

On the Application of Exemption Grounds in Environmental Tort Liability under China's Civil Code

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Abstract

China's environmental protection laws such as China's Environmental Protection Law and China's Air Pollution Prevention and Control Law do not provide for exemption grounds for environmental tort liability. According to the applicable rules of the law, if there are no special laws on environmental protection, the provisions of China's Civil Code shall apply. However, Chapter 7 of the Part 7 of China's Civil Code does not specifically provide for exemption grounds from environmental tort liability, so only the general provisions of Chapter 8 of the Part 1 and Chapter 1 of the Part 7 of the Civil Code can be applied. However, due to the special nature of environmental tort liability, not all exemption grounds are suitable as exemption grounds for environmental tort liability. By interpreting the system and purpose of legal provisions, combined with the strictest environmental protection policies implemented in China, the intentional of the victim is an exemption from environmental tort liability; Force majeure as an exemption can be conditionally applied to environmental tort liability; Emergency avoidance is only applicable to liability for marine environmental pollution damage and should not be used as a general exemption for environmental tort liability.

Keywords

Environmental Tort; Tort Liability; Exemption Grounds.

1. Introduction

At present, in China's environmental protection laws, only Article 96 of China's Water Pollution Prevention and Control Law and Article 116 of China's Marine Environmental Protection Law provide clear provisions on the exemption of water pollution tort liability and marine environmental pollution tort. However, for air pollution, solid waste pollution, soil pollution, noise pollution, radioactive pollution, etc., since China's Environmental Protection Law, China's Air Pollution Prevention and Control Law, and other related exemption grounds of environmental tort liability are not specifically stipulated, according to the applicable rules of law, the provisions of China's Civil Code (the Civil Code) should be applied. The exemption grounds in the Civil Code include general exemption grounds and special exemption grounds. If there are special provisions in the Civil Code regarding the exemption grounds for environmental tort liability, the special provisions of the Civil Code shall prevail. If there are no special provisions in the Civil Code, the general provisions of the Civil Code regarding exemption grounds shall apply. Chapter 7 "Environmental Pollution and Ecological Damage Liability" of Part 7 "Tort Liability" of the Civil Code, does not make special provisions for the exemption from environmental tort liability. It only stipulates in Article 1230 that "polluters shall bear the burden of proof for situations where they are not liable or have reduced liability as provided by law". Due to the lack of exemption provisions in the Environmental Protection Law, Air Pollution Prevention and Control Law, and the absence of specific exemption provisions for environmental tort liability in Chapter 7 of Part 7 of the Civil Code, the exemption provisions in Chapter 8 of Part 1 and Chapter 1 of Part 7 Tort Liability of the Civil Code should be applied. The exemption provisions in these two chapters include force majeure, justifiable

defense, emergency avoidance, the Intention of the Infringed Person, the Fault of a third Party, voluntary assumption of Risk, self-help behavior, etc. So, can all the exemptions provided for in the Civil Code be applied to environmental tort liability? I believe that further discussion is needed.

2. Regarding the Intention of the Infringed Person

In tort law, in general, the intention of the infringed party is a statutory ground for exempting the responsible party from tort liability, and the fault of the infringed party is a statutory ground for reducing tort liability. However, due to the application of no-fault liability in environmental tort liability, the environmental tortfeasor is the producer or destroyer of environmental pollution sources, and on the one hand, they should be subject to heavier liabilities; On the other hand, environmental tortfeasors (mainly production and operation enterprises) often have obvious advantages in terms of professional knowledge, technical ability, economic ability, etc. to prevent environment damage. Therefore, the general negligence or minor negligence of the infringed party should not be used as a ground for exempting or reducing environmental tort liability. If the pollution or destruction of the environment is caused entirely by the intentional actions of the victim and causes damage to oneself, the liability of the environmental tortfeasor shall be exempted. However, even in cases where the victim intentionally infringes upon the environment, if the tortfeasor is at fault, such as poor management or lax supervision of pollutants or operating facilities, according to the principle of offsetting negligence, they should still bear tort liability, but their liability can be reduced according to the degree of liability.

If the environmental tort damage is caused by the gross negligence of the infringed party, the liability of the environmental tortfeasor should be reduced according to the principle of offsetting negligence and the degree of liability. If the victim's operational error leads to the leakage of pollutants and causes damage to themselves, the liability of the environment tortfeasor can be reduced.

3. Regarding the Fault of a Third Party

Fault includes intention and negligence, and negligence can be classified into gross negligence, general negligence, and minor negligence. From the perspective of environmental pollution laws and regulations in various countries, it is generally stipulated that when a third party intentionally or has gross negligence, the actor can be exempted from tort liability or reduced in tort liability. Sections such as Section 107 of the United States Comprehensive Environmental Response, Compensation, and Liability Act, Section 178 of the Dutch Civil Code, and Section 205 of the Canadian Environmental Protection Act all consider third-party intention or gross negligence as statutory grounds for exempting or reducing liability. However, it should be noted that China's Civil Code has different provisions on the legal consequences of third-party fault. Although Article 1175 of the Civil Code stipulates that third-party fault is a general exemption from tort liability, Article 1233 of the Civil Code provides that "if a third party's fault pollutes the environment or damages the ecology, the infringed party may request compensation from the tortfeasor or the third party. After the tortfeasor compensates, they have the right to recover from the third party." This means that even if the damage is caused by a third party, the victim still has the right to demand that the actor bears the liability for damages. Therefore, the fault of a third party is not an exemption ground from environmental tort.

The legal basis for the tortfeasor to still bear liability for environmental damage caused by the fault of a third party lies in their control of hazardous facilities, activation of danger, and gain benefits as a result, which has a legitimate basis for assuming such liability and is not related to their own fault. The tort of a third party affects the hazardous sources controlled or manufactured by the tortfeasor, resulting in environmental pollution damage. The joint tort

liability of tortfeasors and third parties is conducive to supervising tortfeasors to actively take pollution prevention and control measures through strict civil liability system design, which meets the requirements of risk initiation and control theory.^[1] Bearing unreal joint and several liability by tortfeasors not only expands the scope of the responsible parties, but also transfers the risk that cannot be compensated by third parties from the victim to the polluters,^[2] providing more comprehensive relief for the infringed party.

There are two types of third-party intervention in environmental tort, namely "third-party fault, tortfeasor not at fault" and "third-party fault, tortfeasor at fault". When the third party is at fault and the tortfeasor is not at fault, it is in line with the concept of attribution that the third party at fault bears full liability for environmental harm caused entirely by the third party's fault.^[3] If the infringed party sues both the tortfeasor and a third party for liability, the tortfeasor has the right to pursue compensation from the third party after assuming full liability. When a third party is at fault and the tortfeasor is also at fault, the tortfeasor bears full liability, and the third party shall bear liability that is commensurate with their fault. After assuming liability, the tortfeasor has the right to recover from the third party the share of liability that should be borne by them. If the infringed party only requests a third party to bear liability and the tortfeasor is also at fault for the occurrence of the damage, the third party shall bear liability that is commensurate with their fault.

4. Regarding Force Majeure

Force majeure is an objective situation that is unforeseeable, unavoidable, and insurmountable. Force majeure includes natural phenomena such as earthquakes, floods, typhoons, tsunamis, etc.; also includes social phenomena such as war, armed conflict, riots. Terrorist activities, strikes, marches and rallies that do not meet the "three impossibilities" of force majeure should not be recognized as force majeure.

Regarding whether force majeure is an exemption ground for environmental tort liability, Article 96 of the current Water Pollution Prevention and Control Law and Article 116 of the Marine Environment Protection Law both clearly stipulate that force majeure is an exemption ground for environmental tort liability. Before the revision, the Environmental Protection Law (revised in 2014) and the Air Pollution Prevention and Control Law (revised in 2018) also stipulated that force majeure is an exemption ground for environmental tort liability. After the revision, both laws have deleted this provision. In theory, there are two viewpoints: affirmative and negative. In the affirmative view, some scholars have analyzed from the perspective of legal application rules that force majeure can become an exemption ground for environmental tort liability, but it does not have universal applicability and can only be applied in cases where the law has clear provisions.^[4] There are also views that force majeure applies to various types of tort liability, unless there are special exclusion provisions in the law. Of course, it also applies to environmental tort liability. Another scholar analyzes from the perspective of obligation norms and believes that Article 180 of the Civil Code has room for application in no-fault tort liability, but no room for application in fault tort liability.^[5] The negative view holds that dangerous activities are the cause of damage, and although the damage is directly caused by force majeure, it is only the inducement for the damage to occur. The direct source of the damage is the dangerous activities engaged in by the actor. Force majeure does not cut off the causation between dangerous activities and damage, but only realizes the existing danger. So, force majeure is not an exemption ground for environmental tort liability.^[6]

The author believes that force majeure as an exemption can be conditionally applied to environmental tort liability.

As analyzed earlier, since environmental protection laws such as the Environmental Protection Law don't provide exemption grounds for environmental tort liability, but apply the provisions

of the Civil Code, and there are no specific exemption grounds in Chapter 7 of Part 7 "Tort Liability" of the Civil Code, then the general provisions on exemption grounds in the "General Provisions" of Part 1 of the Civil Code and the exemption grounds in Chapter 1 of Part 7 "Tort Liability" of the Civil Code should be applied. The provisions on force majeure are reflected in Article 180 of the General Provisions of Part 1 of the Civil Code. The exemption grounds in the General Provisions have universal applicability and are universal ones.^[7] They are universally applicable to civil liability, including environmental tort liability. What does Article 180 of the Civil Code refer to as "otherwise provided by law"? There are different viewpoints in the theoretical community. One viewpoint holds that "the law has other provisions" is an exception to the principle of force majeure exemption as a negative norm. Another viewpoint holds that "the law has other provisions" is a positive provision, which refers to the special provisions of the law that exempt force majeure from tort liability.^[8] Since there are no special provisions in environmental protection laws such as the Environmental Protection Law, force majeure is not an exemption for environmental tort liability.

The author believes that "otherwise provided by law" should refer to the provision that force majeure cannot be used as an exemption ground from tort liability as stipulated by law. Firstly, the first sentence of Article 180 (1) of the Civil Code affirms that force majeure is an exemption ground from civil liability. Logically speaking, the latter sentence "if the law provides otherwise, in accordance with its provisions" is a negation of the previous sentence, that is, force majeure cannot be used as an exemption ground from tort liability. If the phrase "otherwise provided by law" is understood as a norm applicable to the exemption of force majeure, then the two sentences before and after this clause are redundant provisions. Secondly, there are several special tort liabilities that apply no-fault liability, or exemptions are specifically provided in the Civil Code or special laws. Does it mean that there are no exemptions for environmental tort liability? Obviously not, because Article 1230 of the Civil Code stipulates that "the actor shall bear the burden of proof for situations where the law does not provide for liability or reduces liability." This means that environmental tort has exemption grounds from liability. So, in the absence of exemption grounds stipulated in special environmental laws, how can the actor provide evidence of "non liability or reduced liability"? The occurrence of such a situation is either due to significant loopholes in legal norms, or in accordance with the applicable rules of law, the provisions on exemption grounds in the General Provisions or the General Provisions on Tort Liability in Part 7 of the Civil Code shall apply. If it belongs to the former, it is urgent to amend the law or issue judicial interpretations to fill the gaps; If it belongs to the latter, according to the applicable rules of law, only the exemption provisions in the General Provisions or the General Provisions on Part 7 of the Civil Code can be applied. Therefore, in the absence of loopholes in legal norms, whether through logical analysis of Articles 180 and 1230 of the Civil Code or from the perspective of the normative system of the Civil Code, it can be concluded that in China's legal norms, force majeure is an exemption ground of no-fault liability, including environmental tort liability, in the absence of legal exclusion. Article 26 of the Interpretation on Several Issues Concerning the Application of Law in the Trial of eco-environmental tort Liability Disputes issued and implemented by the Supreme People's Court stipulates that if the infringed party has gross negligence in causing or expanding damage to the same polluted environment or ecological destruction, the tortfeasor may request a reduction of liability. For light to heavy, it means that if the infringed party intentionally causes damage to the same polluted environment or ecological destruction, the tortfeasor's liability can be exempted. This indirectly proves that the provisions on exemption grounds in the General Provisions of Part 1 or Chapter 1 "General Provisions" of Part 7 of the Civil Code, unless otherwise provided by law, apply to environmental tort liability.

The so-called exemption refers to the situation where civil liability has been established but there are legal exemption grounds, resulting in the exemption of liability. The establishment of

tort liability requires certain elements. In theory, it is generally believed that the constituent elements of tort liability applicable to fault liability are fault, damage consequences, and causality. If we interpret Article 1165 of China's Civil Code literally, it can be understood that fault absorbs illegality, and illegality does not constitute an independent element of fault liability. In the case of damage caused entirely by force majeure, the defendant is not at fault. As long as the plaintiff cannot provide evidence to prove that the defendant is at fault, the tort liability applicable to fault liability cannot be established. Since the tort liability is not established, there is no issue of exemption from liability due to force majeure. Therefore, the civil laws of Germany, France, Japan do not include force majeure as a general exemption for tort, but instead include force majeure as an exemption for external causes in no-fault liability. Force majeure (natural force) is only used as a defense for reducing liability under strict liability, and only as an external factor under strict liability does it become a defense.^[9] Environment tort liability is a no-fault liability. Therefore, from the perspective of the impact of force majeure on the establishment of environment tort liability, force majeure is the exemption ground.

5. Regarding Justifiable Defense, Emergency Avoidance, and Self-help Behavior

The Civil Code provides for justifiable defense and emergency avoidance in Articles 181 and 182 of the General Provisions section, and for self-help behavior in Article 1177 of Part 7 "Tort Liability" of the Civil Code. Justifiable defense and emergency avoidance are stipulated in Part 1 "General Provisions" of the Civil Code and are generally considered as universally applicable exemption grounds. Self-help behavior is generally considered as an exemption ground from tort liability due to its inclusion in the tort liability section. So, can these three exemptions apply to environmental tort liability? I believe that conclusions cannot be drawn arbitrarily and further analysis is needed.

5.1. Justifiable Defense

Justifiable defense is a defensive measure taken to protect the civil rights or public interests of oneself, others, or society against unlawful act. In the environmental tort liability, justifiable defense should not be used as an exemption ground. Firstly, if justifiable defense can be used as an exemption ground for the environmental tort liability, it means that others have committed acts that harm oneself, others, or the public interest. The actor defends against the tortfeasor by polluting the environment or damaging the ecology, and the probability and likelihood of this situation occurring are very small. Secondly, the consequences of environmental pollution or ecological destruction are usually severe and have a wide range of impacts. Counterattacking in this way often causes more damage than the actions of the tortfeasor, exceeding the necessary limits. Once again, although there are different opinions on whether the liability for environmental tort is based on illegality, according to the provisions of laws such as the Civil Code and the Environmental Protection Law, as well as relevant judicial interpretations, the environmental tort liability in China does not require the illegality of the behavior. Regardless of the legality of the actor's defensive actions, as long as they pollute or damage the environment, they should bear the tort liability. As a reason to prevent the illegality of acts, justifiable defense has no room for application because the issue of illegality is not considered in the environmental tort liability. Finally, from the regulations of countries (regions) outside the region, there is no provision for justifiable defense as an exemption ground for environmental tort. In conclusion, the author believes that justifiable defense should not be used as an exemption for environmental tort liability.

5.2. Emergency Avoidance

Emergency avoidance is an action taken as a last resort to avoid imminent danger for oneself, others, or the public interest. Article 182 of the Civil Code stipulates the rules for assuming liability for damages caused by emergency avoidance. At present, China only stipulates the application of emergency avoidance in marine environmental dumping pollution. Article 15 of the Regulations on the China's Management of Marine Dumping stipulates that in order to urgently avoid or save lives, if dumping is not carried out in accordance with the conditions and areas specified in the permit, efforts should be made to avoid or mitigate pollution damage caused by dumping, and the competent department should be reported as soon as possible afterwards. The dumping unit and the beneficiaries of emergency avoidance or rescue of human lives shall compensate for the pollution damage caused thereby. However, can emergency avoidance as an exemption ground be applied to other environmental tort liabilities? There are different views between the theoretical and practical circles in China. It is certain that from the perspective of legislative application rules, legislative reasons, etc., it is believed that emergency avoidance can be applied to environmental tort liability.^[10] The negation theory analyzes the principle of attribution of environmental tort and the particularity of its constituent elements, and believes that emergency avoidance should not be applied to environmental tort liability.^[11] The author believes that it is not appropriate to apply the provisions of emergency avoidance exemption in marine accidents to other environmental tort cases, and emergency avoidance should not be used as a general exemption for environmental tort. The legitimacy basis of emergency avoidance as an exemption ground is to prevent the illegality of the actions of the emergency avoidance party. As mentioned earlier, the environmental tort liability in China does not require illegality as a prerequisite. Therefore, there is no legitimate basis for exemption from environmental tort liability for emergency avoidance. Secondly, navigation or other activities at sea pose greater risks and are far away from land. Once danger arises, one is often isolated and helpless, making it difficult to have other timely and effective rescue measures. Emergency avoidance may be the only and last resort for self-rescue. Thirdly, from the perspective of international conventions and environmental laws of various countries, it is rare to see emergency avoidance as an exemption for environmental tort liability, except for marine accidents liability.

5.3. Self-help Behavior

Self-help behavior refers to the act of the victim, within the necessary scope of protecting their legitimate rights and interests, taking reasonable measures such as detaining the tortfeasor's property when their legitimate rights and interests are infringed upon, the situation is urgent, and they cannot obtain timely protection from state organizations. Failure to take immediate measures will cause irreparable damage to their legitimate rights and interests. Of course, after taking reasonable measures, relevant state organizations should be immediately requested to handle it. If the measures taken by the victim are improper and cause harm to others, they should bear tort liability. Self-help behavior belongs to the victim's self-defense behavior, which exempts the victim from tort liability. Article 1177 of the Civil Code stipulates self-help behavior as a general exemption for tort liability. Self-help behavior refers to the situation where the victim takes certain measures against the tortfeasor and causes damage when the situation is urgent and there is no time to request assistance from state organizations. As long as the self-help behavior complies with legal provisions, the victim is not liable for tort. Specifically in cases of environmental tort, if self-help behavior is used as an exemption for environmental tort liability, it means that others have committed tort acts against environment polluters or destroyers. In situations where the situation is urgent and the state authorities cannot be promptly requested for assistance, environmental polluters or destroyers protect their rights by polluting the environment or destroying the ecology. The author believes that the

probability and likelihood of such a situation occurring are extremely low, and even if such a situation occurs, self-help behavior cannot be exempted from tort liability. The reasons are as follows: Firstly, one of the conditions for the application of self-help behavior is that "failure to take immediate measures due to urgent circumstances will cause irreparable damage to their legitimate rights and interests". In reality, polluters are usually business entities, and the infringement of others on business operators usually does not reach the degree of urgency. Even if the degree of urgency is reached, the damage suffered may not be irreparable compared to the damage caused by environmental pollution. Secondly, because environmental polluters are generally the main entities engaged in business activities, they have better economic and ability to respond to external harm compared to individuals. Self-defense through polluting the environment or damaging the ecology is too extreme and unacceptable, and should not be encouraged by the law. Once again, the damage caused by self-help behaviors that pollute the environment or damage the ecology is often not limited to the harm to the infringer, but its scope of damage is even larger and the consequences are more serious, exceeding the necessary scope. Finally, in order to protect one's own rights and interests, discharging pollutants or damaging the ecology is also a heinous act that violates the law and damages the environment, and should be punished by the law.

6. Regarding Voluntary Assumption of Risk

Although Article 1176 of the Civil Code stipulates that voluntary assumption of risk is a general exemption for tort liability, it imposes strict limitations on its application. Firstly, it only applies to "voluntary participation in recreational or sports activities with certain risks". The term "risk" here should include all "risks" that may cause harm to personal and property rights, as well as the "risks" of discharging environmental pollutants causing harm to personal and property rights. However, victims participating in "recreational or sports activities" must be aware of the risk of personal and property damage caused by pollutants, and still voluntarily participate, such as traveling to polluted areas, participating in performances, mass recreational or sports activities, etc. Secondly, the victim must have caused damage due to the actions of other participants, and voluntarily taking risks exempts other participants from tort liability. However, the actor of environmental tort is usually not another participant in recreational or sports activities with certain risks, and there is no situation where the actor of environmental tort is exempted from liability due to voluntary assumption of risk. If the behavior of other participants causes environmental pollution, it should be dealt with in accordance with Article 1233 of the Civil Code. Therefore, according to Article 1176 of the Civil Code, voluntary assumption of risk is not an exemption from environment tort liability. Some scholars believe that Article 1243 of the Civil Code: "Where any harm is caused by the unauthorized entry into an area of ultrahazardous activities or an area of storing ultrahazardous materials, if the manager can prove that sufficient safety measures have been taken and sufficient warning obligations have been fulfilled, his liability may be reduced or exempted." This article establishes the rule of voluntary risk-taking in the field of ultrahazardous liability.^[12] I believe that it cannot be generalized. One of the conditions for the application of voluntary risk-taking is that the actor knows that there may be a certain risk and takes it. In some cases, the actor is not aware that it is an area of ultrahazardous activities or an area of storing ultrahazardous materials, and voluntary risk-taking has no room for application. If the actor knows that it is an area of ultrahazardous activities or an area of storing ultrahazardous materials and enters without permission, and the manager cannot prove that sufficient safety measures have been taken and sufficient warning obligations have been fulfilled, the manager still cannot reduce or not assume liability. If the actor knows that an area of ultrahazardous activities or an area of storing ultrahazardous materials and enters without permission, and the manager can prove that sufficient safety measures have been taken and sufficient warning obligations have been

fulfilled, the manager may not be assumed the tort liability. At this point, Article 1174 of the Civil Code can be applied, which states that damages caused intentionally by the victim are exempt from tort liability.

7. Conclusion

Due to the lack of clear provisions on exemption grounds for environmental tort liability in Chapter 7 of Part 7 of the Civil Code, some environmental laws have provisions for exemption grounds, while others do not. It is urgent to clarify how exemption grounds apply to environmental tort liability. In the legal system in China, from the perspective of the rules of legal application, the main exemption grounds from environmental tort liability are force majeure and intentional acts of the victim. Emergency avoidance only applies to liability for marine environmental pollution damage. There are various types of environmental tort liability. To avoid confusion in the application of exemption grounds, it is recommended that the exemption grounds for environment tort liability be clearly stipulated in various special environmental protection laws based on the characteristics of different types of environment tort.

References

- [1] Z.F. Zheng: Theoretical Research on Third Party Tort Behavior, (China Legal Publishing House, China 2018), p.355, 358, 373.
- [2] S.K. Wang: On the Third Party in Environmental tort, Journal of Henan Normal University (Philosophy and Social Sciences), vol. 49(2022), No.5, p.65-74.
- [3] D.G. Feng: Study on the Third Person Involving Environmental Infringement Interpretation, Journal of Henan University of Economics and Law, vol. 32 (2018), No.3, p.20-29.
- [4] X.F. Cao: On the Application of Legal Norms of Force Majeure in Environmental Pollution Liability - Commentary on Article 29 of Tort Liability Law, Contemporary Law Review, vol. 27(2013), No.5, p.101-107.
- [5] W.F. Nie: The Basis of Obligation Types for Constructing Logic of Force Majeure Exemption Norms - Historical Review of the Legislative Methodology of Article 180 (1) of Civil Code, Legal Methods, vol. 36 (2021), p.291-315.
- [6] P.H. Zhang: The Force Majeure in Tort Law, Journal of Hunan Police Academy, vol. 1(2017), No.1, p.42-48.
- [7] L.X. Yang: Construction and Application of the Tort Liability Exemption System of the Civil Code, Qiushi Journal, vol. 44(2022), No.5, p.107-121.
- [8] W.Q. Yuan: Understanding and Application of Force Majeure as an Exemption from Tort Liability - Interpretation of Article 29 of Tort Liability Law of the People's Republic of China, Studies in Law and Business, vol. 32(2015), No.1, p.129-135.
- [9] European Group on Tort Law: Principles of European Tort Law: Text and Commentary, translated by Yu Min and Xie Hongfei, (Law Press, China 2009), p.181-182.
- [10] W.D. Fu: "Justification Determination of Emergency Evacuation Behavior in Environmental Infringement", Environmental Economy, 2022, No.4, p.48-51.
- [11] H. Jin: "The Defense Effect of Emergency Evacuation in Environmental Tort Liability: A Reflective Review", Studies in Law and Business, Vol.42(2025), No.1, p. 131-137.
- [12] L.M. Wang: On Victim's Voluntary Assumption of Risk, Journal of Comparative Law, Vol.31(2019), No.2, p. 1-12.