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Book review

Managing the Risk of Offshore Oil and Gas Accidents—The International Legal Dimension, Gunther Handl, Kristoffer Svendsen (Eds.). Edward Elgar (2019). p. 482 pp ISBN 978 1 78643 673 3

In common with the accidents at the Montara Wellhead Platform and the Macondo (Deepwater Horizon-DWH) oil well, the offshore oil and gas industry has, relatively speaking, escaped global-level scrutiny and regulatory attention. The reason for this is that the offshore oil and gas industry, globally, has remained largely unregulated. These two offshore accidents did trigger certain degree of response, as regards national (and regional) laws applicable to offshore oil and gas operations. At the global level, however, efforts at expanding the offshore industry's international governance structure have been limited, let alone making progress in establishing globally binding instruments, to manage the risk of offshore accidents. The situation is exacerbated by the lack of international regulatory attention concerning the transboundary impacts of offshore accidents. This book aims to provide a comprehensive analysis of this neglected transnational legal dimension of offshore oil and gas activities. To serve this purpose, this book intends, in three parts, to address the issues of, the prevention/minimisation of harm, the allocation of harm through liability and compensation arrangements and the processing of claims for compensation, especially in a mass torts context.

Part I is entitled 'Prevention and Minimisation of Harm'. At the outset, the importance of corporate governance and risk management is emphasised. It is perceived that, rules relating to corporate governance may constitute independent internal regulations. An important aspect of corporate governance is the respect for applicable rules, whether 'hard law' or 'soft law', by taking into account the 'social responsibility of enterprises'. These different aspects of corporate governance may be considered as relevant for risk management, as regards avoiding catastrophic incidents and dealing with the consequences thereof, should they occur (p. 4). It is also suggested that, an international treaty on the issue of risk management and corporate governance in terms of the offshore oil and gas industry would be highly desirable (p. 17). Despite the aforementioned, the emergence and consensus among the international community relating to the subject matter is still debateable. In considering regulating the safety of offshore oil and gas operations, it is observed that certain degree of uniformity exists whereby an international legal regime would be preferable to national standards. The reasons are that many of the national socioeconomic requirements concerning safety are shared among States and some uniformity between national systems is generated because of the need to comply with the international and regional environmental and precautionary duties. The corporate environment of offshore exploration and exploitation is dominated by a few major companies. These increasingly need to develop and apply uniform standards for their operations. As a result, this actively encourages companies to adopt measures and rules through self-regulation beyond what is legally required (p. 21). At the international level, States have a general duty to protect the environment and have generally committed themselves to fight pollution. The general intentions, however, cannot readily form a basis for a duty to act in a specific situation such as to initiate clean-up operations. In addition, States have a special duty to prevent the spread of pollution beyond coastal zones and be responsible for pollution caused by any non-fulfilment of their obligations under international law. The rules on the reimbursement of the costs of assisting States is available, whereas, the requesting State may not necessarily be able to recover its costs from the polluter, if the latter can limit its liability (p. 125). At the regional level, the cooperative efforts have so far been uneven and variable depending on the marine region involved. In some cases, cooperation includes both prevention and response measures. Where disputes concern sovereignty or marine boundaries this can create uncertainty among the States concerned. In the case of adjacent States, this may occur at any point on the coast where the projections of maritime entitlements overlap. In the case of opposite States, however, this will occur whenever the distance between the two States is less than twice the respective maritime entitlement (p. 220). Such uncertain situations may delay the development of offshore exploration and exploitation activities, not to mention cooperation. If activities are, nevertheless, carried out without agreements in place, this may create serious risks for the marine environment (p. 219). The general rule is that maritime delimitation agreements do not address issues related to the risks of transboundary accident or environmental issues. In addition, joint development agreements are more likely than delimitation agreements to address cognate issues of managing environmental risks and liabilities. At this stage, it is impossible to identify a consistent body of State practice that may mature into customary law and difficult to establish any minimum standards. As a result, States are offered a range of options from which to choose in meeting their particular requirements and interests (p. 220–251).

Part II addresses the issue of 'Liability and Compensation of Loss'. When concerning allocating transboundary losses from offshore oil and gas accidents, specific international legislation would seem essential, to ensure the proper compensation of all claimants but somehow, such provision is lacking. It is, therefore, proposed that an international instrument of this kind would have to be in the form of a 'civil liability' convention and incorporate elements that nowadays are standard and tested features of analogous international liability/compensation instruments. In addition, the offshore instrument ought to define 'damage compensable' broadly, to include not only pure economic loss as do other relevant international liability/compensation instruments already but also damage to the environment per se (pp. 283–284). Pure economic loss is generally the most extensive damage category following oil spill accidents, as it treats separately, any loss suffered by any injured party. It would be appropriate if the various rules that call for environmental damage recovery could apply a uniform definition of 'environmental damage' and harmonise the remedying obligations. It is,

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therefore, suggested that an explicit obligation should be imposed on the shipowner to effect suitable and alternative restoration, that is, to provide equivalent resources and habitat, when restoration of the environment is not fully possible. In addition, even if restoration at a reasonable cost were to be possible, the shipowner should be obliged to compensate for the loss of environmental values during the period of restoration (pp. 330–331). The issues regarding the award of punitive damages are also discussed, as this phenomenon is usually an issue of common law countries, rather than of civil law countries. It should be noted, however, that Australia, Canada, Singapore and the United Kingdom all have a more open-ended approach in awarding punitive damages when the defendant's conduct is considered so unacceptable that it warrants punishment, deterrence and condemnation, or is considered to be 'harsh, vindictive, reprehensible or malicious' or amounts to 'contumelious disregard' by the defendant for the rights of the plaintiff. Even some civil law countries, such as, France and Spain are more accommodating, with the courts in these countries being prepared, in principle, to enforce foreign awards of punitive damages provided that the enforcing court does not regard the award as excessive in amount (pp. 338–339). In order to avoid risk, oil companies not only invest heavily in safety and risk protection techniques but also purchase insurance cover, as a fundamental part of their risk management strategy. London, with its leading role in the energy insurance field, has recently designed some novel and unique risk transfer policies, including, for instance, 'Contractors Pollution Liability' policies and 'Pure Financial Loss' policies to cover third party financial losses following a pollution incident. It should be noted, however, that contracts that insure interests involving offshore oil and gas operations are likely to incorporate appropriate standard wordings but ultimately, the policies are manuscripts and parties modify the terms to fit their insurance needs (pp. 381–382).

Part III discusses the issues concerning, 'Claims Processing'. It is fair to suggest that the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage have functioned reasonably well in most cases. It is particularly important that the great majority of compensation claims have been settled amicably as a result of negotiation. The reason for this is that the Funds' governing bodies have always endeavoured and with very few exceptions succeeded, in arriving at decisions by consensus. This has resulted in consistency in decisions relating to the admissibility of compensation claims, which in turn, has helped potential claimants to foresee whether their loss or damage claim is likely to be considered admissible (p. 407). After discussion regarding the Montara Oil Spill, it is perceived that difficulties associated with proving causation and loss following transboundary oil and gas pollution events remain a fundamental threshold problem. There is persistent uncertainty about the nature and scope of the liability of States to pay compensation for loss caused by pollution events that occur within their territory. It is suggested that compensation claims brought by private individuals under municipal law may become a private mode of industry regulation and an effective means of ensuring that offshore oil and gas operations are conducted safely (pp. 445–446). The overall outcome regarding the liability of the oil and gas industry as regards transboundary pollution is not yet clear. As a way to settle mass tort, the key differences that exist between mass litigation in Europe and the United States are highlighted. After examining relevant cases, some general features of European mass tort processes are identified. Firstly, state institutions and state-based initiatives play a markedly more important role in providing effective law enforcement in Europe than in the United States. Secondly, in Europe, the satisfaction of mass tort claims primarily aims at providing compensation to victims and only indirectly, as a reflection of law enforcement. Thirdly, the occurrence of large-scale mass tort cases almost always gives rise to legislative intervention (pp. 447–457).

In summary, this book offers a unique perspective and closes a noticeable gap in the literature, as there currently exists no comparably extensive studies on how to manage the transboundary risk of offshore accidents from a legal perspective. Given the fact that extractive operations continue to expand into deeper waters, remote locations and hostile environments and now involve smaller and possibly less experienced operators, it is unlikely that the risk of offshore accidents is diminishing appreciably, in fact, the risk of accidents might be increasing rather than decreasing. In this regard, the value and importance of this book cannot be over emphasised. This book should be of great inspiration to scholars, policy makers and practitioners, as it adds to the international law literature in a meaningful way.

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