EU Directive on Ship-Source Pollution - Open to Challenge?  January 2006 (Updated)

Introduction

As reported in Sea Venture issue 3 ("EU Criminalisation of Accidental Pollution") there has been much comment on this controversial directive since its first draft was released in 2003. Directive 2005/50 has been criticized for its impact on the industry, its human rights implications, its effectiveness in preventing further pollution incidents and its legality in terms of international law.

The Directive came into force on 1 October 2005. Despite vigorous protest from industry bodies since its inception in draft form, the Directive finally published included no concessions. By way of background, according to the EU, the Directive was introduced because it was felt that numerous ships were ignoring the provisions relating to the discharge of polluting substances contained in MARPOL 73/78. No corrective action was being taken and this needed to be changed in order to protect EU waters. One of the stated purposes of the Directive was to remove the discrepancies in the domestic legislation by which individual EU member states had implemented MARPOL 73/78 and thereby "harmonise its implementation at Community level" (Para. 3 of the Preamble to the Directive). It is unfortunate, therefore, that this attempt to "harmonise" the implementation of MARPOL not only deviates from that Convention but also contravenes the over-arching principles of UNCLOS to which MARPOL is subject.

MARPOL Obligations

The Directive provides that discharges of oil and other noxious liquid substances (i.e. discharges of MARPOL Annex I or II substances) in excess of the limits provided for in MARPOL will be regarded as an infringement and constitute a criminal offence. "If committed with intent, recklessly or by serious negligence", in contrast, MARPOL states that sanctions may apply only "if the owner or the master acted either with intent to cause damage or recklessly and with knowledge that damage would probably result".

There has rightly been criticism of the inclusion of "serious negligence" as a standard of conduct giving rise to criminal liability. "Serious negligence" is not, under English law and other European legal systems, a term of art. As such, it carries with it the risk that the standard of conduct will be judged by reference to its consequences, rather than by reference to the mind of the party charged. In other words, there is a risk that sanctions will be applied to acts of "ordinary" negligence resulting in serious levels of pollution. Human rights issues arise due to the subjectivity of this concept and the fact that the criminal liabilities carry with them the possibility of custodial sentences (which have been subject to considerable comment). Even leaving human rights issues aside this new criterion is a substantial departure from the position under MARPOL. The EU, and its Member States, would be entitled to alter the standard of conduct giving rise to criminal sanction in respect of pollution where such pollution takes place within a state's internal waters - to which MARPOL does not apply. However, to do so with regard to "MARPOL waters", which include the territorial sea (normally up to a 12 mile limit), the exclusive economic zone (up to a 200 mile limit), and the high seas beyond, would constitute a breach of MARPOL treaty obligations. It is the breach of these treaty obligations that leaves the validity of this Directive open to challenge.

Challenging the Directive

1. The European Court of Justice

Unlike EU Regulations which are directly applicable and binding in all EU Member States without the need for any national implementing legislation, EU Directives only bind Member States as to the objectives to be achieved within a certain time-limit while leaving the national authorities the choice of form and means to be used. (Article 16 of this Directive requires that "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 March 2007", ). Directives have to be implemented through national legislation in accordance with the procedures of the individual Member States. Although past challenges to the validity of EU law in the English Courts have related to EU Regulations, there is no reason, why a Directive cannot be challenged.

In a case bearing similarities to the current position of shipowners vis-à-vis the Directive/MARPOL, R v. Secretary of State for the Environment, Transport & The Regions, ex parte International Air Transport Association (2000) 1 Lloyd's Rep 242, the International Air Transport Association (IATA) brought an application for judicial review in the English High Court in which it sought to challenge the validity of an EU Regulation which it argued was contradictory to the 1929 Warsaw Convention. This Convention governs the limits the liability of air carriers in respect of death/injury to passengers, whereas the Regulation in question imposed unlimited liability on the carriers. IATA further argued for a reference to the European Court of Justice (ECJ).

Mr. Justice Jowitt, on the basis of compelling precedent, held as follows:

- Whilst a national court of a Member State of the European Community might make a determination that a Regulation was valid, it was not entitled to determine that it was invalid. Such a decision could only be made by the ECJ.
- Once the validity of a Regulation was called into question, the court was required to refer the question, if the answer was relevant to its decision in a particular case, to the ECJ unless the court was completely confident that it was valid.
- In the present case the court had come to the conclusion that a reference to the ECJ was inappropriate because the Regulation was valid; and in those circumstances the application failed.

Crucial to the judge's decision was the fact that the Warsaw Convention dated from 1929. The first paragraph of Art. 234 of the EC Treaty (The Treaty of Rome) was relevant in this respect:

"The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty . . . To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude."

It followed that since the obligations of Member States under the Convention pre-dated their joining of the Community, they were not affected by the EC Law and the first paragraph of Art.234 meant that the Regulation did not put Member States in conflict with their public international law obligations. Although there was clear incompatibility between the Regulation and the Convention, the solution lay in the second part of Art. 234, where the Member States were required to take all appropriate steps to eliminate the incompatibilities established.

Mr. Justice Jowitt held that there was nothing in Art. 234 which suggested that if States were not able to resolve their own conflicts internally they could seek a referral to the ECJ. Consequently, he held that the Regulations were contrary to the Warsaw Convention. The ECJ later confirmed that there was no need to refer the Regulations to the ECJ.

The problem for the EU Court of Justice is that it does not have the same powers as the English High Court. If the ECJ were to find the Regulations compatible with the Warsaw Convention, it would need to give a reasoned opinion as to why the Regulations contravened the Warsaw Convention. This would require the ECJ to interpret the Warsaw Convention in order to make the Regulations compatible with the Convention.

The English courts and the ECJ sit at the top of the hierarchy of interpreting the law. The ECJ is the final court of appeal in the EU. Just as the English courts are not permitted to interpret the Warsaw Convention, the ECJ is not permitted to interpret the Regulations. This is a matter for the English courts to resolve.

Mr. Justice Jowitt's decision was based on the premise that the Regulations were contrary to the Warsaw Convention. The ECJ confirmed that the Regulations were not incompatible with the Warsaw Convention.

The weakness of the ECJ's decision was that it did not address the fact that the Regulations were not compatible with the Warsaw Convention.

The ECJ's decision is not binding on the English courts.

In summary, the ECJ confirmed that the Regulations were compatible with the Warsaw Convention, but did not address the fact that the Regulations were not compatible with the Warsaw Convention.

The English courts are not permitted to interpret the Warsaw Convention, and the ECJ is not permitted to interpret the Regulations.
name cooperation between the states to eliminate the incompatibility, pending which the earlier rights and obligations would continue to have precedence.

Fortunately the logic of this decision is outside the scope of this discussion, as the Treaty of Rome predates MARPOL. In a further case on similar issues, also involving IATA, and relating to a convention acceded to by the EU after the Treaty of Rome, the English Court did refer questions of validity of an EU Regulation to the ECJ. In this case, IATA & The European Low Fares Airlines Association (ELFFA) v. Department of Transport [2004], IATA and ELFFA challenged the validity of a Regulation which came into force in 2005 and set out compulsory compensation payable to passengers in respect of flight cancellation, denied boarding, or long delays.

Following the IATA cases it would appear that major shipping industry bodies would have sufficient standing to bring an application in the English Court, challenging the Directive and seeking to have the matter referred to the ECJ. Less clear, however, is whether a shipowner, or for that matter a private individual, would be able to do so. As for the timing of the application, there appears to be nothing to prevent action being taken now, even though the Directive has no legal force. That said, with the IATA precedent in place, it will clearly be more straightforward to bring such an application as and when the Directive has been implemented in the UK through domestic legislation.

As to how the ECJ will find, it is worth noting the likely outcome in the IATA/ELFFA reference. It appears that the Regulation in question is likely to be upheld after a European Court of Justice Advocate General advised the court to back the legislation in September. Although these opinions are not binding, in practice it is rare for the court to go against them. The two trade bodies had argued that the regulation was contrary to the Montreal Convention, which sets out principle guidelines for airline liability. ELFFA and IATA argued that the new rules added to these liabilities. The Advocate General disagreed, stating that there was no friction between the two sets of rules as the new European Regulation was essentially about people's rights rather than airline liability, and is therefore "complementary" to the Convention. According to the Advocate General "The Montreal Convention regulates the kind of claims for damages that can be brought before the courts, whereas the Regulation seeks to assist stranded passengers, regardless of whether there is any damage or fault on the part of the carriers." Whilst the stated intention of the European Parliament with regard to the Ship-Source Pollution Directive is to complement MARPOL, one would hope that an Advocate General, and of course the ECJ, in a similar challenge, will see the obvious contravention of MARPOL - it would be difficult for a subtle distinction of the sort drawn in the IATA/ELFFA case between the International Convention and the EU Legislation to be drawn with regard to the Pollution Directive, as the Directive purports to operate within the framework of MARPOL.

2. International Tribunal for the Law of the Sea

Another manner in which the Directive could be challenged is through the dispute resolution provisions provided for in UNCLOS (it should be noted, however, that such dispute resolution mechanisms are only available to States). In the 2005 Cadwallader Memorial Lecture, organised by the London Shipping Law Centre, Judge Thomas Mensah, a member of the International Tribunal for the Law of the Sea, addressed the issue of the legality of the Directive in terms of International Law and the options available to flag states when faced with an EU member state applying the Directive to one of its ships.

Judge Mensah underlined the clear conflicts between the Directive and MARPOL and stressed that there is no basis either in MARPOL or in UNCLOS for a coastal state to enact laws that deviate from the parameters specified under international law. As mentioned above, MARPOL 92(2) reserves the possibility that a coastal state may be entitled to enact laws that go beyond the provisions of MARPOL, but this reservation applies only if the laws so enacted are in accordance with the applicable provisions of UNCLOS. The only case in which UNCLOS permits a state to impose more stringent requirements than those provided for internationally, he said, is when the state legislates for vessels flying its own flag. Coastal states are not entitled to legislate in this manner. Hence in the absence of a wilful or reckless act of pollution, passage by a foreign vessel in the territorial sea of a coastal state must be considered to be innocent passage.

By adopting a criterion of serious negligence, which is found in neither MARPOL nor UNCLOS, Judge Mensah felt that the EC Directive adopted a standard, the effect of which is to hamper innocent passage of a foreign vessel through the territorial sea of EU Member States. He felt that any EU Member State implementing the Directive in its entirety could face a challenge by other parties to MARPOL and UNCLOS who are not members of the EU and would be entitled to expect the EU Member State to respect its treaty obligations.

When asked about the appropriate forum in which a flag state could take action against the EU or a specific Member State, Judge Mensah mentioned the dispute resolution mechanisms in UNCLOS which provide, in the absence of amicable resolution, for reference to the International Tribunal on the Law of the Sea.

Flag State Intervention

It is worth noting the approach certain flag states have taken in response to draconian acts by the French authorities in relation to pollution incidents. Recently both Norway and Malta have intervened in French criminal proceedings against masters of Norwegian and Maltese flagged vessels. In both instances the flag states invoked their rights under UNCLOS to have the Masters tried in their own Courts. These instances demonstrate a willingness on the part of flag states to challenge disproportionate responses by a coastal state to the perceived threat of pollution (in one of these instances the French Secretary of State for Transport and the Sea commended the French authorities for bringing to justice what he described as "gangsters of the sea"). Given the disregard the EU has shown for its international treaty obligations in this instance, it is probable that certain flag states will seek to challenge the new Directive when its implementing legislation is in force, if not sooner.

Summary

As an objective, the encouragement of the consistent application of MARPOL across the EU is commendable. However, when executive action to achieve that objective is excessive and, rather than ensuring consistent application of international law, in fact breaches the very conventions it sets out to uphold, it is important that both states and industry bodies intervene. It is reported that certain states and certain shipowner organisations are investigating the possibility of challenging the validity of the Directive, and it is probable that whilst the former may either intervene in criminal proceedings or take the matter to the International Tribunal for the Law of the Sea, the latter is more likely to seek to have the matter referred to the ECJ through a court in member state.

For further information on Directive 2005/35 see: EU Directive on Ship-Source Pollution In Force

Update - January 2006

1. Since first publishing this article it has emerged that Intertanko, Intercargo, the Greek Shipping Co-operation Committee, Lloyd's Register and the International Salvage Union have commenced proceedings in the English High Court to challenge the Directive. The case should then be referred to the ECJ. The Directive is challenged on the basis that it conflicts with international law and that it fails to comply with the established EU principle that there must be legal certainty, particularly in legislation involving penal sanctions.

2. In relation to the IATA/ELFFA case the ECJ has now followed the advice of the Advocate General and Regulation 261/2004 on passenger compensation has been upheld.