UK P&I Club Forum on "Criminalisation in the Maritime Context"

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Criminal Liability and International Law

Ladies and gentlemen, good morning. It is a great honour to be invited to speak to such a distinguished gathering. I do so as a practising lawyer who has been one of the people involved in some of the cases you have heard about. I am going to comment on the current proposals in the EU for criminalisation of ship-source pollution, in the light of some of the issues which these cases have raised.

First I hope it will be helpful if I give a brief reminder of the existing regulations that we are talking about. I apologise in advance if these are familiar to most of you already but it is, I think, important to be clear about what they say.

In international law and practice there has always been a clear distinction between two types of incident. One is the operational discharge and the other accidental pollution.

The operational discharge is of course the deliberate release into the sea of oil or oily waste, in circumstances which are often perfectly lawful, and where the discharge may be necessary because adequate reception facilities are not available. The circumstances must strictly comply with the controls which MARPOL prescribes for discharges of this kind, otherwise they are expressly prohibited by the Convention. Concerns have been expressed that ships are discharging oil in breach of these controls.

In the case of accidental discharges, on the other hand, where a casualty is involved and there is damage to the ship or its equipment, MARPOL provides that there is no criminal liability provided there is a proper response to the incident and provided there has been no deliberate or reckless misconduct by the owner or master. (I am para-phrasing here slightly but that is the essence of what the regulation states.)

There are also other types of accidental pollution, which do not result from damage to the ship or its equipment – for example, accidents in handling cargo or bunkers, mistakes in operating valves, leakages from pipes, and also operational discharges which accidentally breach the controls. These types of case fall outside the exclusion of liability for pollution resulting from accidental damage to the ship. I am not concerned with those today. Here I am concerned with how the proposed laws in the EU will affect casualties – groundings, collisions and the like – where the circumstances fall within the exclusion from liability I have just described.

The other relevant international rule of which you have already heard is the provision in UNCLOS that monetary penalties only can be imposed for pollution from foreign vessels in respect of incidents in the territorial sea unless the case involves wilful and serious pollution.

Now it is a fact of life that these principles of international law have not always been observed. The relevant cases in recent years include the NISSOS AMORGOS in South America after a spill following the grounding of the ship in the entrance channel to Lake Maracaibo. There are concerns that that incident owed a lot to the state of the channel and the information available as to its draft. The ship was detained for several months and the master remained under detention in Venezuela for over a year.

The AMORGOS is a bulk carrier which ran aground off Taiwan in early 2001. A number of officers were detained in the country for six months or so before being released. One of the concerns about that case was that their detention was linked to demands for security for civil claims.

The PRESTIGE is continuing and I am not going to say much about it. As you all know the master was detained in Spain for two years, including 83 days in jail, and for today's purposes one need only refer to the facts set out in the official flag state report of the Bahamas Maritime Authority. It is quite a bulky and thorough report. A number of experts were involved in its preparation and the main conclusions reached were that there was no clear cause of damage; no evidence of wrongdoing; and that the ship was ordered out to sea without regard to her condition. The treatment of the master was also criticised.

More recently in Karachi, in the case of the TASMAN SPIRIT in August 2003, eight people were detained for some eight months. One of the members of the crew made an attempt on his life which was fortunately unsuccessful. Again there were concerns about the cause of the incident, and with matters still on-going I will only say that there are disputes as to the role of the port authorities in maintaining the channel and possibly contributing to the incident. When complaints were made about the detention of the personnel involved, the authorities in Pakistan cited the PRESTIGE and said that their actions were no different from those taken in Europe.

At this point it is worth emphasising that although these cases have highlighted concerns about fair treatment of seafarers, it is not only seafarers who have an issue with what is going on. In the ERIKA – obviously an appalling case from the point of view of its impact on France – it is still a feature of the case that over five years after the incident there are various criminal proceedings still pending against several people. They include senior executives in various companies, including the oil major that chartered the vessel, and some may feel that it remains to be seen exactly what personal wrongdoing is said to have taken place to justify these charges.

In the light of the experience of these cases it would be fair to suggest, I think, that the issues they raise are obviously prevention of pollution – how to avoid these accidents happening and to reduce their impact – but also other concerns, including the need for a proper study of the causes. One of the issues to emerge from some of these cases is that if the prosecuting authorities are not wholly independent of the maritime administration of the coastal state, which may perhaps bear some responsibility for contributory causes of the incident, then justice is not seen to be done if there is an obvious incentive to secure a conviction against the seafarers involved and thereby take pressure off people who are being criticised locally.

But above all perhaps the most important issue involved in those cases was one of international legal order. Obviously a lot of diplomacy was required to obtain the release of the people concerned, but it shouldn't be forgotten that some of these cases have raised serious concerns about compliance with international law.
Against this background the EU Directive came on the scene, and the first thing to be said about it, I think, is how soon after the PRESTIGE it was put on the table. Within only a month after the incident a decision was made by the Council that something along these lines should be done. A draft was proposed in early 2003 and ever since then, although there have been amendments to it as we have gone along, we have been stuck with the fundamental problems of an early draft conceived in haste, before sufficient informed consultation had taken place as to what its objectives should be and how best to achieve them.

One of the concerns about the Directive, for anyone reading it with any experience in this field, is that it betrays something one sees quite frequently when talking to people who have concerns about pollution but are new to the subject, and that is that they don't always immediately understand or appreciate the distinction between operational discharges on the one hand and accidental spills on the other. The outrage rightly caused by deliberate illicit discharges tends sometimes to obscure an objective understanding of the different issues involved in genuine accidents. I am afraid to say that from my point of view, reading the Explanatory Memorandum which accompanied the first draft of the Directive, and indeed some of its preamble material, the Commission from the outset mixed up the two things.

This explanatory material begins by saying that the PRESTIGE incident has highlighted the need for the proposed measures because those responsible for pollution are not being penalised. This incidentally of course assumes that there was criminal wrongdoing involved in that case, without waiting to see whether proper investigations would reveal any evidence that this was the case. It then goes on to discuss in detail the concerns about the unacceptable continuance of illegal operational discharges, and the complaints of some coastal state governments that they have been gathering evidence of this type of incident, and have been forwarding it to flag state administrations, but have not been receiving reports in return of any action being taken. The bulk of the thinking expressed behind the Directive, and many of its provisions, are focused on these concerns and are aimed at ensuring more effective enforcement of MARPOL controls. Unfortunately, accidental spills were caught up in all this, for both types of incident have been, as it were, tarred with the same brush – both treated as "illegal discharges". The resulting concern is that a desire for tougher steps against the rogue operator has brought in its wake a disproportionate threat to those caught up in genuine accidents.

The thinking behind the Directive does not go into the causes of accidental spills, or the steps that could be taken to avoid them, other than to claim that criminal sanctions can be assumed to have a deterrent effect. As we all know, a lot of things have been taking place in recent years to improve standards both by regulation at the IMO and by advances in industry practice. There is very little investigation of all that, and little consideration of how it should dovetail with, or even render unnecessary, any criminal sanctions for accidental spills.

Another obvious point about the Directive is that it departs from MARPOL in territorial waters, inasmuch as it provides for a test to apply there of serious negligence in place of the test of deliberate conduct or recklessness. (Indeed, even outside territorial waters it provides for this test to apply to persons other than the owner, master or crew).

Now the concern about serious negligence is that this test of liability is imprecise and subjective. The expression "serious" negligence, now used in the proposed Directive, replaces "gross" negligence used in earlier drafts. It has been suggested incidentally that this change was made to accommodate concerns expressed by English lawyers that "gross" negligence was an inappropriate test due to connotations with the law of manslaughter. This was not the concern actually expressed, and so far as I know there has been no one – at any rate in Britain – who has suggested that shortcomings in the notion of "gross" negligence could be cured by calling it "serious".

The objection actually expressed was that both of these tests would suffer from the same defect, namely that in order to determine whether someone should bear criminal liability for negligence on the basis that it was "gross", or "serious", the process normally involves asking whether his acts or omissions were of a kind which ought to be punished. The concern about this is that unless you are very careful the test will turn out to be circular. You ask whether the person should be punished and, having decided that the answer is yes, you hold him guilty; having held him guilty, you go back to where you started and conclude that he ought to be punished. Penalties are then imposed without any clear objective step to determine whether there should be criminal liability at all. This presents a high a risk of criminal liability being incurred for reasons which owe too much to the seriousness of the consequences of what has occurred, or of society's reaction to it, and which is out of proportion to the culpability of the individual, or to the significance of his acts or omissions in the overall scheme of causes contributing to the incident.

To avoid this it is vital to have clear criteria identifying exactly what factors will constitute "serious" as distinct from ordinary negligence. What sorts of acts or omissions are involved? What standards must be breached? What link of causation is required? What degree of contributory effect is needed? These questions affect not just seafarers and others directly involved in relevant acts or omissions; there are also ambiguities as to how the Directive and Framework Decision would affect corporate defendants and any directors or senior managers who might be prosecuted by virtue of their position. The Directive does not contain any criteria addressing these issues.

One of the arguments heard in response to this is that there is nothing to worry about because criminal liability can be imposed only by courts of law, after a proper judicial process. However this does not really answer the main concerns. Experience has shown that in a climate of public outrage after oil spills courts as well as prosecutors can come under very great pressure to reflect society's disapproval of what has occurred, and in some cases have found it difficult to avoid a harsh verdict without risking criticism of themselves for a politically unpopular decision. Sometimes courts have sought a way out of this dilemma by repeatedly postponing hearings until the dust has settled.

This brings us to the next point, that in cases like the ones I have mentioned the real concern isn't so much that people are unfairly imprisoned after being convicted at trial. Such cases have been relatively few. More commonly the concern is related to the treatment of defendants (and especially foreign defendants) in the period prior to the trial – their detention while proceedings are pending or, even if they are not detained, the fact that criminal charges hang over their heads. The more usual complaint lies in the fact that the prosecution has been brought at all; that it reflects an overriding political need not to be seen to allow the master or other foreign defendant to go home; and that the end has justified the means – criminal charges of sufficient seriousness to justify detaining the defendant, with little apparent regard for the likelihood of the charges being proved. There have been cases which have ended up with charges of this sort either being dropped, or the defendant being acquitted, but only after a considerable time.

For similar reasons one can only be sceptical about any claim that under the new European proposals there could not be a repetition in Europe of a master being detained in the manner of Captain Mangouras; or that the Commission could prevent this by bringing proceedings against a member state in which such a detention occurred. It is very difficult to interfere in proceedings at a time when they remain *sub judice* in a national court. Any action by the Commission along these lines would be unlikely to reach a conclusion until long after the harm to the defendant has already been done.

The other concern about the test of serious negligence is a wider one of principle, and that is that it is inconsistent with the global regime. The inconsistency is really not in dispute, for it is clear from the Directive itself that the liability of owners and masters will depend on the MARPOL test beyond territorial waters – in other words, in the EEZ and on the High Seas – and that the different test of serious negligence will apply within territorial waters. It is therefore clear that there will be two different standards applying in two different areas, the one based on the international regime and the other on Community law.

For some people the concerns go further than this, for the Directive is not just inconsistent with MARPOL, but in my personal opinion is actually contrary to international law, inasmuch as it conflicts with the treaty obligations undertaken by MARPOL contracting states. Reference has been made to UNCLOS, the Law of the Sea Convention, as justifying the proposed legislation in Europe. It may therefore be worth emphasising that no one that I know of has suggested that the Directive is or would be a breach of UNCLOS, or that it in any way exceeds the powers of the coastal state as far as the law of the sea is concerned. The issue we are talking about is not the extent of the sovereign right of coastal states to legislate in their waters; what it is about is the effect of an agreement they have made, in a convention such as MARPOL, to exercise that right in an agreed uniform manner.

MARPOL makes it clear that its purpose is to establish universal rules. It states that the obligations of the parties to the Convention involve undertaking to give effect to the Convention and Annexes to it by which they are bound. It is not uncommon for international conventions to allow states to reserve the right to deviate from certain specified provisions, and indeed there is such a provision in MARPOL which allows states the option of adopting or not adopting some of the Annexes. It goes on to make

it clear that these do not include Annexes I and II, which are the ones with which we are concerned. These are obligatory Annexes, and the Convention provides that contracting states shall be bound by them in their entirety.

Now at the MARPOL Conference in 1973 there was a proposal by the Canadian delegation that there should be some sort of freedom for coastal states to enact measures of their own if they saw fit. This was strongly resisted, and there were long negotiations to try to agree on a compromise text. The idea of this was to allow states to take specific measures within their own jurisdictions – in other words, to enact their own laws – in cases where this was thought to be justified by special factors such as a need to protect particularly vulnerable waters. However the idea of a compromise proved very controversial, with many states voicing concerns that the proposed text was too vague, and did not establish sufficiently clear limits to the latitude it gave to coastal states to legislate in a unilateral manner.

In this context it may be worth commenting that the French delegation at the time said that "the Conference would strengthen the value of the Convention by deciding to delete [the draft compromise text] and in so doing would recognise that Contracting States would not take special measures within their jurisdiction and consequently go against its objectives." The draft failed to achieve sufficient support, and no agreement was reached that contracting states were free to legislate in their own jurisdiction in terms which differed from those set out in Annexes I and II.

This was reinforced when a further proposal was made by the Canadian delegation, which argued that in the absence of a compromise states should have freedom to legislate as they wished in their own waters. It suggested a text stating:

"Nothing in the present Convention shall be construed as derogating from the powers of any Contracting Government to take measures within its jurisdiction in respect of any matter to which the Convention relates …"

This was described by other delegates as an invitation to take unilateral action, a course totally at variance with the objectives of the Conference. It was defeated by 32 votes against 15 in favour. Only two European states voted in favour of this proposal (Ireland and Spain), and those against included Belgium, Cyprus, France, the Federal Republic of Germany, the German Democratic Republic, Greece, Italy and others.

For these reasons I do not agree with the claim that the proposed change of the test of liability in the territorial sea is permitted by international law.

I am aware of the argument we have heard that there are already national laws among MARPOL member states which are not consistent with the Convention, or which do not sit happily side by side with it. Indeed the UK is one such state. After the SEA EMPRESS incident in 1996 criminal charges were brought against the Milford Haven Port Authority for its part in the incident, on the basis of failures in the training and allocation of pilots. That prosecution was brought under environmental legislation which had nothing to do with merchant shipping, and which made an offence to pollute "controlled waters". These were defined as extending three miles out to sea. When this prosecution was brought a lot of concerns were voiced that people in the industry could be prosecuted under this legislation, and that this wasn't intended.

These concerns were referred to Lord Donaldson to consider in a review of various issues which he undertook for the Government. In his report he referred to MARPOL, with its exclusions from liability in Annex I, and he said that he could not believe that the legislator in England had MARPOL in mind, or that he intended to cover pollution from ships as distinct from land-based sources.

The same comment, I think, applies to other laws mentioned earlier. For example the Dutch legislation which has been mentioned is clearly an environmental law of a wider kind, including land-based pollution, which may well have been enacted without MARPOL being in the mind of the draftsman at all. I would suggest that there are dangers in drawing too many conclusions from environmental laws of this kind, particularly when the constitution of some states makes it clear that international laws prevail in any event.

By contrast the proposed Directive sets out to prescribe how MARPOL will apply in member states. It purports to give effect to the Convention, but it implements only some of its provisions whilst expressly overriding others. It asserts, in effect, that in territorial waters – where of course most accidents are likely to happen – MARPOL contracting states have the freedom to adopt or ignore different parts of the Convention, as they see fit. Speaking for myself I have difficulty accepting that this is correct.

So my final comment about the new European laws is that they challenge international legal order. If this is allowed to pass without objection, naturally one is bound to ask where it is all going to lead, not just in the European Union – which reportedly proposes next to extend its influence over the Exclusive Economic Zones of member states – but also in other parts of the world which may be tempted to follow the same example. What if other MARPOL states suggest that serious negligence is too lenient a test, and that there ought to be strict criminal liability for pollution? These, I think, are reasonable concerns.

To give credit where it is due, during the legislative process there have been some limited amendments to reduce conflict with international law, notably the restrictions in UNCLOS on custodial sentences. As a result it may be, for example, that under the revised Framework Decision the prospect of imprisonment is not as great as it was under earlier proposals. However that is small comfort for responsible people and companies who do not deserve a criminal record, or the threat of one hanging over their heads. It is also no answer to the complaint that conflict with MARPOL still remains.

Last December the Council invited the Commission to explore the possibility of launching an initiative within the framework of the IMO with a view to having the MARPOL Convention reviewed, and to report to the Council in 2006. It has been said that the idea behind this statement was to convince others in the international community to raise their standards to those of their European counterparts, rather than to bring European standards down to international standards. I respectfully suggest that it is an over-simplification to regard the issue as merely one of raising standards, and that it is more one of striking a well informed balance which takes proper account of all the factors involved.

Although it is late in the day of the European law-making process, hopefully it is never too late for a decision to be made that if the wider international community concludes that MARPOL strikes a better balance, or that an improved balance could be struck by a suitable amendment of the international regime, then the new European proposals should themselves be brought into line.