

The Construction of the expression “en route” in Marpol Annex II

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A discussion of the judgement of the Amsterdam District Court of 1 June 2010 regarding the question if a under Annex II of Marpol a ship is allowed to leave port, or is allowed to detour, with the sole intention of discharging tank cleaning water containing residues of noxious liquid substances as meant in Annex II of Marpol.

Introduction

Marpol 73/78 is the International Convention for the Prevention of Pollution from Ships. The intention of the convention is to protect the marine environment from pollution by ships. In order to reach this object rules have been drafted forbidding the discharge of certain substances into the sea or into the air. Marpol contains the following six annexes relating to various forms of pollution by ships: Annex I : oil Annex II : noxious liquid substances in bulk Annex III : harmful substances carried by sea in packaged form Annex IV : sewage Annex V : garbage Annex IV : pollution of the air

Under Marpol Annex II noxious liquids substances may be discharged as long as the discharge is in accordance with Regulation 13.2.2.1(1) which provides as one of the conditions for discharge that: “the ship is proceeding en route at a speed of at least 7 knots in the case of self propelled ships or at least 4 knots in the case of ships which are not self-propelled.”

The case before the Amsterdam District Court

The Dutch public prosecutor had brought criminal proceedings against six shipowners for the alleged crime of, contrary to Marpol, discharging noxious liquid substances in the Dutch Exclusive Economic Zone. The public prosecutor made it clear to the court that these proceedings were brought as a test case in order to have the meaning of certain Marpol terminology, namely the expression “en route” in Annex II of Marpol, established in law.

The vessel I was representing was on a voyage from Rotterdam to Amsterdam. It did not sail directly to Amsterdam but first sailed a number of tracks in a deep water route whereby it proceeded right up to the German Bight in order to wash its tanks of palm oil. Palm oil is a noxious substance as meant in Marpol, Annex II. The ship did not deny that it had washed its tanks and discharged noxious substances but contended that such discharge was in accordance with the provisions of Marpol and therefore it did not constitute a criminal offence.

The Public Prosecutor however, contended that the vessel had not sailed in accordance with the “en route” requirement as meant in Regulation 13.2.2.1(1) Marpol. She expressed the view that sailing en route means that the vessel must sail the shortest route from the port of departure to the port of destination. Therefore, in her view, a

vessel is not allowed to leave port for the sole purpose of washing tanks and then return to the same port. Neither is it allowed to deviate from the shortest route from the port of departure to the port of destination in order to discharge noxious substances.

The Public Prosecutor based her construction of the expression "en route" on the Dutch translation of the Marpol definition of "en route" which provides in Regulation 1(6) of Annex II: "En route means that the ship is under way at sea on a course or courses, including deviation from the shortest direct route, which as far as practicable for navigational purposes, will cause any discharge to be spread over as great an area of the sea as is reasonable and practicable."

The Dutch translation of this provision was less clear. However according to art. 20 of Marpol the authentic languages of Marpol are English, French, Russian and Spanish. Therefore Dutch is not one of the authentic languages. Furthermore Marpol has direct effect under Dutch law. Therefore the Dutch translation of the Marpol definition of en route is irrelevant.

The criminal court held that en route means that the vessel must be underway during discharge in the sense that it must be sailing at the speed stated in the definition during discharge and that this does not necessarily mean that the vessel must take the shortest route from the port of departure to the port of destination. The court reached this conclusion on the basis of construction of the English definition of en route in Regulation 9(6) Annex II of Marpol. It held that the Dutch translation of the MARPOL definition of en route was incorrect. It also took into consideration the comments of a member of the Dutch delegation to Marpol who was involved in the drafting of Annex II. This person explained that if a ship adheres to the provisions of Marpol it is deemed to be environmentally clean when it leaves port. In order to render itself industrially clean it is therefore permitted to discharge noxious substances in accordance with the provisions of Marpol. As the ship is at that time deemed to be environmentally clean such discharge will not have negative effects on the environment.

The judgement was therefore that the ship had indeed discharged noxious substances but as this was in accordance with Marpol it did not constitute a criminal offence.

The public prosecutor subsequently announced that she would be appealing against this holding.

Comment

According to article 31 of the Vienne Convention on the Law of Treaties (VCLT) a treaty shall be interpreted in good faith and in accordance with the ordinary meaning of the words in their context and in the light of the treaty's object and purpose. Article 32 VCLT provides that in case of ambiguity recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.

In this case the words of the treaty are clear. En route means the ship is: (i) under way at sea on a course or courses;

(ii) including deviation from the shortest direct route;

which

(iii) as far as practicable for navigational purposes, will cause any discharge to be spread over as great an area of the sea as is reasonable and practicable.

This is clear language which is not contrary to the object and purpose of MARPOL. Indeed, the witness made it clear that as a ship is deemed to be environmentally clean when she leaves port, interpretation of the Marpol definition of en route in accordance with the ordinary meaning of the words will not be contrary to Marpol. Although the Marpol definition of en route allows a ship to discharge water used to clear the tanks of residues of noxious substances this will not lead to pollution of the sea.

Conclusion

The result of this judgement is that if a vessel acts in accordance with the provisions of Marpol it is allowed to leave a port for the sole purpose of washing its tanks and discharging tank cleaning water containing noxious substances as meant in Annex II and then return to the same port. It is also allowed to deviate from the shortest route to the port of destination in order to do the same.