

Study of the Methods of Recouping the Losses in Maritime Incidents and the Efficiency of Such Methods

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ABSTRACT

Maritime transport industry is progressing qualitatively and quantitatively, especially in transporting the fuel materials such as the oil; and it is obvious that the related technologies are being developed increasingly as well. According to the estimations, currently more than 93% of the commodities are being transported through the seas and water channels. A glance at the internal and international nature of this transportation way on the one hand, and the potential threats upon the ships, passengers, and commodities due to the natural coercive accidents, and human errors on the other hand show the necessity of a unique law that can settle the probable claims because such incidents undoubtedly leads to some sorts of loss. With its long history and its especial attention to the rules and principles of the maritime transport, insurance and environment, Maritime Law or the Law of the Sea roots back to the long past in the customs and traditions of the marine travels. The principle of indemnity has a long history in international customs. Studying the methods of recouping the losses in maritime incidents and the efficiency of such methods is the main objective of this research. We have used descriptive analytical methodology to approach the subject. Moreover, we have used archival methods by studying the internet resources, and related journals to collect the needed data of the research. The findings of the research imply that despite all international principles and requirements and the application of the general rules, the recouping methods has not been efficient in the case of maritime losses. Accordingly, it is inevitable to try to develop a more efficient system of law for recouping the maritime losses, especially the environmental damages. But before such an attempt, it is vitally important and necessary to regulate some rules and to create some methods to prevent the environmental damages because some damages and losses are not recoupable.

KEYWORDS: International Environmental Law, Maritime Incidents, Principle of Indemnity, Recouping Methods.

1. INTRODUCTION

Ship Transport is one of the most popular transportation ways because of its cleanness and economic advantages. Fuel and chemical materials, and even the humans form a great part of the cargos. These cargos are always prone to incidents that can lead to losses and damages of the passengers, waters of the coast countries, or the environment of the seas and rivers (Aghaei, 1998). The incidents can be raised by natural causes or by the human errors due to neglecting the technical rules of securing the transportation. Regarding the fact that incidents are inevitable anyway and the incidents inevitably lead to losses and damages, we have to think to some solutions to decrease the incidents and to minimize their subsequent losses and damages. On the other hand, it will be necessary to identify the responsible of the incident in order to force him to recoup the losses and reduce the damages of any kind. The incidents that will be study in this research are limited to the incidents that include the collision of ships to each other or to the facilities and equipment like the docks, ports, and oil platforms. Due to the heavy financial consequences whose compensation need a long time, in the maritime incidents, any mistake in choosing the claimer, competent authority or legal references will lead to irreversible temporal and financial damages for the aggrieved party. Meanwhile, forcing the responsible party to recoup the damages of any kind not only reduces the financial damages of the aggrieved party, but such a force will send a message to other transportation companies implying that in cases of the incidents, they have to recoup the damages. And since such a redress causes some problems for the companies, thus it would force the transportation companies to reduce their risky behaviors to prevent such incidents. In this research we attempt to evaluate different mechanisms of recouping the damages and losses (Emami, 2005). In this regard, we try to determine the role of different organizations in preventing and recouping the losses in the cases of the incidents so that the damaged parties know their rights in maritime incidents. We believe that obligation to redress is a part of prevention because the repayment or returning the situations to its previous mode will require financial

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load and will capture a part of the capital of the culprit. It is hoped that the rigid regulations in the field of recouping the losses for natural or legal persons make them forced to consider the safety regulations and to maximize the relevant cautions.

2. METHODOLOGY

We have used the descriptive-analytical method for studying the subject of the research. Moreover, we have used archival methods by studying the internet resources, and related journals to collect the needed data of the research. The topics will be conducted in two parts. First we will discuss about different probable damages to the sea and different types of damages, especially those occurring about the subject of the research. The next part will deal with different types of recouping the damages and its related approaches. In this latter part, we will review the methods of compensation and redress and finally the efficiency of these methods will be analyzed. The main goal of the research is to fill the informational gap in the field of the research subject and to enrich the topic, because the literature of the field is not so rich.

3. LITERATURE REVIEW

3.1. Types of maritime damages

The law experts have defined damages in different types. This diversity of the definitions is based on different regulations and their histories and different dimensions of the time and origin of the subject. It is common to classify the damages into two types of material and non-material damages. Some damages cover the both dimensions. There is no difference among the experts on how to compensate the material damages; but the experts are not agree on how to recouple non-material damages, though they all agree on the necessity of the compensation of such non-material damages and losses. Undoubtedly, the first concern in any ship collision or any other maritime incidents is the lives of the people who are in the damaged ship as the passengers or crew. Generally, maritime damages can be classified in four groups:

1. Damages to the life (Fatalities)
2. Financial damages
3. Environmental damages
4. Damages resulting from the rescue services

Damages to life: Undoubtedly, the first concern in any ship collision or any other maritime incidents is the lives of the people who are in the damaged ship as the passengers or crew. According to the articles of the United Nations Convention on the Law of the Sea, following incidents can be called damages to life:

- Death or serious injury of the person(s) occurred in relation to his (their) work of operation with and/or by the ship
- Losses and damages to the people resulting from the ship in relation to its operation
- Very serious incident is an incident that leads to the total damage to the ship, damage to the life of the people, or intense pollution of the environment

Financial damages: One of the most damaging and intense maritime incidents is the collision of the ships, or according to the British Marine Law, the collision in the sea. In its general sense, collision is the clash of the ships to any other floating vehicle including other ships, navigation equipment such as lighthouses, and the clash of the ships to coastal non-floating assets such as the wharfs. But in maritime law where the collision of the ships is a very important subject, collision implies the clash between the two ships.

Environmental damages: In our contemporary world, environment is tied to the human activities like the security, culture, etc. Regarding the limitations of the natural resources and unrecyclable nature of many of such resources, the environment is not mere a matter of national decision and no longer the countries can freely decide on exploiting the resources within their own borders because the effects and consequences of such decisions will affect the people of other countries as well. Genetic diversity and biodiversity and maximum benefit from these diversities are the key of the development of countries in future; while some developed countries such as Japan, Germany, US, etc. need the natural and mineral resources of the other countries to supply the raw materials of their own industries.

Damages resulting from the rescue services: Not all maritime incidents necessarily include the collision of the ships. Some maritime incidents are those occurring during the operation for rescuing a sinking or aground ship or rescuing the people who are being threatened in the seas. The ship that voluntarily offers rescue services may face some incidents and damages. For example, a rescue vessel may be damaged due to overloading. Voluntarily rescue operation is considered as an operation that had imposed any legal obligation to offer rescue services to the rescuer.

3.2. Definition of the insurance and marine transport insurance

By definition, insurance means to insure and protect against the potential risks. In legal terms, insurance is to distribute and impose the losses and damages resulting from a determined or undetermined incident for a person(s), properties, and/or objects by un-suffered persons (Dana Insurance Portal, 2008). By another definition, the insurance is an operation by which a party (insurer) makes himself committed to recoup the other

party's (insured) losses and damages to a determined risk in exchange for payment (Hayati, 2000). In yet another definition by the British marine insurance, marine insurance contract is a contract that covers the loss or damage of ships, cargo, terminals, and any transport or cargo by which property is transferred, acquired, or held between the points of origin and final destination (Hodges, 1996). But according to the legal definition of the insurance, it is a contract according to which a party makes himself committed to recoup the losses and damages to other party against the payment of a determined charge. The undertaker party is called insurer, the undertaken party is called insured, the amount to be charged for a certain amount of insurance coverage is called the premium, the type of the insurance is called insurance subject, and the insurance contract is called insurance policy (Babaei, 2007). This merely legal definition implies the commitments of the parties and thus it reveals just a limited dimension of the insurance institution. Even it offers an image of the insurance similar to a betting or a game of chance between the two parties. To correct such an image and to determine the exact commitments of the insurer in the insurance policy, it is said that insurer will be committed to provide the safety of the insured party in case of any incident as specified in the insurance subject against the commitment of the insured party to pay the premium (Hodges, 1996). All risks and losses that the insurer is committed to indemnify them will be specified in the insurance policy in details. The marine insurance covers all accidental and unpredictable damages like the damages resulting from the sea whose concept is defined per the damages due to the marine adventure. This concept will not cover any damage or shortage in the sea (such as the damages resulting from the custody of the ships in the sea). But the marine insurance policy covers all incidents of the clashes of the ship with other ships or other floating objects (QaediHeidari, 2009). According to British marine laws, the marine insurance is to indemnify the insured against losses incident to marine adventure (Hodges, 1996).

3

RETURN PREMIUMS
CANCELLATION - REDUCTIONS

Insurance Co. _____ (Agents)

Please reduce _____ Date effective _____

Insurance on _____ (State interest insured) per _____ (given name vessel)

Reason for _____
reduction _____

Basis upon which return premium to be made _____
If in accordance with policy conditions, or state otherwise clearly state basis upon which return is to be made

IDENTIFICATION OF ORIGINAL INSURANCE
(Give full identification of Risk. If "open" so state.)

Policy No.	From	To	Amount Insured

Underwriter _____ Brokers _____

CALCULATION OF RETURN PREMIUM

Original Insurance \$	Rate	Premium	Brokerage	Net Premium	NET RETURN PREMIUM
Reduced to \$	Rate of Return	Return Premium	Less Bro'age	Net Return Premium	
Amount cancelled \$					\$

Figure 1. A sample of a marine premium form

3.3. Methods of recouping the marine damages

Although it would seem that the subject of the damage recoup has to be (at least relatively) similar in all international arenas, but it must be noted that in some subjects as the human rights and war damages the penalty and indemnifying system operates in different ways and form due to the motivations and different forms of the crimes. But in marine incidents, recouping the damages and losses (even life losses) is based on the financial nature and reparation. Conversely, in other areas of the international law, including war crimes or war rights, this recouping and compensation is based on more brutish and severe penalties such as the execution or long-term sentences. Generally, the methods of recouping the marine damages can be classified in three groups:

- Financial methods
- Preventive methods
- Compensating methods

The first objective of recouping methods in international law is to return the state of affairs to its previous state. After any damages occurred, it is necessary to undertake such an objective to recoup the damages and losses. Regarding the type of the damage, the compensation of the damages can take the financial or non-financial forms. These compensations vary from cleaning the seas of the oil stains, paying the indemnity to the victims' families, to indemnify the damages of the fishers all are included in financial methods of recouping. But the exclusive nature of the environment is so that the damages cannot be compensated merely by financial penalties. For example, the extinction of animal and plant species of a region cannot be compensated by

financial penalties or by any other sort of recouping. But since the other side of the punishments is the "principle of the prevention", and imposing the penalties is a factor for preventing similar damages, thus even if the punishment cannot return the state of affairs to its previous state, and since the lack of punishment would courage the people to repeat their criminal behavior, imposing some penalties is inevitable. Undoubtedly, one of the main goals of obligation to compensation is the approach of preventing from the error repetition. Naturally, the prevention form committing damaging action has to be so that it can overcome the potential and actual abusive feelings. For the same reason, fulfilling the goal of prevention is sometimes accompanies with a sort of cruelty and panic against the potential committers.

4. The analysis of the collected data

Chapter VI of the United Nations Charter and the articles 23-28 and articles 11 and 99 of the Charter deal with peaceful settlement of disputes. It requires countries with disputes that could lead to war to first of all try to seek solutions through peaceful methods such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Accordingly, in case of any maritime incidents that has led to losses of damages to the parties, they have to resolve their case through the juridical authorities. The rate of disputes on the maritime issues is very high, not all limited to cases of causalities but many of which can be related to water borders of the adjacent countries. "Despite the disputes between the persons and the countries, all disputes between the governments are international issues by nature. For an example of such disputes one can refer to the Corfu Channel case between UK and Albania. Such disputes are never referred to the national courts because a rule of the international law clarifies that no government is the subordinate the qualifications of the courts of any other country. Thus the governments are committed to resolve their disputes in peaceful ways such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice" (Robin and Allen, 1999). Several conventions and rules have been created in past years to settle the maritime dispute and to offer a system of recouping the damages. Table 1 shows the history of these conventions.

Table 1. History of the issuance of marine conventions		
#	Convention type	Year of Issuance
1	UK Maritime Act 1906	1906
2	International Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea	1910
3	International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter	1975
4	International Convention for Safe Containers	1977
5	The International Convention for the Prevention of Pollution from Ships (MARPOL)	1978
6	The International Convention for the Safety of Life at Sea (SOLAS)	1980
7	International Nations Convention on the Law of the Sea	1982
8	International Convention on Maritime Search and Rescue	1985
9	International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC)	1995

Here we explain two of these conventions in detail, and then we will refer to two cases of two issued decisions in maritime disputes.

Convention 1982: Since the establishment of the United Nations Organization up to now, three international conferences have been held on the law of the sea. The first and second conferences, known as Geneva Conferences were held in 1958 and 1960 respectively. The third conference was held between the years 1974 to 1982, the result of which was the new convention on the law of the sea" (Louis and Gustafson, 2001). At the third United Nations Conference on the Law of the Sea that resulted in the Convention 1982, several achievements were obtained in regard to the settlement of marine disputes. In an attempt to reduce the possibility of groups of nation-states dominating the negotiations, the conference used a consensus process rather than majority vote. With more than 160 nations participating, the conference lasted until 1982. The resulting convention came into force on November 16, 1994. If the conference failed to predict a determined and efficient system for the settlement of the disputes, then it would be possible to come to an agreement on the articles of the conventions. In this regard, Amrasink, the first chairman of the third Conference of the Law of the Sea believes that "effective orders in settling the disputes are necessary for establishing and maintaining the conciliations on the basis of the convention; thus we can claim that the main stream of the dispute settlement is the deliberate parallel between the agreements that necessarily have to be dominant. Otherwise, any agreement will promptly be collapsed. Moreover, an effective dispute settlement is one that be guaranteed. Such a guarantee is clearly represented in the soul and legal language of the Convention" (Mirabbasi, 1981). Convention 1982 of the Law of the Sea has predicted several dispute settlement authorities. The governments are free to choose any of these authorities, but decisions of each chosen authority will be binding for the parties. The mentioned authorities are introduced in table 2.

Table 2. Dispute settlement authorities of the Convention 1982

#	Authority of the Convention
1	International Tribunal for the Law of the Sea (ITLOS) based on the Annex 6 of the Convention
2	International Court of Justice
3	International Court of Arbitration, established and operating on the basis of Annex 7 of the Convention
4	International Court of Arbitration, established and operating on the basis of Annex 8 of the Convention

International Tribunal for the Law of the Sea (ITLOS) : International Court of Justice is just open to the states for referring their disputes, but the Tribunal is not only open to the States Parties to the Convention (i.e. States and international organizations which are the parties to the Convention), but it is also open to entities other than States Parties, i.e. States or the intergovernmental organizations which are not parties to the Convention, and to State enterprises and private entities in any case expressly jurisdiction on the Tribunal which is accepted by all the parties to that case. By and large, the entities can refer their dispute to the International Tribunal of the Law of the Sea who:

- Are an State organization
- State Parties have given them the authority of referring their dispute to the Tribunal
- The conditions mentioned in the Article II of the Tribunal Statute are met, but the person means the companies who are administered by a State Party or the citizens of a State Party (Robin and Allen, 199).

The International Tribunal for the Law of the Sea is an independent judicial body established by the United Nations Convention on the Law of the Sea to adjudicate disputes arising out of the interpretation and application of the Convention. The Tribunal is composed of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea, as predicted by the Convention. The International Tribunal for the Law of the Sea entered into force 12 years later, on 16 November 1994. The selection method of 21 members of the Tribunal is so that all important juridical systems of the world have representatives in it. Additionally, the geographical distribution of the Judges is fair and no two members with identical nationality can be member the Tribunal simultaneously. The method of changing the judges in The International Tribunal for the Law of the Sea is the same as the International Court of Justice. One-third of the judges are selected for a period of three years, on-third are selected for a period of 6 years, and remaining one-third of the judges are selected for a period of 9 years. Then at the end of each three years, elections are held to elect one third of the members. At this stage, each judge is being selected for a period of 9 years. If each one of the Tribunal members resigns and his chair become empty, then a new judge will be selected with the same method of election as mentioned before. The membership period of this new selected will be equal to the remaining time period of the resigned member. The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release, was the first case submitted to the Tribunal on 13 November 1997. According to the Article 21, Annex 6 of the Convention on the Law of the Sea, the jurisdiction of the Tribunal comprises all disputes submitted to it in accordance with the Convention. It also extends to all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. To date, ten multilateral agreements have been concluded which confer jurisdiction on the Tribunal. "As just one of different authorities for settling the legal marine disputes, International Tribunal for the Law of the Sea has proved its own competence and has shown that it can decide on the cases clearly and rapidly. The decisions of the Tribunal are well respected". The states who accept the competence and qualifications of the international juridical systems will find the decisions of these international bodies very beneficial at long terms, even if the decisions are issued against their short-term interests. All decisions of the Tribunal have been accepted and followed by the disputed parties up to now. At the following we refer to two cases issued by the International Tribunal for the Law of the Sea.

a. Corfu Channel Case

On May 15th 1946 the British warships passed through the Corfu Channel without the approval of the Albanian government and were shot at. Later, on October 22nd, 1946, a squadron of British warships (two cruisers and two destroyers), left the port of Corfu and proceeded northward through a channel previously swept for mines in the North Corfu Strait. Both destroyers were struck by mine and were heavily damaged. This incident resulted also in many deaths. The two ships were mined in Albanian territorial waters in a previously swept and check-swept channel. After the explosions of October 22nd, the United Kingdom Government sent a note to the Albanian Government, in which it announced its intention to sweep the Corfu Channel shortly. The Albanian reply, which was received in London on October 31st, stated that the Albanian Government would not give its consent to this unless the operation in question took place outside Albanian territorial waters. Meanwhile the United Nations advised the parties to refer their dispute to the International Court of Justice. The Court reached the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom. The Albanian Government was decided to be responsible for the incident by 11 positive votes vs. 5 negative votes of the

members of the Court. Besides, the Court condemned UK for sweeping the channel by the British Navy without the permission and satisfaction of the Albanian government.

b. Gabchiko- Nagymaros Case

This case is the only case that includes a mere environmental problem. On 2 July 1993, Hungary and Slovakia notified the International Court of Justice that a Special Agreement existed between Hungary and Czechoslovakia regarding the implementation and the termination of the Budapest Treaty of 16 September 1977 on the Construction and Operation of the Gabchiko- Nagymaros System of Locks on the Danube. The Special Agreement identified Slovakia as the sole successor of the State of Czechoslovakia. In its Judgment of 1997, the Court asserted that Hungary was not entitled to suspend and subsequently abandon, in 1989, the Nagymaros project and the part of the Gabchiko project for which it was responsible, and that Czechoslovakia was entitled to proceed, in November 1991, with a provisional solution (damming up the Danube on Czechoslovak territory). The Court also stated that Czechoslovakia was not entitled to put into operation, from October 1992, the system of locks in question, and that Slovakia, as successor to Czechoslovakia, had become Party to the Treaty of 16 September 1977 as of 1 January 1993.

5. Conclusion

The occurrence of maritime incidents is inevitable. The principle of obligation to recoup the losses and damages is a universal principle, both in national and international juridical systems. There is no doubt that the losses and damages can be recouped to some extents, but some losses and damages are not recoupable per the subject of the damages and losses. The jurists and the governments have done their best attempts to regulate some rules to compensate the losses and damages at most, but unfortunately, since some environmental losses and damages such as the distinction of animal and plant species are not recoupable, thus we have to look for mechanisms to prevent such incidents. We believe that recouping the damages is a sort of punishment for the committers of the incidents. As it is usually said in the discussions of the philosophy of the criminal punishments, the guilty persons usually compare the benefits of their crime to the losses resulting from the punishment. If their obtained benefits are higher than the losses by the punishment, such a benefit will encourage them to re-commit their crimes. In the line with our discussion, if the committers face financial penalties along with the punitive compensations, and if the weight of such punishments are higher than the losses and damages, then the involved parties of the maritime transport industry will do their best attempts to consider the rules and prevent similar incidents. In sum, in marine transport industry, the authorities have to pay enough attention and cautions in transporting different cargos. In other words, if an iron cargo sinks in the sea, the owners of the cargo will suffer some financial damages, but if a vessel full of fuel or chemical materials is sunk, great risks and threats will imposed on the environment whose losses and damages cannot be recouped, thus in the latter case, the authorities have to pay more attention and cautions to maximize the safety standards. On the other hand, insurance companies and legal authorities who issue the compensations have to know that the damages and losses are not merely financial, but their financial and non-financial consequences can last for several decades and centuries. Thus it may be necessary to consider the causes and reasons of the incidents along with recouping mentioned losses and damages, and to stop the activities of the manufacturers of the vessel-related equipment and fuel and chemical containers for their shortages in considering the standards or to force them to maximize the quality of their products. Alternatively, the insurance companies can exclude potentially damaging materials from their insurance policies to prevent their transport. Finally, regarding the environmental science is a young and new science in the area of the international law, it seems necessary for this new science to regulate regional and international rules to be considered by the involved parties in the marine transport industry. The diversity of and obligation to recoup the damages have to be emerged in more diverse ways so that they can fulfill the goals of establishing such rules and regulations.

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