

Dr. Béatrice Schütte

Summary of the presentation

‘Marine Pollution in the Arctic Region: What Future for Civil Liability? - The need for a comprehensive liability scheme’

Human impact on the Arctic region has significantly increased throughout the past years. The declining polar ice opened new sea lanes facilitating greater maritime traffic, new fisheries and access to natural resources.¹

This means also a higher risk of accidents, pollution and damage – not only to the environment per se, but consequentially also to individuals and legal entities. Damage in this context includes bodily harm, property damage and economic loss.

This paper discusses the need for a comprehensive civil liability scheme for cases of damage arising from marine environmental pollution for the Arctic. This could ensure the same level of legal protection for potential injured parties in the entire region.

It is worth examining the chances of implementing such a comprehensive scheme because due to transboundary pollution the same requirements for compensation should apply to a coherent marine area as is the Arctic Sea.

Currently, the question whether or not an injured party is entitled to damage compensation is to be answered according to the respective applicable national law which again must be determined following the *lex loci delicti commissi* rule in private international law pointing either at the law of the country where the tortious act was committed or where the damage occurred.

Several international treaties apply to the Arctic. Environmental issues are for instance addressed by the LOSC, MARPOL, the Espoo Convention, or the CLC Convention.

The United Nations Convention on the Law of the Sea (LOSC) obliges state parties to provide appropriate legal remedies for damage caused through pollution, but it does not determine any compensation mechanism.² MARPOL concerns the prevention of marine pollution emerging from ships through oil, noxious liquid substances, harmful substances in packaged form, sewage and garbage.³ The ship owner, the master and other persons causing environmental damage can be liable.⁴

The CLC convention covers civil liability for marine oil pollution. The ship owners are strictly liable according to article 3. The servants or agents of the ship owner and members of the crew, the pilot, any charterer as well as any person performing salvage or any preventive

¹ Stephens, Tim/Van der Zwáag, David L. *Polar Oceans Governance in an Era of Environmental Change*, p. 5, pp. 59, 60.

² *Ibid.* p. 730.

³ Alam, Shawkat et al. (eds.) *Routledge Handbook of International Environmental Law*, p. 284.

⁴ *Ibid.*

actions are exempt from liability. All Arctic states except the United States are contracting parties.

The OSPAR Convention applies to the North Sea and the North East Atlantic. It implements the Polluter Pays Principle. The addressees of the convention are the contracting parties and it does not provide individuals with a damages claim. Contracting parties of the OSPAR convention are the EU, Denmark, Finland, Sweden, Iceland and Norway, thus only European Arctic countries.

The CLC Convention is the only one that establishes actual liability rules but its scope is limited to vessel source oil pollution.

An overarching principle of environmental liability is the so-called Polluter-Pays Principle (PPP). The polluters are those who directly or indirectly damage the environment or those who create conditions leading to such damage. The PPP imposes liability on those to bear the costs of the measures necessary to restore the environment.⁵ The meaning of the PPP as such is open to interpretation, especially as regards the scope of application and the nature and extent of costs included.⁶ This margin of discretion has been criticised.⁷ It is not a liability rule.

EU law is not directly applicable to the marine Arctic. However, certain frameworks and policies could serve as a basis for a potential civil liability framework for the Arctic. In addition, through the external dimension of EU law, some of the EU standards could be implemented in the Arctic region.

With regard to the implementation of a framework on civil liability, one must consider both hard law and soft law approaches. Hard law implementation options include the adoption of a regional seas agreement, the establishment of a regional ocean management organisation in order to govern the ABNJ or the transformation of the Arctic Council into a treaty-based organisation.⁸ In terms of soft law, one may think of the harmonisation of environmental and technical standards or integrated ocean planning initiatives for transboundary marine areas.⁹

⁵ Chen, Chen-Ju “*The Liability and Compensation Mechanism under International Marine Environmental Law*” LOSI Conference Papers 2012, “Securing the Ocean for the Next Generation”, pp. 9, 10.

⁶ Sands, Philippe; Peel, Jacqueline (eds.) *Principles of International Environmental Law*, 3rd ed. 2012; pp. 228, 229.

⁷ Bleeker, Arne “Does the Polluter Pay? The Polluter-pays Principle in the Case Law of the European Court of Justice” in *European Energy and Environmental Law Review* 2009, 289.

⁸ Koivurova et al *Canada, the EU, and Arctic Ocean governance: a tangled and shifting seascape and future directions* Transnational Law and Policy 2008, p. 278.

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