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Contractual Liabilities for Reducing Environmental Pollution in Marine Transportation: An Analysis

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ABSTRACT

The contemporary era has seen maritime transportation of goods playing a pivotal role in global trade. With the increase in such practices, it became imperative to establish international regulations governing the same. The changing needs and wants on international carriage of goods by seas brought in several new requirements, one of which was eco-friendly shipping. Despite global acknowledgement of its importance, practical implementation remains elusive. Similar to other transportation modes, ships emit carbon dioxide, and can occasionally be seen to have unfortunate accidents during transit which results in irreversible pollution which substantially impacts the marine ecosystems. Therefore, safeguarding the environment during the carriage of goods by sea emerges as a critical concern that demands immediate attention at the international level. One way of increasing the practical efficiency and ensuring implementation is by creating liability over the parties entering into a contract for this carriage of goods.

This paper aims to analyze the scope and effectiveness of creating contractual liabilities to address environmental pollution caused during transportation of goods by sea. The study aims at understanding the existing international framework governing maritime transportation and the environmental protection to identify the gaps and opportunities for incorporating eco-friendly practices through contractual agreements.

Keywords: *environment, contractual liability, maritime transportation, goods.*

I. INTRODUCTION

A majority of the transportation in order to facilitate global trade practices takes place through the marine transportation². Although the seaborne route for trade dates back to the medieval times, the same is still developing in various ways from getting acquainted to the various technologies available for easy facilitation of transportation and the newbuilds being delivered around the world³, to the new laws parties to marine transportation should adhere to. The market

¹ Author is a student at Tamil Nadu National Law University, India.

² *Review of maritime transport*, UNCTAD (Nov. 29, 2022), <https://unctad.org/topic/transport-and-trade-logistics/review-of-maritime-transport>.

³ *Marine News' Top Vessels of 2022*, MarineLink (Nov. 28, 2022), <https://www.marinelink.com/news/marine->

on the same is expected to reach up-to USD 188.57 billion by 2028⁴. Somewhere between the growing demand for increasing marine transportation, the impact on the environment started coming into the limelight, which included emission of air pollutants which is the by-product of burning fuel energy and vessel discharges from the accidental oil spillages which today accounts for more than 10% of the existing oil that enters the ocean globally every year. Sometimes, the ships are required to taxi until they are provided with a spot to berth itself and the same might even go on for up-to two weeks⁵.

“*Marine pollution*” has been defined under the UNCLOS as any intentional or unintentional man-made introduction of substances or energy into the marine environment which would impact the marine life and living resources, or which is hazardous to human health and further create hinderances towards the marine activities such as fishing and further impact the quality of the sea water⁶. To manage and mitigate marine pollution, the legal framework of international law has been formed and evolved. International marine law generally relies on conventions and ranges from public international law to private international law, with regulatory legislation in between⁷. The impact that this has on the natural resources and the marine species, which was especially understood and acknowledged through the SS Torex crude oil case, led to global institutions introducing standards to be abided by, along with international legal frameworks and conventions. One such organization is the International Maritime Organization (IMO), and this organization has realised that, along with the responsibility for global shipping safety, that there is a need to acknowledge the environmental disturbances created through marine transportation and port activities⁸. The IMO formed the International Convention for the Prevention of Pollution from Ships (MARPOL), which became one of the principal conventions addressing contamination of the maritime environment by ships through operational or unforeseen causes. The same includes procedures for member nations to prevent tanker accidents and reduce their effects, including preventive measures during normal operations such as cargo tank cleaning and disposal of oily engine room wastes. MARPOL also addresses chemical pollution, packaged goods contamination, pollution from sewage, waste pollution, and

news-top-vessels-501243.

⁴ *Marine Vessel Market Size, Growth, Industry Forecast, 2028*, <https://www.fortunebusinessinsights.com/marine-vessel-market-102699>.

⁵ *What Are Five Environmental Impacts Related To Shipping?*, Sinay (Aug. 21, 2023), <https://sinay.ai/en/what-are-five-environmental-impacts-related-to-shipping/>.

⁶ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3, (entry into force 16 November 1994), Art 1(1)(4) (henceforth known as ‘UNCLOS’).

⁷ Yan Xiaolu, *The International Legal Framework for Prevention of Vessels-source Pollution and Its Implementation in Chinese Legislation*, p.13 <https://core.ac.uk/download/pdf/289941301.pdf>

⁸ *World Maritime Theme 2024, “Navigating the Future Safety First!”*, IMO, <https://www.imo.org/en/MediaCentre/PressBriefings/pages/World-Maritime-Theme-2024.aspx>.

air pollution⁹. The convention brought about regulations on different kinds of pollutions wherein the same includes the pollutants like oil, noxious liquid, gaseous emission leading to air pollution, and prevention of pollution by garbage from ships¹⁰. However, the same has been limited to only certain issues and an all-inclusive regulation is yet to be formed. For example, noise pollution is not focused upon, although this pollution has also been shown to lethally impact the marine biodiversity¹¹. Further, the same is silent on what the remedies and punitive measures or damages are when it comes to member countries breaching the provided guidelines, and the same has been looked up in the upcoming chapters.

Another main convention addressing environmental impacts of marine transportation of goods is the United Nations convention on the Law of the Sea (UNCLOS), which provides sustainable measures which have been taken up by maritime transportation companies¹². Under Section 2 of Part VII and Part XII, the convention urges the country members to take care of the marine biodiversity through various means including measures to monitor that the state abides to the same. Section 9 of Part XII further talks about the responsibility of each state and the liabilities to ensure the safekeeping. However, considering how both the above-mentioned conventions are to be abided by the member countries alone and further cannot impose penalties leads one to ponder upon the efficacy of the main aim of the same, especially in High Seas.

One of the possible methods of implementing the same is by ensuring that the same has been provided as a measure under the contracts signed by the parties involved, which depending on who does the damage, should be held liable. For example, if the shipper intentionally decides to discharge waste into the high seas, then he or she should be made accountable for the same, but if the cargo, due to the faults of the carrier or the charter party lead to the aggravation of this issue, then there should be a shared liability.

II. CHALLENGES IN IMPLEMENTING ECO-FRIENDLY TRANSPORTATION

Although there are conventions giving importance to the environmental protection and liabilities, there are certain practical issues in implementing results in impeding the efficiency of the same. Some of them have been explained in this chapter.

In circumstances when cargoes are lost owing to marine hazards, whether foreseeable or not,

⁹ [MARPOL](https://wwwcdn.imo.org/localresources/en/publications/Documents/Supplements/English/QQEQ520E_092020.pdf) (Sept. 28, 2020), https://wwwcdn.imo.org/localresources/en/publications/Documents/Supplements/English/QQEQ520E_092020.pdf.

¹⁰ IMO, [https://www.imo.org/en/about/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](https://www.imo.org/en/about/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx).

¹¹ Susan Millward, *Microsoft Word - Lindy's Biodiversity paper*, (Apr. 22, 2008), https://awionline.org/sites/default/files/uploads/documents/Weilgart_Biodiversity_2008-1238105851-10133.pdf.

¹² Part XII, A. 192 to 237, UNCLOS.

member states to the Hague Rules can invoke the defence of A. IV (2) of the Hague Rules, and here one is to evaluate who is responsibility and to what extent. When seen from an environmental standpoint, the situation gets more complicated since the question of who should be held accountable becomes quite vague. It is also possible that the transporter and the shipper were both equally responsible for exacerbating the damage done to the marine creatures. Thereby creating a need for shared liability. Another issue in implementing liabilities would be monitoring the same under high seas and further measuring the same depending the type of carriage done¹³. One of the complicated issues that, especially multimodal transport, faces is to decide upon the liability when it comes to damages caused to goods¹⁴. Similarly, providing contractual liability over the environment can also be hard, since there is no specified standard method to quantify the damage done, or further how to resolve the same that is where the damages should be paid, or what the punitive measures should be. When it comes to the other contractual liabilities that have been put forth, there is a person who is aggrieved by some loss and the violator of the contract is directed to pay damages to this specific person, however when it comes to environmental liability, the question of whom are you paying damages to, becomes an issue again.

Last but not least, another challenge that the world faces include how there may be impediments considering how ocean freight has been looked at as one of the most affordable transportations worldwide, but this factor of how economical the same may be lost on the contract parties when it comes to the corporate social responsibility in maritime transportation of goods, considering the voluntary aspect of CSR itself¹⁵.

III. SCOPE OF INTRODUCING CONTRACTUAL LIABILITY WITH REGARDS TO THE ENVIRONMENT

Contractual responsibility is generally based on the reasoning that if there is a fault that causes a violation of the contract, then the person who violated the contract is accountable for the same, and this is known as the "no-fault, no liability" theory. There are various types of contracts that are present when it comes to the carriage of goods in the high seas, and the same will further provide the choice of law mostly through the bill of lading (BL) or the same will be decided upon by the contracting parties and or their nations. There are more contracts that help in the

¹³ INCOTERMS

¹⁴ UNECE TRANS/WP.24/2000/2, *Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport, overview of provisions in existing civil liability regimes covering the international transport of good*, note by the secretariat, 2 February 2000.

¹⁵ Pawlik T. Gaffron P. and Drewes, *corporate social Responsibility in Maritime Logistics*, EMERALD GROUP 225, 205-226 (2012).

overall process of carrying the cargo some of which are inclusive of other contracts and some which have been specifically brought forward such as the contract of affreightment and the time charterer¹⁶. Another important contract that can be found under this particular facet is the charterparty which mainly focuses on the employment of the vessel¹⁷. Usually, the contractual liabilities can be bifurcated into two, where it can be the fault-based liabilities which includes liabilities arising out of collision and carrying goods generally, and the other type of the strict liability which is provided for protecting the passengers and preventing marine pollutions¹⁸. Under the carriage of goods by sea, generally the law can be seen to be focussed on proving without consideration the issue of fault¹⁹. The contracting parties have been given the right to decide on the liabilities falling on each other by deciding on, and the same could, to an extent at least be used to create a shared environmental liability.

Considering how marine transportation of goods is not limited to the boundaries of state jurisdiction, neither are accidents limited to the state jurisdictions, i.e., the same can also occur on the high seas. When it comes to the practicality of implementing contractual liabilities over the parties in order to improve the environmental protection of the marine lives and resources, the same can even be seen to have limitations in simply holding parties liable through the MARPOL and UNCLOS conventions itself.

One of the principles that have been applied in case of such accidents is the *sic utero* principle, which is a maxim that basically means that one is to use their own property in such a way that the using will not injure that of another²⁰. Applying the same into the above-mentioned context, there is a need for the involvement of States to ensure that future problems impacting the environment does not arise out of the same²¹. The same had been relied on in S. S. "I'm Alone" case²². In another case where a Japanese person got injured while he was in the high seas during a US nuclear weapon test in 1954, wherein Japan received \$2 million. This kind of an obligation had been further accepted for injury to users in the high seas in Australia and New Zealand in the *Nuclear Testing Cases*, which involved weapons by the French²³.

Bringing the above into the context of commercial goods being transported, the same relevance

¹⁶ *Maritime Contracts*, MarineLink <https://www.marinelink.com/articles/maritime/maritime-contracts-100150>.

¹⁷ Caslav Pejovic, TRANSPORT DOCUMENTS IN CARRIAGE OF GOODS BY SEA, 2020.

¹⁸ Arthur Von Mehren and James Gordley, *The Civil Law System* (2nd ed. Boston, Little Brown & Co., (1977) 1106.

¹⁹ Caslav Pejovic, TRANSPORT DOCUMENTS IN CARRIAGE OF GOODS BY SEA, 2020.

²⁰ <https://kslreview.org/index.php/kslr/article/view/989>

²¹ *Developing a Liability and Redress Regime Under the Cartagena Protocol on Biosafety for damages resulting from the transboundary movements of genetically modified organisms*, 12 <https://www.twn.my/title/blp.pdf>

²² Example: *I'm the Alone* (Canada v US 3 R. I.A.A. 1609, 1933-5).

²³ [1978] ICJ Pleadings, vol I at 14 and vol. ii at 8.

is to be given when it comes to the issues that arise out of spillages, fires and other environmental pollutions that are being created. The rationale behind the same is how the commonly shared resource is at stake, and the same needs to be altered.

The contractual liabilities as of now does not necessarily provide specific liability on whomsoever becomes the cause of pollutions and damages. However, the same is not something that should be ignored, or even considered to be entirely difficult and impossible. Strict adherence to the international principles, monitoring of the same by a globally accepted standards, educating shippers on means to ensure eco-friendly cargo shipping and providing incentives to ensure better efficacy are some of the methods forward.

Further, when it comes to contractual agreements, including certain environmental protection clauses in the commercial shipping contracts could be a start to the same. Artificial intelligence can be seen to be made use of is through the use of autonomous ships controlled by artificial intelligence and the same shows how the future complications could erupt when it comes to the contractual liabilities, and the same should also be considered from an environmental perspective²⁴.

IV. CONCLUSION

Marine pollution is defined as any human activity that modifies the environment and hence has an impact on maritime animals and flora, fisheries, public health, or amenity. It so addresses the implications of coastal development, offshore gas and oil production, and other activities such as sewage and industrial effluent discharge, oil pollution, and hazardous waste disposal. The same has been considered to have occurred in general by direct discharge of the aforementioned "pollutants" into marine waters, and occasionally through indirect discharge, directly, such as by rain and other relevant variables. Pollution caused by situations that can be regarded acts of God is unavoidable; however, other difficulties can be regulated to a certain extent, and one such method is to impose contractual duties on the parties.

Conventions that have environmental implications with regards to marine transportation which have been discussed in brief in this research paper are the MARPOL and UNCLOS, however the same is not limited to these two. In conclusion, when it comes to the high seas, the present regulatory systems regarding the environmental consequences placed on the parties to the transport contract must be altered. The same also faces issues such as to what extent this liability

²⁴ Luci Carey, *Contractual and Tortious Maritime Liability Regimes and the Introduction of Autonomous Vessels*, NUS Centre for Maritime Law Working Paper (2023) <https://law.nus.edu.sg/wp-content/uploads/2023/03/CML-WPS-2303.pdf>

may be imposed, what the damages should be, and to whom exactly the same ought to be given when it comes to locations beyond jurisdiction, although studies have shown how 61% of the world's ocean are made up those areas beyond the national jurisdictions²⁵. Though a long way off, providing the same through contract can be one approach to increase the overall efficacy of the conventions, and the conventions should advocate such regulations be adopted.

²⁵ *Governing areas beyond national jurisdiction*, IUCN <https://www.iucn.org/resources/issues-brief/governing-areas-beyond-national-jurisdiction>.