PRESENTATION OF THE DRAFT CMI LEX MARITIMA PRINCIPLE POLLUTION LIABILITIES

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Overview

The CMI Working Group on the Lex Maritima was set up to provide an organic bundle of common accepted principles of maritime law. Within the project, which last version shall circulate under the nomenclature of "Gothenburg Draft" (hereinafter the Gothenburg Draft or the Document)[1], Part 4 devotes to "Maritime Responsibilities and Liabilities" (Principles 6 to 12). In this paper, I will examine briefly Principle 12 "Pollution Liabilities". This principle focuses on compensation, one of the gateways that the international community found to make good their commitment towards protection of the marine environment. Other legal devices, with the aim to prevent shipping incidents and operational pollution alike, have been addressed elsewhere in the Document[2].

In the economy of the Gothenburg Draft, Principle 12 is a second category principle[3]. The first paragraph is devoted to compensation for oil

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1 The document "The CMI Lex Maritima. The 25 Principles of Maritime Law. The Gothenburg Draft", dated May 23, 2024, is available at: https://comitemaritime.org/work/lex-maritima/ (last accessed in July 2024)

2 Methodologically, the CMI Lex Maritima focuses on private maritime law contents. Therefore, the body of rules related to construction, operation and manning standards for ships, training standards for crews and the set up of management systems for ships, ports and shipowners, are not embodied as such as principles within the Gothenburg Draft. Nevertheless, some blending of public and private laws has been reflected in the Document, for example, in Principle 3 (Identification, nationality and flag), Principle 6 (Liabilities of the Shipowner and operator towards the marine environment), Principle 11 (functions of the Master), Principle 20 (salvage), Principle 22 (wreck removal), where in one way or the other, the rules behind the principles have been designed to (or have the effect of) prevent or address the marine pollution. See Gothenburg Draft, p. 8-9.

3 According to the General Introduction to the Document, the first category is assigned to principles the content of which is directly proclaimed by the document where there is demonstrable uniformity. The second category is assigned to those rules that are usual in the positive maritime law but, however, there is no overall international uniformity about their exact substance and/or where the rule becomes operational only on the condition that positive maritime law introduces it (contingent). The *tertium genus* is assigned to principles where *renvoi* is made to the text of international instruments (which as such are part of the Lex Maritima). See Gothenburg Draft, pages 5, 40-41.

pollution damages whereas the second refers to the rules that play a role in the compensation for damages coming from other sources. All in all, this principle reflects the major trends in a field where there is no uniformity[4]. This explains why it was not assigned to the first category of principles[5].

First Paragraph: Compensation for oil pollution damages

Regarding compensation for oil pollution damages, the text of the first paragraph transpires the essence of the 1992 Protocol to the Civil Liability Convention Protocol (hereinafter 1992 CLC) and the supplementary 1992 Protocol to the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (hereinafter 1992 IOPC Fund)[6].

I. *Liabilities of the shipowner*

Principle 12 (1) initially contemplates the rule of strict civil[7] liability of shipowners for claims involving oil pollution damages[8].

The wording then goes on to paraphrase the core provisions of the 1992 CLC so that the reader shall find there in a) the exclusion of liability of the shipowner in case of force majeure or intent to cause damage by third parties, b) reflects that liabilities are channelled towards the registered owners and thus some persons have the protection of the regime and cannot be sued, c) provides

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4 One might immediately think on the different successive instruments that followed the original 1969 CLC/1971 IOPC, not mentioning that some states adopted a different approach (for example, the 1990 Oil Pollution Act in the United States), or left, although in minority, the matter unregulated (thus applying general civil or environmental laws).

5 In a different fashion, Professor Jorge Begolea Zapata elaborated on the general principles of shipping law as these then must have been in 1976. In the context of his *teoría general* (general theory), principles were distinguished, according to their degree of generality, in general principles (strictu sensu) and particular to a certain institution. Limitation of shipowners' liability was considered a general principle though no reference was made to cases of marine of pollution (which at the time were largely unregulated). See [in Spanish] Bengolea Zapata, Jorge, Teoría general del Derecho de la Navegación, Buenos Aires, Plus Ultra, 1976, pages 63-87. More recently in Argentina on principles of shipping law see [in Spanish] Chami, Diego E, "Curso de Derecho de la Navegación", Abeledo Perrot, Buenos Aires, 2022, pages 52-63 and from the author of this paper [in Spanish], *Los principios en el ámbito del derecho marítimo*, Revista de Derecho Comercial y de las Obligaciones, 2011-A-547, Lexis Nexis, Buenos Aires, 2011.

6 See Gothenburg Draft, commentary at p. 40. The 1992 CLC and 1992 IOPC Fund regimes are in force in most of the South American countries (Brazil is party to the 1969 CLC). These entered into force (by accession) in Argentina on October 13, 2001. For an explanation of how paths divert – in the field of principles – from the Environmental and Maritime Laws perspectives see [in Spanish] Cappagli, Alberto C (h), "La contaminación del medio marino y los buques petroleros", Abeledo Perrot, Buenos Aires, 2011, pages 3-21.

7 Criminal liability has not been provided for here.

8 Art III, 1. 1992 CLC. Strict civil liability, designed to protect vulnerable interests, seems to be the trend in this field, see inter alia the amendments brought by the 1990 Oil Pollution Act to the 33 USC Ch. 40 §2702, Elements of liability (a) In general: *Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident*.

for the shipowner's right of recourse whereas in d) the shipowner has the right to limit his liability in accordance with limits based on the tonnage of the ship.

Conversely, e) emphases that shipowners shall not be entitled to limit their liability if it is proved that the pollution damage resulted from personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such loss would probably result. Formula akin to the provision in art. 4 of the 1976 Convention on Limitation of Liability for Maritime Claims (breviter 1976 LLMC).

Practicalities have been also considered. The enjoyment of the benefit of limitation is tied to the constitution of a limitation fund for distribution among claimants. The shipowner shall maintain insurance or other financial security, with each ship carrying the appropriate certificate. Any claim for compensation may be brought directly against the insurer or other person providing financial security.

II. *Other sources for funding compensation*

Principle 12 (1) considers in h) the main features of the 1992 IOPC Fund. Thus, the wording provides that States may engage in an international funding mechanism to provide compensation for oil pollution damage to the extent that strict liability of the shipowner is inadequate. Thus, as a matter of principle, a supplementary compensation scheme may apply in cases where the shipowners´ liability is excluded, or the same or their insurers are financially unable to provide for compensation, in presence of "mystery" oil spills (unidentified source), as in the 1992 IOPC Fund regime.

It shall be noted that, although successful, the 1992 IOPC Fund regime has not been labelled as such as Lex Maritima, arguably due to the fact that it has been implemented if only by different simultaneously applicable successive versions[9].

Second Paragraph: Pollution from other sources

Finally, Principle 12 (2) is also worded as principle of the second category within the Document. In this sense, it provides that the positive maritime law may – inter alia – implement the principle of strict civil liability coupled with compulsory insurance or other financial security with direct action for bunker oil damages (2001 Bunker Convention), damage caused by hazardous and noxious substances (1996 HNS Convention) and wreck removal costs (2007 Nairobi Wreck Removal Convention). Moreover, the beefier of the 2007 Wreck Removal Convention is, to a certain extent, reflected in Principle 22 of the Gothenburg Draft.

Conclusions

Liabilities for damages to the marine environment coming from marine sources (specially shipping) are a major topic of contemporary maritime

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[9] See Gothenburg Draft, commentary at p. 40.

law. The international community has reacted to the issue coming up with peculiar compensation schemes which Principle 12 tends to condensate for the purposes of the Lex Maritima Project.

At this stage of affairs, no uniformity can be expected in the underlying legislation. Nevertheless, this principle aims to reveal some areas of apparent consensus. As any other principle contained in the Document, is subject to the contingencies of time and place, which might make the apparent consensus we see today strengthened in the future.