

UK Legal Implications of the Macondo Oil Spill

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17 May 2011

7968679



International Regulation aimed at ship spills

- Int'l / European regs aimed at preventing / liability for pollution etc. from oil tankers not rigs
- US Oil Pollution Act 1990 reaction to insufficient Int'l regs protecting the Alaskan coast following the Exxon Valdez Disaster in 1989
- National regulation most effectively regulates rigs in the UK



US Regulation is increasing

- A number of current bills suggest amendments to US legislation
 - Removal of the Oil Pollution Act 1990 offshore facilities liability cap of “removal costs plus \$75,000,000”
 - Inclusion of non-pecuniary losses in the Death on the High Seas Act and the Jones Act
 - And others.....



Pending Oil Spill Legislation

<u>Bill Number & Title</u>	<u>Sponsors</u>	<u>OPA '90-Related Provisions</u>	<u>Status</u>
H.R.3619 Coast Guard Authorization Act	Jim Oberstar (MN-8)	<ul style="list-style-type: none"> Amends OPA '90 to require a claim to be presented for recovery of removal costs for an incident within three years after the date of completion of all removal actions for that incident. (Current law requires such presentation within six years.) Amends OPA '90 to require that double hulled bulk oil tankers over 5,000 gross tons be accompanied by at least two towing vessels (or other vessels the Secretary considers appropriate) in Prince William Sound, Alaska. 	5/7/2010 Passed/agreed to in Senate. Status: Passed Senate with an amendment by Unanimous Consent.
H.R.5214 Big Oil Bailout Prevention Act of 2010	Rush Holt (NJ-12)	<ul style="list-style-type: none"> Amends the OPA '90 to: (1) increase the liability of the party responsible for an offshore facility, except a deepwater port, from which oil is discharged into or upon navigable waters or adjoining shorelines to the total of all discharge removal costs plus \$10 billion (currently, \$75 million) for each incident; and (2) direct the President to promulgate regulations to allow advance payments from the Oil Spill Liability Trust Fund to states and localities to prepare for and mitigate substantial threats from the discharge of oil. Amends the Internal Revenue Code to eliminate: (1) the \$1 billion per incident limitation on expenditures from the Oil Spill Liability Trust Fund for cleanup of oil spills; and (2) restrictions on the borrowing authority of such Trust Fund. Makes Act effective on April 15, 2010. 	Referred to the Subcommittee on Water Resources and Environment
H.R.5313 Offshore Safety and Response Improvement Act	Aaron Schock (IL-18)	<ul style="list-style-type: none"> Not OPA relevant (calls for studies and preventative measures) 	Referred to the Subcommittee on Energy and Mineral Resources
H.R.5356	Roy Blunt	<ul style="list-style-type: none"> Amends OPA '90 to direct the Secretary of Energy, within 	Referred to the House Committee on

<p>Oil Spill Response and Assistance Act</p>	<p>(MO-7)</p>	<p>two years, to require the development and deployment of certain technology for use in the event of a breach or explosion at, or a significant discharge of oil from, a deepwater port, offshore facility, or tank vessel (covered event).</p> <ul style="list-style-type: none"> • Doubles the limits on the total of the liability of, and the removal costs incurred by or on behalf of, the party responsible for a vessel or a facility from which oil is discharged into or upon navigable waters, adjoining shorelines, or the exclusive economic zone. Increases such a limit to the amount of a party's aggregate net after-tax profits generated during the four full financial reporting quarters preceding the date of an incident if that amount exceeds the limit otherwise applicable. • Makes this Act effective on April 15, 2010. 	<p>Transportation and Infrastructure, both to the Subcommittee on Coast Guard and Maritime Transportation and the Subcommittee on Water Resources and Environment.</p>
<p>H.R. 5503 Securing Protections for the Injured from Limitations on Liability Act</p>	<p>John Conyers Jr. (MI-14)</p>	<ul style="list-style-type: none"> • Repeal Shipowner's Limitation of Liability Act of 1851. • The Jones Act (at 46 U.S.C. § 30104) is amended to permit "recovery for loss of care, comfort, and companionship." • Class Action Fairness Act (at 29 U.S.C. § 1711 and 1332) is amended to clarify the class action rules so that state and local governments can bring legal actions on behalf of their citizens in their own state courts. • Agreements to restrict the dissemination of information pertaining to the cause or extent of environmentally harmful discharges off the shore of the United States are made void and unenforceable as against public policy (unless contained in a court or agency order). • Bankruptcy laws of Title 11 are amended to regulate sales and leases of property owned by the estate of a debtor liable for claims under OPA '90. This is intended to prevent responsible parties under OPA from severing their assets from their legal liabilities. • The Death on the High Seas Act is amended to permit family members to bring suit directly rather than through a personal representative and to permit recovery of non-pecuniary damages (e.g., pain and suffering and loss of care, comfort, and companionship) recoverable by the decedent's family. Applicability of the Act is also amended to cover incidents 	<p>Referred to the Committee on the Judiciary and Committee on Transportation and Infrastructure, subcommittee on Coast Guard and Maritime Transportation.</p> <p><u>Mark-up hearing on Tuesday June 22.</u></p>

		that occur on the high seas beyond twelve nautical miles from shore, as opposed to the current three nautical miles, and to exclude in the Great Lakes.	
S.684 Oil Pollution Prevention and Response Act of 2009	Maria Cantwell (WA)	<ul style="list-style-type: none"> Requires Coast Guard to: (1) report to specified congressional committees on the status of all Coast Guard rulemakings under OPA '90 and (2) issue a final rule in each pending rulemaking under such Acts. Requires a variety of measures to reduce the risk of oil spills, Authorizes state enforcement of any marine resource law enforced by the Secretary and allows state inspection of vessels. Allows Oil Spill Liability Trust Fund amounts to be used for response and damage assessment capabilities of the National Oceanic and Atmospheric Administration (NOAA). Prohibits using Fund amounts for claims under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Requires owners of certain tank vessels to maintain evidence of financial responsibility. Makes owners of oil (in addition to vessel owners) transported in single hull tank vessels with a poor safety or operational record liable for removal costs and damages. 	Referred to the Committee on Commerce, Science, and Transportation
S.685 Oil Spill Prevention Act of 2009	Frank Lautenberg (NJ)	<ul style="list-style-type: none"> Requires double hull protection of oil fuel tanks on certain vessels with a tank capacity of at least 600 cubic meters. Requires Coast Guard to conduct a comprehensive review of existing studies of the need for tractor tug escorts to be used by vessels carrying petroleum products or with large supplies of fuel onboard in the five largest U.S. ports; 	Placed on Senate Legislative Calendar under General Orders
S.1194 Coast Guard Authorization Act for	Maria Cantwell (WA)	<ul style="list-style-type: none"> Amends the Oil Pollution Act of 1990 to require any tank vessel over 100 gross tons (except a non-self-propelled vessel that does not carry oil as cargo) using any place subject to U.S. jurisdiction to establish and maintain evidence of 	Placed on Senate Legislative Calendar under General Orders

FY 2010 and 2011		financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected under specified provisions.	
S.3305 Big Oil Bailout Prevention Liability Act of 2010	Robert Menendez (NJ)	<ul style="list-style-type: none"> Amends OPA '90 to increase the liability of the party responsible for an offshore facility, except a deepwater port, from which oil is discharged into or upon navigable waters or adjoining shorelines to the total of all discharge removal costs plus \$10 billion (currently, \$75 million) for each incident. Makes this Act effective on April 15, 2010. 	6/9/2010 Senate committee/subcommittee actions. Status: Committee on Environment and Public Works. Hearings held. May be superseded by Menendez latest bill: S.3472 (see below).
S.3306 Big Oil Bailout Prevention Trust Fund Act of 2010	Robert Menendez (NJ)	<ul style="list-style-type: none"> Amends the Internal Revenue Code to eliminate: (1) the \$1 billion per incident limitation on expenditures from the Oil Spill Liability Trust Fund for cleanup of oil spills; and (2) restrictions on the borrowing authority of such Trust Fund. Amends OPA '90 to direct the President to promulgate regulations to allow advance payments from the Oil Spill Liability Trust Fund to states and localities to prepare for and mitigate substantial threats from the discharge of oil. 	Referred to the Committee on Finance
S.3375 Oil Spill Response and Assistance Act	David Vitter (LA)	<ul style="list-style-type: none"> Amends OPA '90 to double the limits on the total of the liability of, and the removal costs incurred by or on behalf of, the party responsible for a vessel or a facility from which oil is discharged into or upon navigable waters, adjoining shorelines, or the exclusive economic zone. Increases such a limit to the amount of a party's aggregate net after-tax profits generated during the four full financial reporting quarters preceding the date of an incident if that amount exceeds the limit otherwise applicable. Makes this Act effective on April 15, 2010. 	Referred to the Committee on Environment and Public Works.
S.3472 Big Oil Bailout Prevention Unlimited	Robert Menendez (NJ)	<ul style="list-style-type: none"> Amends the Oil Pollution Act of 1990 to make the party responsible for an offshore facility, except a deepwater port, from which oil is discharged into or upon navigable waters or adjoining shorelines liable for all discharge removal costs and 	Referred to the Committee on Environment and Public Works

Liability Act of 2010		damages for each incident (under current law such party is liable for the total of all removal costs plus \$75 million).	
S.3478 Remuneration for Ecological and Societal Tolls Occasioned by Reckless Errors Act	Charles Schumer (NY)	<ul style="list-style-type: none"> • Repeal Shipowner's Limitation of Liability Act of 1851. • Repeal 46 U.S.C. § 30504 which shields vessel owners from liability for loss caused by fire onboard the vessel "unless the fire resulted from the design or neglect of the owner." • Repeal 46 U.S.C. § 30503 which provides that the "owner and master are not liable beyond the value entered on the bill of lading" if a shipper of certain types of valuable cargo fails to give notice of the cargo's true character and value. • Repeal is effective April 15. 	Referred to the Committee on Commerce, Science, and Transportation

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Practical responses already implemented

- Drilling moratorium
- MMS replaced with split regulatory authorities
 - Office of Natural Resources Revenue
 - Bureau of Ocean Energy Management (BOEM)
 - Bureau of Safety and Environmental Enforcement
 - National Commission on the spill / offshore drilling – recommends goal-based regulation
- BOEM additional guidance (Notices to Lessees (NTLs))
 - NTL-06 (oil spill response plans to be well specific) and NTL-10 (subsea containment resources)
- Workplace Safety Rule
 - HSE risk identification and management
- Drilling Safety Rule
 - Operator certifies cement, casing, BOP etc.

There'll be protracted litigation

- Painful period of litigation, much in open court
 - Department of Justice suing BP, Anadarko, Transocean, Mitsui, Lloyds (exc. Halliburton / Cameron Int'l)
 - Third party actions / class actions / compensation fund
 - Also substantive dispute settled in arbitration under the Joint Operating Agreement between BP and Anadarko, Mitsui.

- No single smoking gun

- BP's Deepwater Horizon Accident Investigation Report of 8 September 2010, points to:

“well integrity failure, followed by a loss of hydrostatic control of the well...followed by a failure to control the flow from the well with the BOP equipment...Eight key findings related to the causes of the accident emerged.”

- Following the Exxon Valdez incident, Scott Pegau of the Oil Spill recovery Institute in Cordova, Alaska commented:

“Without a doubt this litigation did more harm to the region than the oil did. It dragged out for 20 years...In Alaska, it was about impacts on fishing, while in the Gulf the business impacts go beyond fishing to a large tourism industry...Legislation coming out of the Gulf is likely to have a much broader effect on the oil and gas industry”

**Quoted by Skip Kaltenheuser in his article “Spills and Bills” which appeared in the August 2010 edition of International Bar News*

Migration of US Regulation

- Some precedent to suggest US regulation may indirectly find its way to Europe and UK
 - The Oil Pollution Act 1990 outlawed single hulled tankers in the US before Europe
 - Accordingly, the International Maritime Organisation phased out single hulls more quickly to avoid increased risks in Europe
- US is no stranger to the concept of extra-territorial reach
 - US citizens' tax! / US trade sanctions
 - US and EU calls for extra territorial regulation (eg. regulation of EU-headquartered companies with EU-driven global initiative for offshore safety*)

**See EU Commission communication: "Facing the Challenge of the Safety of Offshore Oil and Gas Activities," 13 October 2010, together with Public Consultation: "Improving offshore safety in Europe", 16 March 2011 2010*

Regulation in the UK - Background

- 300 offshore platforms, 22 are considered “deep water” with new deep wells planned W.Shetland
- Chris Huhne (SoS Energy and Climate Change) etc. pronounced essentially “fit for purpose”
- EU etc. deep drilling moratorium resisted
 - Greenpeace Vs Gov’t challenge for environmental impact assessment
- The Energy and Climate Change Select Committee
 - Gov’t response
 - OGUK response

Energy and Climate Change Committee

- Captured mood on wide-range of topics (25 recommendations)
 - From the general:
 - *Oilco boards lack environmental experience*
 - *More planning for high-consequence, low-probability events*
 - To the specific:
 - *BOPs to perhaps be prescribed as needing two blind sheer rams*
 - *OPOL limit insufficient, recommends EU polluter-pays directive, etc.*
 - Some misunderstanding / rebuttal
 - *Eg. Prescriptive approach goes against grain / existing liability already uncapped*
 - *But....OGUK sees “the case for potentially high impact wells in the West of Shetland to have an additional ‘top up’ cover in addition to OPOL. DECC already has the power to request...”*



Piper Alpha Lessons

- Suggested that US playing catch up with UK - put house in order following Piper Alpha in 1988
- Lord Cullen review established:
 - Separate Health and Safety Executive (“HSE”)
 - “Goal-setting” regime
 - “Safety Case” regime
- Health and Safety at Work Act 1974 was applied offshore and remains principal statute governing HSE on rigs
 - Wide-ranging regulations contain numerous duties – breach of any one is a separate criminal offence
 - “Duty Holder” – usually the owner/operator of the platform - Offshore Installation (Safety case) Regs 2005
 - “Strict liability” offences in many cases i.e. if proven a breach has occurred, no defence is available

Important Regulations

- The Offshore Installations (Safety Case) Regs 2005
- Control of Noise at Work Regs 2005
- Offshore Chemicals Regulations 2002
- Control of Substances Hazardous to Health Regs 2002
- Pressure Systems Safety Regs 2000
- Management of Health and Safety at Work Regs 1999 (most frequently prosecuted, s3 – failure to carry out suitable and sufficient risk assessment)

Important Regulations (Continued)

- Provision and Use of Work Equipment Regs 1998
- Lifting Operations and Lifting Equipment Regs 1998
- Offshore Installations and Wells (Design and Construction) Regs 1996
- Offshore Installations and Pipeline Works (Management and Administration) Regs 1995 ('MAR')
- Offshore Installations and Pipeline Works (Prevention of Fire and Emergency Response) Regs 1995 (PFEER)

UK Regulatory Lessons from Macondo

- HSE inspectors increased + doubling environmental inspections
 - Increased peer review of well design and auditing of safety cases / well control
- Oil Pollution Emergency Plan requirements
 - Operator response to worst case scenario blow-out needing relief well
 - Operator procedure on pollution response, including relief well
- Technical circulars giving additional guidance have been issued by the HSE, although these do not change the legislative framework
 - HSE Offshore Safety Division circular dated 28 July 2010 describes how to assess the acceptability of riser emergency shut down valve (ESDV) leakage rates
- DECC is also reviewing indemnity and insurance provisions

Oil and Gas Industry in UK Regulation

- “Oil and Gas UK” represents the UK oil and gas industry
 - Oil Spill Response Advisory Group - to learn lessons from the Gulf of Mexico oil spill and the UK’s ability to prevent and respond to oil spills in the North Sea
 - OGUK quick to model likely spill scenarios
 - Recommended that the OPOL limit be increased from \$120 to \$250 million per incident
 - Well Life Cycle Practices Forum / Cameron Ltd BOP / stocks of dispersant / National Contingency Plan exercise Shetland May 2011
- All UKCS operators are voluntary signatories to the Offshore Pollution Liability Agreement 1974 (OPOL)
 - Acceptance of liability on a strict liability basis for pollution damage and cost of remedial measures
 - Enables signatories to meet obligation to demonstrate funds available to discharge liability for damage caused by pollution
- Responsibility for meeting claims under OPOL rests with operator

Contractual Relationship of Parties

- UK offshore exploration and development licenses are awarded over a particular “block” pursuant to the Petroleum Act 1998
- Where more than one licensee, joint and several liability is owed under model clauses incorporated into each licence, to UK government
- Pursuant to the model clauses, licensees are required to conduct operations in accordance with certain minimum standards such as good oilfield practice*
- If licensees fail to attain the minimum standards they potentially face unlimited liability on a “polluter pays” basis as well as criminal, civil and other sanctions, e.g. losing their licence

*(see the Petroleum (Production) Regulations 1988 as re-enacted in Schedule 9 of the Petroleum (Current Model Clauses) Order 1999)

Joint Operating Agreement

- Co-venturers typically enter into a contractual unincorporated joint venture arrangement under a Joint Operating Agreement (JoA)
- The JoA will typically state co-venturers:
 - are to be severally (individually) liable only to the extent of their percentage interest under the relevant licence; and
 - will indemnify other co-venturers to the extent of their percentage interest.
- In the Macondo example, BP agreed (in its capacity as non-operator) to be individually liable up to its 65% (equity) share of all costs and liabilities

Appointment of Operator

- Under the JoA, one party is Operator on a “**no gain, no loss**” principle (Operator neither makes any additional profit nor takes any additional risk)
- The Operator’s liability is very limited:
 - No liability except for wilful misconduct or failure to place insurance
 - *proving negligence / gross negligence is difficult*
 - No liability in any case of consequential loss
- The “no gain, no loss” principle is under pressure given the potential to impose massive civil and criminal liabilities under health, safety and environmental regulations
- Burden of criminal fines remains with Operators as cannot indemnify against criminal liability.
 - HSE etc. offences often “strict liability” (ie. regardless of fault)
- Knock-on effect down supply chain
 - Operators traditionally indemnified drillers etc. for blowouts / pollution – saying can’t afford the risk
 - Drillers saying need indemnities more than ever – each well becomes a “bet the company” event
- Non-operators unable to negotiate limits on liability for blowouts / spills seeking increased rights of oversight Vs liability implications of greater involvement



Conclusion

- UK oil and gas regulation is widely regarded as “fit for purpose” although enforcement and technical guidance can be improved
- Smaller companies increasingly outsourcing operatorship
 - Liability negotiation balance of power / status quo shifting
 - Stabilising oil prices + intricate web of cross – indemnities and insurance means unlikely to see fundamental change to the “no gain, no loss principle” of operation
- We are likely to see more time being spent negotiating indemnities and liabilities and fewer instances of commercial arrangements being left un-papered
- Insurance premia may be likely to increase, not least to meet the higher OPOL limit but unlimited or multi-billion dollar insurance will likely remain unavailable or a luxury
- Regulators and industry alike will continue to recognise the arguably more pressing issues in relation to developing UKCS’s remaining reserves including disincentives to late entrants and ongoing development resulting from decommissioning and security requirements



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