Oil Pollution in Brazil

In the last few years there has been an increasing trend in the number of claims arising out of oil pollution incidents within Brazilian waters with escalating financial demands for fines and compensation sought by federal and state authorities. In many of the cases in which the Club has been involved oil spills are small, often measured in nothing more than litres, and arequickly cleanedup with no scientifically discernable effect upon the environment. Yet, fines and environmental damage claims following a relatively minor spill can run up into several millions of US Dollars. Civil claims for loss of income and clean up costs are also a major source of financial exposure for the shipowners.

The problem is compounded by the involvement of various different state and federal government agencies, a wide range of liabilities spanning areas of administrative, civil and criminal law, inconsistencies in quantification of damages and fines together with lack of legal precedents. These all add to the uncertainty and ambiguity surrounding the shipowner’s liability for pollution in Brazil.

This article does not intend to elaborate on Brazilian pollution laws but aims to increase awareness of the underlying problems associated with dealing with pollution incidents in Brazilian waters.

Environmental liability

Brazil acceded to the International Convention on Civil Liability for Oil Pollution Damage (CLC 69) in 1977[1], however, it is not party to any of its Protocols nor is it a member of the International Oil Pollution Compensation Fund.

The Club is not aware of any cases where CLC 69 has been applied in Brazil.

Since the 1980s Brazil has become more aware of environmental issues and as a result enacted various laws to regulate environmental matters. In accordance with this new found interest in all matters relating to the protection of the environment, a strict liability regime and the “polluter pays” principle were introduced. Contrary to the CLC 69, these new laws apply not only to tankers carrying oil but all ships and provide for an unlimited civil liability for pollution damage.

Pollution damage is described in CLC 69 as “loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.” CLC 69 wording does not provide guidance on compensable natural resource damages[2]. Similarly Brazilian legislation on environmental protection does not include standardized procedures for assessing environmental injury and placing a monetary amount on such damage.

Assessment and quantification of “loss or damage caused by contamination” is a monetary term and is intrinsically a very difficult exercise. In Brazil a number of states employ a method of quantifying environmental damage on the basis of a mathematical formula which, among other factors, takes into account the amount of pollutant introduced into the environment, natural sensitivity of the polluted area, type of pollutant, risk to flora, fauna and human health.

Alternatively, quantification may be left to the court’s discretion.

Wide extremes are seen in the evaluation of environmental damage from state to state and lack of guidance in local jurisprudence on quantification of injury to the environment can result in claim demands largely inconsistent with the degree of pollution.

Criminal liability

Pollution can also give rise to criminal liability of the Master and the shipowner. A ship owning company’s directors, managers, and representatives can be prosecuted for pollution damage where such damage occurs due to their gross negligence or willful misconduct. Depending on the severity of the criminal act or previous record of polluting activity, sanctions can range from up to 4 years imprisonment of the Master and company directors to cancellation of licenses, loss of incentives and imposition of fines not exceeding 360 times the minimum wage.

Administrative liability

Whether or not there is any damage to the environment, introduction of pollutants into the environment is subject to an administrative fine.

The Maritime Authority frequently carries out its own investigation to determine the amount of pollutant introduced into the environment. As a general principle the fine is scaled up in line with the amount of pollutant spilled and can be anywhere up to R$ 50 million (currently equivalent to over US$ 26 million). The fine amount can be increased exponentially depending on the number of polluting incidents caused by the same pollutant. Based on the Club’s experience, a small pollution of a few litres can result in a significantly higher fine than a pollution incident measured in several thousand litres, especially if the polluter in the former incident is a frequent offender.

While in principle the Maritime Authority is empowered to levy such a fine, in some instances Federal and State environmental agencies can
Clean-up

Taking prompt remedial measures to contain and effectively remove the pollutant from the environment is of utmost importance to minimize civil, criminal and administrative liabilities. It is important in mitigating potential damage claims and administrative fines to work closely with the authorities and to be seen to be doing so.

Clean-up is a costly but essential exercise. More often than not clean-up operations are labour intensive, with significant mobilization and demobilisation costs. In addition, contractors need to keep and maintain necessary equipment in a state of good repair together with a reasonable stock of material at all times. These all impact on the cost. This is more so in Brazil where there are only a handful of clean-up contractors and the sheer scale of the coastline means that clean-up material and equipment has to be brought in from further afield.

Close working relationships with the contractors must be established from the start ensuring proper use and appropriate choice of material. During clean-up, material used and man hours worked should be closely monitored and daily reports, together with a detailed list of material used and equipment employed, should be submitted for signature to the clean-up contractors.

Legal and Preventative Measures

While multiple administrative fines, spell amount and authorities’ quantification of damages can be legally challenged, as a consequence of numerous appeals and time required for decisions to be rendered, cases can last a significant number of years before a final resolution can be obtained. Following such challenge, even where reduction of damages can be achieved, 12% pa legal interest and indexation applicable to civil claims inevitably affect the shipowners’ ultimate financial exposure. For these reasons, and in view of strict liability of the polluter, it is essential to carry out a strategic review of each and every case.

In addition to legal measures, it is possible to obtain a waiver of civil and criminal liability for damage to the environment by the polluter agreeing to undertake or contribute to the cost of a local (usually environmental or social) project by means of a formal agreement with the federal and the state prosecutor offices.

The cost, nature and extent of these projects can vary. Because Brazilian courts tend to the view that there must be damage where there is pollution, shipowners’ civil liability for pollution exists regardless of any scientifically measurable damage to the environment. For this reason, especially in smaller spills, the chosen project may not be directly related to the specific pollution incident and can range from addressing the local population’s educational needs to coastal or inland reforestation activities. While this is not desirable to the extent that it disassociates liability from pollution, as long as ambiguities as to admissibility of claims for environmental damage exists, such arrangements will continue to be used to avoid the inherent uncertainty of civil and criminal liability actions.

Any such social and/or environmental project must always be considered early on and active participation and cooperation of the state and federal prosecutors, governmental and administrative agencies should be sought. Once the details are agreed the project must be formalized and approved by the Public Prosecutor or, if a civil action is pending, by the presiding judge.

The conclusion of such an agreement prevents civil and criminal liability actions against the shipowner for matters that are dealt with by the agreement. However, claims that have not been resolved in the agreement can still be pursued by individuals affected by the pollution.

Conclusion

Complications surrounding shipowners’ liability for pollution damage in Brazil is the result of the complex regulatory framework which is in its early stages of development and which has diverted from the path of internationally accepted regimes such as the CLC.

As in any casualty situation, cooperation and liaison with relevant local authorities are essential. Early involvement of the Club, its experts, lawyers and shipowners’ associations like ITOPP can make a real difference in controlling and minimizing the effects of pollution and management and handling of shipowners’ pollution liabilities.

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[1] Decree No.74 dated 4 October 1976 and Decree No. 79.437 dated 28 March 1977. There is legal view to suggest that application of CLC 69 may be challenged in Brazil on the basis of the Federal Constitution dated 1968.

[2] The 1992 Protocol to the CLC 89 expressly limits admissible claims for damage to the environment to “loss of profit from such impairment and cost of reasonable measures of reinstatement actually undertaken or to be undertaken” and to “the costs of preventive measures and further loss or damage caused by preventive measures.”

[3] This is heavily criticized by the Club’s lawyers as it offends the double jeopardy rule, however due to conflicting decisions it continues to be a holly debated topic.