

AN INTERNATIONAL CONVENTION ON OFF-SHORE HYDROCARBON LEAKS?

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Introduction

As the world's known resources of hydrocarbons are diminishing, there has been an increase in the search for and attempted recovery of oil and gas from off-shore wells. Some estimates suggest that there are over 1 500 off-shore oil and gas installations worldwide.¹ I should emphasise that the views I express in this paper are my own, alone, as a person with personal and professional interests in the marine environment and in Admiralty and maritime law.

My interest in the topic of this paper was stimulated in two ways. The first arose from work over the last two years involving judges of the Supreme People's Court of the People's Republic of China and the Federal Court of Australia. This involved us co-operatively considering the operation of various international conventions that dealt with oil pollution from ships. Coincidentally, as we were working on this in Guangzhou in April 2010, the bulk carrier, *Shen Neng 1* grounded on the Great Barrier Reef discharging bunker oil. Earlier this year the Supreme People's Court published a judicial interpretation that provides authoritative directions to all courts in the People's Republic of China in respect of claims for compensation for marine oil pollution damage that have no international elements.²

My second stimulus for this paper was as an observer of the unfolding of events following two recent catastrophes. These were two major spills from off-shore wells that occurred, one off the North-West shelf of Western Australia from the *Montara* platform, the other off the Gulf of Mexico from the *Deepwater Horizon* rig. The *Montara* rig leaked in 2009 for 74 days. It was located in waters about 77 metres deep and drilling at a vertical depth of over 2 500 metres in the Timor Sea about 250 km off the north-west coast of Australia, south-east of Timor-Leste (East Timor) and east of Indonesia. The *Deepwater Horizon* leak in 2010 lasted for 87 days. It was drilling in water of a depth of about 1 500 metres and at a drill depth of about 2 700 metres below the ocean surface, 66 km off the coast of Louisiana. Both leaks occurred because of blowouts.

Pollution from those spills affected the waters and coastlines of both the States that authorised the drilling as well as those of neighbouring States. The costs of cleaning up each spill were considerable. And, particularly in the *Deepwater Horizon* case, many persons, such as fishermen and those with businesses in littoral towns, claimed to have suffered economic loss.

In the United States of America there was an outcry when it was suggested that BP, the multinational oil company, one of the joint venturers operating the *Deepwater Horizon* rig, might seek to limit its liability under US law for compensating those who had suffered loss, including government agencies. This highlighted the absence of any internationally agreed regime to deal with such spills.

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¹ Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, 'A Sea of Troubles' (Research Discussion Paper, GESAMP, 15 January 2001).

² *Provisions on Several Issues Concerning the Hearing of Cases Involving Marine Oil Pollution Damage Compensation Disputes*: adopted by the Judicial Committee of the Supreme People's Court of the Republic of China in its 1509th meeting on 10 January 2011.

Subsequently, the Government of the Republic of Indonesia promoted discussion of a convention within the International Maritime Organisation (the IMO) and by holding the *International Conference on Liability and Compensation Regime for Transboundary Oil Damage resulting from Offshore Exploration and Exploitation Activities* in Bali in September 2011. However, there has been some resistance in the IMO itself to pursuing this objective.

Thus, it is timely to consider the need for an international convention to regulate the liabilities of those involved, or otherwise relevantly concerned in developing, owning, controlling or operating off-shore hydrocarbon exploration and extraction (whom I will call the rig controllers) and the rights of States and persons to compensation against those persons.³

Policy Questions

At the outset, a number of significant policy considerations arise. Without intending to be exhaustive, those include:

- (a) the desirability of an internationally agreed convention or other regime;
- (b) how can a new convention be achieved?;
- (c) the possible frameworks or guidance that may be gained from current conventions;
- (d) who should be liable and the basis of liability;
- (e) identifying an effective means to ensure that insurance or other third party recourse will be available to cover losses;
- (f) whether there should be a right of direct recourse against the insurer or third party;
- (g) the loss for which compensation would be payable;
- (h) the persons, including States, who can make claims for compensation and how liabilities should be enforced, especially in cases involving damage in more than one State;
- (i) whether States should have their rights governed and limited by such mechanisms;
- (j) whether liability should be limited;
- (k) whether some further protective measure should exist, such as an international fund to meet the uncovered costs of a disaster, especially a major one, that may have exhausted the assets and insurance of all persons who were liable.

The Need for a Convention

Off-shore exploration for and exploitation of oil and gas reserves will continue to occur while most of the world is dependent on these hydrocarbons as a source of energy and lubrication. That activity carries an inherent, present and real risk of catastrophic spills or leakages.

³ This topic was addressed at the Federal Court of Australia's second *International Law, Litigation and Arbitration Conference* on 6 May 2011 by the distinguished maritime scholars Prof Nick Gaskell, Professor of Maritime and Commercial Law, Marine and Shipping Unit, The University of Queensland and Dr Michael White QC, Adjunct Professor, The University of Queensland and two prominent commentators, Tom Howe QC, Chief Counsel Litigation, Australian Government Solicitor and Gavin Vallely, partner, Holman Fenwick Willan: published in KE Lindgren and N Perram (eds), *International Commercial Law, Litigation and Arbitration* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2011).

When wellheads are at great depths, sometimes over 1 000 metres, it is physically very difficult to plug a leak. The well publicised attempts to contain the *Deepwater Horizon* leak, over many weeks, showed that there is no exact or precise science to this task. And, of course, the deeper the source of the leak, the more difficult it is to effect repairs from the very remote surface.

No matter how carefully the rig may have been constructed or operated, disasters may occur through human error or, naturally, through events such as extreme weather or earthquakes. So the potential for large scale, widespread pollution damage exists with every off-shore hydrocarbon drilling activity.

In my opinion there is an imperative need for an international convention to regulate the risks and consequences of existing and future off-shore drilling activities. Those activities are conducted, generally, at great cost. Governments at the moment have been able to regulate, to some degree, off-shore activities on their State's territory, territorial seas or exclusive economic zones. However, ingenuity and economic imperatives are likely to make it feasible at some future time for hydrocarbons to be discoverable and recoverable in international waters. What will happen then? Which State or States will have the power to control or regulate that activity if the Authority proves ineffective? And, how will any liability be imposed on the controllers of a rig, located in international waters, that leaks?

These concerns should be addressed now so as to provide certainty, about the rights and obligations that ought be established, to littoral States, the world community, those who want to invest in the off-shore activities and others who may be affected.

How can a new convention be achieved?

There are two possible avenues to achieve a new convention that are worth considering. First, the provisions of the *United Nations Convention on the Law of the Sea (UNCLOS)*⁴ and, secondly, through the IMO.

Possible framework provided by the provisions of UNCLOS

Article 235 of the *UNCLOS* creates a framework under which a new convention on this topic may be progressed. It provides:

Article 235

Responsibility and liability

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

The significance of *UNCLOS* was emphasised in the advisory opinion given on 1 February 2011 by the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*. I will refer to this as the '*State Responsibilities and Obligations Case*'.

In *UNCLOS*, the 'Area' means the sea-bed, ocean floor and its subsoil that are beyond the limits of national jurisdiction.⁵ Part XI of *UNCLOS* deals with the Area, including exploration for and exploitation of all its solid,

⁴ *United Nations Convention on the Law of the Sea (UNCLOS)*, 1982, 1833 UNTS 3. This entered into force generally and for Australia on 16 November 1994.

⁵ *Ibid* art 1.1(1).

liquid and gaseous resources. Any such resources recovered from the Area are termed ‘minerals’.⁶ Importantly, art 136 states that: ‘The Area and its resources are the common heritage of mankind’. And, art 138 requires, relevantly, that the general conduct of States Parties in relation to the Area shall be in accordance with pt XI of *UNCLOS*. Control of these activities is vested in the International Sea-Bed Authority (the Authority) by art 153.⁷

A State Party to *UNCLOS* has responsibility to ensure that activities in the Area that it carries out, or sponsors others to carry out, are carried out in conformity with pt XI.⁸ The *State Responsibilities and Obligations Case* dealt with art 139 par 2 among other provisions. This provides, in substance, that damage caused by the failure of a State Party to carry out its responsibilities under pt XI entails liability. If more than one State Party had responsibility then all will be jointly and severally liable. However, a State Party will not be liable for a person it had sponsored to the Authority under art 153 par 2(b) as a person who could carry on activities in the Area if it had taken all necessary and appropriate measures to secure effective compliance by that person with its obligations under art 138.

Pertinently, pt XII of *UNCLOS* deals with the responsibilities and obligations of States Parties to protect and preserve the marine environment.⁹ Article 235 is the critical provision in pt XII. Nonetheless, there are real and practical issues about how effective the control of the Authority and the Sea-Bed Disputes Chamber of the Tribunal will be and what protection this will afford to littoral States. In July 2011, the Secretary-General of the Authority¹⁰ said that there is:

a renewed commercial interest in deep seabed mining as an alternative source for the minerals that are needed to fuel economic development in many parts of the world... Nevertheless, it remains the case that investments that originate from the private sector will inevitably be guided largely by financial considerations, including the impacts of national taxation, payments to the Authority and debt financing. The responsibility of the Authority in these circumstances is to begin the process to develop fair and equitable policies and regulations for exploitation of marine minerals.

The advisory opinion in the *States Responsibilities and Obligations Case* suggested that a State sponsoring activities in the Area may be held liable to pay compensation if it fails to carry out its responsibilities under *UNCLOS* with due diligence and a third party suffers damage as a result.¹¹ The Chamber concluded that when a State Party sponsored a person to engage in activity in the Area, the State had the responsibility to provide a means for persons, who might be injured as a result of such activity, to seek and receive compensation.¹² However, this advice gave no certainty about the amount or sufficiency of compensation. Nor did it require that an insurer or financially secure person be in a position pay that compensation if the person primarily liable could, or did, not. Nor does an obligation of a State to exercise ‘due diligence’ matter much if the State itself is impoverished and unable to make a meaningful payment of a shortfall in compensation in the event that it breaches this obligation.

In addition, the Chamber advised that a State had to approach sponsoring or engaging in activity in the Area in accordance with principle 15 of the *Rio Declaration on Environment and Development* 1992.¹³ The latter is known as the ‘*Precautionary Principle*’. It obliges States to apply a precautionary approach to allowing development in order to protect the environment from degradation where there is a threat of serious or irreversible damage, even without full scientific certainty that such damage would occur, if the development proceeded.

⁶ Ibid art 1.1(3), 133(a), 134(b).

⁷ Ibid art 153.3 provides that activities in the Area should be carried out in accordance with a formal plan of work, approved by the Authority, in the form of a contract. That contract must incorporate the relevant rules, regulations and procedures set out in the Authority’s ‘mining code’. At the moment, the ‘mining code’ consists only of regulations relating to prospecting and exploration for polymetallic nodules and polymetallic sulphides. The regulations define polymetallic nodules as any deposit or accretion of nodules, on or just below the surface of the deep seabed, which contain manganese, nickel, cobalt and copper. Polymetallic sulphides are defined as certain deposits of sulphides and mineral resources which contain concentrations of metals including copper, lead, zinc, gold and silver. Thus, at present, the Authority has not made any regulations for off-shore exploration and exploitation of hydrocarbons.

⁸ Ibid art 139.1.

⁹ Ibid art 192.

¹⁰ Nii Allotey Odunton (Ghana), speech delivered at seventeenth session of the Authority, Kingston, Jamaica 11 - 22 July 2011.

¹¹ *United Nations Convention on the Law of the Sea (UNCLOS)*, 1982, 1833 UNTS 3, [242]. See Question 2.

¹² Ibid [139]-[140], art 235.2.

¹³ Ibid [125]-[135], [242].

Role of the International Maritime Organisation

Article 1(a) of the *Convention on the International Maritime Organisation*¹⁴ provides that a purpose of the Organisation is:

- (a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to **technical matters of all kinds affecting shipping engaged in international trade**; to encourage and facilitate the general adoption of the highest practicable standards in **matters concerning the maritime safety**, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article. (emphasis added)

The IMO is uniquely well placed to formulate a convention to address the consequences of off-shore leaks from oil and gas drilling installations. The IMO has been able to achieve its success to date by involving the insurance market, and in particular P&I Clubs, to offer insurance or cover for these types of risks.

It is entirely appropriate that the IMO should be interesting itself in this area because of its vast experience propounding international conventions that deal with the consequences and containment of oil pollution from ships and off-shore installations. The IMO has also been responsible for at least two significant international conventions dealing expressly with hydrocarbon pollution from off-shore rigs. First, it promoted the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*¹⁵ as amended by the *Protocol of 2005 to that Protocol (SUA Protocols)*.¹⁶ These protocols were seen, rightly, as a natural extension of the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*.¹⁷

Secondly, the IMO has been directly responsible for significant provisions governing oil pollution from off-shore oil and gas rigs in the *International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC Convention)*.¹⁸ In 2000, the IMO extended the reach of this Convention to substances other than oil in the *Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (2000 Protocol)*.¹⁹

Article 3(2) of the *OPRC Convention* provided that States Party must require operators of any fixed or floating off-shore installation or structure engaged in oil or gas exploration, exploitation or production activities, or loading or unloading of oil under the jurisdiction of the State Party to have emergency plans that are co-ordinated with the national system established under art 6. Article 4 provided for the persons having charge of off-shore rigs to report to the State, in whose jurisdiction the rig was, any actual or probable discharge of oil or any observed event involving such occurrences without delay. Article 6 required each State Party to develop both a national and regional system to respond to pollution incidents from off-shore installations. And, the *OPRC Convention* made a number of other provisions for international co-operation in responding to such events. The *2000 Protocol* recited that, pursuant to resolution 10 of the 1990 Conference for the *OPRC Convention*:

¹⁴ *Convention on the International Maritime Organisation*, 1948, 289 UNTS 3.

¹⁵ *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 1988, 1678 UNTS 201.

¹⁶ *The 2005 Protocol to the SUA Convention (SUA Protocols)*, [2005] ATNIF 30. Under these Protocols, States Parties have an obligation to take such measures as may be necessary to establish its jurisdiction over certain offences (set out in articles 2, 2bis and 2ter) when the offence is committed against or on board a fixed platform which is located on the continental shelf (art 3.1). A relevant offence is to place or cause to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety (art 2.1(d)). 146 countries are party to the 1988 Protocol and 27 countries are party to the 2005 Protocol to amend the 1988 Protocol. As per International Maritime Organisation, *Status of Conventions Summary* (7 March 2012) IMO Website <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>>. Australia is not a party.

¹⁷ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 1993, 1678 UNTS 201 (entered into force in Australia 20 May 1993).

¹⁸ *International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC Convention)*, 1990, 1891 UNTS 51 (entered into force 13 May 1995).

¹⁹ *Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (2000 Protocol)*, 2000 (entered into force 14 June 2007).

the International Maritime Organization has intensified its work, in collaboration with all interested international organizations, on all aspects of preparedness, response and co-operation to pollution incidents by hazardous and noxious substances...

That resolution would appear to invite the continuation of the IMO's leading role in promoting safety at sea and protecting the marine environment by involving itself in the formulation of a convention to deal more generally with off-shore hydrocarbon leaks. The impact of an oil or gas leak from an off-shore platform or rig, can interrupt international shipping lanes, interfere in international trade by sea, affect maritime safety and the efficiency of navigation. The IMO has recognised the significance of its role in this regard in the *SUA Protocols*, the *OPRC Convention* and *2000 Protocol*.

At the meeting of the Legal Committee of the IMO held in November 2010,²⁰ the Government of Indonesia proposed a work program to develop an international regime addressing liability and compensation for trans-boundary oil pollution damage caused by off-shore exploration and exploitation activities. This was in the wake of the *Montara* blowout. The Indonesian proposal also raised the issue of immovable oil storage units that were outside the scope of the *International Convention on Civil Liability for Oil Pollution Damage 1969* as amended by the *Protocol of 1992*, (known as *CLC 1992* or simply *CLC*)²¹ and funds established under the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*,²² (now known as the *1992 Fund Convention*) supplemented by the *Protocol of 2003* to that Convention, which is not yet in force in Australia (the *2003 Protocol*).²³ The current fund is known as the 1992 Fund and the fund established by the *2003 Protocol* is known as the Supplementary Fund.

The minutes of the meeting of the IMO Legal Committee contained the telling point that oil pollution knows no borders and, accordingly, it was important to have a mechanism in place to compensate victims. However, there were concerns at the meeting as to whether the IMO was the proper organisation to deal with this issue.

As a result of these discussions, the IMO Secretariat prepared a note on the existing international instruments relevant to this subject.²⁴ The note referred to arts 192, 208, 214 and 235 of *UNCLOS* but observed that these and other provisions did not create an international liability and compensation regime.²⁵ It also referred to a number of other international instruments including the convention between European countries with oil and gas reserves in the North Sea.²⁶

The *North Sea Convention* provided that the operator designated by the State in whose territory the rig was, or who was in overall control of it, would be strictly liable for any pollution damage resulting from any incident.²⁷ There were limited exceptions such as in cases of acts of war and a natural phenomenon of an exceptional, inevitable and irresistible character.²⁸ An operator would be liable for a maximum amount which was initially fixed at 30 million Special Drawing Rights (SDRs) for the first five years after that *Convention* was opened for signature and, then

²⁰ International Maritime Organisation Legal Committee, *Legal Committee 97th Session* (19 November 2010) IMO <<http://www.imo.org/MediaCentre/MeetingSummaries/Legal/Pages/LEG-97th-Session.aspx>>.

²¹ This is given force of law in Australia by the *Protection of the Sea (Civil Liability) Act 1981* (Cth).

²² *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 1971, 1110 UNTS 57 (entered into force 16 October 1978); *Protocol to the International Convention on the Establishment of the International Fund for Compensation for Oil Pollution Damage of 18 December 1971*, 1862 UNTS 509 (entered into force 22 November 1994); *Amendments to the Limits of Compensation in the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971*, 2000 [2004] ATS 28.

²³ *Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992*, 2003 [2005] ATNIF 21. The 2003 Protocol established the International Oil Pollution Compensation Supplementary Fund.

²⁴ International Maritime Organisation Legal Committee, *Note by the Secretariat – Information relating to Liability and Compensation for Oil Pollution Damage resulting from Offshore Oil Exploration and Exploitation*, 18 February 2011.

²⁵ For example the *International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)*, 1973, 1340 UNTS 184 art 2.3(b) excludes from its ambit release of harmful substances from exploration, exploitation and associated off-shore processing of seabed mineral resources.

²⁶ *Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources*, 1977, 973 UNTS 3. The States Parties to this Convention are the United Kingdom, Germany, Ireland, the Netherlands, Norway and Sweden.

²⁷ *Ibid* art 3.1.

²⁸ *Ibid* art 3.3.

increasing to 40 million SDRs.²⁹ The operator had to insure for at least 22 million SDRs for the first five years, increasing to at least 35 million SDRs thereafter.³⁰ The minimum and maximum amounts could be varied by the States Parties. That *Convention* also provided for an operator to limit its liability in respect of each distinct incident giving rise to liability by establishing a limitation fund to meet any, and all, claims.³¹

Are Off-Shore Rigs Vessels?

It is worthwhile remembering that many off-shore rigs are vessels in their own right. Judge Barbier, the docket judge for all claims arising out of the *Deepwater Horizon* incident recently delivered an illuminating judgment in which he held that that rig was a vessel in navigation.³² He described *Deepwater Horizon* as a ‘mobile offshore drilling unit’. This makes sense, since its only physical attachment to the sea-bed was through a 5 000 foot or 1 500 metre ‘string of drill pipe’. Thus, the drilling unit had to float on the sea surface at all times.

Earlier, in 1959, the Fifth Circuit United States Court of Appeals, had held in *Offshore Co v Robison*³³ that a mobile drilling platform that had been towed to a location in the Gulf of Mexico and had its retractable legs lowered and planted on the sea-bed was a vessel. The platform had no engines but had a hull and was towed to its drilling positions. Judge Wisdom opened his opinion by saying: ‘This case propounds a riddle: when is a roughneck a seaman?’³⁴ Apparently, a ‘roughneck’, in 1959 at least, was an oil field worker. The answer to the riddle, subsequently approved by O’Connor J for a unanimous Supreme Court of the United States in *McDermott International Inc v Wilander*³⁵ was: when the person’s duties contribute to the function of the vessel or to the accomplishment of its mission, such as working as a member of a drilling crew on a vessel or off-shore rig.

As Judge Barbier noted, the Supreme Court of the United States decided in 2005³⁶ that ‘a “vessel” is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment’ for the purposes of the *Longshore and Harbor Workers’ Compensation Act*, 33 USC 901-950 (1927). It is likely that other nations will have similar legislation providing for the special position of persons who work on off-shore oil and gas rigs.

In contrast, the *Montara* rig or ‘well head platform’, was a jack-up structure that had a more substantial physical connection to the sea-bed. It was located on Australia’s continental shelf and so was in an area over which the IMO has already accepted a supervisory role in formulating international law. Like the *Montara* rig, many modern-day jack-up rigs are floating barges fitted with long support legs that can be raised or lowered. They are vessels. So too are floating off-shore storage units which are often converted oil tankers or purpose built vessels. All of these are ships. *Prima facie*, these ships and their off-shore activities appear to be proper subjects for the IMO to regulate. However, the IMO is currently blowing more cold than hot on this issue. That is regrettable.

Thus, international regulation of the safe construction and operation of, as well as the consequences of pollution from, these installations, under the auspices of the IMO, is both practicable and sensible.

A Possible Framework

Some helpful guidance about the potential nature of an international consensus can be gained from the provisions of the most recent instrument governing liability for oil pollution from ships, namely, the *International Convention on*

²⁹ Ibid art 6.1.

³⁰ Ibid art 8.1.

³¹ Ibid art 6-8. Under art 8, a State could exempt an operator from insuring at all to cover liability for pollution damage wholly caused by an act of sabotage or terrorism.

³² *In re: Oil Spill by The Oil Rig “Deepwater Horizon” in the Gulf of Mexico ---* F. Supp. 2d ---, 2011 WL 3805746 (E.D. La.) 26 August 2011

³³ *Offshore Co v Robison*, 266 F 2d 769, 779, (CA 1959) (Rives and Wisdom JJ, Cameron J dissenting).

³⁴ Ibid 771.

³⁵ *McDermott International Inc v Wilander*, 498 US 337, 354-355 (1991).

³⁶ *Stewart v Dutra Construction Co* 543 US 481, 497(2005) (Thomas J).

Civil Liability for Bunker Oil Pollution Damage, done at London on 23 March 2001 (*Bunker Oil Convention*).³⁷ I want to suggest a combination of a regime of that kind supplemented by another layer or layers of protection along the lines of the 1992 *Fund Convention*.

The *Bunker Oil Convention* has the following relevant features:

- a wide definition of ‘shipowner’ so as to include the owner, registered owner, bareboat charterer, manager and operator of the ship (art 1(3));
- strict liability of the shipowner at the time of an incident, with very limited exceptions (art 3);
- a prohibition on claims being made against the shipowner for pollution damage otherwise than under the *Convention* (art 3(5));
- liability for any pollution damage caused outside the ship by contamination resulting from the escape or discharge of its bunker oil, with the proviso that compensation for impairment of the environment, other than loss of profit from that impairment, is limited to the actual or proposed cost of reasonable measures to reinstate, the costs of preventative measures to prevent or minimise such damage and of further loss caused by those measures (arts 1(9), 2(b), 3);
- the right of the shipowner, his insurers or those providing financial security to him, to limit liability under any applicable national or international regime, including the *Convention on Limitation of Liability for Maritime Claims 1976*,³⁸ done at London on 19 November 1976 as affected by the 1996 *Protocol* to amend that *Convention* (*LLMC 1976*) (art 6);
- a requirement that the shipowner effect insurance or provide financial security, such as a bank guarantee, in an amount equal to the maximum amount for which he can limit his liability (art 7(1));
- a right for an injured party to proceed directly against the insurer or security provider (art 7(10));
- a time bar, generally, three years after the date when the damage was done (art 8);
- the conferral of jurisdiction on the Courts of any State Party in which pollution damage occurred, including where such damage was also suffered in the territory of one or more other States Parties (art 9);
- a requirement that all States Parties recognise and enforce such a judgment, except where the judgment was obtained by fraud or the defendant was denied natural justice (art 10).

Who should be Liable and on what Basis?

The commercial relationships that exist between rig controllers will vary considerably. The same considerations apply to immovable off-shore storage units and other similar equipment. For simplicity I will refer to all these as included in the expression ‘rigs’. How should liability be imposed? Should it be on everyone involved or concerned in developing, owning, controlling and operating a rig, however minor a role such a person played in relation to the casualty? Should the liability be strict or fault based? The answers to these questions can only be worked out on the basis of policy choices by the States who negotiate any convention.

³⁷ This entered into force internationally on 21 November 2008 and has been given the force of law in Australia, subject to minor amendments, by the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth). The *Bunker Oil Convention* followed the model in *CLC 1992* closely, but not precisely.

³⁸ This is given the force of law in Australia by the *Limitation of Liability for Maritime Claims Act 1989* (Cth).

Because an off-shore casualty involving leakage of hydrocarbons is likely to be protracted, affect a considerable area and involve complex issues, there is much to be said for a regime that imposes strict liability. That would avoid argument about whether some other criterion of responsibility, such as negligence or other fault, has occurred before someone is required to pay compensation.

Generally, the shipping industry operates with strict liability as the standard in international conventions, such as the *Bunker Oil Convention* and the earlier *CLC 1992*. Strict liability offers certainty both in fixing immediate responsibility on an identified person to pay compensation as soon as a casualty occurs and, generally, in identifying what is payable. These identifiable risks are able to be covered by insurance or protection and indemnity (P&I) club arrangements. The shipping conventions ascertain the maximum quantum of a shipowner's liability based on the ship's tonnage. That is obviously not a suitable criterion to use in fixing a maximum liability for off-shore rig leaks.

There does not seem to be any difference, at least to me, as a lay person, in the potential extensive pollution damage from a leak caused by an exploratory drill, on the one hand, and by an established rig, on the other. Of course, a leak can be caused by either exploration or an established means of exploitation on a commercially operating rig. Once something goes wrong and a leak commences at or near the seabed, hundreds or more metres below the surface, the nature of the antecedent surface activity would not appear to matter. Action has to be taken immediately and continuously to stop the leak.

Thus, the maximum liability should be fixed by reference to a sum that, based on international experience, will meet the likely clean up, preventative and restorative costs, as well as making a sufficient allowance for physical damage and economic loss suffered by States, businesses and other persons as a consequence of any substantial and sustained leak. That maximum liability will also need to be fixed to take account of contingencies. It should also be sufficient for costs and losses caused by a leak from an installation that may be far out to sea, and so have a wide area of potential impact. And, some formula for automatic indexation of the maximum ought to be included in the convention.

The process of arriving at such a maximum liability will not be easy. No doubt, it will need to strike a balance between what quantum should be available, from insurance or indemnity, to be provided by the rig operator to cover potential damages and what the off-shore hydrocarbon industry can afford, or will be prepared, to pay for that quantum. The insurance market will have to participate in this process in order to achieve a commercially feasible solution. Inevitably, there will be a shortfall; hence my proposal for a second tier or tiers along the lines of the *1992 Fund Convention* and the *2003 Protocol*.

There are significant costs and risks of conducting operations off-shore to explore for or exploit hydrocarbons, including establishing and operating the means of exploitation of any economically recoverable resource. Such operations are likely to involve a number of persons with an economic interest in the success of the ventures. The scheme of the *Bunker Oil Convention* that makes a number of persons fall within the definition of 'shipowner' who will be jointly and severally liable up to the maximum amount, has a practical appeal in this area too.

The Source of Insurance or Compensation

The real problem in developing a convention is the diversity of interests among those who are or may be involved in the off-shore exploration and exploitation of oil and gas resources. Historically, the risks of the international shipping industry have been covered effectively by the 13 large P&I Clubs. The P&I Clubs had an incentive to establish, and update, oil pollution and limitation conventions so that they would have certainty about the likely maximum risks that they may be called upon to meet arising out of the activities from ships they covered.

There is no similar concentration of interests, coverage or risk for off-shore oil and gas exploration and exploitation. However, an effective international convention that requires an acceptable, yet commercially feasible, level of insurance cover is likely to generate interest in the insurance market to provide such cover. The P&I Clubs have had considerable expertise and experience in dealing with risks and casualties involving oil and gas at sea. It may be that

P&I Clubs will also be prepared to facilitate the creation of this new market. The *States Responsibilities and Obligations Case* suggests that the State that authorises exploration or exploitation of oil and gas reserves in its territory should be liable for damage when it has failed to exercise due diligence in approving and regulating that activity. If States Parties were also required to ensure that operators had substantive insurance cover this would be another basis for establishing a viable insurance market to address these risks.

Insurers and Direct Recourse

There will always be a risk that insurance arrangements, bank guarantees, or protection and indemnity arrangements may fail to respond, due to the insolvency of the person with the obligation to indemnify the controller. Thus, a wider range of persons involved in the ownership, operation or control of an off-shore rig should be made responsible. This will offer greater chances of recovery in the event that one or more persons who have an immediate economic interest in the venture fails to meet its or their liability, or third parties such as insurers or P&I Clubs fail to honour their obligations or responsibilities to indemnify the controller. At the moment, P&I Clubs generally exclude liability for off-shore exploration and exploitation activities.

The convention should also allow the State Party in whose territory or exclusive economic zone the off-shore facility is located to approve any insurer or other source of indemnity as a condition of permitting the activity. This would offer some protection against the risk that any proffered insurance or indemnity may be chimerical or insubstantial. Again, issues of sovereignty may come to bear on the question of one State Party being entitled to reject an insurer approved by another State Party.

It would be important to provide that the insurer or indemnity provider be jointly and severally liable as a principal with a rig controller. Any insurance or indemnity arrangement for a rig controller should contain provisions requiring the provider to submit to the jurisdiction of the Courts of the State Party in which pollution damage occurs and to consent to registration of any judgment in the provider's home jurisdiction.

The Loss for which Compensation would be Payable

The experience with *CLC 1992* and from the recent *Montara* and *Deepwater Horizon* blowouts suggests that governments or their agencies will need to expend very significant sums in containing and cleaning up leaks, as well as taking measures to prevent further damage. Next, they will have a substantial potential cost to restore, to the extent that it is possible, damage to the marine and littoral environments. Depending on the location of the rig, more than one State's territory may be affected, particularly where the incident takes place in international waters. There is a likelihood that a number of States will wish or need to take action to contain and prevent the further spread of pollutants.

In addition, a number of marine based industries will be likely to be affected, including fishing, tourism and possibly shipping. Physical damage is likely to be occasioned to shore installations. The experience of the *1992 Fund* and its predecessors has covered a wide range of pollution damage suffered from catastrophic shipping events that exceeded the liabilities of shipowners under *CLC 1992*.

The *1992 Fund's Claim Manual*³⁹ provides a broad spectrum of the types of claims for compensation that have been made. I am not aware of any policy reason why, as a minimum, the concept of pollution damage in the *CLC 1992* and *Bunker Oil Convention* would not be appropriate to apply in the case of leaks from off-shore installations.

However, there are other policy considerations which those engaged in formulating an international convention in this area may bring to bear on the process. For example, the environmental movement has criticised the definitions of pollution damage in *CLC 1992* and the *Bunker Oil Convention* as too narrow.

³⁹ International Oil Pollution Compensation Fund 1992, *1992 Fund's Claim Manual* (Impact PR and Design Limited, 2008).

The pace of remedial work in both the *Montara* and *Deepwater Horizon* disasters led to a considerable amount of public frustration. Regulators may wish to insist that a condition of allowing any off-shore drilling be that the rig controllers have in place irrevocable contracts with approved fast response providers of the types of services relevant to plugging leaks, cleaning up pollution or preventing or containing its spread.

Who should be able to make Claims for Compensation and how can Claims be Enforced?

If an international convention is to have broad acceptance, it must allow the widest number of persons and States that may be affected by pollution damage from off-shore hydrocarbon leaks to make claims for compensation.

There does not seem to be any reason why the class of financial claimants should be limited, provided that each has a claim for pollution damage as defined in the convention.

Proceedings should be able to be brought directly against insurers or indemnifiers of any rig controller, as under the *Bunker Oil Convention*.

The model adopted in the *Bunker Oil Convention* and *CLC 1992* conferred jurisdiction on the Courts of any State Party in which the damage occurred and required any judgments given by that Court to be recognised by the Courts of other States Parties, with limited exceptions for fraud and denial of natural justice. That appears to be a very practical and appropriate mechanism.

Consideration might also be given to imposing requirements that:

- if proceedings are commenced in a court of one State Party with jurisdiction, all persons falling within the description 'the rig controller' (including insurers and indemnifiers) must pay into that court or provide security for the maximum amount of its liability, or a lesser sum sufficient to cover its then apprehended liability;
- all States Parties with claims should bring proceedings in the court of the State Party first seized of the matter, though there are issues of national sovereignty and co-ordinate jurisdiction that may make such a mechanism undesirable. Nonetheless, there is obvious utility in a mechanism that enables one Court to deal with all matters. This is particularly so where the available insurance or other security would be likely to be insufficient to cover the total value of the claims so that it will be necessary to apportion the fund between the various persons entitled to compensation.

Should States have their Rights Governed and Limited by the Claims Mechanisms?

If a convention is to work, it is important that the international community accepts that States Parties must be bound by its terms. There has been an unfortunate tendency in the United States of America to refuse to give legal effect to such conventions and, indeed, for it to advocate breaking of limitations of liability. As Prof Edgar Gold QC commented after the 1989 *Exxon Valdez* disaster:

In the ship-source marine pollution area the United States has today manoeuvred itself into a very difficult position, both nationally as well as internationally, through the actions of a rather strange combination of bedfellows – the environmental movement and a group of federal politicians interested in protecting state rights. As a result, the United States, always at the forefront of developing new principles of international behaviour, but also often very reluctant to implement such principles, has, once again, turned its back on the international community on a rather crucial issue.⁴⁰

However, the United States of America is not alone. The State of Queensland recently acted in this politically expedient way in respect of the 2009 *Pacific Adventurer* casualty.

⁴⁰ Edgar Gold, 'Marine Pollution Liability "Exxon Valdez": the U.S. "All-Or-Nothing" Lottery!', (1991) 22 *Journal of Maritime Law and Commerce* 423, 424.

The purpose of a convention of this kind is to provide internationally accepted and recognised norms of responsibility and provide a measure of protection that is known, certain, and insurable. If States Parties are at liberty to ignore the international norms when it suits their own domestic situation, the position may be reached where persons who are supposed to obtain insurance or security to meet liabilities imposed under a convention may also choose to ignore that.

Moreover, I am proposing that there be a further international fund available in cases of significant catastrophes of the scale of the *Exxon Valdez* or *Deepwater Horizon* disasters. This would ensure the availability of a further measure of protection for persons who suffer loss and possibly States Parties as well.

Accordingly, in developing the terms of a convention, some consideration should be given to providing that States Parties' rights be governed and limited by its provisions. That would give rig operators certainty as to their maximum liability and allow them to rely upon the terms of the convention to limit demands that States Parties may seek to make on them beyond the maximum liability imposed.

Limitations of Liability

The history of the law maritime has recognised that those involved in international trade by sea should be entitled to enjoy limitation of liability. I traced some of the history and discussed these matters in *Strong Wise Limited v Esso Australia Resources Pty Limited (APL Sydney)*.⁴¹ The conventions that have allowed shipowners to limit their liability involved compromise. First, the shipowners had to accept that their liability would be limited by a pre-casualty value of the ship calculated by reference to her tonnage. This has been the position since the *International Convention for Unification of Certain Rules relating to Limitation of Liability of Owners of Seagoing Vessels 1924*.⁴²

In exchange for this obligation, the shipowners' right to limit liability evolved to be 'virtually unbreakable', as in the *LLMC 1976*. This important qualification has had the consequence that insurers and P&I clubs can offer insurance or indemnity arrangements to shipowners knowing the amount of their maximum risk and so, making the system of providing insurance or indemnity commercially workable and affordable.

In the case of off-shore hydrocarbon exploration and exploitation, a trade off will also have to be made. There is little point in having unlimited liability for a rig controller whose only asset is the rig that is destroyed in a casualty causing massive damage and who is uninsured. And, if liability of a rig controller is unlimited, it will be uninsurable. This entails that a convention must be based on accepting a commercially realistic limitation of the amount recoverable against rig controllers. If that is accepted then some measure of third party insurance or indemnity will be available to meet some, if not all, of the damage bill caused by a casualty.

In addition, States negotiating such a convention will need to strike a balance that recognises the desirability of entrepreneurs continuing to search for and exploit hydrocarbon resources for which there is still a demand, and sometimes a requirement. The likely maximum loss and damage caused by any one spill is a matter that can be calculated. It will probably be similar in most cases, unless there is something about the scale of the operation or the particular resource that affects the degree of risk of a leak or the potential pollution damage which it might cause.

Therefore, it should be possible to standardise the maximum sum for which a rig controller can be made liable. That will enable that risk to be insured against or provided for by P&I arrangements. Perhaps those involved in the hydrocarbon industry, oil companies and explorers, will establish P&I arrangements to cover these risks.

⁴¹ *Strong Wise Limited v Esso Australia Resources Pty Limited (APL Sydney)* (2010) 185 FCR 149; [2010] 2 Lloyd's Rep 555.

⁴² *International Convention for Unification of Certain Rules relating to Limitation of Liability of Owners of Seagoing Vessels, 1924*, 120 LNTS 123. That methodology followed the provisions of the *Merchant Shipping Acts* of the United Kingdom of the 19th century.

Should there be a Further Fund for Uncovered Costs?

In 1969 the *Tanker Owner's Voluntary Agreement Concerning Liability for Oil Pollution 1969 (TOVALOP)* was set up by shipowners and P&I Clubs in anticipation of the original *CLC 1969*. In 1971 a further voluntary scheme was established called the *Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL)*. The oil companies paid money into a fund under *CRISTAL* to supplement the *1969 Fund Convention*. Both *TOVALOP* and *CRISTAL* ceased to accept claims in February 1997.⁴³ *CRISTAL* sought to ensure that sufficient compensation would be available to persons who suffered oil pollution damage that exceeded the maximum provided for under *CLC 1969* and its predecessors. The *1992 Fund* shifted the cost of excess damage from shipowners to the companies and States that import or export the oil by imposing levies on imports into receiving States.

The *1992 Fund* is an inter-governmental organisation set up and governed by States. It has an executive committee comprised of 15 member States, elected by an assembly composed of representatives of the governments of member States. The committee's main function is to approve claims, although the executive director of the fund has substantial authority to pay claims. Essentially, the *1992 Fund Convention* intended that the *1992 Fund* would make additional compensation available to claimants who did not obtain full compensation under *CLC 1992*. The maximum compensation payable by the *1992 Fund* for any one incident occurring after 1 November 2003 is 203 million SDRs. As the *1992 Funds' Claims Manual* identifies, compensation from the Fund will be payable in cases where:

- the damage exceeds the limit of the shipowner's liability under *CLC 1992*;
- the shipowner is not liable under *CLC 1992* because the damage was caused by a grave natural disaster, or wholly caused intentionally by a third party or as the result of negligence of public authorities to maintain lights or other navigational aids; or
- the shipowner was financially incapable of meeting his obligations under *CLC 1992* in full and insurance was insufficient to pay valid compensation claims.⁴⁴

Under the *1992 Fund Convention*, persons who receive particular quantities of oil, such as importers and major oil companies, are required to pay contributions to the *1992 Fund*. The Supplementary Fund makes additional compensation available to victims of oil pollution in those States that have acceded to the *2003 Protocol*. States Parties to the *1992 Fund* have the option of becoming a member of the Supplementary Fund or of remaining a member of only the *1992 Fund*. The Supplementary Fund provides compensation only to those persons who are unable to obtain full and adequate compensation for an established claim for pollution damage under the terms of the *1992 Fund Convention*. The *2003 Protocol* applies to pollution damage caused in the territory, including the territorial sea, of a State Party. An annual levy to finance the Supplementary Fund is imposed by States Parties to the *2003 Protocol* on oil receivers who receive in total quantities exceeding 150 000 tonnes of oil.

A similar requirement could be imposed for importers of hydrocarbons sourced from off-shore rigs. In addition or as an alternative, it may be necessary to impose a requirement that all rig controllers pay a levy into a fund based on the volume of production from each off-shore rig. This would increase the burden imposed on importers or receivers of hydrocarbons. However, that result is appropriate since the dual risks exist of pollution, first, from the oil or LNG tankers that carry those hydrocarbons (which are already subject to the *1992 Fund* contribution requirement) and, secondly, from the fact that the source of some of those cargoes will be off-shore rigs.

⁴³ see RS French, 'Compensation for Marine Pollution', (2008) 82 *Australian Law Journal* 527, 528-529.

⁴⁴ International Oil Pollution Compensation Fund 1992, *1992 Fund's Claim Manual* (Impact PR and Design Limited, 2008), 1.1.6.

Conclusion

The need for some international regime is, I think, patent and urgent. While the leak continued from the *Deepwater Horizon* rig, there was almost daily news of attempts to stop it and the devastating effect it was having on the environment, not just in the United States but also the other littoral States around the Gulf of Mexico. In that case, BP accepted responsibility to make full compensation. However, not all such off-shore rigs will be owned, operated or controlled by a solvent or substantial multi-national oil company. And, the potential for a disaster of the scale of the *Deepwater Horizon* will remain. Hopefully, the international community will begin debating how best to formulate and move towards agreeing a convention to cover these risks.

This idea is very much prospective and perhaps unduly idealistic. Undoubtedly, there will be difficulties in getting agreement from the United States and possibly also the European Union, which has its own arrangements. In addition, the off-shore industry is unlike the shipping industry. There, the P&I clubs had an incentive to bring about a workable regime, since ships can be still arrested, if they are not lost, after leaks. Leaking off-shore rigs are not in the same category. Their value may be negligible in cases of a tragic disaster such as occurred with the *Deepwater Horizon* blowout.

The interests of the international community are poorly served by the current lack of an appropriate convention to address the significant risks from off-shore hydrocarbon exploration and exploitation. Inaction, however, is not an option.