

The FPSO – Is it a Ship? The Proposed CMI Offshore Mobile Craft Convention – an Up-date

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Summary

In the 1999 issue of the AMPLA Law Journal,¹ Dr. Michael White QC² reported on the Comite Maritime Internationale (CMI) proposals for an international convention on offshore mobile craft. In this paper, Mr Richard Shaw, Chairman of the CMI International Subcommittee on Offshore Mobile Craft and Structures, summarises the arguments for and against such a convention as advanced recently before the Legal Committee of the International Maritime Organisation (IMO) and argues, with reference to three specific legal concepts, and with particular reference to the FPSO³ that clarification of the law at an international level is needed.

Introduction

The proposal for a new international convention on offshore mobile craft has a long history, linked, coincidentally, with conferences in the southern hemisphere. At its conferences in Rio de Janeiro in 1977 and in Sydney in 1994, the CMI, the international federation of national maritime law associations, adopted texts which attempted to apply established legal concepts specific to maritime law to the strange new craft generated by the offshore oil industry. Typical of such craft is the FPSO.

Those texts did not find sufficient support to enable them to be put on the work programme of the Legal Committee of the IMO. The history of those drafts, and of the more detailed work done by the CMI on this topic and presented to the IMO Legal Committee in October 1998, is fully described in the paper by Dr. Michael White QC, published in the AMPLA Law Journal in 1999.⁴

In this short paper, the author will attempt to summarise the arguments for and against such a convention and to offer, by reference to three particular topics, the reasons why such a convention would make a significant and useful contribution to the harmonisation of international maritime law.

It has been a significant feature of international maritime law since its earliest recorded manifestations, that it has been driven by the needs and wishes of its consumers; that is to say, the traders who moved goods by sea and who were often shareholders in (and sometimes masters of) the ships which carried those goods.⁵ It is therefore very appropriate that thus subject should be addressed by the AMPLA, consisting as it does of representatives of oil companies, offshore operators and their legal advisors.⁶

¹ (1999) 18 AMPLJ 21.

² Executive Director, Centre for Maritime Law, University of Queensland.

³ Floating Production, Storage and Offloading vessel.

⁴ "Offshore Craft and Structures; a Proposed International Convention" (1999) 18 AMPLJ 21.

⁵ A concise summary of the early history of maritime law is to be found in the article by the Average Adjuster Mr. John MacDonald in [1998] IJOSL 92.

⁶ Mr. Shaw will be happy to receive further comments on these issues by email at rshaw@soton.ac.uk.

Among the legal concepts unique to maritime law which apply to ships and which the CMI has identified as suitable for extension to offshore mobile craft are the following:

1. Ownership, including financing and mortgages
2. Registration and flag
3. Maritime liens and rights of civil arrest
4. Civil jurisdiction
5. Penal jurisdiction
6. Salvage
7. Limitation of liability
8. Liability for pollution
9. Removal of decommissioned structures and wrecks

It is not intended to repeat in this paper the detailed arguments on each of the above topics, which are set out in Dr. Michael White's paper⁷ and also in the CMI Report.⁸

The Pros and Cons

The arguments advanced in favour of a convention may be summarised as follows:

- a. The absence of consistent rules governing the application of well established maritime law concepts developed for ships to the unfamiliar looking craft developed by the offshore industry creates legal uncertainty. The difficulties encountered by the offshore industry creates legal uncertainty. The difficulties encountered by the International Oil Pollution Fund Convention are a good example of such uncertainty.⁹ In so far as the lack of appropriate legal rules contributes to uncertainties with regard to the safety of human life, the health and safety of personnel working on such craft, and the pollution of the marine environment, this is a matter of grave concern.
- b. The fact that there are a number of regional agreements which set very high standards in such fields (such as those applicable to the North Sea, the Arabian Gulf, and the Mediterranean) should not prevent the extension of similar principles to other areas (such as West Africa, South East Asia, and the South Atlantic) where offshore petroleum development is progressing.
- c. The absence of a set of best practices embodied in a convention with world-wide application is adversely affecting the position of developing countries who find themselves in a relatively weak bargaining position vis-à-vis the major oil companies and drilling contractors when bilateral exploration and production agreements are being negotiated.
- d. The provisions of UNCLOS, particularly Article 214, impose positive obligations on coastal states to adopt laws and regulations to implement internationally recognised standards particularly with regard to the protection of the marine environment, and the proposed convention will go some way to demonstrate compliance with those obligations.

⁷ Op. Cit Footnote 4.

⁸ IMO Document LEG 78/10 and 1998 CMI Yearbook p. 145.

⁹ See the reports of the IOPC Fund Inter-sessional Working Group meetings in April 1999 and April 2000.

The arguments against such a convention¹⁰ may be summarised as follows:

- a. There is no pressing need for such a convention, since the present regime, consisting of a number of regional agreements and bilateral agreements, adequately satisfies the needs of the parties.
- b. The craft which do not presently fit easily with the definition of “ship” in existing conventions are by no means limited to those working in the offshore industry. A distinction between those which are and are not mechanically propelled would be more relevant.
- c. If developed it is unlikely that such an instrument would enter into force.
- d. Identified shortcomings, ambiguity or confusion in existing international instruments and their applicability to Mobile Offshore Units can be resolved if there is a desire to do so.
- e. Any shortcoming, ambiguity or confusion with respect to an instrument is best resolved within the context of that agreement by its parties.
- f. Many perceived shortcomings relate to national implementation (or lack therefore) rather than to the instruments themselves.

Typical problems

a. Registration and Mortgages

It has long been an essential element of the legal status of a merchant ship that she should be registered with, and fly the flag of, a state. Traditionally, the “port of registry” has appeared on the stern of every merchant ship beneath her name, although under recent British legislation all ship registries have been centralised (and computerised) in one location and the port named is now the port “to which the ship is treated as belonging”.¹¹

An essential component of such a ships’ registry is that it should accept also the registration of one or more mortgages on the ship, which in the case of most merchant vessels is a vital part of the financing package enabling the ship to be purchased in the first place. It is therefore essential that craft on which a valid mortgage has been taken out should be registered, so that the mortgage itself can be registered, thus giving notice of it to all persons for all purposes. Failure to do so would surely put in doubt the enforcement of the mortgage against a bona fide third party.

It is particularly appropriate that on the cover on the booklet “Petroleum in Western Australia” displayed in the AMPLA Conference office, there is a picture of the semi-submersible rig MARINE 500 drilling offshore Western Australia. That picture clearly shows the word “Panama” painted beneath her name. The author’s understanding of Panamanian law is that the relevant provisions dealing with ship registration refer to a “vessel” rather than a “ship”, and that the Panama Registrar of Ships is happy to accept such craft for registration as a “vessel”.

Certainly in English law, such a craft would not easily fall within the definition of “ship” in the Merchant Shipping Act 1995, section 313 of which includes the words “‘ship’ includes every description of vessel used in navigation”.¹²

It is understood, however, that such craft have been accepted for registration under the British flag. Since the decision of the House of Lords in *The Gas Float Whitton (No.2)*¹³ the English

¹⁰ For a more detailed presentation of these arguments see the paper LEG 79/10 dated 12 February 1999 submitted to the IMO Legal Committee by the International Association of Drilling Contractors.

¹¹ Section 10(2)(f) Merchant Shipping Act 1995 and the Registration Regulations published thereunder.

¹² The equivalent Australian statutory provision is to be found in sect. 6 of the Navigation Act 1912, the wording of which is similar, but not identical to, the wording in sect. 3 of the Shipping Registration Act 1981 set out below.

Courts have adopted a restrictive interpretation of the phrase “used in navigation”. The typical use of an FPSO is to service a particular oil field and it is intended to remain on location at the production site for many years, receiving crude oil from the well heads and delivering it to shuttle tankers for carriage ashore. It therefore appears very unlikely that such craft would fall within the meaning of the phrase “used in navigation” as now understood.

The FPSO may take many different shapes and guises, from a redundant tanker from which the means of propulsion may (or may not) have been removed and what amounts to an oil production facility built on board, to specially built craft designed for the operations on the North West Shelf of Western Australia, and very different craft for the oil fields off the East coast of Canada.

In a memorable judgment in the case of *Merchants Marine Insurance Co. v North of England P and I Association*¹⁴ Lord Justice Scrutton made the following comments on the problem of defining a ship:

“One might possibly take the position of the gentleman who dealt with the elephant by saying that he could not define an elephant but he knew what it was when he saw one...”

Such a test is unlikely to be of assistance in the case of an FPSO, since their appearance will differ widely. The mere study of a photograph, even by an experienced mariner or judge, is unlikely to reveal the answer to the question whether the particular FPSO falls within the definition of “ship” in the particular convention or statute.

An interesting comparison may be drawn between the definition of “ship” in the British Merchant Shipping Act 1995 and that in the Australian Ship Registration Act 1981. In the Australian statute, the definition section (section 3) contains the following words:

“Ship” means any kind of vessel capable of navigating the high seas and includes:
(a) a barge, lighter or other floating vessel;
(b) a structure that is able to float or be floated and is able to move or be moved as an entity from one place to another; and
(c) an air cushion vehicle, or other similar craft, used wholly or primarily in navigation by water;
but does not include a vessel, structure or craft declared by the regulations not to be a ship for the purposes of this definition.

This definition is clearly drawn more widely than its British counterpart, and one may surmise that the terms of sub-paragraph (b) were drafted with offshore drilling rigs in mind. No FPSO existed, to the author’s knowledge, in 1981, but the clause is drafted sufficiently widely to include such craft as currently understood. It would appear therefore that the FPSO will usually fall outside the law relating to ship registration in England, but within it in Australia.

Whether such craft are ships for the purposes of the International Conventions on liability for oil pollution damage will be considered below. The answer is not necessarily the same.

b. Collisions – the jet ski case.

Another example of the uncertainties which surround the application of maritime law concepts to new types of craft concerns the application of the Collision Convention¹⁵ to jet skis. Most

¹³ [1897] A.C. 337.

¹⁴ (1926) 26 Ll. L. R. 201 at p. 203.

¹⁵ The 1910 International Convention on Collisions.

readers will be only too familiar with these small craft, typically some two metres in length powered by a petrol engine of sufficient power to allow them to plane at significant speed. The “driver”, usually clad only in a swimsuit or wetsuit, controls his/her craft by a pair of handlebars similar to those on a motor cycle, and the noise made by such craft is not dissimilar to that of an ageing motor cycle. Such craft are a far cry from the FPSO, but some useful parallels can be drawn from the application of the relevant legislation.

In the case of *Steedman v. Schofield*¹⁶ the issue concerned the time limit for a claim for personal injury suffered by the Plaintiff as a result of a collision involving a jet ski. The normal time limit for bringing a personal injury claim in England is three years. However, under the 1910 Collision Convention the time limit for bringing legal proceedings is 2 years.¹⁷

The decision in *Steedman v. Schofield* therefore turned on the answer to the question whether a jet ski was a ship for the purposes of the Merchant Shipping Acts. If it was, then the two-year time limit applied and the Plaintiff’s claim was time barred. The Admiralty Judge held that it was not, since the activities of a jet ski were not “navigation” in the traditional sense of taking a vessel from one place to another. While one may readily understand the Judge’s wish to avoid the apparently harsh consequences of applying the Collision Convention time limit, it is questionable whether his decision was correct in law. Uses of craft for recreational purposes, which may often involve an excursion to sea and return to the port of departure, are not necessarily excluded from the term “navigation” in the sense applied by the cases, and *Steedman v. Schofield* is, in the author’s view, an example of the old dictum “Hard cases make bad law.”

This case does, however, highlight the unsatisfactory position of the owner of an FPSO damaged by collision with another ship. Section 190 of the British Merchant Shipping Act 1995¹⁸ provides that it applies to proceedings

“*in respect of damage or loss caused by the fault of [a] ship to another ship, its cargo or freight or any property on board it...*” [emphasis added].

Thus the section does not apply to a collision with a craft which is not a ship, and the relevant time limit will have to be determined by the answer to the question whether the particular FPSO or other craft involved was or was not a “ship” within the meaning of that word in a convention adopted in the earliest years of the oil industry. This cannot be a satisfactory situation.

c. Liability for Oil Pollution

Since the disaster involving the tanker TORREY CANYON in 1967, an elaborate set of interlocking international conventions has been set up to provide compensation to those who suffer damage as a direct result of oil pollution from a ship carrying persistent oil in bulk.¹⁹ This regime provides for strict liability, irrespective of fault, direct action against the insurers of the ship and the IOPC Fund, and a two-tier system of compensation with a ceiling currently fixed at 135 million SDR’s (approximately \$A 325 million).

¹⁶ [1992] 2 Lloyd’s Rep. 163.

¹⁷ The 1910 Collision Convention was incorporated into English Law by the Maritime Conventions Act 1911, now re-enacted by sect. 190 of the Merchant Shipping Act 1995.

¹⁸ The Australian statute giving effect to the Collision Convention is now section 259 of the Navigation Act 1912, but this section contains no reference to the two year time limit.

¹⁹ The 1969 Convention on Civil Liability for Oil Pollution (“CLC”) and the 1971 Convention setting up the International Oil Pollution Compensation Fund (“IOPC Fund”). Both these conventions were revised in 1992.

This regime applies, however, only to oil pollution from ships, and difficult legal questions have arisen where the craft concerned do not fall within the definition of "ship". Claims arising from a fire on an old immobilised tanker anchored in Greece as a slop reception facility have recently been rejected by the IOPC Fund on the ground that she is no longer a "ship". A Formal Working Group set up by the IOPC Fund has concluded that an FPSO which does not carry persistent oil as cargo but is moored in one location on an oil field is not to be considered to be a "ship" within the scope of the Fund Conventions.²⁰ On the other hand, a so-called "grazing tanker", which may carry oil-processing equipment on deck but which moves from one location to another and sometimes to the shore with oil on board may well be a "ship" for the purposes of the Oil Pollution Compensation Conventions.

It should also be noted that in 1996 an IMO diplomatic conference adopted a convention on pollution damage caused by the carriage by sea of hazardous and noxious substances (the so-called HNS Convention) which applies to chemical cargoes legal principles very similar to those applied to oil by the CLC and IOPC Fund Conventions. The HNS Convention has not yet been ratified by any state, but it is believed that a number of states, including Australia, Japan and the European Union, are planning co-ordinated ratification and entry into force of this convention in the reasonably near future.

The HNS Convention only applies to hazardous and noxious cargoes carried in ships, and the same legal difficulties may be anticipated if pollution is caused by chemical spillages from mobile offshore drilling units, FPSO's and other offshore craft which do not readily fall within the definition of "ship".

Conclusions

A comparative study of the principal international maritime law conventions reveals that the definition of "ship" is not uniform. It therefore appears that a simple over-arching convention to clarify what is or is not a "ship" for the purposes of all these conventions is a very remote possibility.

There are no doubt good business reasons why a FPSO should not be regarded as a "ship" for certain purposes, such as, for example, the avoidance of concerns relating to labour unions, load lines, and the ISM Code.²¹ One must, however, caution against the assumption that just by removing the propeller and engine from a tanker she ceases to be a "ship" for the purposes of the Merchant Shipping Acts.²² It is, in the author's view, unsatisfactory to define something by what it does rather than by what it is, and the resolution of the problems summarised in this paper may perhaps be better achieved by clauses dealing with the scope of application of the relevant conventions and statutes rather than by extended definition clauses.

What is clear, however, is that the present state of international maritime law on this subject is uncertain and unsatisfactory. The CMI seeks to address these problems and suggests that a solution may be found in a carefully worded international convention on offshore craft. Those who argue against such an initiative on the ground that there is no real problem are, in the author's view, incorrect.

²⁰ See footnote 9 above.

²¹ But see the IMO MODU Code 1989, which applies the Load Line and SOLAS Conventions to mobile offshore drilling units.

²² See for example *The Gas Float Whitton (No.2)* – footnote 11 above – and *Merchant Marine Insurance Co v North of England P and I Association* – footnote 12 above.

The Future

At the present time, the idea of an IMO offshore convention has clearly failed to excite many of the IMO member states. Within the CMI there has been a divergence of views. The Norwegian Maritime Law Association has come out firmly against the idea whereas the GARD P and I Association, a Norwegian mutual insurer which covers more than 25% of the world's offshore craft, is strongly in favour. The United States Maritime Law Association has declared itself to be against it, although some lawyer members have admitted in confidence that pressure from their oil company clients has over-ridden their own better judgment. The Maritime Law Association of Australia and New Zealand, which opposed the idea of a wider scope convention at the 1994 CMI Conference in Sydney, has now expressed itself to be in favour of the project. The Canadian Maritime Law Association, one of the project's most active advocates, has not been able to gain support for the project from the government of Ottawa. The British Maritime Law Association is in a similar position with its own governmental authorities.

While the arguments are being so vigorously advanced by both sides, it is impossible to conclude that there is a broad international consensus in favour of the Convention on Offshore Craft advocated in the CMI Report dated August 1998,²³ despite the proposed limits of its scope. It therefore appears probable that this project will remain on the back burner at the IMO – a low priority item on the long-term work programme of the Legal Committee.

The preliminary drafting work, which has already been done,²⁴ will not, it is submitted, be wasted. Those who believe in the usefulness of an international convention on offshore mobile craft, or even one extending to fixed offshore structures, will continue to work informally on a draft instrument, which can be kept in reserve until the political will to adopt such an instrument manifests itself.

The major advances in maritime law have almost always followed a major marine casualty – the so-called “Titanic factor”. It is sad to have to admit that it will probably be necessary to wait for an offshore accident involving major loss of life and pollution before this subject is brought again to the attention of the world's legislators in circumstances where they are obliged to give it the attention which it has so long deserved.

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²³ See footnote 8 above.

²⁴ See the draft text prepared by the Canadian MLA at p. 139 of the 1996 CMI Yearbook.