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The U.S. Oil Pollution Act of 1990: Accepting the Present – Preparing for the Future

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THE U.S. OIL POLLUTION ACT OF 1990
ACCEPTING THE PRESENT - PREPARING FOR THE FUTURE

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Thank you Dr. Albrecht and good evening! I also want to thank the Maritime Law Association of Germany for the opportunity to give this lecture and to return for the first time to the land of my forefathers.

As you know, the title of my talk is "The United States Oil Pollution Act of 1990 -- Accepting the Present: Preparing for the Future."

I have given the address that title because OPA is a fact of life -- it is here, it is in effect, it cannot be easily changed. No matter how much we complain, and there is a lot to complain about, oil companies, tanker owners and operators will not be exempt from its provisions if they wish to trade to the U.S. oil market.

Having said that, there are still some things which can be done.

One, is to participate in the regulatory process. In the U.S., after Congress passes legislation, various government agencies are given responsibility to issue specific regulations to carry out the more general provisions of the legislation.

The agency principally entrusted to issue regulations under OPA is the U.S. Coast Guard. But before the Coast Guard can issue final regulations, they must first issue what are known as proposed rulemakings and request industry comments and criticism concerning them. The rulemaking process under OPA is now underway. Even the most well-written comments cannot change OPA itself, but the adverse impact of the Act may be softened somewhat by the industry participation in the rulemaking process. I strongly encourage you and your clients to become actively involved in this process.

Second, those involved in the U.S. oil trade must know and understand OPA and state oil pollution laws thoroughly. Otherwise, you or your clients may find that you are missing out on what is still the largest market in the world for your products and transportation services.

Now, lets turn to the Oil Pollution Act itself.

I. APPLICATION

The Act applies to both U.S. and foreign-flag tankers and dry cargo vessels operating in U.S. waters and up to 200 miles offshore. It applies to dry cargo vessels because of the bunkers they carry as fuel and because such vessels may be at fault for a collision with a tank vessel. It is important to note that the Act applies to vessels on innocent passage through U.S. waters.

II. LIABILITY

OPA imposes liability without fault -- that is, strict liability -- on responsible parties who discharge oil. A responsible party may be the owner, operator or bareboat charterer of the discharging vessel. Each of these parties is jointly and severally liable. Thus as an illustration, if the operator was really at fault because it failed to supply the

ship with the proper charts which caused the ship to run aground, but that operator is insolvent, claimants can proceed against either the registered owner or the bareboat charterer.

III. EXTENT OF LIABILITY

OPA expands the extent of a responsible party's liability exposure, increases the monetary limits of liability and makes it easier to break these limits and thereby impose unlimited liability on owners and operators.

This is accomplished in several ways:

1. The limits of a responsible party's strict liability are increased from $150 per gross ton under the old law, to $1,200 per gross ton for tank vessels and $600 per gross ton for non-tank vessels. This means that for a 100,000 ton tanker, the strict liability limits increase from $15 million to $120 million.

2. These increased limits are now more easily broken and there will be unlimited liability under the following circumstances:

a) Gross Negligence or Willful Misconduct.

These terms are probably familiar to all of us and we are used to dealing with them. However, where as under the prior law[1] such gross negligence or willful misconduct had to be known or capable of being known to the owner, under OPA a single isolated act of gross negligence by a ship's officer -- outside the owner's capacity to know -- will result in unlimited liability.

b) Failure to Report.

Failure to report the discharge or cooperate in clean-up operations will also result in unlimited liability.

c) Violation of a Federal Safety, Construction or Operating Regulation.

Finally, and perhaps most significantly, the mere violation of a Federal safety, construction or operating regulation will break the liability limits. It is very difficult to imagine that a major casualty could occur which does not involve the violation of at least one such regulation. Thus, a failure to comply with a navigational rule of the road by an otherwise fully competent watch officer will probably result in unlimited liability.

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1. The Federal Water Pollution Control Act, 33 U.S.C. § 1321 et seq.

d) Non-Preemption of State Law and Limitation of Liability.

Although the prior federal law permitted the individual states to enact their own marine pollution laws, claims under state law had been subject to the 1851 Limitation of Liability Act.

Under that federal statute, a shipowner could limit its liability to the value of the ship in the condition it existed after the casualty. If the ship was a total loss the owner could possibly limit his liability to zero. Now that state law claims are no longer subject to the Limitation of Liability Act, it is more important than ever to be aware of state laws which exist on marine oil pollution.

Under the prior law, the Limitation of Liability Act also applied to all claims for damages brought under federal law. Under the prior law only federal claims for removal costs were exempt from the Limitation Act. Under OPA, the owner can no longer use the Limitation Act to limit his liability on any type of federal claim.

IV. DEFENSES TO LIABILITY

There still are some defenses to liability but, in most instances, it is unlikely that these defenses will be available to avoid liability. The defenses are:

1. Act of God;

2. Act of War;

3. Act or Omission of a Third Party. This third-party defense is only available where the discharging vessel can show that it exercised due care for the oil and that it took precautions against the foreseeable acts or omissions of third parties.

With regard to all three of these defenses, they can only be asserted where the discharge is solely caused by any of them. In the U.S., we have a system of comparative fault under which the courts will ascertain the percentages of fault when more than one party is responsible for an injury. Thus if a discharging vessel is even slightly at fault for a spill, none of the defenses can be invoked.

V. THIRD PARTY LIABILITY

If a third party is solely at fault for the discharge, that third party may be treated as the responsible party. That is, the third party may be treated as if it was itself the discharger of the oil. Thus if a container vessel was solely at fault for a collision with

a tanker, that container vessel will be treated as the responsible party subject to all of the provisions of OPA.

If the third party is not solely at fault the discharging vessel must pay all damages and claims but may obtain contribution from the third party in a subrogation action.

VI. DAMAGES

Because it is highly likely that a responsible party may be both strictly liable and very possibly subject to strict liability without limit, it is most important to talk about the type of damages which may be recovered under OPA. OPA permits recovery of the following categories of damages:

1. Removal Costs - The costs incurred by federal or state governments to clean up the spill.

2. Natural Resource Damage - This category includes the cost of restoring or replacing the natural resource. If the natural resource cannot be restored, this class of damage may then include the loss of the enjoyment of the natural resource to the public at large. Calculating this type of damage will be very difficult and subjective indeed.

3. Real or Personal Property Damage - This class of damage includes not only the physical loss of the property, but also the loss of profits which may result from such loss.

4. Losses to Local Governments - Local governments which lose tax revenues or incur additional expense to provide public services may claim for such losses. Thus, if a community lost tourism business and taxes associated with such business, this item may be claimed under OPA.

Perhaps the most significant aspects of OPA's treatment of damages is that it effectively overrules maritime common law -- that is, judge-made law -- which limited the recovery of economic losses to claimants who had an ownership interest in property which suffered actual physical loss.

Under OPA, claimants such as restaurants and hotels who lose profits, but suffer no actual physical damage, can make claims. It will be up to the courts which interpret OPA, to determine where they will draw the line on such damages because conceivably any claimant whose loss can be directly related to the spill can submit a claim for economic loss.

VII. MISCELLANEOUS PROVISIONS

There are many miscellaneous provisions of importance from mandatory double hulls to contingency plans.

a) Financial Responsibility

Right now, perhaps the most important and most controversial is that which requires every vessel to be equipped with evidence of financial responsibility in an amount equal to its limit of liability under OPA, that is $1,200/ton for tank vessels and $600/ton for non-tank vessels. The financial responsibility provisions require the person issuing the evidence -- also known as the guarantor -- to agree to be directly liable to claimants and submit itself to direct actions in the U.S. Thus, if a tanker owner was insolvent or was a one-ship company that went down with the ship, the guarantor must step up and agree to pay claims.

Certificates of financial responsibility were required under the old act and also required the guarantor to be directly liable. These certificates had been issued by the P and I clubs. The clubs did not like the idea of issuing these certificates because to do so was contrary to the principle of indemnity, that is, before the club was obliged to pay its member, the shipowner first had to pay. If the shipowner was financially unable to pay, the club might never have to pay.

Nevertheless, under the prior law, the clubs agreed to issue certificates because the liability limits were acceptable, the scope of damages was still limited under maritime common law and the ability of the shipowner to limit its liability with respect to both federal and state claims was a much more realistic possibility.

Right now the Coast Guard is continuing to accept certificates issued under the old law until it finalizes new OPA regulations on the subject. However, the clubs have made it clear that they will not issue certificates under OPA which require the clubs to be directly liable.

Last month the Coast Guard issued its long awaited proposed rulemaking on evidence of financial responsibility. As expected, it offered no compromises and the P and I clubs have said they cannot comply. The comment period for this rulemaking ends on November 25 although it is expected that this period will be extended. I stopped in London last week and met with a number of the clubs. They are working hard on preparing a joint club response to the regulations and are also scheduled to meet in Washington next week with important members of Congress.

The impasse which now exists has the potential to entirely disrupt oil movements to the U.S. for if the clubs won't issue certificates, most tanker owners and operators won't be able to trade there. Although the Act does permit other methods to

be used as evidence of financial responsibility -- for example self insurance and surety bonds -- these other methods can be arranged only by the major oil companies.

Now, remember what I said before -- OPA does not preempt the individual states from making their own laws. This, I know must be a bad dream for all of you and I can understand why. The thought of having to deal with pollution laws of several coastal states -- many of them more stringent than OPA -- is a difficult one indeed. Well, the ability of the states to legislate has extended into the area of certificates of financial responsibility. My firm's Report on U.S. Oil Pollution Laws tells you what states require them.

Soon after OPA was enacted, many states started requiring certificates whereby the guarantor had to agree to be directly liable to the state. Well, of course, the clubs would not issue these state certificates and we did have situations for example in Florida, where ships with oil cargoes had to be diverted to other states.

Situations like that made the states realize the very adverse impact their regulations might have. Thus, we have seen that most states which did or were intending to require certificates of direct guarantee have relented and will now accept evidence that the shipowner is merely entered in one of the International Group of P and I clubs.

The clubs of course would like to see this trend carried over to OPA's certificate of financial responsibility requirements. However, whether this can be done or done in time to avert a crisis is uncertain. By law OPA requires the guarantor to agree to be directly liable for damages. Thus OPA would probably have to be amended to relax the requirement and that can be a difficult and long process. That is one of the purposes behind the clubs' meeting next week with congressional leaders.

I know I've spent a lot of time on these certificates of financial responsibility, but I need to say just one more thing.

OPA deals with pollution by oil. We have another statute that deals with hazardous substances known as CERCLA which stands for the Comprehensive Environmental Response Compensation and Liability Act. That's the subject of another talk except to say here that it applies to marine discharges of hazardous substances. That law also requires the issuance of certificates of financial responsibility. OPA permits the Coast Guard to require joint certificates under both OPA and CERCLA and that is just what the newly released Coast Guard rulemaking requires. Even though oil tankers and dry cargo ships may not carry hazardous substances as cargo, they may still have hazardous substances on board such as paints, solvents and other chemicals.

Thus, most vessels will also have to have this joint OPA-CERCLA certificate. Because CERCLA's strict liability limit is $300/ton, that amount will be added to the OPA limits thus requiring the joint certificate to be in the amount of $1,500/ton for tankers and $600/ton for dry cargo vessels.

b) The FUND

The Oil Spill Liability Trust Fund was established in 1986 and is funded through the imposition of a 5-cents per barrel tax on imported oil. This Fund continues under OPA. It is a 1-billion dollar fund whose purpose is to insure the payment of claims for clean-up costs and other damages where such claims cannot be satisfied by the responsible party.

Claimants must first submit their claims to the responsible party and if the responsible party does not pay within 90 days, the claimant can sue the responsible party or, as is most likely, submit the claim to the Fund. The Fund is then subrogated to the rights of the claimant against the responsible party.

It should also be noted that a responsible party who is entitled to limit his liability to $1,200 or $600 per ton may submit a claim to the Fund if he has paid claims over and above his limitation amount.

c) Double Hulls

Because OPA has the further objective of preventing spills, it contains many technical provisions designed to lessen the likelihood of a spill or lessen a spill's impact on the environment.

Perhaps the most well-known and burdensome of these technical regulations is that dealing with double hulls. Under OPA, all new tank vessels operating in U.S. waters must be equipped with double hulls -- that is double sides and double bottoms.

Existing vessels that are not now equipped with double hulls must be converted pursuant to a phase-in schedule. The outer limit for the conversion of existing vessels is the year 2015.

You probably know that at its annual meeting this past July, the International Maritime Organization expressed its support for double hulls. So I think it is pretty much a fait acompli that by sometime early in the next century, the worldwide oceangoing tanker fleet will be fully equipped with double hulls or an acceptable equivalent.

d) Contingency Planning

OPA requires the Coast Guard to formulate regulations by which all tank vessels have approved written, ship specific contingency plans. These plans must be designed to enable the vessel to respond to what OPA defines as a worst case discharge of all of the ship's cargo under adverse weather conditions.

Of course, it will be impossible for a ship alone to clean up a so-called "worst case" discharge. Indeed, from experience, we know that no matter how much force is brought to bear only a fraction of a major spill will ever be cleaned up. In August the Coast Guard issued a proposed rulemaking which acknowledges the impossibility of such a task and the inability of a tank vessel to be equipped with enough equipment to deal with a worst case discharge. Since then there has been another rulemaking setting forth the Coast Guard's intent to form a industry-wide rulemaking committee which would negotiate contingency plan regulations.

Whatever the outcome of this process, it is clear that when the final contingency plan regulations are issued, at a minimum, they will require:

1. the shipowner or operator to have contractual arrangements with removal contractors so that there can be an immediate and effective response;

2. training programs for vessel and response personnel as well as periodic drills; and

3. some minimum amount of response equipment to be carried by tank vessels.

The Coast Guard is now is now in the process of establishing regional response commands which will be equipped or have available, spill response equipment.

In addition, a company known as the Marine Spill Response Corporation has been formed which is in the process of acquiring a great deal of response equipment including response vessels, skimmers and the like. Like the Coast Guard, this equipment will be located in several regions along the U.S. West, East and Gulf Coasts. Shipowners will be able to subscribe to the services of the Marine Environmental Response Corporation.

e) Manning and Training

It is generally recognized that no matter how well- equipped or technically sophisticated vessels may be, most spills are the result of human error. Thus, OPA requires the Coast Guard to undertake a study of the manning, training, qualifications and watchkeeping standards of foreign flag vessels. If the study reveals that these standards are not at least equivalent to the standards for US flag vessels, those foreign flag tank vessels may be refused entry into US ports.

OPA also establishes maximum working hours for crew members. These maximum work hours include administrative duties, that is the paper work that is done over and above operational duties. The maximum working hours are: no more than 15 hours in a 24 hour period; or no more than 36 hours in a 72 hour period.

For most vessels it is common for these work hours to be exceeded, especially during port operations. These work hours maximums are clearly a federal safety regulation. Therefore, if they are violated and such violation is the cause of a spill, the shipowner will be subject to unlimited liability.

Right now these work hour restrictions are only applicable to U.S. flag vessels but they may effectively apply to foreign flag vessels for as indicated above, the Coast Guard must undertake a study to determine that foreign flag tank vessels meet US manning standards.

At this point let me make another comment about state law both with respect to contingency plans and manning. OPA does permit the states to require their own vessel contingency plans. Although the Coast Guard has not yet issued its final regulations on contingency plans, some states already have. In many states these regulations are in effect right now. It is hoped that once the Coast Guard regulations are out uniform regulations can be achieved, but as of now tank vessel and, in some states non-tank vessels as well, must have contingency plans on board.

It is unlikely that the states will be able to issue manning regulations that will be more rigorous than the federal regulations. Under the commerce clause of the U.S. Constitution, states are prohibited from imposing laws that may have a substantial adverse impact on interstate commerce unless that state's local interest is so strong as to outweigh the need for a uniform federal standard.

In most instances, a state's interest in protecting its environment has been deemed to outweigh the need for uniformity. I think that the courts would find that the states have exceeded their powers if they were to attempt to legislate in the area of crew manning. This is particularly so since the states already have substantial control over local pilotage.

f) Substance Abuse

Monitoring drug and alcohol abuse is a major part of the Coast Guard's objective to prevent oil spills. Prior to the enactment of OPA, the Coast Guard had already implemented broad regulations dealing with pre-employment, periodic and random testing for drug abuse aboard US flag vessels. It also had issued regulations mandating that essential personnel on both US flag and foreign flag vessels be tested for both drugs and alcohol immediately after a major casualty. OPA expands the Coast Guard's powers in this area.

Once again it should be noted that although only the post-casualty testing is applicable to foreign flag vessels, the other types of testing -- pre-employment, periodic and perhaps even random testing -- could conceivably be extended to foreign flag vessels by way of the Coast Guard's evaluation of foreign flag manning standards.

There are numerous other technical regulations which will impact tanker owners and operators. Without going into detail let me list just a few. The Act requires:

1. the Coast Guard to implement rules regulating vessel operations in automatic pilot and with the engine room unmanned;

2. the Coast Guard to designate waters where single hulled tankers exceeding 5,000 tons must be escorted by at least two tugs;

3. the Coast Guard to designate waters upon which a tanker in coastwise trade must, in addition to a federally licensed pilot, have on the bridge a licensed master or mate;

4. certain types of vessels to participate in vessel traffic services. VTS as we call it, monitors waterways by closed circuit television as controllers watch the progress of vessels in these waterways maintaining constant radio contact and advising them on course changes, on-coming vessels and other hazards.

VIII. CARGO OWNER LIABILITY

Let me say something here about potential liability of an oil cargo owner who has no control of any kind over the tank vessel's operations. In the early drafts of OPA, there were provisions which would have made the cargo owner liable along with the shipowner. It was thought that this would provide incentive and encouragement to oil companies who do not use their own vessels, to select high quality vessels in which to carry their cargoes. Those provisions were removed in the final version of the Act and right now there is no independent liability of the cargo owner under federal law. However, that does not prevent individual states from imposing liability on cargo owners and at present at least five states do.

Some have suggested that even where state law does not expressly impose liability on a cargo owner, the common law of that state -- that is the judge-made law formulated over the years through case law -- might impose liability on cargo owners.

This theory goes back to English law and the doctrine of nuisance whereby those who were engaged in an abnormally dangerous activity were held strictly liable for injury resulting from such activity eventhough the participants in the dangerous activity did everything possible to prevent the harm.

It is suggested that transporting oil in coastal waters could be an abnormally dangerous activity for which the participants in the venture -- including "innocent" cargo owners could be strictly liable. I personally feel that that would be carrying the law of nuisance a bit too far but one never knows.

IX. LENDER LIABILITY

Finally, let me say a few words about lender liability. By that I mean the potential liability of a financial institution which has an interest in the vessel through some financing mechanism.

If the financing is structured so that the financial institution is the registered owner of the vessel and bareboats or demise charters the vessel to the actual owner, the financing institution will most assuredly be liable under OPA as an owner.

A more difficult question arises as to whether a lender who is not an owner may nevertheless be deemed an "operator" and thus potentially liable as a responsible party. Although no cases have arisen under OPA dealing with a lender's liability as an operator, some have come up under the hazardous substance statute, CERCLA. These cases range from holdings that the lender must exercise actual control to those which say that the lender's mere ability to influence environmental decisions could be a basis for imposing liablity upon an owner.

Regulations have been proposed under CERCLA which would severely limit the circumstances under which a lender may be liable as an operator. If similar regulations were instituted under OPA, it would cause much comfort in the ship financing sector.

In the meantime, lenders should be mindful not to take on so much an interest in the management of a shipowner that there is risk of being deemed an operator under OPA.

X. CONCLUSION

The Oil Pollution Act of 1990 is broad and sweeping legislation which will have a substantial and long lasting impact on the oil and tanker trade not only in the U.S. but on a worldwide basis.

It is time for the industry to adapt to the new world in which it finds itself. This will require creative approaches as well as a hard reexamination of present owning and operating standards, corporate structures, financing arrangements and chartering practices.