DIFFERENT REGIME APPLIED TO LIABILITY FOR OIL POLLUTION DAMAGE

Lefiana Ferdinandus

With regard to its reaction or probably over­reaction to the disastrous incident of oil spill from “Exxon Valdez” in Alaska, the United States of America put into law Oil Pollution Acts 1990 (OPA 1990). This Acts establishes a new liability and compensation regime for oil pollution damage from ship operations, which is different from the regime adopted by the rest of the world. OPA 1990 adopts unlimited liability whereas the rest of the world who join with CLC 1969, TOVALOP 1969, FUND Convention 1971 and CRISTAL 1971 adopt strict liability. OPA’s unlimited liability has set very high cost that could not be held up by all groups involved in ship operations, such as shipping companies, insurance market, oil companies, and finally consumer.

Introduction

Last year’s collision of two tankers “Evoikos” (Cyprus) and “Orapin Global” (Thailand) on Malacca Strait which has caused 25,000 tonnage oil spill now endangering Singapore shore, have added to the world’s list of oil spills to the marine environment. This incident may recall our memory of the immense oil spills from Inter alia the big tanker Exxon Valdez in Prince William Sound in Alaska in 1989, Amoco Cadiz in Britain in 1978, Argo Merchant in Nantucket Shoals in 1976, Iranian supertanker in the Moroccan Coast in 1990 etc.

In the incident of Exxon Valdez which is known as the largest oil spill in US history, 11 million gallons oil crude spilled, seabird ‘lost at 90,000 - 270,000 and marine mammal lost at 900. The spill posed threats to the delicate food chain that supports Prince William Sound’s commercial fishing industry. Also in danger were ten million migratory shore birds
and waterfowl, hundreds of sea otters, dozens of other species, such as harbor porpoises, sea lions and several varieties of whales. Over 1000 miles of shoreline received some oiling and Exxon has spent over US$2 billion on clean-up so far. Exxon has also a still-controversial settlement with the state of Alaska, currently set at US$ 1.4 billion. Due to these facts, the Exxon Valdez case reveals US serious intention to deal with the liability for oil pollution to its marine environment.

Oil Pollution Act 1990 (OPA 1990)

By the virtue of its reaction or probably over-reaction to the Exxon Valdez disaster, the US Government signed into law Oil Pollution Act in August 18, 1990 (then known as OPA 1990). OPA is a comprehensive statute designed to expand the oil prevention, preparedness and response capabilities of the federal government and industry. The Act establishes a new liability and compensation regime for oil spills from US and foreign flag vessels, onshore and offshore facilities, pipelines and deep water ports into US waters including the 200 mile Exclusive Economic Zone and provides as well resources for the removal of discharged oil.

Besides that, OPA inter alia raise US vessel liability limits to greater of US$ 10 million or US$ 1200/gross tonnage; increase penalties for oil spills; broaden the response and enforcement authorities of the Federal government; require all vessels carrying oil, regardless of their flag, operating in US waters have double hull design over 20 years period and facility response plans; provide for contingency planning in designated areas; and create a National Spill Trust Fund which is available to provide up to one billion dollars per spill incident via 5c/barrel tax on domestic & imported oil. The Notional Spill Trust Fund is available to pay for oil spill related costs when the spiller cannot be identified, when the spiller can successfully defend against a charge of liability; when the spiller can invoke liability limits and claims exceed those limits; when the spiller is not subject to US jurisdiction (a foreign spiller); or when a spiller is insolvent or otherwise cannot make good on its obligations under the Act.

OPA also does not preempt state laws, which may impose additional or other, heavier liabilities on shipowner beyond what the

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Federal government requires, with respect to the discharge of oil or other pollution by oil within the state or any removal activity in connection with such a discharge. Under OPA, the categories of recoverable damages have been broadened extensively including not only Federal government clean up claims but also state government claims and private claims for property damage as well as economic loss.

In regard of the new liability and compensation regime in OPA, there is an important point that I would like to discuss more in this paper. What is the important point? It is OPA’s unlimited liability regime for oil spills. And why is it so important? Because the unlimited liability regime which OPA adopts is different than that of the rest of the world do. The unlimited liability of OPA has put much more burden not only to US vessels but also to foreign vessels which handle, store and transport within the jurisdiction of US waters. Not only the shipowner or operators have to put the burden on their shoulder but also the insurance market, shipping industries, oil industries and consumers. In line with these facts, scholars, congress, US Coast Guard, insurance market, shipping companies, oil industries object OPA 1990 and propose the amendment of it.

Although OPA 1990 is US domestic law, however, due to the possibility of oil spills, any polluters & shipowner which handle, store, transport within US Waters may deal with it. Therefore, I think it will be useful if we know better about OPA 1990 with its unlimited liability.

**Strict Liability VS Unlimited Liability**

OPA 1990, International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC), Tankers owners Voluntary Agreement concerning Liability for Oil Pollution 1969 (TOVALOP), international Convention on the Establishment of an International Fund for Compensation for oil Pollution Damage 1971 (FUND) and Contract regarding an Interim Settlement to Tanker Liability for Oil Pollution 1971 (CRISTAL) are related to oil pollution liability regime. These legislation regulate the area of ship source marine pollution and maintain the balance between environmental interest and liability coverage for potential pollution in ship operations. Even though these regulations have in common of the area of the regulations and of the objectives, they have very different system
or principle in exercising their objectives. Despite the differences of the regimes which they adopt, we have to bear in mind that they are all intended to protect marine environment from ship source marine pollution. In view of those abovementioned facts, we will deeply observe those different regimes.

OPA permits recovery for loss of profits or impairment of earning capacity even if there is no probable property damage on the part of the private claimant because damage is defined in OPA to include only natural resources damages, harm/threat to real or personal property, loss of subsistence use, net loss of revenues, loss of profits and net costs of Public services. It is hard to image any category of damages which would not fall within the OPA’s broad definition of damages. Accordingly, OPA obviously ensures that polluters assume unlimited liability for all direct and indirect damage in most cases.

In other words, OPA 1990 adopts absolute liability/unlimited liability for oil pollution damage. The unlimited liability provision applies to the owner/operator in cases where the gross negligence, willful misconduct or violation of any federal operating or safety regulations is proven. However, the unlimited liability for the response costs and damages of an oil spill can be absolved if the responsible party proves by a preponderance of evidence that the discharge or threat of discharge was caused solely by 1) an act of God; 2) an act of war; 3) an act or omission of a third party other than an employee, agent or contractee of the responsible party, or 4) any combination of these.

Consequently, under OPA, the establishment of liability for marine source pollution damage needs litigation under tort principle or the principle of liability based on fault which makes it become similar with the judicial process in the criminal case. If the spill was caused by the polluters/shipowner’s fault, the polluter’s/shipowner liability is unlimited. It means the polluters/shipowner have full liability for all damage caused by the spill. Otherwise, if it could be proven that the spill is not caused by the polluters/shipowner fault, there will be no liability. For that reason, OPA 1990 is also well known as a regulation adopting the regime of tortious liability which means the liability would enter into force if there is a firm evidence of the polluters/shipowner fault or if the polluters/shipowner is proven guilty. By virtue of tortious liability, if we understand the judicial process of the criminal cases in the US, we may imagine how long the litigation will take place until the
polluter/shipowner is proven guilty and have to be liable to the oil spill. And due to the lengthy litigation, the cost as well will be higher. As a result, tortious liability will involve lengthy and costly litigation even though in fact, to prove some, even a minor breach of federal rule is relatively easy in most cases, according to some experts. In light of its lengthy and costly litigation, tortious liability under OPA has unconsciously created a real paradise for lawyers.

OPA provides for the filing of evidence of financial responsibility sufficient to meet the maximum limited liability set out in the act. Insurers providing such evidence of financial responsibility are now subject to direct actions not only for removal costs but for all marine source pollution damages recoverable under OPA. In the reality, shipping companies that are not oil companies cannot bear such sharply increased costs from their own financial resources, due to the unlimited liability under OPA. Therefore, the shipowner, like everyone in business today, is insured for liabilities and losses arising out of ship operations. The ship will be covered under a hull and machinery marine insurance policy, the cargo will be covered by protection and indemnity (P&I) and special oil pollution liability insurance, P&I insurance is based on a mutual system with the limitation of liability, through a non profit club which collects from its shipowner members projected risk coverage in advance. Insurance rates are not calculated only on actuarial projections but are also related to the loss record of a particular owner and/or vessel. Accordingly, even if the accident is fully covered by liability insurance today, the shipowner will be paying higher premiums tomorrow.

It has to be noted that the shipowner are principally interested in carrying cargoes entrusted to them without any accidental pollution or accident. Shipowner are business people who seek a reasonable return on very high investments in a highly competitive business. In such business, bearing the unlimited liability, the delay or loss of the ship and cargo, high fines, lengthy and costly litigation, higher hull and machinery and liability insurance costs may cause shipping industry go out of business because their financial returns become too small and the risks become too high. In response to the many new and unknown costs, tanker freight rate will increase and finally consumer will pay higher price for energy products. Thus, the term of unlimited liability is obviously of great concern to the shipping and insurance sectors.

Whereas CLC, TOVALOP, FUND and CRISTAL and their Protocols
adopt the limited liability for the polluters/shipowner for oil pollution damage with a limitation ceiling. Therefore, the regime is known as well as strict liability (article 3 of CLC). The rest of the world, excluded US, adopts this regime. Before going to in-depth discussion on strict liability, we would see first what CLC, TOVALOP, FUND and CRISTAL are. CLC governs strict liability for oil pollution damage with the ceiling system, linked to the tonnage of the ship and is supported by a requirement for insurance to cover the potential oil pollution liability of shipowner. Under the 1992 CLC Protocol, vessels under 5,000 GRT are liable for 3 million units of account whilst vessels over this tonnage are liable for 420 units of account per GRT up to the upper limit of 59.7 million units of the account. The CLC is tracked by a private industry scheme called the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution 1969 (TOVALOP). TOVALOP was established by the tanker industry to provide compensation for states, which are not parties to the CLC, at the CLC level. Oil pollution liability coverage is provided by shipowner through their P&I insurance under these scheme, which provide up to US$ 19 million where limitation is permitted and up to US$ 500 million, when it is not. It is suggested that the CLC/TOVALOP limits provide more than adequate coverage for almost, all oil spills with the exception of the largest and most catastrophic accidents.

However, in cases when the CLC/TOVALOP amount are insufficient, another inter governmental scheme, the international Convention on the Establishment of an international Fund for Compensation for oil Pollution Damage 1971 (FUND) comes into operation. Thus, the FUND convention creates an international oil pollution compensation fund to provide supplementary compensation to oil spill victims beyond the limits of liability established under the CLC/TOVALOP. The FUND is financial by a contracting state levy on oil imports by oil companies. Under the 1992 FUND Protocol, the upper limits are raised to 135 million units of account. The FUND is also duplicated for similar reasons as the CLC by a private industry scheme, the Contract regarding an interim Settlement to Tanker Liability for Oil Pollution 1971 (CRISTAL). CRISTAL is funded by the oil industry itself, administered by the Oil Companies International Marine Forum (OCIMF) and provides limits similar to the FUND Convention.

As information, Indonesia has ratified CLC and FUND Convention

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with Presidential Decree No. 18 of 1978 and Presidential Decree No. 19 of 1978. It means that Indonesia adopts the principle of strict liability for oil pollution damage in the ship operations. The Indonesian Law No. 4 of 1982 concerning the Environmental Management adopts the principle of strict liability as well. However, there are still many aspects, for instance insurance market, shipping industries, oil industries, economic impact caused by the application of the liability that have to be considered first before adopting such principle.

As conclusion, I would like to say that in light of the substantial impacts caused by the fundamental difference of the liability system for oil pollution damage between US and the rest of the world, we have to bear in mind that it is important to keep a balance between environmental considerations and the viability of liability coverage for potential pollution in ship operations.

References

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“Meskipun aku hanya pernah melihat burung gagak hitam sepanjang hidupku, bukan berarti bahwa burung gagak putih itu tidak ada”
(David Hume, 1711 – 1776)

Kesombongan dan keserakahan adalah tanda awal kekalahan dan kejatuhan (Jostein Gaarder)

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