



REMEDYING ENVIRONMENTAL DAMAGE FROM WRECKS – THE LIABILITY OF OWNERS AND SALVORS

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Preliminary Notes

- This presentation deals with the *obligation to **remedy** environmental damage* caused by wrecks.
- A sunken or grounded vessel can in many ways cause ***significant harm*** to the marine environment: Cargo and bunkers/the wreck may...

pollute
waters and
coastlines

spoil the
landscape

pose a danger to
other navigation

etc.

- Focus is on wrecks that are **not *historic wrecks***, i.e., wrecks that are younger than 100 years since their sinking or grounding.
- New wrecks covered by the ***Nairobi International Convention on the Removal of Wrecks, 2007*** (entered into force on 14 April 2015) fall outside the study. However, since this Convention mainly regulates the obligation to pay for ***the costs of wreck removal*** and only to a limited extent contains rules relevant to environmental impairment liability, the issues discussed in the present paper remain *topical* also for vessels covered by the Nairobi Convention.

- There is no clearly defined or largely accepted **concept of wreck**.
- cf. terms as "sunken", "grounded" or "abandoned" vessel → "wreck" is not explicitly mentioned
- In general, "**wreck**" seems to cover vessels that are not possible or difficult to salvage, especially if they have been lying a longer period in the water.
→ a relative concept that is "steered" by applicable legal norms

- the obligation to remedy damage caused to the marine environment
- The **concept of remediation** extends further than to a mere *removal* or *disposal* of oil and other pollutants.
- an effort to repair or replenish the environment to its **previous state** (or to provide for so-called **alternative** restoration)

Environmental Liability *Directive* 2004/35/EC (ELD) Art. 2.11

- “‘remedial measures’ means any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II.”

- There is no ***international*** regulatory regime in place for *specifically* dealing with remedying responsibilities and the allocation of liability in relation to environmental damage caused by **wrecks**. Therefore, interest turns to *civil liability conventions, EU law and national legal rules*.

Liability of the owner of a wreck

Civil liability conventions

- **the 1992 CLC:** *strict* but limited liability of the **registered owner** of a sea-going vessel and seaborne craft constructed or adapted for the carriage of *persistent* oil as bulk cargo, which causes *pollution damage* in a contracting state or within its economic zone (or within an area corresponding to such a zone up to 200 nautical miles from the coastline).
- N.B. combination carriers or oil/bulk/ore ships, **OBOS**)

- Thus, an **owner of a wreck**, fulfilling the criteria of a vessel covered by the CLC, incurs liability in accordance with the provisions of the Convention.
- However, it may turn out to be **difficult** to find such an owner, especially if the wreck has been lying in the water for a long period. In addition, there are *time limits* for presenting claims.

- There are similar liability provisions in the **2001 Bunker Convention**. However, this Convention is applicable to “any seagoing vessel and seaborne craft, of any type whatsoever”, and the liable person for bunker spills is the “**shipowner**”, who is defined as “the owner, including the registered owner, bare boat charterer, manager and operator of the ship”. Thus, regarding *bunker spills* also from *wrecks*, there are more liable persons than just the owner (cf. “redare” in Nordic law).

- As regards compensable damage, there are corresponding rules in both Conventions. **Pollution damage** is defined in the CLC (Article 1.6, cf. Article 1.9 of the Bunker Convention) as follows:
 - “(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, *provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;* (my italics)
 - (b) the costs of preventive measures and further loss or damage caused by preventive measures”.

- In addition to personal injuries, property damage and economic losses, damage to the environment *per se*, that is, the “unowned” environment, is thus covered by the definition – although the coverage is rather restricted.
- The notion of “pollution damage” addresses mainly property damage and economic losses, that is, the focus is more on the protection of *private* (individual) rights than of *public* rights.

- Compensation for *damage to the environment* (other than loss of profit) is ***expressly limited*** to “costs of reasonable measures of reinstatement actually undertaken or to be undertaken” (N.B. ***conceptually*** restoration is similar to remediation). Such compensation shall be based on *actual* costs of restoration, that is, speculative costs are not compensated. In addition, the undertaken (or planned) measures shall be *reasonable*, considering especially the extent of the environmental damage and the expected positive effect of the measures.

- “pollution damage”: **insufficient** in cases where restoration of the environment to its previous state *is not possible* or where it would appear to be *unreasonably costly*
 - the idea of so-called *alternative restoration* → not fully accepted
- Nor does the CLC require the shipowner to compensate for environmental values that are lost during the period of the restoration (**interim losses**, cf. “compensatory” remediation under the EU Directive 2004/35).

- Both the CLC and the Bunker Convention have entered into force and most *EU Member States* have ratified them and implemented their rules into national law.
- N.B. The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (***HNS Convention***).
 - has not yet entered into force
 - strict but limited liability on the registered *owner* of a vessel
 - any sea-going vessel and seaborne craft, of any type whatsoever” (Article 1.1) ***carrying HNS substances***

- The HNS Convention defines “damage” as including loss of life or personal injury, loss of or damage to property outside the ship carrying HNS substances, loss or damage by ***contamination of the environment***, and the costs of preventive measures as well as further loss or damage caused by them.
 - Claims for compensation for damage to the marine environment are admissible, but they are, *restricted*, as under the CLC and the Bunker Convention, to “costs of reasonable measures of reinstatement actually undertaken or to be undertaken” (Article 1.6).

EU law

- **EU Directive 2004/35 (ELD)**
- *All EU Member States* are bound by the ELD, which has accepted a **more extensive** approach to remedying environmental damage than the civil liability conventions.
- The *objective* of the ELD is “to establish a common framework for the prevention and remedying of environmental damage at a reasonable cost to society” (recital (3)).

- *Activities (Annex III)* → e.g. waste management operations, manufacture, use, storage, processing, filling, release into the environment and onsite transport of dangerous substances as defined in Article 2(2) of Council Directive 67/548/EEC (repealed by Regulation 2008/1272 EC), and ***transport by sea*** of dangerous or polluting goods as defined in Council Directive 93/75/EEC (with later amendments)
- ELD is of relevance also for shipping activities, including the ***handling of wrecks.***

- The **operator** (cf. “owner” and “shipowner” under the civil liability conventions) of the activities listed in Annex III shall bear the costs for the preventive and **remedial actions** taken pursuant to the ELD (Article 8.1, *strict liability with some exceptions*).
- Occupational activities *other* than those mentioned in Annex III are subject to a **fault-based** regime (Article 3.1 (b)). However, such liability covers only damage and an imminent threat of damage to “*protected species and natural habitats*”.

- The ELD has also adopted the principle of compensating damage to the environment *per se* (“pure environmental damage”). The environmental liability under the ELD is **exclusively** a liability vis-à-vis the public, that is, it aims to protect **public** rights. It makes it possible for *competent authorities* to require that the preventive actions and remedial measures are taken by the operator and, if needed, to take these measures themselves, and then recover all costs from the operator.

- The ELD does *not* apply to cases of personal injury, damage to private property or to any economic loss and does not affect any right regarding these types of damage. Thus, unlike the civil liability conventions, it does not grant ***private victims*** any right of compensation. This is a significant limitation of the Directive's scope.

- The notion of ***environmental damage*** in the ELD covers
 - a) *damage to protected species and natural habitats* (biodiversity), which is any damage that has ***significant*** adverse effects on reaching or maintaining the favourable conservation status of such habitats or species,
 - b) *water damage*, which is any damage that ***significantly*** adversely affects the ecological, chemical and/or quantitative status and/or ecological potential of the waters concerned, and
 - c) *land damage*, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro organisms.

- “Preventive measures” and “remedial measures” should be undertaken either by the **operator** or by **competent authorities**. The former notion is rather “traditional”, that is, it comprises all measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimizing that damage. The latter term of *remedial measures* is of greater interest in the present context. The definition has been **cited** earlier in this presentation.

- *Remedying* of environmental damage, in relation to ***protected species and natural habitats*** and ***water***, is achieved through the restoration of the environment to its ***baseline*** condition. Remediation is divided into “primary remediation”, “complementary remediation” and “compensatory remediation”. These concepts are defined in Annex II as follows:

- a) “‘Primary’ remediation is any remedial measure which **returns** the damaged natural resources and/or impaired services to, or towards, baseline condition;
- b) ‘Complementary’ remediation is any remedial measure taken in relation to natural resources and/or services to **compensate** for the fact that primary remediation does not result in *fully restoring* (my italics) the damaged natural resources and/or services;
- c) ‘Compensatory’ remediation is any action taken to **compensate** for *interim losses* (my italics) of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect.”

- The ELD aims at **fully** restoring/compensating damage caused to natural resources and/or services.
- It emphasizes the need for ***in natura*** restoration. When primary remediation does not result in fully restoring the environment, complementary remediation will be undertaken.
 - purpose: to “provide a *similar level of natural resources and/or services, including, as appropriate, at an alternative site* (my italics), as would have been provided if the damaged site had been returned to its baseline condition”.

- In addition to these explicit provisions on ***alternative*** restoration, compensatory remediation shall be undertaken to compensate for the ***interim loss*** of natural resources and services pending recovery. This compensation “consists of additional improvements to protected natural habitats and species or water at either the damaged site or at an alternative site”. However, it does not provide financial compensation to members of the public.

- **identification** of complementary and compensatory remedial measures → When determining the scale of these remedial measures, the use of *resource-to-resource equivalence approaches* shall be considered first.
- If it is not possible to use these equivalence approaches, then *alternative valuation techniques* shall be used. The competent authority may prescribe the method, e.g., *monetary valuation*, to determine the extent of the necessary complementary and compensatory remedial measures.

- The ELD contains in Article 4.2 and in Annex IV **exceptions** for environmental damage (or the imminent threat thereof) arising from an incident in respect of which liability or compensation falls within the scope of, inter alia, the *1992 CLC*, the *2001 Bunker Convention* and the *2010 HNS Convention*.
- The Conventions should be in force in the Member State concerned. Thus, this exception *restricts the effects of the ELD* regarding pollution damage caused by *shipping* and will do it even more when the HNS Convention enters into force and is implemented into national law. Nevertheless, *all* pollution damage caused by vessels *will not be covered* by the civil liability conventions.

National legal rules

- In addition to the international civil liability conventions and EU law, there are also **national** legal rules concerning *remediation* of environmental damage of some relevance to **vessels, including wrecks**. As an *example*, I will here shortly mention the Finnish Environmental Damage Act, EDA (*Ympäristövahinkolaki, 737/1994*).

- The EDA is the **general law** concerning environmental impairment liability. The *applicability* of the EDA is determined by the description of the *damaging activity* and the *types of compensable damage*. According to § 1 of the EDA, compensation shall be payable for damage to the environment caused by 1) pollution of water, air, or land; or 2) noise, vibration, radiation, light, heating, or smell: or 3) other comparable disturbance.

- The EDA is applicable only to pollution from a ***specific area***.
 - activity harmful to the environment – even if *very short in duration* – performed on land or water
 - the EDA *does not*, as a rule, cover pollution from **moving** means of transport, such as vessels
 - however, an **owner of a grounded or sunken wreck** may, for instance, take part in *removal or salvage operations* that cause harm to the environment and thereby fulfil the criteria of “pollution from a specific area”.

- In addition to compensation for personal injury and property damage, the EDA covers pure economic loss, provided that it is not insignificant (§ 5 para. 1). More interestingly, § 6 of the EDA authorises the **authorities** to claim *reasonable* (by reference to the disturbance or the risk of disturbance and the benefit of the restoration measures) costs from the person(s) liable for measures undertaken to **restore** the environment - in addition to a private person whose individual rights have been infringed. Under *public and administrative laws* the authorities often have a *duty* to take measures to protect and restore the environment. The provision of the EDA helps to *clarify* the question of the responsibility to pay for these measures.

- According to EDA § 7, strict liability is laid upon the **operator**, that is, the person who *carries out* the activity that causes the environmental damage. Furthermore, persons *comparable* with an operator (taking into consideration control, financial arrangements, etc.) also have strict liability, for instance, a parent company could be held liable for the activities of its subsidiary. Consequently, the liability rules of the EDA could be of relevance to **owners of wrecks when they act as “operators”** and cause damage to the environment.

- However, as regards *restoration* measures, the EDA contains **no provisions** accepting the idea that *interim loss* of natural resources and/or services pending recovery (cf. the ELD, above) should be compensated. Neither has such compensation been awarded in court practice. Furthermore, it is **questionable** whether so-called *alternative restoration* (cf. the ELD, above) may be approved and awarded under the Act.

The liability of salvors

- Liability questions relating to salvors are relevant when considering the protection of the marine environment. An ***incompetent or careless salvor*** may cause damage to the environment in many ways.



- The *risk* of incurring liability, which in the case of damage to the *environment* could be extensive, has both a **positive** and a **negative** effect on the salvor's activities. The risk of extensive liability encourages a salvor to do his *work carefully* and use his best skills. On the other hand, the risk may also *discourage* salvors from taking on risky salvage operations.

- The 1989 Salvage Convention provides in Article 8.1 that the salvor shall **owe a duty** to the owner of the vessel or other property in danger:
 - (a) to carry out the salvage operations with due care;
 - (b) in performing the duty specified in subparagraph (a), to exercise due care to prevent or minimize damage to the environment; [...]

- The duties specified above are owed to *the owner of the vessel or other property in danger*. The fact that there is an express duty to the parties mentioned in Article 8.1 *does not mean* that the salvor does not owe duties to **third party claimants** under general law or statutory provisions. As a general rule, salvors, when performing salvage operations, will bear full responsibility for the *competent and skilful* performance of their duties.

- The questions concerning *environmental impairment liability* are, of course, dependent on the *applicable* rules of law. The rules relating to these issues **vary** considerably in different jurisdictions. However, as regards the obligation to **remedy** environmental damage, the civil liability conventions and EU law mentioned above, are, in *addition* to owners of wrecks, also relevant to salvors.

- Although the **CLC** may be applicable, for example, when a *salvor* causes pollution damage during transport of persistent oil from a tanker in distress, from a *practical point* of view more interest is focused on the Convention's provisions **protecting** salvors from liability when performing salvage operations. The CLC does not *totally exclude* salvors from liability claims, but a salvor causing oil pollution damage may refer to the provisions on **channeling** of liability.

- The liability is channeled to the **registered owner** of the vessel and *no claim for compensation* for pollution damage under the Convention or otherwise may be made against “any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority”. Furthermore, “any person taking preventive measures” is protected from such claims.

- These rules are important to the salvor for, *although* subject to the terms of his **contract** he remains responsible to the shipowner under normal legal principles, he is protected from claims from **third parties** which could otherwise be brought in a variety of jurisdictions. However, these provisions do not affect the owner's right of *recourse*.

- There are **identical** channeling provisions in the *HNS Convention*. However, the *liable person* under the *Bunker Convention* is the “shipowner”, who is defined as “the owner, including the registered owner, bare boat charterer, manager and operator of the ship.” But there are *no channeling provisions* protecting persons performing salvage operations.
 - Consequently, salvors are **more open to liability claims** under the Bunker Convention than when performing salvage operations covered by the CLC and HNS Conventions.
 - There may, of course, be **national** rules protecting the salvors.

- The ***Directive (2004/35/EC)*** covers environmental damage and imminent threat of such damage caused by any of the occupational activities listed in Annex III. These activities include, *inter alia*, sea transport of dangerous or polluting goods and of waste. Thus, the ELD may have relevance for persons who “**operate or control**” the *salvage activity*, for instance, when they **remove and transport** hazardous and noxious substances or waste from a vessel in danger. If there is an *accident causing* “environmental damage”, the *salvors may be liable* for the costs of preventive and *remedial actions* taken pursuant to the ELD.

- As was said, the ELD has approved *alternative restoration* and also has accepted that *interim losses* of natural resources and/or services should be compensated. Consequently, **salvors** could be subject to **more extensive remedying liability** under the ELD than under the CLC, Bunker and HNS Conventions, where the authorities, when claiming costs for restoration of the environment, *are bound* by the rather restricted writing of “pollution damage” mentioned before. And although the *main part* of losses and damage caused by harmful substances carried by sea are/will be covered by these Conventions, and thus *excluded* from the Directive, there still remains room for the application of the ELD.

- The ***Finnish EDA*** may also be of relevance when considering the salvor's potential liability. As was said, according to § 1 of the Act, compensation shall be payable for damage to the environment caused by 1) pollution of water, air, or land; or 2) noise, vibration, radiation, light, heating, or smell; or 3) other comparable disturbance. The EDA is applicable only to pollution from *a specific area*. Such activity may be *performed also by salvors*, for example, when ***pulling free a grounded vessel or removing its cargo***. Also ***repairing*** activities may result in liability for salvors.

Conclusions

- *Focus* in this paper has been on remedying obligations. Both an *owner* of a wreck and a *salvor* may incur such liability, provided that their activities fulfil the conditions for applying the ***civil liability conventions***. The concept of “pollution damage” contained in these conventions *determines the extent* of their restoration obligations. However, the ***channeling*** provisions of the CLC and HNS Conventions significantly restrict claims against salvors.

- The *ELD*, which comprises both complementary and compensatory remedying obligations, may also be applicable when **removing/salvaging a grounded or sunken vessel**. However, the effect of these obligations is limited because of the **exception** of the civil liability conventions in Annex IV.

- Finally, *national* legal rules, as the Finnish EDA, contain *varying* restoration obligations for owners and salvors of wrecks, further complicating the legal situation. Thus, we find (at least) **three differing** obligations regarding remedying environmental damage: 1) under the civil liability conventions, 2) according to the ELD and 3) in accordance with national law.