Litigation Procedure in Oil Pollution Incidents

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***Abstract*—After the occurrence of oil pollutions and damages to persons, properties and the environment, important issues will be raised in connection with the litigation process. Victims of oil pollutions are innumerable people and need to be identified in order to be represented in a court of law. Recently, environmental organizations have also been added to the list of plaintiffs. Furthermore, because of the vast dimensions of the oil spills, it should be determined that according to the general principles of private international law, if the oil pollutions occur at high seas i.e. areas outside the territorial jurisdiction of states, which is the competent court to address the issue and which law should be applied.**

In the following we try to briefly examine different aspects of litigation procedure in oil pollution incidents.

***Index Terms*—Environment, litigation procedure, oil pollution**

I. Introduction

Civil liability regime is always in progress and development and tries to compensate for all the damages as its ultimate goal. In the recent decades, the regime has made considerable progress and also considers the harmful effects of human actions on the environment. This type of actions that causes environmental degradation is also directly influential on the quality of human life. Sinking oil-carrying vessels in oceans can directly affect the health and financial aspect of human life on beaches. Generally these types of incidents result in a wide range of complaints and compensation claims. Consequently, further review of these incidents by the civil liability principles appears to be essential.

II. Who Are the Victims?

Who are the victims of oil pollution incidents and who has the right to file a lawsuit?

Those who have been damaged in the oil pollution events can be individuals, corporations and governments as the preservers of public interests. In the following, we will examine this issue according to the international conventions and the existing precedent.

A. Definition of Victim in the International Civil Liability Regime

The 1992 International Convention on Civil Liability for Oil Pollution Damage (hereafter "the CLC Convention") and the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (hereafter "the Bunker Convention") did not provide any definition for the victims. However, in the new draft of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law of 2006, a new paragraph that defines "Victim" has been added to the second principle. It sought to clarify that for the purpose of the present draft principles, natural or legal persons, including States qualify as victims, depending on the nature of damage that would be involved. This definition is very broad.

On some certain arrangements in the civil liability regime like article 18 of the 1993 Convection on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and article 12 of the 2004 European Union directive on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, Non-government organizations have also been considered eligible to be the plaintiffs in such events.

In the absence of similar arrangements on the CLC Convention and the Bunker Convention, the governments or any natural or legal persons who have suffered damages or loss of life and bearing the financial and economic cost of compensatory measures, can be considered as the victim. Obviously, the compensation claims are filed in domestic courts; therefore the civil procedure law of countries recognizes the eligible plaintiff.

B. Definition of Victim in the Domestic Civil Liability Regime

Following the incidents of oil pollutions at the high seas, many people have claimed compensation. Due to their high number, the plaintiffs usually begin the litigation process as a group and are represented by an attorney. For example, in Exxon Valdez case (1984), more than 30,000 people including fishermen, native people, landowners, seafood brokers and environmental organizations brought lawsuits against Exxon Shipping Co [1].

Victims of the oil pollution can also be the public trustees who have been appointed by governments in order to protect natural resources. Thus they qualify as a plaintiff and have the right to claim. The concept of public trustee in many legal systems gives legal personality to different entities in order to plead and receive compensation for the costs of environmental measures [2]. For example, the American Oil Pollution Act of 1990 Section 1006 (b)(1) states that "the President, or the authorized representative of any State, Indian tribe, or foreign government, shall act on behalf of the public, Indian tribe, or foreign country as trustee of natural resources to present a claim for and to recover damages to the natural resources". Public authorities in other legal systems have the same competences. In French legal system, in cases where the violations of environmental happened, environmental associations have the right to plead. This is especially noticeable in the Erika case, which for the first

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time, the Tribunal Correctional de Paris, in its decision clearly recognized the right of environmental associations to claim compensation for damages done to the environment per se [3]. According to the 2003 French Environmental Code Article L142-1, environmental associations in France are in the position to institute proceedings before the administrative tribunals. Obviously, the more people being able to bring lawsuit against polluters, the more principles of compensation, such as immediate, effective and appropriate reward is likely to be met [4].

III. Who is the Competent Authority?

The issue of jurisdiction has been the subject of comprehensive debate throughout the history. If no agreement between governments is reached, this question can be a major obstacle to providing adequate and effective judicial review and immediate solutions for the victims of oil pollution incidents at the high seas [5]. Coordination and agreement on rules for determining the competent authority can help to resolve this issue.

In the following, we are going to examine the jurisdiction under the civil liability regime and the judicial procedure.

A. The Jurisdiction under the Civil Liability Regime

The competent jurisdiction has been determined in many conventions. For example, article 9 of the CLC Convention and article 9 of the Bunker Convention states, "Where an incident has caused pollution damage in the territory, including the territorial sea, or in the exclusive economic zone of one or more States Parties […] actions for compensation […] may be brought only in the courts of any such States Parties." Therefore, the choice of a competent court has been mainly solved. And in the situation that one of the parties or both of them is not Contracting State to the Conventions, according to the established principle of private international law, the competent authority is the country where the pollution took place [6].

B. The Jurisdiction under the Judicial Procedure

What if the oil pollution happened at the high seas and outside of national jurisdiction? then whose is the competent authority? Judicial precedent in this area is clear and well-established. Victims can plead in any country they want and it is the court that in the competency evaluation decides if it has the legal authority to deal with specific matters or not. Since redressing the victims is the fundamental principle of compensation, thus victims bring actions for compensation only in the court of a country where they are more likely to receive the compensations.

However *forum non-conveniens* doctrine applies in order to avoid plaintiffs to plead their case in the court thought most likely to provide a favorable judgment. *Forum non conveniens* is a legal doctrine which states whereby the court in which an action is brought, must be in the best interests and convenience of the parties and witnesses [7] i.e. courts may reject to take jurisdiction over matters where there is a more suitable authority available to the parties. But applying this principle in practice is not always simple.

Usually the owners or the leasers of the oil tanker ships are large oil companies, which have many subsidiary companies. In this case, what solution can be looked for? The best solution is company's main center. It is based on an established principle in private international law that defendant must be present in the court where he or she has permanent domicile. And in order to decide whether a defendant is domiciled in the country whose courts are seized of a matter, the court shall apply its own domestic law [8]. This seems logical because the pressure and difficulty of the trial is on the defendant. This principle is reflected in domestic laws of many countries and in conventions like the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

Undoubtedly the most controversial case that can be pointed out on this subject is the Amoco Cadiz Oil Spill (1978). The Amoco Cadiz was a Liberia-flagged carrier, owned by Amoco International Oil Company. Amoco Company was considered as one of the subsidiaries of Standard Oil Company. Moreover the Shell International Petroleum chartered the Amoco Cadiz from a subsidiary of the Amoco International Oil Company at the time of the incident. But the management, assets, financial administration and corporate benefits of subsidiary companies and their subsidiary were all controlled by the Standard Oil Company. Since the headquarter of the company (domicile) was located in the Illinois state's of the United States of America, various parties brought lawsuits against the company in an Illinois court. The court also considered itself the competent authority to deal with the issue [9].

IV. What Is The Applicable Law?

Regarding the applicable law, courts face two issues: the first is choice of law and other one is substantive provisions. Choice of law deals with the question of which jurisdiction's law should apply in a given case. Normally the choice of law rule applies when the legal dispute is related to elements other than the domestic law of the court i.e. when a legal case has a foreign element. Thus the court is required to determine the competent law with respect to the choice of law rule. After deciding which law is being applied to resolve the dispute, then the court must deals with the substantive provisions i.e. the part of the law that creates, describes, and regulates the rights and obligations of parties.

A. Choice of Law

Regarding the choice of law, there is currently no uniform precedent in existence. Various courts in different cases preferred the domestic laws or they choose the law that has the most connection with the incident or the parties. Present precedent in this area implies that if there is a connection between the victims and the specific law, that law will be implemented. For example, in an incident that occurred at the high sea and the pollution reached to a coastal of a particular country, it is reasonable to consider that country's law eligible. In such circumstances, the law where the damages occurred will be enforced. But in the Amoco Cadiz case, Since the Standard Oil Company and the Amoco Company were both considered American company despite the fact that

the incident happened at the French coast, the court held that the American law is the eligible one but meanwhile stated that the laws of America and France are identical regarding this matter and thereby there is no difference that which law be applied [10].

But what law should apply in the absence of such connection? In other words, what legal rules should apply if the incident occurred completely at the high seas? In such case, the location of damages or harmful act loses its effectiveness, and is inevitably replaced with domestic law of the country whose courts are seized of the matter. Present procedures in the Torrey Canyon oil spill (1967), the Amoco Cadiz oil spill and Erika oil spill imply that domestic law of the court is the applicable law. This is the currently held procedure of the courts that in oil spills which happened at the high seas, they give priority to their own national law. For example, according to the procedures in France, where the high sea is the place where the damage has occurred and no law is preferred, the national law of the court will apply [11].

B. Substantive Provisions

Damage caused by oil pollution can be compensable in a civil liability system. In other words, if International Conventions on Civil Liability do not apply for any reason, the plaintiff can bring the case in the court in the civil law legal system by civil liability law and in the common law legal system by tort law. The United States of America can be considered an exception. Despite the lack of ratification of convention on civil liability for oil pollution and full implementation of tort law principle, the United States of America passed an independent law under the title of the 1990 American Oil Pollution Act.

1) Civil law legal system

Civil Law countries designated an area of law to civil liability rules called "Civil Liability Code". In Iran as well as France civil liability code applies. For example, if, following an accident at sea, a claim is raised in an Iranian court, the 1960 Civil Liability Code will be executed. French precedents with regards to the Erika and Torrey Canyon incidents imply that the plaintiff must prove the defendant has made an error such as lack of adequate supervision, failure to provide skilled manpower, lack of proper maintenance or failure to provide adequate training to those responsible on the deck [11]. In the Erika case, the Total Company was considered responsible due to inadequate supervision and failure to maintain the ship.

2) Common law legal system

A tort is a civil wrongful act under the common law system for which a person may have to pay remedies for damages to other people. Therefore, damages resulting from oil pollution should be examined under the tort law. In this case, England legal system seems to be a good example. Under the England law the victims of oil pollutions can establish their claim on three bases: Trespass, public and private nuisance and negligence.

Trespass to a property is an area of tort law that deals with an unjustified interference with another person's property and land, which will result in civil liability [12]. The person whose land is entered upon may sue even if no actual damage is done [12]. In the case of oil pollution, it only can be invoked in situations where the pollution reaches the coast. In addition, violations of land must be direct and the oil spill should be intentional. Consequently, trespass cannot be invoked in the case of oil pollution incidents, and especially in the high seas pollution.

Private nuisance is an unlawful interference with the use or benefit of land [12]. In order to bring lawsuit on this base, the plaintiff should prove that he is the owner of the land's benefits and prove the intervention. Many of the victims of oil pollution are deprived of this right at the seas or even at the coast. Thus the lawsuit on this basis is ineffective.

Public nuisance is defined as the complete ignorance of the welfare of specific group of people [13]. In other words, if an identifiable public right exists, interfering with those public right results in a tort of public nuisance. Many of the victims including landowners, tourist facilities, restaurants and fishermen can receive compensation through the public nuisance claim.

Moreover, in oil pollution lawsuits, the tort law of negligence has priority over the two other above-mentioned claims in England legal system. Negligence occurs when a person has failed in the task of protecting the interests of others so he is responsible for predictable damages that result from failure to perform this task [13]. For assuming negligence these conditions must be met:

a) The duty of care,

b) Breach of duty,

c) Direct cause and d) Legal causation [14]. The plaintiff carries the burden of proof and he must establish that the defendant failed to provide the necessary and reasonable care to prevent damage. This is based on the general legal principle that the onus of proof lies with the plaintiff.

3) The United States of America Legal System

Exxon Valdez incident in 1989 led America to pass a bill to address the damage caused by oil pollution. The 1990 Oil Pollution Act (hereafter "the OPA") was passed by the United States Congress to ease compensation for victims that were affected by the oil pollution. The OPA is a comprehensive act, establishing a regime of civil liability and compensation resulting from oil pollution and offers a prevention and cleanup plan for oil spills and creates a Compensation Fund.

One of the advantages of the OPA is that the Act includes wide varieties of people as responsible for the incident. In other words, civil responsibility is attributed to the people who could have potentially been liable under this Act like the vessel owner or operator, the holder or the lessee of offshore facility, the owner or the operator of onshore facilities, the licensee of deepwater port and the owner and operator of the pipeline.[1] Another advantage that can be noted is expanding the definition of the removal cost and the scope of removal measures for providing better compensation. Even in case in which there is a substantial threat of a discharge of oil, the removal cost also consist the costs to prevent, minimize, or mitigate oil pollution from such an incident.[2]

A responsible party is excepted from removal costs or damages under section 1003 (a) of the OPA if the responsible

[1]Section 1001 (32) of the OPA
[2]Section 1001 (31) of the OPA

party establishes that the discharge or substantial threat of a discharge of oil were caused solely by an act of god, an act of war, an act or omission of a third party or any combination of thereof. In addition to the establishment one of these factors, responsible party must report the incident and provide all reasonable cooperation and assistance requested by a responsible official.[3]

V. Conclusion

Although the Conventions on Civil Liability were signed and ratified by many States, but unfortunately none of them could cover all cases in connection with oil pollutions. The definitions of the victims, polluters and authorities are vague and ambiguous or they fail to cover all instances in an incident and some damages remain uncompensated. Therefore, experienced lawyers and politician should draft a convention that covers all the relevant issues regarding oil pollutions like definitions of victim and damage so the courts do not involve in such time consuming procedures.

Furthermore, the Convention should provide some measures for the prevention of such incidents, try to provide international standard that will reduce the amount of oil pollution in the hope of preventing irreparable damages to the environment.

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[3]Section 1002 (c)(2)(b) of the OPA