

Can the Civil Liability Convention for Oil Pollution Withstand the Pressure of a Major Oil Spill in the Arctic Ocean?

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As the Arctic Ocean is becoming a busier place for shipping due to an unprecedented sea ice retreat and integration of the regional resources with the world economy, regulatory challenges for the protection and safety of the region become the top priority. According to the Arctic Council's Arctic Marine Shipping Assessment (AMSA) report "the greatest environmental threat presented by the marine shipping industry pertains to the release of oil into the Arctic waters" (AMSA, 2009). Given the magnitude of the threat and the lack of technology to clean up the spilled oil in the Arctic Ocean, it is not surprising that the prevention measures become the highest priority in Arctic marine environmental protection efforts. To this effect, the Arctic states, through Arctic Council, have already agreed on several legal instruments regionally. The IMO Polar Code has also brought various precautionary measures to avoid oil spills in the Arctic Ocean. However, the civil liability scheme in oil pollution has not been properly examined yet. Civil Liability regimes are not drafted in light of the Arctic's unique environmental conditions and risks; therefore, they require adjustments according to the Arctic shipping realities that we face today.

Introduction

Major disasters, in general, translate to change in legal structures because only after the accident we can test the true functionality of a legal framework set for the given industry. In oil pollution, it was the Torrey Canyon incident causing massive oil pollution in England and France in 1967 that become the turning point for the major change in the civil liability structure of oceanic oil pollution. In the wake of this incident, it became clear that no proper legislation governing liability and compensation for such events existed either nationally or internationally (Jacobsson, 2007: 1). For example, the immediate problems with the Torrey Canyon incident were first how to establish jurisdiction because to establish jurisdiction one needed to arrest the ship, but the ship had sank right after the incident; and second how to compensate the damages because civil actions for oil

pollution were limited to common law claims in tort against the vessel owner or other responsible parties which required proof of fault (Griggs, 2012). As a result, in order to respond to shortcomings of the system, a global regime addressing these issues was created by means of two international treaties adopted under the auspices of the International Maritime Organization (IMO), at that time the International Maritime Consultative Organization (IMCO) (Jacobsson, 2007: 1).

After decades of existence and evolution, the three-tier International Civil Liability Convention for the Oil Pollution Damage, consisting of the Civil Liability Convention (CLC), the Fund Convention (The Fund), and the Supplementary Fund Convention is about to face its biggest test against the recent phenomena of Arctic marine transportation. The question is, would this regime withstand a possible major oil pollution damage occurring in Arctic waters?

As for this article, I will only examine the 1992 International Civil Liability Convention as all the Arctic states, except the USA, is party to it.

Brief Review of the Civil Liability Convention for Oil Pollution Damage

A. The CLC

Geographical Scope

According to the CLC Article II, the convention exclusively applies to oil pollution damage suffered in the territory, including the territorial sea and the exclusive economic zone of a Contracting State. Therefore, place of the damage is important to define the geographical application of the convention.

Additionally, the convention also applies to preventive measures, wherever taken, to prevent or minimize such damage within the geographic scope of the Convention. Scenarios where a tanker, for example, is involved in a collision beyond the territorial sea of a Contracting State and threatens to cause pollution within it: measures taken to prevent further oil spillage or collect the already spilled oil will be eligible for compensation under the Convention if all other criteria are satisfied.

The nationality of the ship involved in the oil spill is irrelevant for this purpose.

Ship

Liability is imposed on certain vessels that constitute a “ship” as defined by the Convention.

Article I (1), 1992 CLC defines ship as:

“...any sea-going vessel and seaborne craft of any type whatsoever constructed or adopted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.”

The definition of a “ship” is narrow, referring to ships that carry oil in bulk as cargo, for example, typical oil tankers. CLC does not apply to spills from dry cargo ships, passenger vessels or other non-tankers despite the fact that large ships in these categories often carry in their bunkers substantial quantities of fuel oil capable of causing considerable pollution damage.

Combination Carriers

Combination carriers, or Oil/Bulk/Ore ships (OBOs), as well as tankers capable of carrying cargoes of persistent oil but also other liquid cargo in bulk, such as non-persistent oil or chemicals³, are covered by the definition of “ship” only when actually carrying oil in bulk as cargo or when in ballast following such carriage.

Oil Barges

In general, the CLC does not require the ship to have any means of steering or propulsion. Therefore, an oil barge carrying oil in bulk as cargo from one place to another may actually constitute a “ship” for the CLC and Fund purposes. However, we have to bear in mind that there are also contradicting court rulings regarding the ship status of oil barges (De La Rue & Anderson, 2009: 86-92). For example, in the 1998 Pantoon No 300 Case, in relation to the questions whether the barge constituted a “ship” for the purposes of the Civil Liability Convention 1969, the Executive Committee of the 1971 International Oil Pollution Compensation (IOPC) Fund attached importance to the fact that the barge had been actually transporting oil in bulk as cargo from one place to another and concluded that in these circumstances it was a “ship” for the purposes of the Conventions (IOPC Fund Claims Manual, 2010: 86-87). Other example cases involving oil barges under tow include the Nestucca Incident (Canada, 1998) and the Vistabella incident (Caribbean, 1991), both of which gave rise to claims against the 1971 Fund. In the former case the question whether the barge constituted a ‘ship’ was not raised, and did not arise in the decision, because it was concluded that the Fund Convention 1971 did not apply to the incident on the grounds that it occurred before the Convention entered into force in Canada (IOPC Fund, 1990). In the latter case, it appears to have been accepted without debate that the barge was a “ship” (IOPC Fund, 1991).

Offshore Floating Storage Units

The situation regarding Floating Storage Units (FSU) and floating production, storage, and offloading units (FPSOs) is not crystal clear. It is agreed by the 1992 Fund Assembly that the offshore crafts should be considered as ‘ships’ under the 1992 Conventions only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate (Attard, Fitmaurice, Martinez & Hamza 2009: 292). Accordingly, the offshore craft would fall outside the scope of the 1992 Conventions when they leave an offshore oil field for operational reasons or simply to avoid bad weather. The circumstances of an incident should be taken into account when assessing the situation.

Anchored Vessels

Permanently and semi-permanently anchored vessels engaged in ship-to-ship oil transfer operations should be regarded as ‘ships’ under the 1992 Civil Liability and Fund Conventions (Attard, Fitmaurice, Martinez, Hamza 2009:292). The 1992 Fund Assembly decided in 2006 that such vessels should be regarded as ships only when they carried oil as cargo on a voyage to or from a port or terminal outside the location in which they normally operate, but that in any event the decision as to whether such a vessel fell within the definition of ship should be made in the light of the particular circumstances of the case.

State Owned Ships

As stated at CLC Article XI (1), the Convention does not apply to warships or ships owned or operated by a State for non-commercial purposes.

Oil

Under the Article I (5) of the CLC, oil is defined as:

“any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil, and lubricating oil whether carried on board a ship as cargo or in the bunkers of such a ship”.

The targeted oil in the convention is, therefore, “persistent oil” because it is slow to dissipate when spilled into the water; therefore, it has potential to create widespread pollution that requires an effort to clean up, whereas non persistent oil normally evaporate by itself fairly quickly and does not require a clean up operation. Spills of non-persistent oil include, gasoline, light diesel oil, and kerosene, and they are not covered by the Conventions. Additionally, spills of non-mineral oils, for instance, palm oil and whale oil, fall outside the 1992 Conventions as well.

Notably, there is no definition for persistent oil in the convention. And this omission seems to be intentional and non problematic as it has not given rise to any difficulties in the application of the Conventions yet (cf. the Maritza Sayalero Incident (Venezuela, 1998)). But it is important to highlight the fact that the Fund Assembly later provided explanation to the term “persistent oil” as:

“All oils which are not within the category of “non-persistent oil” as defined shall be regarded as “persistent oil”. “Non-persistent oil” is oil which, at the time of shipment, consist predominantly of non-residual fractions and of which more than 50 per cent by volume distills at a temperature of 340°C when tested by the ASTM Method D 86/78 or any subsequent revision thereof”(F.D. Fund/A.4/11, 15/7/81: 17).

Both the operational or accidental oil spill cases are covered under the CLC. An oil spill that occurred while loading and discharging operations, collisions, groundings, hull failures, equipment failures, bunkering, fires and explosions is also in the CLC coverage. Moreover, it is immaterial whether the oil is part of the ship’s cargo or escapes from the ship’s bunkers. Thus, pollution damage covered by the Convention may arise both where the ship is actually carrying oil in bulk as cargo, where the ship is laden, or during any voyage following such carriage, where the ship is in ballast.

Types of Damage Covered

An oil pollution incident can generally result in six types of damage:

Property Damage

Pollution incidents often cause damage to property; the oil may contaminate fishing boats, fishing gear, yachts, piers, and embankments. Costs for cleaning polluted property are admissible for compensation under the Conventions (Fund Claims Manual, 2008: 12). If the polluted property for example fishing gear cannot be cleaned, the cost of replacement qualifies for compensation, subject to deduction for wear and tear.

Preventive Measures

As indicated in the Article 1.6. and 1.7., 'Pollution damage' includes the cost of 'preventive measures' that is reasonable measures to prevent or minimize pollution damage, as well as loss of damage caused by preventive measures. Clean-up operations at sea or onshore have generally been considered to fall within the concept of preventive measures (Attard, Fitmaurice, Martinez & Hamza 2009: 295). For example, clean-up costs occurring on the high seas or within the territorial waters of a State that is not a party to the convention will be covered under the convention.

Consequential Loss

Compensation is payable for the loss of earnings suffered by the owners of property damaged by oil as a result of the spill, for example, a fisherman who is unable to fish while his fishing gear is being cleaned (consequential economic loss) (Fund Claims Manual, 2013:13).

Pure Economic Loss

People whose property has not been damaged can also suffer the loss of earnings. For instance, fishermen who are prevented from fishing in a particular area of the sea because of the oil spill, even though their nets have not been damaged, may be eligible for compensation (Attard, Fitmaurice, Martinez & Hamza 2009: 295). Also, hoteliers who suffer losses because of a downturn in the number of guests due to contamination of a public beach may also have a claim. Such losses are, in common law jurisdictions, referred to as pure economic losses.

Even though the compensation for such losses is allowed, there is an inconsistency in practice because the regime does not specify the criteria that should be applied in order to settle the pure economic damage claims. In common law countries, the matter is left entirely at the discretion of national courts and thus creates a potential for the discrepancy in states (such as Australia, Canada, New Zealand, and the United Kingdom), which have implemented the international regime into their legal systems (Soyer, 2009). The situation in countries outside the common law system is also unclear. In some of these countries, pure economic loss is not considered to be a separate type of damage. The courts in these countries may apply the criterion of foreseeability and remoteness or require that there is a direct link of causation between the damage and the defendant's action and that the damage must be certain and quantifiable in monetary terms (Jacobsson, 2016: 249).

Environmental Damage

Significantly, in accordance with the Article 1.6(a), general claims for damage to the marine environment are not admissible, therefore, they cannot be awarded for claims of a non-economic nature. The marine environment provides environmental services that support the plants and animals that live within it and to the humans who depend on the sea and shoreline for their livelihoods, recreation and enjoyment. The Conventions do not provide compensation for what is sometimes referred to as 'pure' environmental damage; that is, compensation for the loss of environmental services (IOPC Funds, 2018: 8). For example, a father who usually spends time with his children in a particular spot engaging in recreational activities such as fishing and camping for the last two years cannot claim damage because he can not find any other close by place to camp and fish with his children.

However, claims for the economic consequences of such environmental damage can be compensable according to Article 1.6(a). Typical claims for loss of profit resulting from

impairment of the environment might include loss of revenue for a marine or coastal park or a nature reserve, for example, due to reduced income from car parking, camping or mooring fees. In the fisheries sector, claims may be admissible for reduced catches of commercial species of marine products. An example might be the disruption of the capture and sale of mangrove crabs and other shell fish due to the contamination of mangroves.

Additionally, compensation for the environmental damage may be available, provided that any compensation claimed, other than loss of profit, is limited to the costs of reasonable measures taken, or to be taken, to restore the environment to the condition that it was in prior to the incident (Claims Manual, 2008: 13). For example, if a response were undertaken on the high seas or within the territorial waters of a State that is not a Party to the Conventions in order to prevent or reduce pollution damage within the territorial sea or EEZ of a State Party, the cost of the response would in principle qualify for compensation. Such compensation includes the reasonable costs associated with the capture, cleaning and rehabilitation of wildlife, in particular birds, mammals and reptiles (2013 Claims Manual, 2013: 14)

Claims for the environmental damage can be presented by anyone who has suffered a financial loss due to oil pollution caused by a tanker. This could be national or regional governments or government agencies mandated to manage natural resources on behalf of the nation or region. Similarly, any claim for the reinstatement can be admissible with the condition to align with the standards set out in the Fund Claims Manual (IOPC Funds, 2018: 8)

Shipowner's Liability

Under the CLC Article 3(1), the registered shipowner is strictly liable for any oil pollution damage caused by his ship unless the circumstances fall within one of the stated exceptions from liability. This also means that the claimant is not under any duty to prove the fault or blame on part of the shipowner or its crew, and the proof of “incident” is not necessary to hold the shipowner liable for the damage that his ship caused.

The shipowner is exempt from liability under the Article 3.2 only if he proves that:

- (a) the damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- (b) the damage was wholly caused intentionally by a third party, or
- (c) the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.

Limitation of Liability

Under certain conditions, shipowners are entitled to limit their liability under 1992 CLC Convention to an amount which is linked to the tonnage of the vessel. The limitation amounts under the 1992 Convention are—after increases by 50.73 percent with effect from 1 November 2003—as follows:

- (a) for a ship not exceeding 5,000 units of gross tonnage, 4,510,000 Special Drawing Rights (SDR) (6.2 million USD);
- (b) for a ship with a tonnage between 5,000 and 140,000 units of tonnage, 4,510 000 SDR

- (6.2 million USD) plus 631 SDR (879 USD) for each additional unit of tonnage; and
 (c) for a ship of 140,000 units of tonnage or over, 89 770 000 SDR (125 million USD).

7

Constitution of Limitation Fund

In order to be entitled to limitation of liability, the shipowner must, under the CLC Article V.3, establish a limitation fund corresponding to the limit of his liability by depositing that amount in court or by producing a guarantee acceptable to the court. The limitation fund should be constituted with the competent court (or other competent authority) in one of the States parties where an action for compensation has been brought against the shipowner under the Convention or, if no such action has been brought, with any court in one of the States parties where such an action can be brought under the Convention.

In some jurisdictions the courts accept that the limitation fund is constituted by means of a letter of guarantee, for instance by a Protection and Indemnity Association (P&I Club), whereas in other jurisdictions the limitation amount will have to be paid into the court (Attard, Fitmaurice, Martinez & Hamza 2009: 302)

Channeling the Liability

According to the CLC Article III(4)(a)-(f), the shipowner is the only liable party and subject to liability. His servants or agents are outside of the scope of the rule, therefore, they cannot be found liable for the oil pollution damage unless they cause the damage willfully or recklessly.

Following is the list of people exempt from liability:

- (a) the servants or agents of the owner or the members of the crew; this exclusion extends to the employees of representatives of the owner, manager, operator and other parties whose liabilities are excluded;
- (b) the pilot or any other person who performs services for the ship;
- (c) any charterer, including bareboat charterer, manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any person taking preventive measures, and
- (f) all servants or agents of those persons in subparagraphs (c)-(e).

This system provides a simplified and efficient claims procedure for those who suffer pollution damage, and also allows the insurance market to provide appropriate cover. There are numerous important exceptions to this list: proceeding against the builders of the ship or its classification societies is allowed if there is any defect that causes or contribute to the incident. Similarly, proceeding against the owners or operators of a terminal is allowed if there is any fault on their part; or proceeding against the owners of another vessel is possible if they are involved in a collision with the tanker from which the oil spills.

Compulsory Insurance

The owner of a ship registered in a State, party to one of the Civil Liability Conventions and

carrying more than 2,000 tonnes of persistent oil as Cargo, is under Article VII.1 obliged to maintain insurance or other financial security to cover the liability under the applicable Convention.

B. The Fund Convention

The Fund Convention (1992 International Oil Pollution Compensation Fund) is created to be the second part of the two-tier international compensation system. Its main purpose is to provide additional compensation for victims of oil pollution and transfer some of the economic consequences of the damage to the oil cargo owners, as well as the shipowners.

Since the Liability Convention had chosen the shipowner as the liable party on the basis of strict liability, it was considered necessary to shift some of the burden of compensation onto the oil industry, the main beneficiary of the carriage of oil by sea, which led to the idea of a second convention establishing a Fund to which the industry would contribute (Wu, 1996:76).

Payment of Compensation

According to the Fund Article IV.1, there are three situations in which compensation will be payable to any person who is unable to obtain full and adequate compensation under the CLC, these situations are:

- a) where there is no liability for the damage arising under CLC;
- b) where the owner liable for the damage under CLC is financially incapable of meeting his obligations in full, and any financial security provided under CLC does not cover or is insufficient to satisfy the claims for compensation which result from an incident; or
- c) where the damages exceed the amount of the shipowner's limited liability under the 1992 CLC.

It should be noted that the 1992 Fund is only obliged to pay compensation under item c) if the shipowner is entitled to limit his liability.

Fund's Liability Limit

According to the Fund Article 4(4)(a), for incidents occurring on or after 1 November 2003 (Amendment 2003), the liability of the Fund in respect of any one incident is limited to the aggregate sum of 203 million SDR (approximately 313.21 million USD). This amount is available irrespective of the size of the ship and includes any compensation actually paid under the Fund Article IV.4.(a).

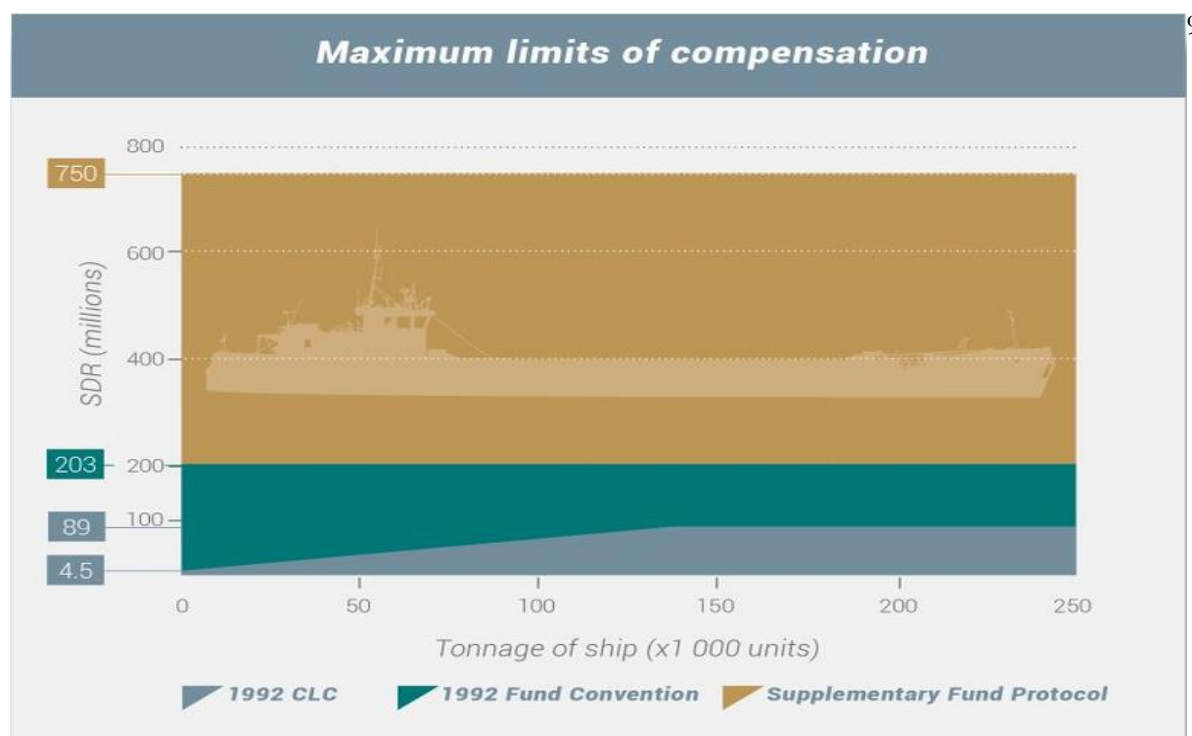
C. The 2003 Supplementary Fund Protocol

As a third-tier compensation system, the Protocol on the Establishment of a Supplementary Fund for Oil Pollution Damage adopted on 16th May the 2003 and came into force on 3 March 2005 (Supplementary Fund Protocol).

Limits of Compensation

According to Supplementary Fund Protocol Article IV(2)(a), the aggregate amount of compensation payable by the Supplementary Fund, in respect of any one incident, is limited to 750 million SDR (approximately 1157.1 million USD). This amount is inclusive of any

compensation actually received under the CLC and Fund Conventions.



Source: The International Oil Pollution Compensation (IOPC) Funds Website.

Application of the Convention to the Arctic Ocean

Sufficiency of the Monetary Compensation

Aside from the economic damages, the most important contributor to overall oil spill incident cost in the Arctic Ocean will be the cost of preventive measures, including the response and clean-up efforts.

It is difficult to answer the question whether the monetary compensation schemes will be sufficient to meet the cost of responding to a major oil spill in the Arctic Ocean since we have not experienced one yet (CMI, 2017: 51). But it is possible to state that the cost will be considerably higher compared to any other place in the world. For example, in BP oil spill, it has been reported that on a single most demanding day of the response, 6,000 vessels, 82 helicopters, and 47,849 individuals were on the spill site helping with the clean-up efforts (Department of Health and Human Services, 2011: 1)

At the end of the day, the clean-up cost for the BP was \$11.8 billion USD (Spear, 2012) which was a sizable portion of the total cost of \$62 billion USD (Busso, 2018).

The Gulf of Mexico in BP oil spill represents an ideal environment for oil spill recovery and cleanup operations, therefore, for a closer comparison to actual Arctic Ocean settings, we may need to examine the Exxon Valdez oil spill in Alaska. In 1989 Exxon Valdez oil spill clean-up efforts involved more than 1,000 people and 1,400 vessels, and it was not only about cleaning up the oil but also accessing the spill site. Therefore, there was a substantial land-based infrastructure build up as well (Patrick, 2018). Systematic cleanup operations underwent during the spring and

Summer of 1989-1992, and at the end, the overall clean-up cost was about 2.5 billion USD which was an important portion of the total cost of 7 billion USD (Patrik, 2018). As a result, the clean-up factor of the Exxon Valdez oil spill was a lot higher as a proportion of the total cost compared to the BP oil spill.

It is clear that when we go further north, the circumstances change drastically. The remoteness, lack of infrastructure, limited seasonal operation window leading to a multiyear clean-up operation, and the harsh climate conditions will escalate the response and clean-up cost in the Arctic Ocean. Response measures need to be mobilized and brought in from far distances, and in many instances, national response options will likely be inadequate, therefore, they will be supplemented by resources procured on market terms (CMI, 2017: 51).

Overall, the CLC and Fund Conventions will not be enough to cover the cost of oil spill damage in the Arctic Ocean. And as for the Supplementary Fund, it seems that the Arctic oil spill will be a real test. Some claim that the Supplementary Fund is sufficient enough to cover all the costs exceeding the CLC and Fund limits (CMI, 2017: 53), however, given the facts listed above this seems very optimistic and actually unrealistic.

Reasonableness Test

The Article VI (a) of the CLC states that “only reasonable reinstatement costs are admissible for compensation”.

The reasonableness concept for reinstatement costs needs further analysis. In order for the preventive measures to qualify for compensation, the measures must be reasonable, and reasonableness should be determined on the basis of objective criteria in the light of the facts available at the time of the decision to take the measures. For example, the Fund has accepted to pay compensation for reasonable costs of cleaning and rehabilitation of contaminated birds and mammals, provided the measures were taken by qualified personnel and there was a reasonable chance that the animals would actually survive the process. It is extremely difficult in the Arctic to apply a reasonableness test. For example, how the reasonableness question will be answered in a salvage situation in the Arctic Ocean. It is difficult to answer this question because there is a high possibility that salvage operations alone will exceed the cost of the ship, or it will not even be possible. The Funds' governing bodies have taken the position that the costs incurred for such operations qualify in principle for compensation under the CLC and Fund Conventions if the primary purpose of the operations was to prevent pollution damage; should the operations have another purpose, such as saving the ship or cargo, they would not fall within the definition of preventive measures and the costs incurred would not be admissible under the Convention (Attard, Fitmaurice, Martinez & Hamza 2009: 298).

Environmental Damage

The CLC does not have environmental damage coverage. In other words, the meaning attached to the environmental damage compensation does not cover all the possible circumstances of an environmental damage. Victims of oil pollution damage in international regime can claim for impairment of the environment, but such claims are limited to property damages and economic aspects. Thus, only economic damage, cleaning, and reinstatement costs may be compensated by the CLC regime. (Attard, Fitmaurice, Martinez & Hamza 2009: 298).

Irreversible damages such as destruction and death of wildlife and flora are considered indirect consequences that are not compensable. In other words, the environmental damage itself, or pure ecological damage, is not addressed by the regime. 11

The Arctic Ocean sets itself apart from the rest of world's oceans with its unique environment and marine biodiversity. Scientists predict that oil spilled in the Arctic waters may prevail for more than 50 years before natural elimination processes make it disappear (Ostreg, 1999:10) This gives us an overall idea about the magnitude of the environmental damage and difficulty for nature to recover in the Arctic Ocean.

Therefore, we should start considering environmental damage compensation systems where the damage to the environment itself can also be translated into a monetary value and compensated under the CLC regime.

Navigational Aid

Navigational Aid, also known as Aid to Navigation, is described as any device external to a vessel specifically intended to assist the navigators in determining their position or safe course or to warn them of dangers or obstructions to navigation (US Coast Guard). The common types of such aids include lighthouses, buoys, fog signals, and day beacons.

Safe and effective use of the Arctic Ocean for shipping depends heavily on safety systems as such as fixed and floating aids to navigation, long-range aids to navigation (shore-based electronic or satellite-based), as well as safety and navigation information broadcasts (AMSA). While the southern waters and maritime routes are well served by the established systems, northern waters are served by a patchwork of said systems (AMSA). Therefore, ships in this part of the waters have no other option but to use and rely on a combination of satellite positioning and traditional navigation techniques (AMSA). And this situation can create a scenario where the shipowners can exonerate from legal liability for oil pollution by exposing the Arctic coastal state governments to the oil pollution liability.

As indicated above, under the Article III(2)(c), the CLC regulates "Navigational Aid" exemption to shipowners' liability. According to this Article, no liability for pollution damage shall attach to the owner if they prove that the damage "was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function." This exemption only applies if the shipowner proves that damage was "wholly caused" by matters falling within the exclusion. Thus, a shipowner would not be able to rely on the exemption in cases where the oil pollution damage was also due to another contributory cause, such as contributory negligence by those on the board the ship (Tsesis Case, 1977). For example, if an oil tanker with maximum draft of 8 meters runs aground in a Russian Arctic port with the depth of 7 meters by relying on the official draft limitation of 9 meters set by the Northern Sea Route Administration, they can claim to be exonerated from the oil pollution liability if the shipowner can prove that the 7 meters depth was not marked on the chart, or the chart was not up to date.

High Seas

Currently, the high seas area of the Arctic Ocean is not open to marine transportation due to thick, multiyear, sea ice coverage, even in Summer. However, the prediction is that the high seas will be

open to trans-Arctic shipping in the near future due to trends in climate change (Humpert & Raspotnik, 2012). Arctic coastal states do not have jurisdiction in the area as this is beyond their EEZ. This issue raises liability questions in case an oil spill occurs in the area. Because a coastal state's authority to regulate foreign shipping does not extend to the high seas, transiting ships would only be subject to global shipping safety, environmental and security rules and standards adopted through the IMO and as may be applied by the flag states (CMI, 2017: 50) Therefore, the question arise as what happens if the oil spill occurs in the High Seas area, outside of the geographical scope of CLC 1992.

The current gap with respect to the High Seas in the Arctic is not a problem at the moment as there is no access to the area, however, in time, this issue needs to be addressed. The vastness of the area is a great challenge from a response perspective and the problem could possibly be managed and resolved to some extent by establishing transport corridors and restricting navigation to certain areas (CMI Report, 2017: 51)

Alternatively, a simpler approach would also be to copy the Norwegian model of extending the application of the CLC 1992 (as impended nationally) to oil pollution on the High Seas as that would benefit both the environment and the polluting ship owner (CMI Report, 2017: 51).

Conclusion

As the Arctic is warming at an unprecedented rate, it is imperative that we review and revisit the legal liability systems for oil pollution damage. With the International Oil Pollution Regime for Oil Pollution, the Arctic Coastal States have in place legislation that deals with the pollution, liability, calculation of losses, responsible parties and funding. However, there are many issues that we need to re-consider in adjusting and applying in Arctic setting. For example, with the lack of infrastructure and difficulty in responding to an oil spill, it's almost certain that the monetary compensation will not be enough to cover the expenses that come with a major oil spill in the Arctic. This may create a particular problem for Russia as it is still not a party to the Supplementary Fund Protocol. The lack of infrastructure will also potentially lead to Coastal State's exposure to liability in oil pollution. Interpretation of some of the articles in Arctic Ocean will be difficult, and we certainly need to have a section that requires compensation for the damage to the environment itself. And lastly, even though it is not an immediate problem, we have to start considering the ways to deal with possible high seas oil pollution scenarios and create the necessary rules.

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