Neil Q Miller of Norton Rose

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Laws passed by individual states undermine international efforts, write Neil Miller and Lawrence Bowles

WHILE debate (and litigation) continues about who is to blame and what could or should have been done to prevent or limit the pollution caused by the Prestige in November 2002, what is clear is that layers of national or regional/community marine environmental legislation will now be added to an already complicated array of conventions and statutes.

The intent of the international community to develop a single and consistent legislative regime to protect the marine environment, through and under the auspices of the IMO, has been consistently undermined as individual states legislate in response to high profile casualties affecting their own waters or shoreline.

That said, the procedure in getting an international convention agreed and ratified by enough states to come into force is painfully slow. Spain and Italy's more immediate legislative remedy/response to the Prestige casualty can be likened to the US response to Exxon Valdez, resulting in OPA 90. The fact that individual states within the US can enact their own additional, inconsistent legislation to supplement OPA 90 is perhaps no different to alternative legislative approaches to the double-hull debate in member states within the European Community.

A brief analysis of the current status of the major marine environmental conventions is illustrative. The attempt to replicate the successful CLC/FC civil compensation regime for oil pollution for other hazardous and noxious polluting substances has failed. The HNS Convention has been sitting on the books for ratification since 1996 with still only a handful of signatories to date. The Bunker Oil (Pollution and Damage) Convention of 2001 has fared no better. Hardly encouraging for those planning to meet in February 2004 to discuss the draft Ballast Water Convention. If the combination of the CLC/FC Conventions worked as a compensation regime (with compensation levels reviewed and increased periodically), why is it that not all states that are party to the 1992 CLC Protocol are parties to the 1992 Fund Convention and that some are still parties only to the 1969 CLC despite the 1971 Fund having ceased to be in force? Will states adopt the same approach to the new levels of third-tier fund compensation?

Perhaps the most interesting recent development in Europe is the intervention of the European Commission with a number of directives and proposals. The commission in its Proposed Directive COM(2003) 92 sought to fill what in its opinion were some of the most important remaining regulatory gaps, relating to both deliberate and accidental discharges, by suggesting sanctions, enforced through criminal law, for ship-source pollution of the marine environment. Its justification was that the above-mentioned international civil liability regimes had failed to dissuade those polluters from operating ships of "dubious quality". However, at the council of Europe's meeting in Luxembourg on October 9, while all delegations supported the objective of the commission proposal to integrate international rules on ship-source pollution into community law, all voiced concerns about the legal correctness of using a community instrument to impose penal and criminal sanctions. Doubts were also expressed as to the possibility of implementing the directive if it went beyond the provisions of Marpol. The position favoured was the concept of prohibition to ensure monetary penalties for pollution offences as well as the principle of being able to act against ships, even under the flag of a third state, if the pollution damage reached the coasts or territorial waters of member states.

No such concerns exist in the United States. The government is vigorously enforcing environmental laws including OPA 90.

A number of shipping companies and vessel chief engineers have recently pleaded guilty to discharging untreated waste oil and to making false statements in their oil record books. Substantial fines have been imposed under the False Statement and the Alternative Fines Act; and at least one chief engineer is facing a possible 20-year jail term. Whistleblowers may be "rewarded" by payments of up to one half of the polluter's fine.

In determining whether to prosecute and if so the range of the sentence to be imposed, the government considers inter alia whether the corporate defendant had in place an effective compliance programme to prevent and detect violations of law.

If it did not, then, as part of the sentence, it is frequently forced to (a) institute comprehensive environmental management systems/compliance programmes and (b) hire third parties to monitor/audit their performance.

The message is clear: if a shipowner does not have an adequate compliance programme in place before a

pollution incident, then, after any pollution incident, it will probably be sentenced to institute such plan, all at considerable expense.

The US government is moving forward with proposed new regulations dealing with managing ballast water discharges in all US waters, including proposals to make reports of discharges mandatory, establishing penalties and developing standards for living organisms and effective treatment programmes.

It is doing this, notwithstanding (a) disagreements by scientists to how to verify treatment effectiveness, and (b) the unavailability of technology to treat adequately commercial vessels' ballast water.

The highest priority of US port state control officers is preparing for the implementation of the ISPS Code and the MTSA 2002 on July 1, 2004. On January 1, 2004 the government will commence a pre-enforcement campaign including visiting vessels and issuing warnings if compliance preparations are inadequate. Owners are advised that, if their vessels are not in full compliance with the ISPS Code or the MTSA 2004 by July 1, 2004, they will not be allowed to do business in the US.

Should a maritime security incident result in pollution from a vessel, the government will investigate and prosecute criminally under the environmental laws, some of which contain strict (no fault) criminal liability provisions.

Neil Q Miller is a partner Norton Rose, London and Lawrence J Bowles is a partner at Nourse & Bowles LLP, New York

Post-Prestige legislation further complicates regulatory minefield

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