter 8.