

韩立新 著





本书由大连市人民政府资助出版

船舶污染损害赔偿 法律制度研究

韩立新 著



图书在版编目(CIP)数据

船舶污染损害赔偿法律制度研究/韩立新著. 一北京: 法律出版社,2007.8

ISBN 978 -7 -5036 -7538 -6

I.船··· II. 韩··· III. 船舶—海洋污染—国际法:环境保护法—研究 IV. D996.9

中国版本图书馆 CIP 数据核字(2007)第 104831 号

© 法律出版社・中国

责任编辑/吴 昉 刘 辉	装帧设计/乔智炜		
出版/法律出版社 总发行/中国法律图书有限公司 印刷/北京北苑印刷有限责任公司	编辑统筹/法律教育出版分社 经销/新华书店 责任印制/张宇东		
开本/A5 版本/2007 年 9 月第 1 版	印张/14 字数/388 千 印次/2007 年9 月第 1 次印刷		
法律出版社/北京市丰台区莲花池西里 7 号(100073) 电子邮件/info@ lawpress. com. cn 销售热线/010 - 63939792/9779 网址/www. lawpress. com. cn 咨询电话/010 - 63939796			
中国法律图书有限公司/北京市丰台区	莲花池西里7号(100073)		

中国法律图书有限公司/北京中丰台区连化池四里/号(1000/3) 全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782 西安分公司/029-85388843 重庆公司/023-65382816/2908 上海公司/021-62071010/1636 北京分公司/010-62534456

深圳公司/0755-83072995 苏州公司/0512-65193110

书号: ISBN 978-7-5036-7538-6 定价: 28.00 元 (如有缺页或倒装,中国法律图书有限公司负责退换)

总序

仲春四月,正值莺飞草长、万物复苏之季。本人总主编的《海商法博士精品文库》与读者见面,图为繁荣法学园圃,能增添一枝新葩。

海商法作为法学的一个分支,屈指算来,在欧洲近则有几个世纪的发展历史,远则可追溯到查士丁尼的《法律汇编》。经过长期的积淀,形成了特色鲜明、风格独特的调整海上运输关系和船舶关系的法律制度。我国航海事业的萌芽发展也甚为悠久,据史料记载,早在殷商末年,我国就有人横渡太平洋到达美洲。后来,秦朝徐福远渡日本,唐朝设立众多市舶司,宋朝郑和七下西洋——这些辉煌的航海历史,说明我们曾经在航海事业上处于世界领先水平。然而自明清以来,政府厉行海禁,闭关锁国,谓之寸板不得下海,航海事业一落千丈。在这样的社会政治经济背景下,加之我国历代民商法制落后,海商法的立法和研究也就暂付阙如。

改革开放后,我国国民经济持续快速发展,依法治国方略逐渐得以实施,对外经贸来往活动日益繁多。在现实经济生活的推动下,我国海商法理论和实践也取得了突飞猛进的发展,与航运发达国家的差距正在不断缩小。其主要标志有三:一是1993年新中国第一部《海商法》颁布并实施,标志着我国海事立法进入一个新的历史阶段;二是自1985年以来,十个专门海事法院相继诞生,每年受案量逾万件,海事司法实践锤炼了大批海事专业法官和律师;三是人才培养,每年数以百计的海商法本科生和硕士研究生,源源不断地输入人才市场。更为可喜

的是,自20世纪末,中国开始自己培养海商法的博士生。

大连海事大学基于自身位居沿海港口城市的地缘优势,一直着重海商法学学科建设。在领导的关心、学校的扶持、教师的群策群力下,海商法学在大连海事大学得以稳步发展,学生培养层次也逐渐提高。1998年,经国家学位委员会正式批准,大连海事大学设置了我国第一个以海商法为主要研究方向的国际法学博士点,迄今共有博士生导师7.人。

本人所指导的年轻学子,理论功底深厚,专业知识广博,思想敏锐,有强烈的创新意识及开拓精神。他们的博士论文拓宽了海商法学的视野,丰富了海商法学的内容,具有较高的学术价值及实践意义。为了展示年轻一代海商法学者的风貌及研究成果,增加不同部门法之间的了解融通,今将陆续出版其中佳作,命名为《海商法博士精品文库》。希望该系列专著能够由涓流而积瀚海,推动我国海商法的研究,使之走向更高远的境界。同时也恭迎兄弟院校的海商法博士论文,忝于此系列专著。如果这种愿望可以达致,实为海商法之福祉。

寥此数言,是为序!

司玉琢 二零零七年春于大连

内容摘要

目前,我国没有专门的船舶污染损害赔偿民事立法,但在船舶油污方面参加了1992年《民事责任公约》,结果出现了国际公约和其他相关国内立法并存,在船舶污染司法实践方面适用法律混乱的局面。作者综合运用法理学、国际法、侵权法、环境法、行政法及法律经济学的基本理论对船舶污染损害赔偿法律制度进行了系统、深入的分析,并在研究基础上,提出了"船舶污染损害赔偿法建议案"(见附录)。本书研究成果为制定、完善我国船舶污染损害赔偿立法提供了重要理论依据和参考。

本书共分为十一章。

第一章为引言,介绍了本书的研究背景、研究范围及意义,该领域已有文献的评述,研究的前期成果、研究方法和主要内容。

第二章为船舶污染及污染损害赔偿立法现状分析,通过收集大量的数据,以图表的形式生动形象地说明了国内外船舶污染现状、赔偿现状、立法现状,分析了我国海域发生的船舶污染案件赔付能力低的原因,并从四个方面说明了制定专门的船舶污染损害赔偿立法的必要性。

第三章为船舶污染损害赔偿的法律适用,主要根据国际法与国内法的关系,我国有关立法、司法实践,分析了我国参加的《民事责任公约》与有关国内法的适用,主张只有在涉外案件中才能适用该公约,对不属于该公约调整范围的船舶污染案件,主张适用《海洋环境保护法》和《防止船舶污染海域管理条例》确定责任主体,适用《海洋环境保护

2

法》和《民法通则》确定责任人的归责原则和免责,对责任限制主张适用《海商法》第十一章或交通部的规定,但不能适用《民法通则》的实际损失赔偿原则。

本章同时以侵权法中的因果关系理论为基础,经过深入分析得出结论:应把船舶碰撞与污染作为两个法律关系处理,适用不同的法律。但是,漏油船承担责任后,有权按照碰撞过失比例向对方船舶追偿。

第四章为船舶污染损害赔偿的责任主体,主张应以船舶所有人为责任主体,对燃油污染、船舶所有人的含义应作扩大解释;在《海洋环境保护法》下,完全由于第三人的故意或过失造成船舶污染时除外;讨论了国有船舶所有人、挂靠船舶所有人、光船租赁、方便旗船舶所有人的认定;在此基础上,提出了对"船舶所有人"定义的建议。

第五章为船舶污染损害赔偿的归责原则与免责,在侵权法中归责、归责原则含义的基础上,同时从法律经济学的角度分析了对船舶污染这种环境侵权行为应采用严格责任原则的正确性。针对《海洋环境保护法》中的免责事项与《民事责任公约》不一致带来的不利司法统一问题,提出应和公约保持一致以统一立法和法律适用的观点。

第六章为船舶污染损害赔偿的连带责任,根据共同侵权理论和现行法律规定,主张两船都漏油时并不构成典型的共同侵权行为,而是共同危险行为,需要承担连带责任;一船漏油时不存在共同侵权,而应坚持"谁漏油谁赔偿"原则。当漏油船无清偿能力时,建议通过法定代位允许受害人按照碰撞过失比例向非漏油方索赔,而且各船应当享有法律所赋予的责任限制的权利。

第七章为船舶污染损害赔偿范围,结合国内外立法,针对我国船舶污染损害赔偿实践,明确了我国船舶污染损害赔偿的范围。其中对海产品养殖物损失、养殖户的主体资格、清污费用的性质、纯经济损失的赔偿进行了较详细的探讨;区分了海洋环境、海洋生态、海洋资源、渔业损失、渔业资源损失等概念,提出了"海洋环境损害"的概念,并对"渔业中长期损失"的提法提出质疑,主张渔业中长期损失就是天然渔业资源损失,应属于海洋环境损害中的一部分,除利润损失外,只应当赔偿合理恢复措施的费用;为避免索赔主体过多、职权划分不清、重复索

赔等问题,提出海洋环境损害索赔的主体应统一为县级以上人民政府; 为了规范海洋环境损害评估工作,使恢复措施费用尽量合理,建议制定 《海洋环境损害评估规则》。

第八章为船舶污染损害赔偿的责任限制,讨论了油污责任限制与一般海事赔偿责任限制的关系;对分别适用 1969 年和 1992 年《民事责任公约》的船舶责任限制以及船舶碰撞造成油污时两船的责任限制问题都进行了分析;根据航区、油类的不同提出了责任限制建议案。本章还分析了我国《海事诉讼特别程序法》中设立海事赔偿责任限制基金程序存在的问题,以及船舶油污损害赔偿责任限制程序与一般海事赔偿责任限制程序的区别,借鉴有关国际公约与国外立法中责任限制程序的规定,提出了完善我国船舶污染赔偿责任限制程序的建议。

第九章为船舶污染损害赔偿基金,主要结合《基金公约》和国外主要立法,对《船舶油污损害赔偿基金征收和使用管理办法》(征求意见稿)的产生背景、主要内容作了介绍,重点分析了该办法存在的不足之处,并从征收的油类、基金的来源、基金的免责、诉讼时效、索赔程序、基金主管部门的权力与义务等多方面提出了对该办法的修改完善建议。

第十章为船舶污染损害赔偿责任保险与直接诉讼,对实践中此方面存在的主要问题进行了深入分析,并建议在光船租赁期间应允许光船承租人以"船舶所有人"的名义登记船舶,允许以光船承租人名义提供强制保险或财务保证;建议在实体法中赋予污染受害人直接诉讼的权利,并规定船舶所有人与保险人或财务保证人可以作为共同被告,两者应当承担不真正连带责任。

第十一章为结束语,是对全书主要观点的总结。

关键词:船舶污染 法律适用 连带责任 赔偿范围 立法建议

Abstract

At present stage, there is no special civil legislation of compensation for pollution damage caused by ships in China, however, China is a state party of the Civil Liability Convention 1992 (hereinafter referred to as CLC). As a result, it causes the situation that the relative conventions and national legislations exist at the same time, and the application of law is very confusion in the judicial practice of ships' pollution. Through the method of comprehensively using legal theory, international law, tort law, environment law, administrative law, law and economics, this doctoral dissertation gives a deep and systematic analysis of the legal system of compensation for pollution damage caused by ships, on the basis of the studies result of this paper, the author puts forward a suggestion of the Law of Compensation for Pollution Damage Caused by Ships (please see Attachment I). The studies result of this book would provide important theory basis and reference for making and improving the legislation of compensation for pollution damage caused by ships.

This book consists of eleven chapters with the main contents of each chapter as follows:

Chapter 1 "Introduction" includes the background of selecting the title of this book, the scope of the subject and meaning, comments on the available related materials, the previous achievement of the subject, the

ways used in the studies and the main contents of the subject.

Chapter 2 "Analysis of the Status Quo of Ships' Pollution and Legislation of Compensation for Pollution Damage Caused by Ships", through collecting many statistic data and figures, it vividly states the status quo of the international and national ships' pollution, compensation for and legislation of ships pollution damage. Further more, this paper analyses the reasons why the compensational capability is low for the ships' pollution damage occurred in Chinese sea areas, and states the necessity of making special legislation of compensation for ships' pollution damage.

Chapter 3 "Application of Law of the Compensation for Ships' Pollution Damage", based on the relationship between international law and national law, Chinese relative legislation and judicial practice, the author analyses the application of CLC acceded to by China and related national laws, holds that CLC shall be applied only in the oil pollution cases with foreign-related matters. With regard to the ships' pollution cases which are not governed by CLC, the author holds that it should apply the Marine Environment Protection Law (the MEPL) and the Ordinance of Prevention Pollution from Ships to determine the responsible party for pollution damage, apply the MEPL and Civil Code to determine the principle of imputation and exemptions, apply Chapter 11 of CMC or regulations of Chinese Ministry of Communication to determine the limitation of liability, but not the principle of compensation for actual damage provided by the Civil Code.

Meanwhile, on the basis of theory of causation in tort law and deeply analyses, it draws a conclusion that the collision between ships and pollution caused by the collision should be treated as two different legal relationship, and applied different laws. However, where the ship leaking oil has born liability for pollution, it should have the right to recourse against the ship without leaking oil in proportion to the extent of its fault.

Chapter 4 "The Responsible Party for Compensation for Pollution Damage Caused by Ships" discusses that the shipowner is the responsible party, and it should have an amplified interpretation to the banker and oil pollution. According to the MEPL, where the pollution is caused wholly by a third party's intentional behavior or negligence, the third party but not the shipowner is the responsible party. It also discusses who is the shipowner under different situations, such as the ships owned by State, nominal operation, demise charter and flag of convenience, and then, the suggestion of the definition of the shipowner is given in this Chapter.

Chapter 5 "The Principle of Imputation and Exemptions of Compensation for Ships' Pollution Damage", on the basis of the meaning of imputation and principle of imputation in tort law, as well as from the view of law and economics, analyses the correctness of applying the strict liability principle for this kind of environmental tort—ships' pollution. It holds an opinion that the provisions of exemptions contained in the MEPL should be the same as thereof CLC in order to avoid harmful to unification of judicial practice due to the different provisions between the MEPL and CLC.

Chapter 6 "The Severally and Jointly Liability for Compensation for Ships' Pollution Damage" based on the common tort theory and existing law provisions, holds that two ships leaking oil could not constitute typical common tort behavior, but only common danger behavior, and need bear severally and jointly liability; where only one ship leaks oil, no common tort, it should apply the principle of who leaks who pays. Where the leaking ship sinks or her owner has no capability of compensation for pollution, this book suggests that it should allow the victim of pollution to claim the compensation against the unleaking ship's owner in proportion of its negligence through legal subrogation, and the shipowners concerned have the rights to limit their liabilities endowed by law.

Chapter 7 "The Scope of Compensation for Ships' Pollution

Damage" combines international and national legislations with the Chinese practice of compensation for ships' pollution damage, clears the scope of compensation for ships' pollution damage of China. In this Chapter, it mainly discusses the problems of the loss or damage to mariculture, the qualification of sea-farmers, the characteristic of clear-up charges, the compensation for pure economic losses; distinguishes the definitions of marine environment, marine ecology, marine resources, fishery losses and fishery resources losses, puts forward the definition of "marine environmental damage", and calls in question of the wording "fishery mid-long term losses", argues that "fishery mid-long term losses" is in fact natural fishery resources losses, it belongs to a part of marine environment damage, the compensation for it should only be limited to costs of reasonable measures of reinstatement other than loss of profit. In order to avoid existing too many claimants, the rights of them are not clear each other and claiming pollution damage repeatedly, the author maintains that the claimants of marine environment damage should be unified to the county governments or above governments thereof; and it suggests to stipulate an Assessment Rules of Marine Environmental Damage in order to regulate the assessment work of such damage, and make the costs of measures of reinstatement more reasonable.

Chapter 8 "Limitation of Liability for Ships' Pollution Damage" discusses the relationship between the limitation of liability for oil pollution and thereof general maritime claims, analyses the limitation of liability for the ships governed by CLC 1969 and 1992 and for the ships caused pollution due to collision of ships; According to different shipping areas and different oil, this paper gives a suggestion of limitation of liability for ships' pollution damage. In addition, this Chapter analyses the problems existing in Procedures for Constituting a Limitation Fund for Maritime Claims Liability provided in Special Maritime Procedure Law of the People's Republic of China, and the distinguishment between the

procedures for limitation of liability for general maritime claims and therefor oil pollution damages caused by ships. Then the author puts forward suggestions for perfecting procedures for limitation of liability for pollution damages caused by ships with reference to relative international conventions and foreign legislations.

Chapter 9 "The Ships' Pollution Damage Compensation Fund" mainly introduces the provisions of the Fund Conventions, foreign legislations, and the background and main contents of the Management Regulations of Collection and Use of the Ships' Pollution Damage Compensation Fund (Draft). The stress of this Chapter is analyzing the shortcomings of the Draft, and puting forward suggestions for amending and perfecting the Draft from the points of the oil to be collected for the Fund, the sources of the Fund, the exemption of the Fund, time bar, proceeding of claims from the Fund, the duty and power of the department in charge of the Fund, etc.

Chapter 10 "Mandatory Insurance and Direct Litigation of Ships' Pollution Damage" discusses the main problems existing in ships' pollution practice, suggests that the demise charterer should be allowed to register the demise-chartered ship in the name of "the shipowner", and to provide for mandatory insurance or other financial security for the ship demise chartered by him; and that the victims of pollution damage be endowed the right of direct litigation in substantial law, the shipowner and mandatory insurer or the person providing other financial security be common defendants, and they should bear a not real severally and jointly liability for ships' pollution damage.

Chapter 11 "Conclusion" is a summary of the main views of this book.

Key words: ships' pollution, application of law, severally and jointly liability, scope of compensation, legislation suggestion

目 录

第一章	別言	1
第二章 舟	B舶污染及污染损害赔偿立法现状分析	7
第一节	船舶污染损害及赔偿现状	7
第二节	船舶污染损害赔偿立法现状	19
第三节	制定我国船舶污染损害赔偿法律制度的必要性	45
第三章 射	船舶污染损害赔偿的法律适用	49
第一节	《民事责任公约》的适用	49
第二节	有关国内法的适用	68
第三节	船舶碰撞造成海洋污染时的法律适用	73
第四章 射	船 的污染损害赔偿的责任主体	89
第一节	有关国际公约的规定介评	89
第二节	有关国外立法的规定介评	92
第三节	中国法下船舶污染损害赔偿责任主体的认定	100
第五章 舟	船舶污染损害赔偿的归责原则与免责	112
第一节	侵权责任归责原则理论概述	112

第二节	国际公约对船舶污染责任归责原则与免责的	
	规定介评	126
第三节	国外立法对船舶污染责任归责原则与免责的	
	规定介评	130
第四节	船舶污染损害赔偿采严格责任的法律经济学分析	134
第五节	我国现行立法中免责事项存在的问题及完善建议	140
第六章 射	B 舶污染损害赔偿的连带责任	143
第一节	中国	143
第二节	国际公约有关船舶污染连带责任的规定介评	151
第三节	国外立法有关船舶污染连带责任的规定介评	156
第四节	我国船舶碰撞污染的连带责任问题	158
	船舶污染损害赔偿范围	165
第一节	船舶污染损害赔偿基本理论	165
第二节	有关国际公约对赔偿范围的规定介评	168
第三节	2005 年 IOPC Fund《索赔手册》中可接受的索赔	
	请求	176
第四节	国外立法对赔偿范围的有关规定介评	190
第五节	我国船舶污染损害赔偿范围及存在的问题	202
第八章 角	船污染损害赔偿的责任限制	255
第一节	国际公约有关责任限额的规定介评	256
第二节	国外立法有关责任限额的规定介评	259
第三节	我国海域船舶污染损害赔偿的责任限制	268
第四节	船舶污染损害赔偿责任限制基金和责任限制程序	278
第九章 舟	沿舶污染损害赔偿基金	309
第一节	有关国际公约的规定	309
第二节	有关国外立法的规定	331

第三节	我国船舶污染损害赔偿基金的设立及完善的建议	357
第十章	船舶污染损害赔偿责任保险与直接诉讼	369
第一节	船舶污染损害赔偿责任强制保险的意义	370
第二节	强制保险或财务保证适用的船舶	374
第三节	强制保险或者财务保证的取得与船舶的扣押	378
第四节	强制保险或者财务保证的义务主体	382
第五节	船舶污染损害赔偿中的直接诉讼	386
第十一章	结束语	401
附录:中华	上人民共和国船舶污染损害赔偿法建议案	406
参考文献		414
致 谢		430

第一章 引 言

一、本书选题背景、研究范围及意义

自从19世纪工业革命以后,人类的科学技术和生产力飞速发展,经济贸易和海上运输越来越繁荣,人们对海洋开发和利用的程度也越来越高,但与此同时,海洋遭受的污染损害也日趋严重。在海洋污染中,船舶是最重要的油类污染源。1〕例如,1967年3月18日"托利·堪庸"(Torrey Canyon)号油轮在英吉利海峡触礁,船体断裂,约10万吨原油泄入海中,给英国、法国和荷兰造成严重污染及惨重损失。2〕此次事故的发生使国际社会更加注意到防止船舶污染、保护海洋环境的重要性,也促使了在船舶污染损害赔偿领域起到重要作用的1969年《国际油污损害民事责任公约》(以下简称《民事责任公约》)和1971年《设立国际油污损害赔偿基金公约》(以下简称《基金公约》)的诞生。国际海事组织(IMO)把"让海洋更清洁,让航行更安全"作为其神圣的奋斗目标,也体现了国际社会对海洋环境保护的重视。随着国际上一系列重大油污事件的发生,(3)海洋环境保护与船舶污染损害赔偿问题更加受到国际公约与国内立法的关注。在国际立法方面,出台了1996

^{〔1〕} 根据我国 1999 年修订的《海洋环境保护法》的规定,造成海洋污染的污染源有:陆源污染、海岸工程建设项目造成的污染、海洋工程建设项目造成的污染、倾倒废弃物造成的污染和船舶及有关作业活动造成的污染。

^[2] 此案例详情参见本书第二章第二节一(一)部分。

^[3] 如 1978 年的"阿莫柯·卡戴兹"油污案、1989 年 3 月美国埃克森石油公司"埃克森·瓦尔迪兹"号油轮污染案、1996 年 2 月发生在英国的"Sea Empress"污染案、1997 年发生在日本的"Nakhodka"油污案、1999 年 12 月发生在法国的"the Erika"油轮污染案、2002 年 11 月发生在西班牙的"the Prestige"轮污染案、等等。