

Marine Salvage and Liability Concerning Oil Pollution Damage Caused by the Collision of Foreign Vessels in the EEZ

Shanghai Salvage Bureau of Ministry of Transport

v.

Provence Shipowner 2008-1 Ltd, CMA CGM SA, Rockwell Shipping Ltd.

Guo Zhongyuan* Yu Shifeng**

Abstract: Marine salvage and pollution can be concurrent with decontamination in behavior yet separate in nature (行为竞合性质分立). The emergency measures for the ships involved should be analyzed and judged according to the risks they faced and the actual activities undertaken. In the case of oil pollution damage caused by the collision of two or more ships, the non-leaking party, as a third party at fault, shall bear liability in proportion to the degree of its faults.

Key Words: Ship Collision Marine Salvage Compensation Oil Pollution Damage

This subject case is a typical case of marine salvage and of liability for pollution damage caused by Vessels. It has completed the second trial at the Supreme People's Court on September 20, 2019. The court's decision on the differentiation between marine salvage and pollution and decontamination, as well as the proportion of liability for oil pollution damage caused by the non-leaking party in the ships' collision, is authoritative and of great reference value. This case was selected as one of the "2019 Typical Example of Maritime Trial Cases". Due to the complicated facts and legal relations of this case, we will select the major parts to discuss herein¹.

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¹ Civil Retrial Verdict of the Supreme People's Court on Shanghai Salvage Company v. Provence Shipowner 2008-1 Ltd's, 2018, 最高法民再 No.368.

Facts and Judgment

On March 19, 2013 at 00:30, the British vessel “CMA CGM Florida” (hereinafter vessel Florida) owned by Provence Shipowner 2008-1 Ltd. (hereinafter Provence), operated by the French company CMA CGM SA (hereinafter CMA), collided with the anamanian vessel “Cho Shan” owned by Rockwell Shipping Ltd. (hereinafter Rockwell) at 124 nautical miles southeast of the light vessel in Yangtze River, which caused severe damage to Bunker No.5 of CMA CGM Florida and resulted in oil leaking. The total amount of oil that leaked into the sea was 613.278 tons, based on the evaluation by the Shanghai Maritime Safety Administration. On the same day, starting at 12:00, the Shanghai Maritime Safety Administration and the Shanghai Maritime Search and Rescue Center organized rescue efforts by coordinating various rescue departments, including the Shanghai Salvage Bureau Ministry of Transport. On March 21 at 4:30, the Shanghai Maritime Search and Rescue Center instructed vessel Florida to sail into Yangshan Port, where they planned to initiate their rescue mission to prevent the vessel from breaking and sinking. On March 24 at 13:10, vessel Florida, accompanied by six salvage and waste cleaning boats, lifted anchor and sailed towards the port. On its way to the destination, salvage operations were performed at various anchor areas, such as transferring the oil sewage, securing and unloading the container, cutting off the protruding steel plates from damaged parts, and extinguishing the fire. On April 4, vessel Florida arrived safely at the shipyard. After 17 days of continuous rescue efforts from air and marine services, vessel Florida was saved, thus avoiding a disastrous spill of the oil that was onboard at the time, which totaled upwards of 6,100 tons.

Disputes and Judgment

Shanghai Salvage Bureau of Ministry of Transport, the Plaintiff, applied for a retrial. The Plaintiff contended that the salvage operation was ordered by the Nation’s authorities and that pumping oil is a necessary measure in cleaning and decontamination, as well as to avoid further pollution of the sea. Provence and CMA are fully liable for the compensation of all the expenses involved in the salvage operation. Rockwell, the owner of the non-leaking vessel, shall be liable for the compensation of the expenses based on the fault ratio of 50%.

Provence and CMA argued that the operation undertaken by the Plaintiff does not constitute salvage at sea. Rockwell joined with Provence and CMA on this issue. Rockwell further argued that the liability for the salvage expense should be on the owner of the leaking ship, rather than the owner of the non-leaking ship.

The Supreme People’s Court found that Plaintiff did dispatch three boats (Shen Qian Hao, United Zheng Li, and De Yong) for the purposes of marine salvage, decontamination,

and pollution prevention. Although there was no oil leakage from Rockwell's vessel, the collision was partially due to its fault in navigation. Rockwell shall be liable for the damages, in accordance with the proportion of fault attributed, which is to be determined at 50%.¹

Comments

I. Distinctions between marine salvage, pollution prevention, and decontamination

The primary causes of the dispute in this case stem from inability to recognize the connections between marine salvage, pollution prevention, and decontamination, as well as failing to recognize the characteristics of the activities. Marine salvage refers to any act or activity undertaken to assist and aid a vessel, its cargo, or any other property, including people in danger at sea or in any waters connected with the sea.² Generally speaking, marine salvage refers to salvage of properties.

However, pursuant to Article 1 (a) of International Convention on Salvage 1989, "salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever". The preface of the International Convention on Salvage 1989 also states that, "...substantial developments, in particular the increased concern for the protection of the environment, have demonstrated the need to review the international rules presently contained in the Convention... Conscious of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment." In other words, environmental marine salvage and encouragement of protection of the marine environment has become one of the general principles of modern maritime salvage law. Article 14 of International Convention on Salvage 1989 provides that, if the salvor has carried out salvage operation and thus has prevented or minimized damage to the environment, he shall be entitled to a special compensation from the owner of that vessel. Article 13 further states that, to encourage salvage operations, the skill and efforts of the salvor in preventing or minimizing damage to the environment is one of the criteria taken into consideration when calculating the reward. Apparently, maritime salvage and the measures taken to prevent or minimize oil pollution damage can be coherent and coincide with each other during the emergency operation. In determining whether an operation constitutes marine salvage, pollution prevention, or decontamination, it is necessary to assess and analyze based on the original purpose of the operation, the risks faced by the vessel, and the measures taken during rescue operation. In addition, the Supreme People's Court has even specified the fees for

² Civil Retrial Verdict of the Supreme People's Court on Shanghai Salvage Company v. Provence Shipowner 2008-1 Ltd's, 2018, 最高法民再 No.368.

³ Zhang Xianglan, *Maritime Law*, Wuhan University Press, 2008, p.231.

salvage at sea, and for pollution prevention and decontamination, in Article 11 of “Provisions of Supreme People’s Court on Issues Concerning Disputes over Compensation for Vessels Involved Oil Pollution Damages”.

In its analysis, the Supreme People’s Court has taken the following into consideration: the purpose of the task, the risks faced by the vessels, and the nature of the salvage operation.

a. The assessment of the purpose: Shanghai Maritime Search and Rescue Center sent two separate orders to Shanghai Salvage Bureau of Ministry of Transport (hereinafter as SSB) and Xinan Company, requesting the former to dispatch rescue forces and the latter to clean up the site. According to all the documented evidence, the intention of SSB to secure rescue is obvious and clear.

b. The risks faced by the vessel in collision: Even though the message sent from the captain of Vessel Florida did not specifically request salvage, the report from the ship examiner afterwards, as well as the shelter request from CMA, provide ample evidence that Vessel Florida was indeed in direct and imminent danger. Judging from the facts and evidence, the People’s Supreme Court’s conclusion is objective and scientific.

It is noteworthy that the danger referred to in the maritime salvage law does not have to be absolute or immediate. No actual or immediate distress is required, as long as it is reasonably predicted to be unavoidable under the particular situation at the time¹, or if there is a misfortune that may expose the vessel to the risk of destruction². The People’s Supreme Court overruled first and second trials’ decisions, which had found that Vessel Florida was not in danger based on the fact that it was capable of navigating without assistance.

c. The nature of the operation: The Court found that all three of the boats dispatched by SSC to rescue the leaking vessel were equipped with tools, supplies, and material for either salvage or pollution prevention purposes. Based on the actual content of the operation, and the functions of each boat respectively, the Supreme Court concluded that the operation was of maritime salvage, pollution, and decontamination nature.

II. Liability and Compensation of the Non-Leaking Party for Damage Caused by Collision of Ships

There are many different views on the liability of the non-leaking vessels in the case of oil pollution damage as a result of collision of two or more vessels at fault. They can be summarized as follows: (1) Non-leaking party shall not be liable for the damages; (2) Non-leaking party shall bear responsibilities on a pro rata basis; (3) Non-leaking party and leaking party shall be jointly and severally liable for the compensation of damages; (4)

¹ Hu Zhengliang, Admiralty Law, Peking University Press, 2006, p.116.

² Aleka Mandaraka-Sheppard, Modern Maritime Law, Third Edition, Vol.2: Managing Risks and Liabilities, Informa Law from Routledge, 2013, p.492.

The non-leaking party and the leaking party shall be commensurately liable for the compensation; (5) The non-leaking party shall bear the supplementary liability parallel to general guaranty¹. In this subject case, the Supreme Court adopted the view that the non-leaking party's liability shall be based on the proportion of its fault. This decision puts an end to years of debates on this matter. The Supreme Court held a lengthy discussion of the application of these laws. Article 3, Paragraph 1 of International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 states, "the ship owner shall be liable for pollution damage caused by bunker oil on or originated from the ship". Article 4 of the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Disputes Over Compensation for Oil Pollution from Vessels states, "Where the oil pollution damage arises from a both-to-blame collision of ships, the person who suffered damage may claim for full compensation against the owner of the leaking ship". Neither of the provisions above mentions the issue of a third party; however, from this, one should not infer exclusion of the possibility that a third party could be liable for compensation of the damage. Marine environmental damage has special characteristics, so applying the laws accurately is of paramount importance. The Tort Law of the People's Republic of China shall apply in this case for the following reasons: (1) This case involves foreign entities who have all accepted the application of Chinese law; (2) Chinese law will only be applied where the specific issue is not addressed in the international convention. Both Chinese Maritime Code and International Convention for the Unification of Certain Rules of Law with Respect to Collision between Vessels 1990, regulate on the issues of damage caused to the vessels, to their cargo, or to other property of the crews, passengers, or other persons on board, but not on the issue of third party liability for oil pollution due to the third party's fault. Even though Article 169 Paragraph 2 of Chinese Maritime Code contains regulations on the loss and damage caused to property, aside from the collided vessels and the property on board, Tort Law of China and its judicial interpretation by the Supreme Court shall be more appropriate in the subject case. The application of laws in this case is an example of "domestic laws complementing other domestic rules, as well as domestic laws supplementing international laws" (国内法补充国内其他法律规则, 国内法补充国际法).

The significance of the Supreme Court's decision

(1) In this case, the Supreme Court takes a position which is in line with today's spirit of ocean management. Marine environment protection is currently one of the most urgent global issues. Due to the increasing size of vessels and oil tankers, a large amount of oil

¹ Chen Xiangyong, Chen Yongcan, Civil Liability of Non-Leaking Party in Compensation for Oil Pollution Damage Caused by Ship Collision and A Review on the New Development of the Draft Judicial Interpretation on Compensation for Oil Pollution Damage, Annual of China Maritime Law, Vol.4, 2010, p.32-33. (in Chinese)

spilling into the ocean during the accident would result in massive pollution and severe damage to marine ecology and the environment for a long period of time. Leading scholars of marine law in China have brought attention to the potential problems of adhering to the old principle of liability being placed solely on the owner of the leaking vessel, which is primarily that it may create difficulty in protecting the environment and result in injustice to the victim. It is suggested that the victims are entitled to the right to claim compensation from the owner of the non-leaking party for the proportion of its fault¹. (2) Saving judicial resources thereby leads to substantive justice. According to Article 4 of the Provisions of the Supreme Court on Several Issues Concerning the Trial of Cases of Disputes over Compensation for Vessel-Induced Oil Pollution Damage, the victims shall first file a lawsuit against the leaking vessels to request complete compensation for pollution damages. Then, the leaking party shall bring another lawsuit against the at-fault, non-spilling party to request that the latter share in the liability, according to the determined proportion of fault. This will not only increase the litigation burden on the leaking party; in the instance that the non-leaking party is unable to pay, due to financial hardship, it will also impose all the compensation liabilities on the leaking party.

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¹ Han Lixin, SI Yuzhuo, Civil Liability for Oil Pollution Damage Caused by Ship Collision, Annual of China Maritime Law, Vol.14, 2003, p.221 (in Chinese)