Maritime and Marine Law in Namibia

A further discourse on the subject by Roger Field

This article is the second on the subject to appear in this publication (see Namibia Brief No 18, June 1994). With particular reference to the development of Namibia’s Maritime Law over the past two years, it would have been of interest and a step forward to be able to confirm that Namibia now had an up to date Admiralty Jurisdiction Regulation Act, or like piece of legislation, on its Statute Books and that a body of case law was beginning to evolve thereunder through decisions and interpretations by the courts touching on a diverse number of maritime and shipping related issues.

No significant development of admiralty jurisdiction

Alas this is not, for whatever reason, the case and in the intervening period the High Court’s admiralty jurisdiction (if indeed it has any) has remained restricted to that which is prescribed by the Admiralty Act of 1890 of the old colonial courts. This act conferred admiralty jurisdiction on the Cape Supreme Court sitting as a Court of Admiralty and as codified in the English Admiralty Acts of 1840 and 1861!

As such the High Court’s legal authority, having as its somewhat tenuous source an English act of Parliament drafted some 155 years ago, remains limited to maritime issues falling under eight main headings only. These are:

5. ownership of ships;
6. salvage;
7. claims for wages and Master’s disbursements;
8. claims arising under mortgages over ships.

Although, with the possible exception of Master’s disbursements, these issues remain relevant today, a useful comparison in the Namibian context would be the much greater relevance of the far wider and commercially realistic jurisdiction enjoyed by the present day Cape Supreme Court in the exercise of its admiralty jurisdiction. This embraces no fewer than 32 clearly defined categories of “maritime claim” plus a catch-all category at the end to ensure that nothing remotely to do with the sea and/or shipping escapes the jurisdictional net!

Provision under this jurisdiction, for such matters as security arrests and the right to proceed against an “associated ship” as opposed to the vessel which actually incurred the debt or caused the damage, also the inclusion of workable rules for gaining access to and the inspection of ships and cargoes in order to determine the cause of loss or damage and generally to preserve evidence, strengthens the argument for the adoption by Namibia of a new and up to date admiralty dispensation as part of developing its maritime law.

Out of date rules

The result of the remaining ties to the 1840 – 1861 regime over the past two years is that the Namibian court practitioner and client are restricted in the exposure to legal
matters maritime, as a consequence whereof there has not been any significant development in the Namibian (admiralty) law. All concerned have been bound by a set of rules made in pursuance of an act of Parliament passed in the 26th year of the reign of Her Majesty Queen Victoria “Touching the Practice to be Observed in the Vice-Admiralty Court”. These rules together with forms and tables of fees were established by the Queen’s order in counsel of the August 23, 1883!

**Droits of Admiralty**

There is surely no longer a need to provide for such matters as a droit of admiralty or for that matter a Bottomly bond no matter how intriguing these may sound. So too the continued inclusion of “endorsements of claim” in respect of such headings as “derelict”, “piracy” (perhaps not so remote after all) and the “slave trade” is as unlikely as the expectation that learned Namibian counsel would be prepared to accept a first day fee on trial of £10.10.0 (approx. N$70.00)!

**Maritime Law Association**

It is understood that there is presently a move to form a Namibian Maritime Law Association. As in the case of South Africa, membership of such an association would not be restricted to the legal profession but would be open to commerce and industry as well as to Government and the Judiciary. As such, a powerful lobby (and advisory body) could well come into being for the updating and development of Namibia’s maritime law and also the country’s participation in the work of international maritime law bodies such as the CMI.

**Marine law**

In the area of marine law and in particular that branch of the law which is concerned with the exploration and exploitation of the living and non-living resources of the sea and the seabed within the exclusive economic zone and/or on the continental shelf, the developments have both in Namibia and South Africa seen advances in technology. The advances in turn give rise to a need to develop the law so as to provide a basis inter alia for the avoidance of conflicts in (resource related) rights and the resolution of disputes when such conflicts arise as they inevitably must – neither country having any such regime in place as yet.

**Advances in technology**

On the technical side the Namibian fishing fleet is for instance becoming vastly more sophisticated in way of vessels, equipment and general expertise in its quest to harvest the various living resources which comprise the economically important fisheries industry. For confirmation one only has to have regard to the recent developments in the potential for the exploitation of deep water fish species such as orange roughy and the fact that this new fish resource is harvested at depths of up to 1 000 m providing the basis in turn for considerable investment both local and foreign in processing factories and export marketing structures. So too the capacity of the important offshore diamond recovery industry to operate in ever deeper waters and to dredge ever increasing quantities (upwards of 50s ton per hour) of “process-sized” gravel from the seabed in the quest for carats (of the non-edible kind).

**Potential conflicts**

Factor into this equation the dredging for sand and gravel in the interest say of making cement and last but certainly not least the millions of dollars at present being invested in the offshore exploration for and/or the exploitation of Namibia’s oil and gas resources and the recipe for potential conflicts of interest must surely speak for itself.

**Fish vs oil and gas**

A recent headline reading “Hopes soar as more gas found off Namibia” (Cape Times business report of March 13, 1996) and the bold statement that this gas (from the Kudu field) could be piped to Saldanha in South Africa over the next thirty years to fuel a new power station as well as local power consumption and new industry in Namibia, surely begs the question as to the ramifications arising from the inability of the holders of say fishing or seabed mining or dredging rights to exercise these rights over the next three decades by reason of the presence of a pipeline (or more likely a matrix of pipelines) in and across productive trawling grounds and/or rich mining or dredging concession areas – this not to mention the threat of pollution vis-à-vis living resources that would be associated with a pipe burst, blow out, fire, collision or the like.

**SA precedent**

Let us take as an example the conditions under which the Suidelike Olie-Eksplorasie-Korporasie (Eiendoms) Beperk (SOEKOR) was granted an exclusive right (lease) some 30 years ago to prospect for “natural oil” in an area comprising the territorial waters and the continental shelf off and adjoining the Republic of South Africa. In this context it is possible that a comparison can be found between these conditions and the conditions under which the holders of the Kudu offshore petroleum exploration licence are bound to conduct their operations.

**“Unjustifiable interference”**

A most material and indeed peremptory condition of Soekor’s prospecting lease and one which has its origins in the 1958 Convention on the Continental Shelf (see also Art. 78(2) of the 1982 Law of the Sea Convention) and by law must be incorporated in any subsequent mining lease or authorisation (being the right to actually produce the oil) states in terms that it (SOEKOR):

> “shall not carry out operations in or about the prospecting (mining) area in such manner as may interfere unjustifiably with navigation or fishing or with the conservation of the living resources of the sea, and SOEKOR shall, as far as is reasonably possible, give due consideration to any representations by the government in this regard.”

If one accepts as common cause that the presence in the middle of say a most prolific and sensitive hake trawling ground of a number of large offshore oil production platforms each having a considerable “no go” area around it plus the presence of a matrix of pipelines running ashore, alternatively a number of tankers receiving calm buoys constituting oil collection facilities, the interference with navigation, fishing and the (threat) to the conservation of the living resources in the area such as fish, crustacea and other marine life speaks for itself.
The question which then arises is whether this interference is justified e.g. whether in the overall scheme of things the short-term production of oil is for instance more important than the long-term preservation of fish stocks and/or more particularly the livelihood of those who for decades have been dependant on the right to fish commercially. So too the interest of the offshore diamond, gravel or sand dredging industries could be seriously affected should it happen that the oil production platform or platforms need to be positioned in already demarcated and paid for concession areas.

**North Sea experience**

In an article published in 1990 by Robin Churchill, then a senior lecturer in law at the University of Wales College of Cardiff and co-author of the first detailed and comprehensive work on UNCLOS III (The Law of the Sea, Manchester University Press 1983, 1985), the learned author deals with the conflict between the fishing and offshore petroleum industries which arose in the North Sea.

The article is divided into two main parts. The first part examines the way in which conflicts between the fishing and offshore industries arise in practice and the second explores the ways used to attempt to resolve such conflicts in the British and Norwegian sectors of the North Sea.

For reasons of space it is not possible to deal with this article in any great detail. For present purposes it will suffice, however, to record that based on the North Sea experience similar conflicts between the respective industries are bound to occur in both Namibian and South African waters with the interests of the offshore diamond industries in each country adding a further complication.

**Lessons to be learned**

Churchill concludes his article by stating that:

"the experience of Norway and the United Kingdom offers a number of lessons to any country faced with a conflict between offshore petroleum and fishing. The main lesson is that certain issues need to be resolved at an early stage, preferably if possible before offshore oil and gas activities begin."

Two of the principal issues referred to by the author are: the need to determine procedures for deciding which activity, e.g. offshore petroleum, fishing (or diamond mining) is to have priority in any particular area and secondly deciding whether compensation should be paid to say the commercial fishing (and/or diamond recovery) industries for loss of access to fishing grounds or concession areas.

**No procedure for resolving conflicts**

The weakness of the national law of both Namibia and South Africa is that no guidance or procedure is laid down for determining whether it would for instance be justifiable to allow offshore petroleum activities to interfere with say fishing and/or whether such interference might be justifiable if meaningful compensation were to be paid to the fishermen. What indeed should the test be and how would such compensation be structured.

**Legal position**

As matters stand at present an aggrieved party would probably need to look for the answer in an interpretation of existing (resource) rights (conditions requiring consideration of the rights of others) also what remedies might be available under administrative law (review of ministerial decisions to grant a particular right) and/or under Constitutional law (deprivation of an existing right by the granting of a right to another). A possible breach of the obligations imposed on coastal states by the international law of the sea (optimum utilisation of living resources and the implementation of proper conservation and management measures) might also come into the argument.

Sooner or later the question of the resolution of a serious conflict of resource-related rights will need to be determined more than likely by the courts. The lessons from the North Sea should perhaps be heeded now.

*The author:* Roger Field holds a master's degree in maritime and marine law from the University of Cape Town. He is senior partner of the maritime and marine law firm of Field & Co. in Cape Town. Since March 1, 1994 his firm has practised in association with attorneys D.F. Malherbe & Partners in Walvis Bay to provide maritime and marine law expertise in Namibia’s principal and rapidly growing port.