ROLE OF MARINE INSURANCE IN OIL POLLUTION IN INDIA

Abhishree Manikantan

20 April 2021

All too often, *"the asserted divide between public and private international law suggests that the two occupy different, mutually exclusive domains. On the one hand, public international law comprises the legally binding rules and principles governing States' interactions. On the other, private international law concerns the civil and commercial interactions of private actors — who might hail from different States but who are subject to domestic law regarding jurisdiction, the applicable law, and the enforcement of judgments. While public international law is commonly regarded as truly international, private international law is generally considered to be international only in name. Distinctions along these lines no longer reflect, and perhaps never reflected, reality"*.[1] Within the maritime domain, a striking example of the porosity between "public" international maritime law and "private" international maritime law is that of maritime pollution — whether caused by invisible chemicals, or by far more visible forms of plastics (including micro-plastics), or, (and this is arguably the most visible of all) by oil pollution. The carriage of cargo by sea is typically considered under the corpus of private international law, with matters being regulated through the contracts of carriage agreed upon by the parties. However, environmental harm, including pollution, is governed by public international law through agreements between States.[2] Compensation to victims of marine environmental damage, which is one of the focal points of this article, is thus a matter relevant to both private and public international maritime law.[3]

Crude oil, with its manifold applications, is the backbone of industrialised nations. It has been indispensable to countries across the globe since the advent of the industrial revolution. Oil fulfils many developmental requirements, most prominent amongst which is, of course, the supply of energy.

More than half of the world's crude oil is transported by sea. India is a major market for crude oil and, with an annual refining capacity of 249.4 million tonnes, it is the second largest

---

[1] Diego P Fernández Arroyo and Makane Moïse Mbengue, "Public and Private International Law in International Courts and Tribunals: Evidence of an Inescapable Interaction", 20 May 2108, http://diegofernandezarroyo.net/wp-content/uploads/2019/10/DPFA-MBENGUE-Public-and-Private-International-Law-in-International-Courts-and-Tribunals-05-2018.pdf

[2] Philippe Sands, Jacqueline Peel, Adriana Fabra, and Ruth MacKenzie, *Principles of International Environmental Law*. 3rd ed. Cambridge University Press, 2012

[3] Corfu Channel (UK v. Albania), Judgment, 1949 ICJ (09 Apr 1949), https://icj-cij.org/en/case/1/judgments

See also:

Lake Lanoux Arbitration (France v. Spain) 12 RIAA 281(1957), https://www.informea.org/sites/default/files/court-decisions/COU-143747E.pdf

See also:

United Nations University. "Compensatory Remedies: Gaps and Trends in International Law." Accessed April 19, 2021. https://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee0i.htm

refiner in Asia.[4] However, oftentimes during transportation, carrier vessels meet with accidents that lead to crude oil spilling into the oceans. Notwithstanding the significant reduction in the number of oil spills since 1970, these accidents remain a serious cause of environmental pollution.[5] This paper will discuss the role of insurance coverage in tackling oil pollution in India.

Oil Pollution: More Than an Environmental Concern

Accidents at sea often have lasting consequences, leading to losses of human life or damage to property. Ship-related accidents and oil-rig catastrophes are common causes of oil spillage in the oceans which, due to the near-instantaneous generation of toxicity in the surrounding environment, results in the loss of marine life.[6] Besides the loss of aquatic flora and fauna, such events also have significant economic repercussions. For example, after the *Deepwater Horizon* oil rig in the Gulf of Mexico exploded, a staggering 2.52 million gallons of oil per day leaked into the surrounding waters.[7] Oil spills cause coastlines to turn tarry black and picturesque landscapes to be tainted with inky black oil slicks. Thus, apart from the destruction of the surrounding marine life, several important industries, especially tourism, fishing, and, the hospitality (food and beverage) industry are also adversely affected.[8] Consequent upon the *Deepwater Horizon* accident, Florida's tourism industry alone suffered a staggering loss of USD 3 billion. Several businesses located along the coastline were forced to shut down due to property damage and associated losses, leading to significant short and long term economic uncertainty in the region.[9]

It is clear that given the environmental hazard created by oil spillages and the very substantial downstream monetary losses, a comprehensive regulatory framework needs to be put in place in order to contain the damage caused by such incidents and return life to as close to "normal" as possible, at the earliest. Such a framework must contain regulations for preventing spillage incidents in the first place, and, if accidents do occur, it must encompass rules and processes to: **(i)** determine liability of all involved parties, **(ii)** provide adequate compensation to mitigate the economic damage caused, and, **(iii)** incorporate an effective and expeditious system for the necessary environmental clean-up.

[4] India Brand Equity Foundation. "Oil & Gas Industry in India," https://www.ibef.org/industry/oil-gas-india.aspx
[5] "Liability and Compensation for Ship-Source Oil Pollution: An Overview of the International Legal Framework for Oil Pollution Damage from Tankers." New York & Geneva: United Nations Conference on Trade and Development, 2012
[6] "Effects of Oil Pollution on the Marine Environment." International Tanker Owners Pollution Federation, 2011
[7] Charles W Schmidt, "Between the Devil and the Deep Blue Sea: Dispersants in the Gulf of Mexico" 118(8) (2010): a338–44. https://doi.org/10.1289/ehp.118-a338
[8] L Kellner, "Insurance Coverage Issues for Third-Party Businesses and Municipalities with Losses Due to the Oil Rig Explosion in the Gulf of Mexico." *Insurance Coverage Alert, Dickstein Shapiro LLP*, 2010
[9] Kyriaki Noussia, "Environmental Pollution Liability and Insurance Law Ramifications in Light of the Deepwater Horizon Oil Spill" In *European Energy and Environmental Law Review*, 2011, 98-107

Determining Liability in an Oil Spill: Common Law Perspective

Apart from the environmental damage and economic setbacks, the victims involved in such oil related accidents are in large numbers. The question of the extent to which shipowners can be made liable for the loss is, therefore, one that is particularly germane.

Under circumstances where the spill is caused by patent negligence of crew members or is the result of defects in the ship due to lack of maintenance by the shipowner, it is easy to impute liability under common law, since it would appear that the rule of strict liability, as evolved in the case of *Rylands vs Fletcher*,[10] can be readily applied. However, a theoretical approach to the issue may conversely suggest that since oil tankers are specifically designed to transport oil, there can be no "non-natural use of land" which is a pre-requisite for applying the rule of *Rylands*. Thereby, a tort of public nuisance may seem more applicable under such circumstances.[11]

Another inhibiting factor in applying a purely common-law-based approach to the problem at hand is the large number of parties involved. Corporate trading in oil generally involves carriers owned by corporations of one country, chartered by another and sailing under the flag of a third nation. In such circumstances, imputing liability is arduous and the delivery of justice takes a considerable amount of time. Further, while tort law primarily focusses on individual rights and liabilities, in oil-spill cases, the environmental damage caused results in the encroachment of collective rights. Thus, it has been recognised that a common ground must be reached in order to streamline the process of determining liability and providing compensation under these circumstances.[12]

International Legislative Framework

Given that marine oil pollution often occurs on the high seas as a result of seaborne trade, it is classified as an international concern.[13] It cannot, therefore, be solved by the actions of a single nation acting alone. Consequently, since 1954, constant efforts have been made to devise international conventions that could hold ship-owners liable for the pollution caused by their vessels. This is also an embodiment of the "polluter pays" principle, which demands that the enterprise causing the harm should pay for the damage.[14]

The robust international framework in existence today is a result of the collaboration of nations under the auspices of the International Maritime Organisation (the erstwhile Inter-Governmental Maritime Consultative Organization). The international regime essentially has

[10] Rylands v Fletcher, [1868] UKHL 1, (1868) LR 3 HL 330, https://www.casemine.com/judgement/uk/5a938b3d60d03e5f6b82b9ef
[11] Saadiya Suleman, "Oil Spills: Law on Liability with Special Reference to the Indian Regime." *BLJ*, 2011
[12] Alan Khee-Jin Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation,* Cambridge University Press, 2005
[13] Eric A Posner, *The Perils of Global Legalism*, University of Chicago Press, 2009
[14] Patricia W Birnie, *International Law and the Environment*, Oxford University Press, 2009

two sets of conventions that co-exist to compensate oil pollution victims via a multi-layered system in which the vessel's liability is augmented by fund-based compensation.
As a result of the catastrophic *Torrey Canyon* incident of 1967,[15] the International Convention on Civil Liability for Oil Pollution Damage (**"CLC"**), 1969, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (**"Fund Convention"**), 1971, were adopted.[16] These conventions, which set the groundwork for the international regime, were later superseded by the 1992 CLC and 1992 Fund Convention. Where the 1969 CLC established strict liability of the shipowners in cases of oil spills but limited it up to a maximum aggregate amount by the ship's tonnage, the 1992 CLC widened the geographical scope of the Convention and increased the maximum limits of compensation for victims. The 1969 CLC also introduced the concept of compulsory liability insurance. Further, the Fund Convention set up the International Oil Pollution Compensation Fund (**"IOPC Fund"**) to provide damages in excess of the shipowner's liability, albeit still subject to a monetary cap. At present, the 1992 and 1969 CLC Conventions co-exist at the international level. However, the 1971 Fund Convention ceased to have effect on 24th May 2002 and all second-tier compensation is now available only under the 1992 Fund Convention.[17] An optional third tier of compensation is provided by the 2003 Supplementary Fund Protocol. Adopted after the 2002 *Prestige* incident,[18] it established a supplementary IOPC Fund with a maximum compensation amount of USD 1,024 million. The Protocol presently has 32 State Parties.[19]

Apart from the CLC and Fund Conventions, there exist the International Convention on Civil Liability for Bunker Oil Pollution Damage (**"Bunker Convention"**) and the Convention on Limitation of Liability for Maritime Claims, 1976 (**"LLMC"**). The Bunker Convention has many similarities with the CLC, most prominent amongst which are the strict liability of ship owners, the limitations upon liability, and, the system of compulsory insurance. Meanwhile, the LLMC elaborates upon the circumstances under which shipowners may limit their liability. It must be noted, however, that the LLMC, vide Article 3(b), does not apply to claims arising out of the CLC.

Insurance and Liability: An Intersection of Concepts

The primary goal of the international regime discussed above is adequate compensation for victims of oil pollution. However, the goal of any such system ought to be deterrence. As an incidental occurrence, the international framework does, to an extent, contribute to deterring future oil accidents. Curiously, this is made possible through the insurance provisions briefly touched upon earlier in this article.

---

[15] International Tanker Owners Pollution Federation Ltd. "TORREY CANYON, United Kingdom, 1967", https://www.itopf.org/in-action/case-studies/case-study/torrey-canyon-united-kingdom-1967/
[16] Colin de la Rue and Charles B Anderson, *Shipping and the Environment*, 1st ed, Taylor & Francis, 2009
[17] *Supra* Note 5
[18] International Tanker Owners Pollution Federation Ltd, "PRESTIGE, Spain/France, 2002", https://www.itopf.org/in-action/case-studies/case-study/prestige-spainfrance-2002/
[19] "Report by the IOPC Funds to the Division for Ocean Affairs and the Law of the Sea", International Oil Pollution Compensation Funds, 2020, https://www.un.org/depts/los//general_assembly/contributions_2020/IOPCFunds.pdf

First of all, the CLC imposes compulsory insurance upon shipowners. Moreover, every vessel is required to carry proof of such insurance. Victims of oil pollution are then given direct access to the insurers (vide Article VII of the CLC) so the former can bring actions directly against the latter. It must be noted that this is a departure from the general rule of privity of contract. Compulsory insurance under the international regime has a two-fold impact. In the first instance, it ensures that companies cannot escape liability by hiding behind the corporate veil of the one-ship company system that is prevalent in the shipping industry. In the second instance, compulsory insurance forces ships from non-contracting states, too, to purchase such insurance in order to trade with CLC contracting parties. The obligations under the convention are such that ships cannot escape compulsory insurance by asserting that they belong to a non-contracting state party.[20]

Secondly, insurance premiums paid through the above mechanism (and other associated ones) are reflective of the compensation paid to the victims of oil pollution. Thus, the flow of logic is simple: high damage leads to high compensation, which is effected through high premiums paid by the ship owners. In the interest of their own monetary well-being, ship owners are compelled to utilise heightened standards of care and caution, which effectively leads to less incidences of accidents.[21]

Finally, the second- and third-tier compensation schemes through the IOPC and Supplementary Funds also play a minor, indirect role in deterring seaborne incidents. Oil companies are contributors to both the aforementioned funds, and, more often than not, are also key players in the oil trade. Therefore, safety — of the ships themselves, as also the oil stored aboard the ships — is of paramount importance to these companies. They consequently exert pressure upon the crew of these ships to exercise high levels of diligence, and also influence ship owners to maintain their vessels to the highest possible standards. In this manner, the insurance regimen contributes to deterrence as well.[22]

It must also be noted at this juncture that even the above-discussed scheme would fail if the insurers were to be able to escape liability by denying their relationship with the ship owners or adopt any other such defence. An important premise of insurance law is that the insurer's liability is coexistent with that of the insured. It, therefore, cannot exceed the liability that the insured himself is under. Article VII of the CLC thus attempts to restrict the defences that insurers might invoke, by limiting them to the defences available to the ship owners. Therefore, the "pay to be paid" or the "pay first" provisions that are hallmark of the English laws are invalidated under this regime. Further, an insurer cannot employ the defence of the insured failing to pay the premium. Most importantly, however, under the international regime, an insurer cannot escape liability by asserting breach of warranty conditions such as seaworthiness of the vessel. A prominent exception here is damage caused due to wilful misconduct of the

---

[20] Suzanne Hawkes and Michael M'Gonigle, "A Black (and Rising?) Tide: Controlling Maritime Oil Pollution in Canada", In *Osgoode Hall Law Journal* 30, No. 1 (1992): 165-260

[21] Kenneth S Abraham, *Distributing Risk: Insurance, Legal Theory and Public Policy*. Yale University Press, 1986

[22] Muhammad Masum Billah, "The Role of Insurance in Providing Adequate Compensation and in Reducing Pollution Incidents: The Case of the International Oil Pollution Liability Regime", In *Pace Environmental Law Review*, 2011, 42-78

shipowner. In this regard, Article VII(8) of the CLC should be read in conjunction with Article V(2). The most common instance of wilful misconduct is scuttling of the ship.[23]

Therefore, it is eminently clear that under the international regime, insurance is wielded as an effective tool to ensure compensation is delivered to the victims of oil pollution while also acting as a deterrent against such incidents.

Liability Under the Indian Legislative Framework

Under Indian law, liability for maritime accidents, including oil pollution, is imputed through international treaty law, judicial decisions and the relevant provisions of the Merchant Shipping Act, 1958 (**"MS Act"**), and, the Marine Insurance Act, 1963 (**"MI Act"**).

The MS Act has three parts devoted to regulation of damage caused by oil pollution. Part X-B discusses civil liability for oil pollution damage, Part X-C describes the international oil pollution compensation fund, and, Part XI-A discusses prevention and containment of oil pollution at sea. Parts X-B, inserted through the amendment of 1983,[24] and X-C, inserted by the amendment of 2002,[25] are relevant for the purposes of this paper. It must also be noted here that the MS Act applies to Indian commercial ships as well as all foreign ships at port in India. In cases of collision and maritime accidents, the MS Act fixes the liability of shipowners in proportion to the fault of the parties. However, ship owners are precluded from limiting their liability in cases of negligence.[26]

India acceded to the CLC in 1987. Even though it later went on to denounce this convention,[27] India remains a party to the 1992 CLC, and the salient features of the relevant national legislations persist. The provisions of the convention are thus applicable to Indian ships and accidents, particularly after the amendment Act of 1988 inserted the relevant sections into the MS Act.[28] In line with Article VII of the CLC, ships with cargo of 2000 tonnes of oil, or more, are required to procure a certificate of liability insurance.[29] No ship is permitted to enter or leave Indian ports / India's Territorial Sea without such a certificate.[30] Moreover, oil spills are compensated through the CLC and the Fund Convention in the manner discussed in the preceding sections, as enshrined in sections 352U to 352W of the MS Act.

---

[23] Elli Sperdokli, "Marine Insurance for Oil Pollution", In *Tort Trial & Insurance Practice Law Journal*, 2014, 611-43
[24] The Merchant Shipping (Amendment) Act, Act No. 12 of 1983, § 10 (1983)
[25] The Merchant Shipping (Amendment) Act, Act No. 63 of 2002, § 26 (2002)
[26] The Merchant Shipping Act, Act No. 44 of 1958, § 352J(2) (1958) (hereafter, ***MS Act***)
See also:
Pooran Chand Meena, "The Protection of the Marine Environment within the Territorial Seas and Contiguous Zone of India as Part of Salvage Interventions", World Maritime University, 2019, https://commons.wmu.se/cgi/viewcontent.cgi?article=2217&context=all_dissertations
[27] International Maritime Organisation. "Status of Conventions" as on 01 March 2021, https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx.
[28] The Merchant Shipping (Amendment) Act, Act No. 55 of 1988, § 5 (1988)
[29] MS Act, *supra* note 26, § 352N
[30] MS Act, *supra* note 26, § 352P

Apart from the CLC, India is also a party to the LLMC, 1976.[31] It is in accordance with this convention, codified as part X-A of the MS Act,[32] that ship owners may limit their liability in respect of oil pollution damage under the prescribed circumstances.[33] The Supreme Court of India has pointed out that the purpose of limiting liability is to protect the ship owner from claims exceeding the value of the ship and the cargo.[34] Any ship owner who wishes to avail the benefit of such limitation of liability must make an application to the respective High Court for the constitution of a limitation fund. This fund is the beneficiary of any right of subrogation arising from payment of damages. It is important to stress at this juncture that only the ship owner may be held liable under the MS Act. However, as mentioned previously, the LLMC does not apply to claims arising out of the CLC.

Conclusion and Recommendations

As discussed at the very outset, oil pollution is a global issue. The international regime evolved over the years is an admirable effort to furnish a global solution for a global problem. While no system is perfect, it is apparent from the foregoing discussion that the CLC and Fund Conventions, taken in tandem, do cover most major grounds for concern with regard to marine oil pollution. The major drawback is the fact that ecological damage does not play a very major role in the evaluation of damage, i.e., the major focus remains upon mitigating the economic impact of the oil spillage.

India, with its large coastline, is vulnerable to the deleterious effects of oil spills. Major disasters do have the capacity to disrupt much more than picturesque landscapes, beaches and islands. The foregoing discussion has shown that India follows the civil liability regime promulgated by the CLC and Fund Conventions. However, certain lacunae in the Merchant Shipping Act that imbibes these conventions bear mention at this point:

- *First,* both the CLC and the MS Act hold ship owners liable for *"any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident."* [35] The wide ambit of this provision, though applicable to immediate harm caused to marine flora and fauna, cannot be extended to the damage to natural resources as a whole. This precludes victims such as fishermen from applying for compensation. There needs to be a system in place to allow the poor and underprivileged to easily gain compensation for the loss of their livelihood.

- *Secondly,* building upon the first lacuna, India does not have a provision for imputing criminal liability upon persons causing such devastating damage upon the marine ecology. While this issue may be resolved by characterising oil pollution as a public

[31] India acceded to the LLMC on 01 Dec 2002
[32] The Merchant Shipping (Amendment) Act, Act No. 25 of 1970, § 16 (1970) and MS (Amendment) Act, *supra* note 25, § 16
[33] MS Act, *supra* note 26, §§ 352A, 352B and 352C
[34] World Tanker Corporation v SNP Shipping Services Pvt. Ltd, 1998 AIR (SC) 2330
[35] International Convention on Civil Liability for Oil Pollution Damage, 1969, art. III:1; MS Act, *supra* note 26, § 352-I

nuisance and making it actionable under the Indian Penal Code, 1860 (**"IPC"**), it must be noted that the IPC only provides a sum up to Rs.200/- as compensation in these cases.[36] Oil being a combustible substance, such incidences must at the very least lead to imprisonment of up to 6 months and a fine of up to Rs.1,000/-.[37] Alternatively, as the offence essentially relates to "stealing" the livelihood of vulnerable sections of society as well as loss of important marine ecosystems, the gravity of the offence may, at the minimum, be equated to robbery.[38] However, it is the author's opinion that the fines in these cases must attempt to be proportional to the "priceless" value of nature and account for the required environmental clean-up operations. This is particularly true in circumstances wherein the damage is a result of wilful misconduct or gross negligence. Therefore, it is apparent that a change in the legal framework is necessary.

- *Finally,* holding solely the shipowner liable for damage is detrimental to the process of imputing liability. Persons intimately involved in the incident, such as the master of the crew and relevant port authorities responsible for coordination, must also be held liable for the role they played in bringing about the incident (such as the *MSC Chitra-Khalijia III*[39] collision).

At their very core, oil-related accidents in the oceans are eminently avoidable disasters that have a significant and entirely deleterious effect on the environment. Looking at the status quo in this era of ecological breakdown, preventing future oil-related catastrophes should be considered the need of the hour. While the present international system is fairly well-armed to meet the needs of the industry, it cannot be considered sufficient. The Indian domestic implementation of the same must also be overhauled in order to develop more effective environment protection methodologies. The enactment of more stringent laws to prevent, deter, and later, manage oil disasters as necessary, is indeed an imperative that can no longer brook delay.

About the Author

Ms Abhishree Manikantan is a Fourth Year Law Student who is currently undergoing a five-year BBA-LLB (Hons.) course at the Symbiosis Law School, Pune. Her primary interest areas are Environment & Energy Laws, Intellectual Property Rights, and, International Trade. She may be contacted at abhishree.manikantan@gmail.com.

---

[36] The Indian Penal Code, Act No. 45 of 1860, § 290 (1860)
[37] *Ibid* § 285
[38] Punishment is rigorous imprisonment up to 10 years and fine; *Ibid* § 392
[39] Megha Sood and Bhavika Jain, "City Ship Collision: Reports Find Port, Captain at Fault", In *Hindustan Times,* 10 October, 2010, https://www.hindustantimes.com/mumbai/city-ship-collision-reports-find-port-captain-at-fault/story-gb1BPVrXyYTxapcKlaBvMM.html
See Also: "Government Orders MSC Chitra to Pay Damages" *The Hindu.* August 11, 2010, https://www.thehindu.com/news/national/Government-orders-MSC-Chitra-to-pay-damages/article16126923.ece.