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CHAPTER 4

COMPENSATION FOR POLLUTION DAMAGE RESULTING FROM EXPLORATION FOR AND EXPLOITATION OF SEABED MINERAL RESOURCES

Professor B. Soyer*

INTRODUCTION

In parallel with technological advances, offshore industry is beginning to intensify its efforts to explore and exploit seabed mineral resources in deeper locations, resulting in a considerable increase in the number of fields that are currently in operation. Partly due to stringent regulatory demands put in place by coastal states,¹ the offshore industry enjoys a good safety record. In fact, until recently the industry has been viewed as being only a minor contributor to pollution in the marine environment compared with other sources of pollution.²

However, public perception on the matter has shifted following two recent high-profile incidents involving offshore oil installations. In August 2009, the *Montara Wellhead* platform, located off the northern Australian coast about 400 miles west of Darwin, had an uncontrolled release of hydrocarbons that subsequently led to a fire in November 2009. The resulting pollution contaminated 70,000 km² of the ocean before the gushing oil on the seabed was capped almost 10 weeks after the blow-out. Only a few months later, in April 2010, the world woke up to one of the worst-ever pollution disasters following an explosion on the *Deepwater Horizon*, a mobile offshore drilling rig situated about 41 miles off the southeast coast of Louisiana. The incident claimed the lives of 11 workers and the rig sank a few days after leaving the well it drilled in the Gulf of Mexico gushing at the ocean bed for 87 days. The harm to the marine environment was devastating and the fishing and tourism sectors suffered multi-million dollar losses as a result of the incident.

Both incidents not only give a vivid picture of the enormity of the damage that could arise as a result of spills from well blow-outs, they also raise concern as to the availability of a satisfactory compensation regime in case of a similar incident arising in the United Kingdom (UK) waters. The existence of over 100 active oil and gas fields located mainly in the UK

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1. In some parts of the world, regional agreements have been developed that put obligations on contracting parties to take the necessary measures regarding design, construction, placement, equipment, marking, operation and maintenance of offshore installations. For instance, the United Kingdom (UK) is party to the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) 1992, which obliges the contracting states to take all possible steps specified in Annex III to prevent and eliminate pollution from offshore installations for the purpose of exploration of the seabed and exploitation of its natural resources (art. 5 of the OSPAR Convention 1992). The following states are other parties to the OSPAR Convention 1992: Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and Switzerland together with the European Union. Other similar notable regional agreements are Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) 1976; Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention) 1992 and Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution 1978 (applies in the Persian Gulf).

2. E. Gold, A. Chircop & H. Kindred, *Maritime Law* (2003), p. 715.

section of the North Sea³ highlights the extent of the danger from the British perspective. The most recent incident that occurred at the *Gannet Alpha* production platform in August 2011, only 112 miles off Aberdeen, was perhaps a warning sign.⁴ Even though the scale of pollution was relatively small and the leak was sealed in a week,⁵ discharge of 220 tonnes of oil into the sea is likely to cause harm to marine life, and perhaps more significantly it amplifies the need to have a thorough debate as to whether the existing legal regime is capable of dealing adequately with the legal problems that could arise in the case of another incident on a much larger scale.⁶ It is also a cause of concern that offshore companies are increasingly considering exploitation of mineral resources in deeper waters in the North Sea. For example, BP has recently announced controversial plans to drill a well off Shetland at 1290 m. In the case of an emergency, it might take up to 140 days for such a well to be sealed; environmental pressure groups argue that spillage of oil over a such an extensive period might constitute the worst oil spill in history and one more than twice the size of the *Deepwater Horizon* catastrophe.⁷

The purpose of this paper is twofold. First, evaluating the current legal regime, it is intended to highlight potential legal difficulties that might occupy courts in case of an offshore- originated pollution incident. Lack of any international regime dealing with the issue of compensation, coupled with the difficulty of applying existing maritime conventions and various common law rules to offshore installations and crafts could create serious legal difficulties. In the second part, it will be deliberated what steps can be taken in the context of international treaties to enhance the position of victims if such a pollution disaster strikes. Given the prospect of pollution arising in neighbouring coastal states affecting the UK coastline and waters⁸ and the international nature of the oil industry, the preference will be to find a solution to the problem in an international (or at least regional) context.

CURRENT LEGAL REGIME AND POTENTIAL PROBLEMS

It is not possible in practice for any operator to obtain a licence from the UK government⁹ for operations in the offshore sector without becoming party to the Offshore Pollution Liability Agreement (OPOL). OPOL is a voluntary contractual regime entered into by a group of major oil companies. At the time when OPOL came into force, on 1 May 1975, the international community was occupied in negotiating an international regime governing liability from offshore activities. Originally, OPOL was considered to be an interim measure until such

3. See, <http://www.dbd-data.co.uk/bb2001/book.htm> (last visited on 1 November 2011). Whilst most fields are in the North Sea, they are spread over a larger geographical setting, e.g., Atlantic margin of UK waters (west of Shetland). Fields in the southern North Sea are serviced from Easington, Lowestoft, Hartlepool and Yarmouth and near Skegness, whilst Aberdeen is a key port servicing fields in the central North Sea and northern North Sea. Fields in the Irish Sea are serviced from Liverpool, Blackpool and Morecambe.

4. "Shell North Sea Oil Spill Is the Worst in the UK for 10 Years", published on 17 August 2011 in *The Independent* by Michael McCarthy.

5. It should be noted that in the UK the Secretary of State's Representative for Maritime Salvage and Intervention (SOSREP) has powers to intervene and give orders to avoid or prevent pollution in case of an emergency concerning offshore installations. See, for example, the Offshore Installations (Emergency Pollution Control) Regulations 2002 SI 1861 made under s. 3 of the Pollution Prevention and Control Act 1999.

6. Since 1969, 10 serious incidents have occurred on offshore oil rigs located in the UK waters. The most dramatic was the explosion that occurred on the *Piper Alpha* platform in 1988 which claimed the lives of 167 people.

7. "BP Faces Fierce Backlash from Green Groups over New Oil Well", 13 October 2011, *The Independent*.

8. For example, in the North Sea, offshore installations are active in the waters or within the exclusive economic zones of four other states, namely the Netherlands, Germany, Denmark and Norway.

9. In the UK, the safety and licensing aspects are handled by two regulatory bodies, the Health and Safety Executive and the Department of Energy and Climate Change.

an international regime entered into force. The efforts of the international community resulted in the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE) 1977. The Convention sets out detailed rules on liability standards¹⁰ and limitation amounts¹¹ and applies offshore installations including all fixed and mobile drilling units, storage facilities and most pipelines.¹² Even though the CLEE was initially signed by a number of states,¹³ it has not received adequate ratifications to enter into force. In response to the failure in securing an international agreement, with the support of the industry and relevant governments, OPOL has been extended to cover offshore facilities of Denmark, the Federal Republic of Germany, France, the Republic of Ireland, the Netherlands, Norway, the Isle of Man and the Faroe Islands.

It is fair to say that the first port of call for any claimant in case of a pollution incident arising from an offshore installation will likely be OPOL. The agreement is administered by the Offshore Pollution Liability Association Ltd, a company registered in the UK. For an operator to join the agreement it has to establish financial responsibility to meet claims arising under OPOL by producing evidence of insurance, self-insurance or other satisfactory means. The responsibility of meeting the claims under OPOL lies solely with the operator of the offshore installation.¹⁴ OPOL defines offshore facilities in a wide fashion including mobile installations used for treating, storing or transporting crude oil from the seabed.¹⁵ The liability of the operator is strict, with certain exceptions,¹⁶ and has an overall limit of US\$250 million per incident.¹⁷ Under the agreement, the operators agree to meet the cost of preventive measures and pollution damage as long

10. The operator or operators are made strictly liable under the Convention (art. 3 of the CLEE).

11. By virtue of art. 6 the operator is entitled to limit his liability under the CLEE for each installation and each incident to the amount of 30 million SDR. Art. 6(1) allowed an increase up to 40 million SDR once five years have elapsed from the date on which the Convention was opened for signature. Art. 15(1), however, left it open to a member state to introduce an unlimited liability or a higher limit of liability than that currently applicable under art. 6.

12. See, art. 1(2) of the CLEE.

13. Germany, Ireland, the Netherlands, Norway, Sweden and the UK all signed the CLEE in the late 70s.

14. The parties to OPOL also agree to contribute to the payment of claims due from an operator that fails to meet its claims obligations.

15. Clause 1 (8) of OPOL (updated on 1 October 2010) defines an offshore facility for the purposes of the agreement in the following manner:

- A. any well and any installation or pipeline or portion thereof of any kind, fixed or mobile, being used for the purpose of exploring for, producing, treating, storing or transporting oil from the seabed or its subsoil; and
- B. any well used for the purpose of exploring for or recovering gas or natural gas liquids from the seabed or its subsoil during the period that any such well is being drilled (including completion), re-completed or worked upon (except for normal work-over operations); or
- C. any installation of any kind, fixed or mobile, intended for the purpose of exploring for, producing, treating or storing oil from the seabed or its subsoil where such installation has been temporarily removed from its operational site for whatever reason; which is described in the Appendix to the Rules and located within the jurisdiction of a Designated State but excluding any Offshore Facility located in the Baltic Sea or Mediterranean Sea to the extent that it and, in the case of any well, any installation from which it is drilled, are both to seaward of the low-water line along the coast as marked on large scale charts officially recognised by the Government of such Designated State...

16. Clause IV of OPOL stipulates:

- B. No obligation shall arise hereunder with respect to Remedial Measures and/or Pollution Damage arising from an Incident if the Incident:
 - 1. resulted from an act of war, whether there be a declaration of war or not, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable, and irresistible character;
 - 2. was wholly caused by an act or omission done with intent to cause damage by a third Person;
 - 3. was wholly caused by the negligence or other wrongful act of any Government or other authority or resulted from compliance with conditions imposed or instructions given by the Government of the State which issued the Licence as to the Offshore Facility involved; or
 - 4. resulted wholly or partially, either from an act or omission done with intent to cause damage by a Claimant, or from the negligence of that Claimant, in which case any Party hereto which would otherwise be liable hereunder shall be exonerated wholly or partially from its obligations to said Claimant.

17. The limit has recently been increased in the aftermath of the *Deepwater Horizon* incident.

as the offshore installation in question is located in an area where the agreement applies. Therefore, it will be, for example, possible for claimants located outside the waters of a state designated under OPOL to bring action for pollution damage stemming from an offshore installation located in the North Sea. Preventive measures under OPOL are “reasonable measures taken by any party from any of whose designated facilities a discharge of oil occurs and by any public authority to prevent, mitigate or eliminate pollution damage following such discharges of oil or to remove or neutralize the oil involved in such discharge, excluding however, well control measures and measures taken to protect, repair or replace and such designated offshore facility”.¹⁸ Pollution damage has been described as “direct loss or damage by contamination which results from a discharge of oil”.¹⁹ The funds available have been allocated equally for the cost of preventive measures and pollution damage. However, when all claims in one category have been met, any surplus may be used to meet unsatisfied claims in the other category.²⁰

One of the main objectives of OPOL is to provide a mechanism that ensures that claims put forward by the claimants are paid up to the maximum limit in an efficient manner by the relevant operator. However, OPOL does not attempt to regulate the relationship between the relevant operator and other participants in a venture, such as drilling contractors and subcontractors (e.g., well and other drilling specialists and technical experts). In practice, operators make their own arrangements as to the financial responsibility with such parties. That said, third parties are protected under the OPOL regime, as payment to a claimant is conditional upon the claimant assigning to the operator any right of action against third parties.²¹

It would not be an overstatement to suggest that OPOL enables a mechanism for expeditious settlement of claims arising out of an escape or discharge of oil from offshore energy installations. However, on closer scrutiny it becomes apparent that especially in cases where the extent of the pollution is considerably great, the OPOL regime could prove to be inadequate and even troublesome from a legal perspective. The rest of this part will discuss problems that are associated with this voluntary scheme which seems to be favoured by the oil production industry.

Limits and Recoverability of Claims Under OPOL

First, the magnitude of the pollution in the *Montara* and *Deepwater Horizon* incidents demonstrates clearly that the funds available under OPOL, US\$250 million per incident, will be negligible in case of a similar incident arising in any of the oil fields in the North Sea. Considering that the clean-up bill that BP in the *Deepwater Horizon* incident had to pay alone reached billions of dollars, it is evident that US\$125 million allocated will remain grossly inadequate. It is also worth noting that by September 2010, nearly 170,000 claims, mainly from fishermen and the tourism sector, had been submitted to BP’s claims offices following the *Deepwater Horizon* incident.²²

Even in incidents of a smaller scale, there are doubts as to whether certain types of losses will be recoverable under the OPOL regime. The operator’s responsibility for pollution damage arises as long as loss or damage is a direct result of contamination from discharge of oil. It is not clear whether the need for direct relationship between the loss or damage and the contamination will restrict the types of damages that are recoverable under the agreement. For

18. Clause 1 (15) of OPOL.

19. Clause 1 (13) of OPOL.

20. Clause IV (A) of OPOL.

21. Clause VII of OPOL.

22. Press Release, BP, Update on Gulf of Mexico Oil Spill (3 September 2010), <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064849> (last tested 1 October 2011).

example, will a claim for loss of earnings brought by a hotel situated in the area be recoverable under OPOL? This type of loss is commonly known as “pure economic loss” and it relates to consequential economic loss suffered by people whose property has not been contaminated by the oil spill. In most common law jurisdictions, courts are not receptive towards such claims.²³ However, under some international regimes, for example, the International Convention on Civil Liability for Pollution Damage (Civil Liability Convention) 1992, pure economic loss claims are recoverable.²⁴ It can justifiably be argued that being an agreement that aims to provide immediate remedial action for the victims of a pollution incident emanating from the offshore sector, OPOL should provide compensation for victims suffering from pure economic loss. However, the insistence on “direct relationship” might work against the claimants under OPOL.²⁵ It should be noted that under the Civil Liability Convention (CLC) 1992, which allows recovery of pure economic loss claims, the definition of pollution damage is much wider and there is no reference to the need for direct relationship between the loss or damage and the contamination.²⁶

In a similar vein, it remains unclear whether under the definition espoused by OPOL, damage to global commons (such as the high seas) or ecological damage to wildlife will be recoverable. Such damage might stem from seismic surveys, drilling and the use of oil-based drilling mud (or fluid).²⁷ Apart from the difficulties in quantifying such damages, the view might be taken that a causal link between such loss and contamination that results from discharge of oil from an offshore installation does not exist.²⁸ One also sees difficulties arising under the OPOL regime if compensation is sought for pollution caused by other sources such as deck drainage from offshore platforms which usually consists of lubricating oil from machinery and spilled mud and deck wash. Given that “oil” is described to mean only crude oil, any loss or damage caused by the discharge of lubricating oil will possibly not be covered under OPOL regime.

Applicability of National and International Regimes and Problems Emerging

One should not lose sight of the fact that OPOL is a voluntary agreement between major offshore operators involved in exploitation and production of seabed mineral resources.

23. For the traditional stand taken against pure economic loss claims (also known as the exclusionary rule) see *Cattle v. Stockton Waterworks Co* (1875) L.R. 10 Q.B. 453. In the USA a similar rule, instituted in *Robins Dry Dock & Repair Co v. Flint* (1927) 275 U.S. 303, strictly limits liability for pure economic loss.

24. Although the Convention allows compensation for pure economic loss in oil pollution cases, no attempt has been made to provide guidelines as to how far the right to compensation extends in such cases. The matter is left entirely to the discretion of national courts. For an analysis as to how the British courts should determine liability for pure economic loss in cases coming under the CLC 1992, see B. Soyer, *Ship-sourced Oil Pollution and Pure Economic Loss: The Quest for Overarching Principles* (2009) 17 *Torts Law Journal* 270.

25. Any dispute between a claimant and an operator that is party to OPOL will be submitted to arbitration in London in accordance with the rules of the international Chamber of Commerce by virtue of clause IX.

26. The term “pollution damage” has been defined in art. 1(6) of the Civil Liability Convention (CLC) 1992 as:
(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken...

27. Drilling mud or drilling fluid is the steam of gases, liquids and solids suspended in liquid, with additives, which circulates through the drilling string and the annulus at high pressure, and is an essential requirement for all rotary drilling operations. There are two types of drilling mud. Drilling mud which contains water is called water-based mud and the drilling mud which contains about 70–80% of oil is called oil-based mud. The latter includes some known toxic pollutants such as hydrocarbons and concentrations of heavy metals, including chromium, cadmium, copper, zinc, lead, mercury and nickel. See, H. Whitehead, *An A-Z of Offshore Oil and Gas*, (1983), p. 88.

28. By virtue of clause 1 (5), discharge of oil means any escape or discharge of oil into the sea from the offshore installation(s).

Although coastal states, including the UK, require operators to be a party to OPOL, this does not elevate the legal standing of the agreement. OPOL remains a contractual commitment on the part of offshore operators by which they agree to accept strict liability in cases of pollution emerging from offshore installations (as defined in OPOL) subject to the terms and limits set out in the agreement. There is, therefore, nothing to prevent claimants from bypassing the OPOL regime and pursuing directly the operators or even their contractors, especially in cases where the scale of pollution is large and it is evident that the limits of OPOL will remain unsatisfactory. Needless to say, any claimant taking this kind of action will be required to demonstrate that the operator and/or contractor has failed to take reasonable measures to prevent pollution. If such a course of action is taken, it will be inevitable for the courts to grapple with the question of whether certain international regimes are applicable to offshore installations. Another problem will be whether existing tort regimes are capable of providing adequate compensation in case of a pollution event emerging from offshore installations and craft. These issues will be deliberated next.

Limitation of Liability for Oil Rigs

In a case where the pollution springs from an offshore platform and the claimants decide to bring an action against the owners of the platform in tort, the latter might attempt to limit their liability under the Merchant Shipping Act (MSA) 1995.²⁹ The UK is a party to the Convention on Limitation of Liability for Maritime Claims 1976, and the Convention has been incorporated into the law of the UK by section 185 of the MSA 1995.³⁰ Under the Convention regime, "floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof" have been excluded from limitation by virtue of article 15(5). However, this article does not appear in Schedule 7, Part 1 of the MSA 1995 and, therefore, has no force of law in the UK. The corollary of this exclusion from the incorporating statute is that limitation for floating platforms could potentially be possible as long as such crafts satisfy the definition of the term "ship" contained in paragraph 12 of Schedule 7, Part II, to the MSA 1995. This provision stipulates the following:

References in this Convention and in the preceding provisions of this Part of this Schedule to a ship include references to any structure (whether completed or in course of completion) launched and intended for use in navigation as a ship or part of a ship.

As a preliminary point, it should be noted that not insisting on a particular type of structural design probably broadens the number of movable chattels that could qualify as a ship for limitation purposes. However, it is apparent that the key element in the definition is whether the craft is "intended for use as a ship or part of a ship". It is worth noting that the definition does not distinguish whether the craft should be used exclusively or partly in navigation. This might be a decisive point in determining whether the relevant provisions of the MSA 1995 apply to an offshore oil platform or not.

Some eminent authorities have taken the view that floating platforms would possibly not fall within the definition of "ship" in paragraph 12 of Schedule 7, Part II, and accordingly liability

29. In a similar fashion, in the United States prior to the introduction of the Oil Pollution Act 1990, whether the Limitation of Liability Act 1851 had applied to offshore oil rigs has generated a rigorous debate. See, for example, S.J. Seeberg-Elverfeldt, *The Limitation of Liability Statute and Its Applicability to Oil Pollution Damage resulting from Offshore Drilling* (1980) N.Y.J. Int'l Comp. L. 48.

30. The text of the Convention itself is set out in Part I, Schedule 7 to the MSA 1995.

in respect of such platforms will be unlimited in the UK.³¹ However, in the light of the fact that there is no legal authority considering the position of such platforms from the perspective of limitation of liability and the relevant provision in the MSA 1995, it is submitted that the matter is far from settled and requires further deliberation, taking into account the case law on the subject, the purpose of the limitation of liability and perhaps also judicial developments in other jurisdictions.

In several cases, British courts took the view that an object that performs its main function when it has been affixed to the bottom of the sea would not be regarded as a ship that comes under Admiralty jurisdiction. In *Wells v. Owners of Gas Float Whitton (No 2)*,³² for instance, a "gas float", which was, in fact, shaped like a boat and moored in tidal waters, ran aground in a storm. The gas float was 15 m long and 6 m broad, and had neither the oars, nor the mast or rudder. It was unmanned and contained a gas cylinder. The issue was whether it could be regarded as a ship so as to be the subject of salvage. The County Court judge made a salvage reward for £15. The matter was ultimately brought to the House of Lords, which was adamant that the gas float was not a ship for the purposes of salvage law. The fact that the gas float had to be towed to its current position at sea did not have any bearing on the decision.³³ Referring to the gas float, Lord Herschell made the following remarks:³⁴

It was not constructed for the purposes of being navigated or of conveying cargo or passengers. It was, in truth, a lighted buoy or beacon. The suggestion that the gas stored in the float can be regarded as cargo carried by it is more ingenious than sound.

In light of such authorities, it can safely be said that offshore platforms, which are firmly fixed to the seafloor, will not satisfy the definition of a ship for limitation purposes.³⁵ A fixed platform will not have any propulsion nor will it carry any navigation device, and it will usually be towed to a particular location and then fixed on the seabed where it performs its function. In this regard a parallel can be drawn with a gas float which is neither constructed to be used in navigation nor is it used in navigation.³⁶ On the other hand, the legal position concerning floating platforms might be rather different. Some semi-submersible rigs operate under their own power in deep waters and usually carry crew on board that frequently includes professional seafarers. Likewise, jack-up rigs, although their legs remain in contact with the seabed during drilling, are capable of being moved from one location to another even within the same field.

In some older cases, certain types of craft capable of being moved on water for certain purposes were, nevertheless, not classified as ships, on the premise that movement was an exception for them and they performed their primary function when stationary. Probably the best-known case on the subject is *Merchants' Marine Insurance Co Ltd v. North of England Protection & Indemnity Association*,³⁷ which involved a pontoon coming into collision with a ship, the *Fernhill*. The owner of the *Fernhill* became liable to the French government and the owner of the pontoon for a sum of over £12,000. At the time of the collision, the pontoon was

31. P. Griggs & R. Williams and J. Farr, *Limitation of Liability for Maritime Claims*, 4th edn (2005), p. 90.

32. [1897] A.C. 337 (HL).

33. Similarly, a gas buoy was held not to be a ship in *The Upcerne* [1912] P. 160 when its owner attempted to bring an action in rem in relation to a collision damage it sustained.

34. [1897] A.C. 337, at p.343.

35. Of course, legislation could extend the application of maritime rules to fixed platforms as well. For example, Spanish Act No 21 (Dumping from Ship or Aircraft) 1977 treats fixed platforms in the same manner as ships are treated for the purposes of dumping at sea.

36. In the United States, a fixed offshore platform was considered not to be a vessel in *Laffland Brothers Co v. Roberts* 386 F. 2D 540 (1967) (5th Circuit CA).

37. (1926) 25 Ll.L.R. 446.

in a naval dockyard permanently moored to the river bank by six chains and moored also, fore and aft, to warships. Gangways of a semi-permanent nature had been laid from the pontoon to the shore, and to the warships. It was possible to move the pontoon, and one witness had seen it being done but it had taken two hours to move her a mile. She was in the shape of a ship, and adapted by the provision of decks for being inhabited or manned by a staff which was called the crew. The *Fernhill* was entered into a P & I Club which provided cover for the owners in relation to third-party liabilities arising out of a collision. The club's liability would have been restricted to one fourth if the owner became liable to pay in respect of loss or damage caused by the *Fernhill* to any other ship or vessel. However, the club would have been liable to pay in full if the *Fernhill* came into contact and caused damage to docks, piers, quays, works, jetties, erections, or any fixed or mobile units, other than ships or vessels. The key question was, therefore, whether the pontoon was a ship for the purpose of the rules of the P & I Club in question. The court found against the P & I Club, indicating that the pontoon was not a ship. Roche J. put the point thus:³⁸

... in my view the primary purpose for which this pontoon is designed and adapted is to float and to lift, and not to navigate. Whatever other qualities are attached to a ship or vessel, the adaptability for navigation, and its use for that purpose, is in my judgment one of the most essential elements... although fully capable of movement, although it is moved from time to time in order that it may operate elsewhere in the lifting of heavy objects out of ships, yet having regard to its history I am satisfied that movement is the exception in its career and not the rule...

It is rather doubtful whether the decision in *Merchants' Marine Insurance Co Ltd v. North of England Protection & Indemnity Association* can be taken as an authority for the proposition that floating offshore oil platforms are not ships for the purposes of limitation. Although some resemblance between the pontoon and floating offshore platforms exists in the sense that both perform their duties at a fixed location, it can hardly be argued that movement for a floating platform is an exception. Such platforms are moved on several occasions during their time and in some cases movement in the same field becomes necessary as a result of seismic surveys. Also, one should not lose sight of the fact that the court in *Merchants' Marine* was deliberating the issue of whether the pontoon was a ship or not in order to determine the extent of the P & I Club's liability under an insurance contract. What qualifies as a ship might well be different when the matter is considered from another perspective, namely limitation of liability.³⁹ In determining whether a craft is a ship for limitation purposes, the court must inevitably take notice of the general objective of limitation of liability in maritime law with a view to reaching a conclusion as whether it was the intention of the draftsman to extend limitation to this kind of commercial activity at sea. The fact that the draftsman chose to leave article 15(5) out of the legislation incorporating the Convention on Limitation of Liability for Maritime Claims 1976 into English law could be seen as an indication of its desire to extend limitation to crafts involved in exploration and exploitation of the seabed for mineral resources.

Furthermore, a cursory look at the case law also reveals that crafts similar in structure to the pontoon in *Merchants' Marine* were held to be ship for limitation of liability purposes. For example, in *The Titan*,⁴⁰ there was a general consensus that a floating crane, which performed its work

38. *Ibid.*, at 447.

39. It has been acknowledged that defining what qualifies as a ship is not a straightforward task and no general rule can be devised. On being asked where the line should be drawn in determining whether an object is a ship or not, Lord Coleridge in *Southport Corporation v. Morris* [1893] 1 Q.B. 359, at p. 361, in the most emphatic fashion, said: "The answer is that it is not necessary to draw it any precise point. It is enough to say that the present case is one on the right side of any reasonable line that could be drawn."

40. (1923) 14 Ll.L.R. 484.

while it was at rest, was a ship for the purposes of limitation.⁴¹ It is also worth noting that even in the *Merchants' Marine* case, it was acknowledged by Roche J that certain types of floating cranes might be regarded as ships as long as they engage in some kind of movement on the surface of the water, which can be regarded as a form of navigation, in the course of performing their function.⁴² This brings us possibly to the most important element in the definition of the ship for limitation of liability purposes under the MSA 1995. The ultimate question is, what is meant by navigation, and have the floating offshore platforms been intended to be used in navigation?

There is no shortage of case law in maritime law on the meaning of "used in navigation". Most recently, in the context of a charge arising under section 58(2)(a) of the MSA 1995, the Court of Appeal (Criminal) in *R v. Goodwin*⁴³ held that the phrase is confined to vessels which are used to make ordered progression over the water from one place to another. In a similar fashion, the term "navigation" was judicially defined as the "nautical art or science of conducting a ship from one place to another" in *Steedman v. Schofield*.⁴⁴ In both cases, the courts stressed that movement must be motivated by a need to perform a precise function and progressing on the water simply for having fun without the object of going anywhere specific could not be regarded as "navigation".⁴⁵ It has also been emphasised on numerous occasions that for a ship or craft to be involved in navigation it is not necessary that it is self-propelled. Thus, a ship or other craft may well be used in navigation with the aid of external forces, such as towing.⁴⁶ Considered in the light of these authorities, one could forcefully argue that floating platforms are, indeed, intended to be used for navigation. They make a planned and ordered move on the surface of water, in some cases by using their own power (e.g. some semi-submersible rigs), with an intention of reaching a drilling site. They also carry drilling equipment and personnel to the site, and even when on the site some degree of mobility on navigable waters might be required.⁴⁷

It is, of course, true that navigation is not the primary purpose of floating platforms. However on several occasions, the occasional use of a craft in navigation has been deemed adequate for it to be considered as a ship.⁴⁸ The fact that the relevant statute does not stress the need for exclusive use in navigation strengthens the argument that a floating platform can be

41. The Canadian Federal Court of Appeal reached a similar conclusion in relation to a floating crane used in a port in *R v. St John Shipping & Drydock Co* (1981) 126 D.L.R. (3d) 353. See also, *The Mudlark* [1911] P. 116 where a hopper barge, 90 ft long and 19½ ft wide, without means of propulsion, was held to be a ship for limitation purposes under s. 742 of the MSA 1894 (repealed) which described a ship as "including every description of vessel used in navigation and not propelled by oars".

42. (1926) 25 Ll.L.R. 446, at p. 447.

43. [2005] EWCA Crim. 3184.

44. [1992] 2 Lloyd's Rep 163, at p. 166.

45. On that basis, in both cases, a jet-ski was not held to be a ship within the meaning of s. 313 of the MSA 1995 which describes a ship as including "every description of vessel used in navigation not propelled by oars". Cf. the decision of the Irish Supreme Court in *The Von Rocks* [1998] 2 Lloyd's Rep 198.

46. *St John Pilot Commissioners and the Attorney-General for the Dominion of Canada v. Cumberland Railway & Coal Co* [1910] A.C. 208, at p. 218.

47. Taking this reasoning further, it can convincingly be put forward that drill ships are capable of engaging in navigation. For all intents and purposes drill ships are vessels that are fitted with drilling apparatus. They usually operate in deep waters (i.e., modern drill ships have the ability to drill in water depths of more than 2500m) and have the advantage of moving freely between oil fields worldwide.

48. *Marine Craft Constructors Ltd v. Erland Blomquist (Engineers) Ltd* [1953] 1 Lloyd's Rep 514; *Cook v. Dredging & Consultation Co Ltd* [1958] Lloyd's Rep 334. The point has been reiterated by Carnwarth J in *Perks v. Clarke* [2001] EWCA Civ. 1228; [2001] 2 Lloyd's Rep 431 at [42]: "so long as "navigation" is a significant part of the function of the structure in question, the mere fact that it is incidental to some more specialised function, such as dredging or the provision of accommodation, does not take it outside the definition [of ship]". There, in reversing the judgment of the High Court, the Court of Appeal reached the conclusion that a jack-up rig was a "ship" (in the context of section 313 of the MSA 1995) and the taxpayers' earnings were from employment as seafarers within para. 3(2)(A) of Schedule 12 of the Income and Corporation Taxes Act, 1988. The taxpayers were, therefore, entitled to take advantage of the more generous provisions in relation to exemption.

deemed to be a ship which is intended to be used in navigation even though it will be required to navigate from time to time.

Last but not least, it should be noted that courts in various common law jurisdictions have regarded floating offshore platforms as ships in different maritime contexts. In *Global Marine Drilling Co v. Triton Holdings Ltd*,⁴⁹ following the arrest of a semi-submersible drilling rig, the *Sovereign Explorer*, at Ivergordon in Scotland, the defendant owners sought to challenge the arrest on the premise that the *Sovereign Explorer* was not a ship. In Scotland, the definition of "ship" for the purposes of arrest is found in the Administration of Justice Act 1956, section 48. This section, which resonates with section 313 of the MSA 1995 when it comes to defining the attributes that a ship should carry, states that the term "ship" includes "any description of vessel used in navigation not propelled by oars". Having reviewed a vast amount of case law on the subject, Lord Marnoch reached the conclusion that the *Sovereign Explorer* was capable of navigating on water and was accordingly regarded as a ship as defined by section 48 of the Administration of Justice Act 1956. It was, therefore, competently arrested. Similar views have been expressed both by Canadian and American courts. For example, in *Bow Valley Husky (Bermuda) Ltd v. Saint John Shipbuilding Ltd*,⁵⁰ the court was of the view that the *MODU Bow Drill III*, a drilling platform, was capable of navigation and was a ship for the purposes of the application of tort law principles in maritime law.⁵¹ Likewise, in *Claborne McCarty v. Service Contracting*,⁵² a Louisiana district court made the following remark in relation to a submersible drilling barge:

By the very nature of their job, this specialised craft must be capable of at least some degree of mobility on navigable waters and there is now simply no question but that such craft are vessels within the import of both the Jones Act and general maritime law.

It is submitted that it will be against the preponderance of authority on the subject to reach a conclusion that a floating offshore platform is not a ship for limitation of liability purposes. When determining whether a craft should be able to limit its liability or not, the extent of the harm that follows the wrongdoer's actions or its impact on human life or the environment should not be a relevant consideration. Limitation is a right that is afforded by law to maritime operators and their employees. Therefore, as long as a craft concerned is one that the draftsman finds worthy of benefitting from limitation and a claim that falls under article 2 of the Limitation Convention arises, limitation should be available. It could be inferred from the explicit decision of the draftsman to leave article 15(5) of the Limitation Convention out of the implementing legislation that, within the UK at least, it is intended that limitation is made available to any kind of craft, including floating platforms that are intended to be used in navigation.⁵³ Pollution damage claims relating to floating platforms and payment of property clean-up expenses will certainly fall within article 2(1) of the Limitation Convention as they incur in direct connection with the operation of such platforms.⁵⁴

49. (23 November 1999) unreported, Ct Sn:O.H; Lord Marnock.

50. (1995) 126 D.L.R. (4th) 1.

51. On appeal, the Supreme Court of Canada seemed to have endorsed the view of the court on the status of the *MODU Bow Drill III* [1997] 3 S.C.R. 1210 (SCC).

52. [1971] A.M.C. 90, at pp. 90-91.

53. In Greece, there is legislation in force stipulating expressly that the Limitation Convention 1976 applies to floating rigs of more than 5,000 tons and to floating refineries and oil storage tanks of more than 15,000 tons; see, art. 1 of the Legislative Decree (177/1974, Govt. Gaz. A310/23.10.1974).

54. Art. 2(1) of the Limitation Convention stipulates: (emphasis added) ... the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) Claims in respect of loss of life or personal injury or loss of or *damage to property* (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or *in direct connection with the operation of the ship* or with salvage operations, and consequential loss resulting therefrom...

That said, even if a floating platform is classified as a ship for the purposes of limitation of liability, at least under the UK law, problems are likely to arise in applying various provisions of the Limitation Convention 1976 to such crafts, essentially due to the fact that the Convention was never intended to be applicable in those instances. The main difficulty will be calculating the gross tonnage of an oil rig for limitation purposes.⁵⁵ The matter will be further complicated in a case where the source of a pollution is a pipeline attached to the oil rig. The burning question in that case will be whether the pipeline could be treated as a part of a ship for limitation purposes under paragraph 12 of Schedule 7, Part II, to the MSA 1995. If so, further complications will be inevitable when it comes to calculating the tonnage for limitation purposes.

Application of the CLC and Fund Conventions 1992 to Offshore Crafts

The crafts designed to store, process and offload natural resources obtained from the seabed play a significant role in offshore oil production. Such crafts, known as floating production storage and offloading (FPSO) units, are usually designed to receive hydrocarbons from well-heads, process them and store oil until it can be offloaded onto a tanker or transported through a pipeline. A vessel which is essentially used for storing oil but has no facility to process it is known as the floating storage and offloading (FSO) vessel. An old oil tanker can be modified to function as an FPSO or FSO vessel but it is also common to see crafts specifically built for this purpose.

In a case where the pollution originates from an FPSO or FSO vessel, a claimant might attempt to argue that such a craft is a ship within the meaning of the CLC and Fund Convention 1992. Bringing his claim under the CLC and Fund regimes might yield significant advantages for a claimant. In that case, the owner of an FPSO or FSO will be strictly liable with limited defences, but significantly higher levels of compensation will be available under the CLC and Fund regimes for the claimants as opposed to the limitation available under the Limitation Convention 1976 – this is under the assumption that an FPSO or FSO will be regarded as a vessel intended for use in navigation under paragraph 12 of Schedule 7, Part II, to the MSA 1995.

A ship will fall under the remit of the CLC and Fund Convention 1992⁵⁶ if it is a “sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues”. Compared to the language used in the earlier version of this provision which defines a convention vessel as “any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo”,⁵⁷ there is room to argue that the current definition is wide enough to cover any craft, including an FPSO or FSO vessel, as long as they are constructed or adapted for the carriage of oil in bulk

55. Art. 6(5) of the Limitation Convention 1976 provides the following:

For the purposes of this Convention, the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex 1 of the International Convention on Tonnage Measurement of Ships 1969.

The International Convention on Tonnage Measurement of Ships 1969 was implemented in the United Kingdom by the Merchant Shipping (Tonnage Regulations) 1997(SI 1510). Although a general formula exists under the Regulations, identifying enclosed spaces and volume in cubic meters, which are vital for the calculations, will be a rather challenging task in the context of an oil rig.

56. See, art. 1.1 of the CLC 1992 and art. 1.2 of the Fund Convention 1992.

57. See, art. 1.1 of the CLC 1969.

as cargo. Put another way, in determining whether a craft falls under the scope of the CLC and Fund Convention 1992, it can plausibly be argued that the actual use to which the vessel is being put at the time of the incident should not matter as long as it is “constructed or adapted” for the carriage of oil in bulk as cargo.

Even though a literal interpretation of the relevant provision lends considerable support to this conclusion,⁵⁸ the truth of the matter is that there is no evidence in the official records indicating that any consideration had been given to the position of FPSOs or FSOs when the revised wording was adopted. The motivating factor behind the change was to broaden the scope of the compensation regime under the CLC and Fund Convention 1992 to include bunker spills from tankers in ballast. Furthermore, given that the main objective of the CLC and Fund Convention 1992 is to provide compensation for loss or damage arising from the escape or discharge of oil when such oil is carried in bulk,⁵⁹ there is force in the argument that the conventions apply only when FPSOs or FSOs are involved in carriage of oil, not when they are at anchorage or connected to well-heads and engaged in the production process or simply used as a storage units.

In its 1998 meeting of the Assembly of the 1992 Fund, various concerns were raised regarding the legal position of FPSOs and FSOs under the CLC and Fund regimes, and it was decided to establish the Fund’s Second Inter-sessional Working Group to examine the subject in detail. The report of the Working Group was considered at the meeting of the 1992 Fund in October 1999. The Assembly took the view that FPSOs or FSOs should be regarded as ships under the 1992 Conventions only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they operate. Conversely, FPSOs or FSOs will fall outside the scope of the 1992 Conventions when they leave an offshore oilfield for operational reasons or simply to avoid bad weather.⁶⁰

The Assembly’s standpoint on the matter is logical and seems to be within the spirit of both of the conventions. However, this does not mean that the FPSOs and FSOs will be treated in the same manner in all jurisdictions that are party to these conventions. The Assembly’s view on the position of FPSOs and FSOs does not bind national courts, and the manner in which these conventions have been implemented into national legislation might have an impact on the issue. The decision of the Greek Supreme Court in *The Slops*⁶¹ is a spectacular example of how the judiciary could put a spanner in the works when it comes to bringing harmony to the manner in which FPSOs and FSOs are dealt with in jurisdictions that are party to the 1992 Conventions. *The Slops* had originally been constructed for the carriage of oil in bulk. Later, she was converted into a facility for receiving and processing oily waste. Her propeller was removed and her engine was deactivated. The oil residues were offloaded from her and carried to oil refineries by barges. The *Slops* was permanently at anchor and was never involved in carrying oil to the refineries. On 15 June 2000, when she was laden with 5,000 cubic meters of oily water and at anchor in the port of Piraeus, the *Slops* suffered an explosion and caught fire, giving rise to pollution of a substantial scale. The contractors, who were engaged in clean-up operations, having failed to obtain adequate compensation from the owners of the *Slops* or any insurers, brought an action against the 1992 Fund. The Executive Committee of the 1992 Fund rejected the claim on the premise that *Slops* could not be regarded as a ship for the

58. The view has been expressed that in the French text of the Convention, which is equally authentic, the definition of “ship” reflects a notion of transport more clearly than the English version; see, C.D.L. Rue and C.B. Anderson, *Shipping and Environment*, 2nd edn, (2009), p. 247.

59. See the preamble of the CLC and Fund Convention 1992.

60. Record of Decisions of the Third Extraordinary Session of the 1992 Fund Assembly, (92FUND/A/ES. 3/21).

61. Greek Supreme Court, 2006.

purposes of the 1992 Fund Convention as she was not engaged in the notion of transport of oil and her only function was to receive oil residues for storage on board. The decision of the Executive Committee was certainly in line with the stance taken by the Assembly in 1999 in relation to the legal position of the FPSOs and FSOs under the Fund Convention 1992. *The Slops* was permanently at anchor and was not used to carry oil as cargo on a voyage. It was, therefore, in a similar position to that of an FSO attached to a well-head in an offshore oil field.

The clean-up operators, however, brought legal proceedings against the 1992 Fund in Greece and a judgment was given in their favour at first instance. The Court of Appeal, on the other hand, reversed the decision upholding the Fund's position. The matter was taken to the Greek Supreme Court, which delivered a surprising majority decision (17:5) in favour of the claimants. The Supreme Court's reasoning was very curious. It was held that the requirement to be "actually carrying oil in bulk as cargo" was applicable only to ships that are capable of carrying oil in bulk and other cargos. Other ships fall under the scope of the Fund Convention as long as they are constructed or adapted for the carriage of oil in bulk as cargo. *The Slops*, therefore, should be regarded as a "ship" within the meaning of both the CLC and Fund Convention 1992. On that premise, the Supreme Court returned the case to the Court of Appeal for consideration on merits. The Court of Appeal awarded the claimants the full amount of their claim.

The stance that English courts might take on the matter remains to be seen. It is submitted that the decision of the Greek Supreme Court is not only out of line with the ethos of the Convention but is also at odds with the fundamental principles of literal construction. However, it serves a useful purpose in demonstrating the problems that could potentially arise in other jurisdictions on this point in the future.

Recoverability of Pure Economic Loss Claims

Under English law, the claimant will not necessarily be in a better position, in terms of recovering pure economic loss resulting from pollution, by suing the operators or other wrongdoers in tort. In negligence, British courts have traditionally not been receptive of such claims. Although courts in some other common law jurisdictions have taken a more flexible stand on the matter,⁶² and in some cases under the Nuclear Installations Act 1965 courts were prepared to allow pure economic loss claims,⁶³ there is no indication that an imminent change in the position of British courts is likely to occur in the near future.

The door remains open for recovery of pure economic loss claims in pollution cases by pursuing an alternative course of action, namely a claim of public nuisance. Such claims have

62. The landmark case on the matter is the Australian High Court decision in *Caltex Oil (Australia) Pty Ltd v. Dredge "Willemstad"* [1976] H.C.A. 65. There, a dredge as a result of negligent navigation broke an underwater oil pipeline that connected an oil refinery on one shore with an oil terminal on another. The pipeline, which was owned by the refinery, was used to deliver refined oil from the refinery to the terminal owned by Caltex. While the pipeline was being repaired, Caltex incurred additional expenses of transporting the oil from the refinery, and taking delivery of, and distributing some of the refined oil at a different terminal. The High Court unanimously allowed Caltex to recover economic loss although it did not own the property damaged. A similar development has taken place in Canada where a railway company was allowed to recover economic loss for damage to a bridge used largely, though not exclusively, by the railway company although the bridge was not owned by them: see *Canadian National Railway Co v. Norsk Pacific Steamship Co* [1992] 1 S.C.R. 1021.

63. In *Blue Circle Industries plc v Ministry of Defence* [1999] Ch. 289, the Court of Appeal ordered compensation to be paid for the reduction to the value of Blue Circle's land as a result of radioactive contamination which was above regulatory levels. See also, *Magnohard Ltd v. United Kingdom Atomic Energy Authority* [2004] S.C. 247.

been always allowed, subject to the remoteness requirement, under public nuisance.⁶⁴ It should be, however, borne in mind that there is no precedent for a case of public nuisance being successfully made in English law in the case of a marine pollution incident. To establish a cause of action for public nuisance, a claimant has to establish that the defendant committed an act not warranted by law or omitted to discharge a legal duty and the effect of the act or omission was to endanger life, health, property or comfort to public, or to obstruct the public in the exercise or enjoyment of common rights. The claimant is also required to establish that he has sustained particular damage other than and beyond the general inconvenience and injury suffered by the public, and that the particular damage which he has sustained is direct and substantial.⁶⁵ On that premise, fishermen who are prevented from fishing, and tourism interests that suffer from cancellations following a pollution incident emanating from an offshore installation could well establish that they have suffered such a particular loss but, of course, this is only possible if the courts are prepared to break into uncharted waters by extending the scope of the tort to pollution cases.⁶⁶

THE WAY FORWARD

The analysis carried out in the previous part leaves no doubt that there is an urgent need for a liability regime devised exclusively to provide compensation for the victims of pollution incidents arising from offshore structures and crafts. Admittedly, following the US model,⁶⁷ a national solution to the problem could be introduced in a relatively short period of time.⁶⁸ However, considering the vast number of oil and gas fields in the North Sea located in the territorial waters or exclusive economic zones of other states, and the potential for a huge disaster occurring in those offshore installations affecting British waters and interests, it is submitted that an international (or at least a regional) solution to the problem is desirable and will serve the interests of all states that have coastline in the North Sea.

Assuming that an international solution is favoured, this could be achieved either by extending the existing international regimes to cover liability for offshore installations, or by devising a new international regime dealing with the issue. The viability of these options will be considered next.

Extending the Scope of the CLC and Fund Regimes

The CLC and Fund Conventions have been developed to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of persistent oil from tankers. These conventions have received worldwide support⁶⁹

64. See, particularly *Wilkes v. Hungerford Market Co* (1835) 2 Bing NC 281 and *Blundy Clarke & Co Ltd v. North Eastern Railway Co* [1931] 2 K.B. 334.

65. *Benjamin v. Storr* (1874) L.R. 9 C. & P. 400.

66. For a comprehensive analysis on how the tort of public nuisance can be utilised in this context, see Chapter 6 by S Rainey in this book.

67. The Oil Pollution Act 1990 was introduced as a reaction of the United States Government to the *Exxon Valdez* tanker incident near Alaska and is a prime example of a national legislation offering a comprehensive legal regime for any kind of marine pollution including pollution emanating from the offshore drilling industry.

68. Recommendations to that effect have been made in the Second Report of the Energy and Climate Change Committee (*UK Deepwater Drilling – Implications of the Gulf of Mexico Oil Spill*), published on 14 December 2010 (The Stationery Office, HMSO), Part 4.

69. As of 5 February 2011, 105 states, representing over 94% of the world tonnage, had ratified both the CLC and Fund Convention 1992.

and, in fact, have attracted more ratifications than any other international liability convention. Technically, it is possible to make modifications in these conventions to extend their scope to cover liability for pollution arising from offshore installations (including pipelines attached to them) and crafts. This was the envisaged solution to the problem when the Comité Maritime International (CMI) made an attempt to create a viable, comprehensive regime for offshore operations by putting forward the Draft International Convention on Offshore Mobile Craft 1977. The Draft Convention was aimed at applying the regulations of existing maritime conventions on different maritime matters such as arrest, collisions, mortgages and salvage, to any maritime structure of whatever nature not permanently fixed into the seabed. When it comes to pollution liability of offshore installations and crafts, the Draft Convention recommended that the states party to the Draft Convention extend the application of the earlier version of the CLC and Fund Conventions (1969) to such structures.⁷⁰

Although the solution seems plausible on paper, on a practical level one could foresee several difficulties emerging. First, a thorny issue will be how contributions to the Fund from the offshore sector will be calculated, and more significantly, who will bear the financial responsibility for such contributions. Under the current regime, contributions to the Fund come from receivers of oil in member states; and it is relatively easy to determine the amount of the oil received by each receiver in each member state. If the scope of the CLC and Fund regimes is extended to the offshore industry, it will be a logical step to make the operators of offshore installations responsible for contributions to the Fund. However, the offshore industry is a rather complex sector and in addition to operators, the interest of various other players, such as licence holders, other contractors and coastal states, are at stake. It should not be assumed that operators will be readily disposed to accept the additional financial burden straightaway, given that they are not the only beneficiary from offshore operations. The matter of which party will be made responsible for contributions to the Fund has the potential of turning into a political mine-field.

Another difficulty that might arise when assimilating the offshore sector into the CLC and Fund regime is satisfying the compulsory insurance requirements that form the backbone of the CLC and Fund regimes. The CLC 1992 requires registered owners to carry compulsory insurance up to the limit of their liability under that Convention.⁷¹ Such insurance in contemporary practice is provided by the protection and indemnity (P & I) clubs, which issue the owners with a certificate in standard form (also known as the blue card) confirming the existence of insurance cover in compliance with the Convention. The shipowner then submits this document to the competent authority of the State of the ship's registry, which issues a certificate of insurance in the form prescribed in the Convention. The relevant state will normally issue such a certificate in cases when a blue card is from a respectable and reliable liability insurer, e.g. a P & I club that is a member of the International Group of P & I Clubs. Liability insurance for pollution damage arising from the wells drilled, blow-outs and subsea equipment connected to offshore installations, as well as clean-up costs, are not normally provided by P & I clubs,⁷² and offshore operators usually obtain this kind of insurance from the commercial market. If offshore installations

70. The Draft Convention, which is also known as the Rio draft, was forwarded to the Legal Committee of the International Maritime Organisation (IMO) but did not receive any consideration until 1990. That year, the IMC referred the Draft Convention back to the CMI for further consideration and the CMI was requested to provide the IMO with a study and a possible draft Convention on the subject. The CMI responded by making some changes to the Rio draft at its Sydney meeting in 2004. The new draft, which is known as the Sydney draft, adopts a similar approach to liability issues relating to pollution.

71. The CLC 1992 also enables the claimants to bring direct action against the insurer.

72. Some specialist P & I clubs provide liability cover for offshore crafts providing major maintenance, and other service crafts as well as vessels and floating installations used for the production and/or storage of extracted resources

(including pipelines connected to them) come under the scope of the CLC and Fund Conventions, it is rather doubtful whether the P & I clubs will have the appetite to provide cover on a mutual basis to operators, given the special nature of the risks involved. In the absence of the backing of the P & I sector, the key question is whether relevant states will be satisfied with the financial stability of the commercial insurers issuing blue certificates to offshore operators (or whoever might be liable under the new regime) given especially that the limits of liability under the CLC are likely to be much higher than the current limits of liability under OPOL. One should not lose sight of the fact that one of the main factors behind the success of the CLC and Fund regimes is the existence of a well-developed liability insurance market which operates on a mutual basis. Without the backing of such a market, it is hard to see how the offshore sector could function in an efficient manner under the CLC and Fund regimes.

Above all, the main danger in extending the scope of the CLC and Fund regime to cover offshore installations is that such a move could potentially disturb the stability and uniformity that has been achieved in this area worldwide so far. It is not an overstatement to suggest that the conventions have worked well in practice. They are in force in most parts of the world with the support of a sound P & I system. Introducing offshore installations into the equation, however, could change the balance completely. Apart from the risk of the P & I sector pulling out of the business of providing coverage for such risks, it is highly possible that states that do not have an offshore industry could turn their back to the CLC and Fund Conventions, as remaining within the system might ultimately mean subsidising a fund that benefits states with a buoyant offshore industry. It will not be a very sophisticated observation to note that this could jeopardise the future of the CLC and Fund Conventions.

Devising a New International Liability Regime

The author is of the opinion that the interests of the international community will be best served if it proves possible to put in place an international liability regime dealing with offshore installations and crafts. However, it will be naive to assume that there is at the present moment a strong political will among the states pushing this agenda forward. The truth of the matter is that for any attempt to devise an international liability regime to be successful, it is vital to overcome various obstacles that have played a significant part over the years in slowing down any such movement. The rest of this part will evaluate these obstacles by making recommendations as to how they can be best addressed.

Political and Practical Difficulties

One of the main difficulties encountered during the negotiation process of the CLEE 1977 was the fact that the states that pushed for the development of an international regime did not have the support of any international organisation. There are distinct advantages of negotiating a new international regime under the auspices of an international organisation that has a standing in the international community. Such an organisation could not only attract individuals with technical expertise on the subject to the debate but will also provide a forum for various interest groups (such as environmental pressure groups, insurers and the offshore industry) and also state representatives. In today's shipping world, the IMO, a specialised agency of the United Nations, is probably the only organisation that could provide the desired leadership in this area. However, the current Strategic Plan of the IMO does not extend to pollution damage caused by offshore oil exploration and exploitation activities. This does not mean that the IMO's Assembly and the Council could not alter the plan and add such activities within

the remit of the IMO.⁷³ While it has traditionally been the objective of the IMO to improve the safety and security of international shipping and to prevent marine pollution from ships, there is no doubt that offshore exploration and exploitation could be at least as hazardous for the marine environment. Therefore, politically and technically no objection could be brought against the idea of expanding the remit of the IMO.

It is not a secret that the offshore oil industry puts up a strong opposition against adoption of a global liability convention. Apart from labouring hard to retain the status quo, the industry, behind the scenes and in a sustained fashion, also applies pressure on governments both in developing and developed states.⁷⁴ In developing states, the priority of the governments is to attract international partners to their country that have the financial force to engage in exploitation and exploration of mineral resources in their waters. The worst thing that can happen to any developing country is to discourage international companies from investing in their country, by becoming party to an international regime that will expose such companies to higher limits of liability. Likewise, developed countries have been vocal opponents of civil liability regimes in the fear that removing obstacles to trans-boundary litigation through international agreements could expose themselves and companies in their jurisdiction to additional liability.⁷⁵ Also, in some developed countries there is a tendency to think along the lines that the offshore industry will not necessarily rely on the indemnities and rights afforded to them by law in case of a huge disaster, especially when they feel the pressure from the public and the politicians. BP's decision to pay all the claims in the *Deepwater Horizon* incident, without seeking to rely on the right of limitation afforded to them under the OPA 1990, has often been considered to lend support to the proposition that the offshore industry is likely to do the right thing when it matters! If so, it can be argued that there is no point for the developed countries to be the primary advocate of a new global civil liability convention. By retaining the status quo, they keep the offshore industry in their jurisdiction on their side in the knowledge that they will be able to obtain compensation for those who suffer from pollution arising from offshore installations by applying political pressure.

These are formidable obstacles but it is submitted that all the interested parties could benefit from the existence of a global liability regime. Let us start with the offshore industry. OPOL regime does not provide any certainty for the offshore sector. As analysed in the previous part, in case of a pollution disaster defendants could bring tort action to operators and other wrongdoers, and it is not certain to what extent the sector could benefit from the right of limitation afforded in general maritime law. Furthermore, when it is not an oil rig, but a pipeline that is connected to the well-head that is the source of the pollution, it is very likely that the party responsible will face unlimited liability. Therefore, if a global liability regime is put in place there is no doubt that this will provide legal and financial certainty to the offshore sector; and undoubtedly, this will improve their position when negotiating their liability insurance.

The coastal states also could make considerable gains from the development of a global liability regime. In international law, if an offshore installation or rig causes damage on the continental shelf or exclusive economic zone of another country, the coastal state under whose

73. At its 97th Session held during 15–19 November 2010, the Legal Committee of the IMO approved a proposal to recommend that the Assembly revises the Strategic Plan to include impact by offshore activities on the environment and related liability and compensation issues.

74. For a very interesting analysis on such matters see, N. Sachs, *Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law* 55 U.C.L.A. Law Review 837 (2008).

75. *Ibid.*, at pp. 867–68.

jurisdiction the exploration or exploitation took place ultimately bears the responsibility.⁷⁶ This will make the coastal states a viable target in cases where the victims of oil pollution in other jurisdictions fail to pursue offshore operators due to jurisdictional, procedural and other difficulties emerging from the tort system of the coastal country. It is worth noting that in the aftermath of the *Montara* incident, Indonesia logged a claim for compensation from the Australian government for the oil pollution damage to Indonesian coastline and fisheries.⁷⁷ Development of a global liability regime for the offshore sector will not remove the possibility of coastal states being the target of a lawsuit,⁷⁸ but it will, undoubtedly, reduce the possibility of such actions in future. Also, it will be wrong on the part of coastal states to assume that all operators will act in the same manner as BP did in the *Deepwater Horizon* incident and pay regardless of immunities provided to them by law. In addition to the political pressure that the company faced in the United States, BP, as a self-insured organisation, was in a unique position. It could be a very different story if a smaller operator, who might have to leave the control of any action against itself to the lawyers of its liability insurers, finds itself the target of litigation following an oil spill.

It is promising to see that the international community has recently started investigating the possibility of a global solution to the problem. The IMO is the appropriate venue for this debate to be held and it is hoped that the Assembly of the organisation will take the recommendation of the Legal Committee on board and agree to extend the jurisdiction of the organisation to offshore-related marine pollution.

The Key Features of a Global Solution

Assuming that the international community deems a global solution to be the way forward, it is absolutely vital that lessons are learned from the past and present experiences in shaping up the structure of the new convention, in addition to keeping an eye on the sensitivities of coastal states, the offshore sector, and the domiciliary states of operators and insurers. Accordingly, a number of recommendations will be made in this part with a view to mapping the boundaries of a global solution. As is the case with any other international convention, once the work on the project commences, adjustments and further refinements will be inevitable as part of the political bargaining process.

First, it is absolutely vital that the project is restricted, at least for the time being, to devising an international civil liability regime for offshore-sourced pollution. The CMI's Draft International Convention on Offshore Mobile Craft 1977 was far-reaching in its scope, attempting to offer a solution to various aspects of offshore operations, including arrest, mortgages, liens, salvage and collision liability. If a similar line is taken by making an attempt to establish a comprehensive international regime for offshore installations and crafts dealing with issues such as safety, and penal and civil jurisdiction, one could foresee several difficulties emerging that will slow the process down, if not halt it altogether. There is no doubt that a strong correlation exists between incident prevention and the regulation of offshore

76. Art. 194(2) of the United Nations Convention on the Law of the Sea 1982 stipulates:

"States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention." Similar provisions appear in regional agreements such as the OSPAR Convention 1992 and Barcelona Convention 1976.

77. P Alford, *Deadline Issued for Montara damages on Oil Spill*, 30 September 2010, *The Australian*.

78. A state department could still be sued on the premise that it was not a diligent regulator or did not enforce its rules and regulations on the operators.

industry; but it is also undeniable that in most states the offshore sector is highly regulated by coastal states which are likely to set high standards in this regard in compliance of their bilateral and international obligations. If a new regime, one that will require setting new safety standards and readjusting coastal states' civil and penal jurisdiction on such installations and crafts, is to be devised, such a convention should be carefully negotiated, taking into account the existing international rules and coastal states' obligations under regional agreements regulating these aspects. This might take a considerably long time; and even if a consensus could be reached, there is the risk that developed countries might regard the new regulatory requirements, which will inevitably be the product of a compromise, as a step backwards compared to their existing rules and regulations. In a nutshell, it is submitted that the whole project might be doomed from the outset if an over-ambitious target of establishing a new comprehensive international regime regulating offshore installations and crafts is set. A more realistic and practical solution is to carry out a piecemeal reform in this area starting with civil liability issues. Once a certain and acceptable global liability regime is put in place and the IMO proves its competence in this area, it will enable change in other areas relating to offshore operations.

In developing the basis of the liability regime and the scope of coverage under the new convention, the OPOL regime could certainly be a good template to use. OPOL has been in use for several years as a private agreement between oil companies and various states. There is, therefore, a good chance that the offshore industry will be comfortable working with a model that stems from one they are already party to. The strict liability system with limited defences, which channels liability to operators, is a model that offers the desired protection for the victims of oil pollution incidents and is the one that the industry is comfortable with. However, there is a need to clarify the meaning of certain key terms for the purposes of the Convention. For example, the meaning of "pollution damage" should be specified and possibly extended to cover pure economic loss and other losses that are associated with drilling. In a similar fashion, it is vital to identify the meaning of "offshore installations" that will come under the scope of the new Convention. It will make sense, and avoid difficult demarcation issues with other international regimes, if the scope of the Convention is extended to cover ancillary offshore crafts and FPSOs/FSUs. Such crafts form a vital part of offshore operations and can justifiably be subjected to the same liability system as offshore installations.

The limit of liability under the Convention is likely to be a battleground between various interest groups. Naturally, environmental pressure groups and some states might wish to have the option of introducing unlimited liability. However, it should not be disregarded that this was one of the main reasons why the CLEE 1977 failed to attract industry support. Facing unlimited liability for offshore-sourced pollution will also not be an attractive proposition for the liability insurers.⁷⁹

It is submitted that retaining the right of limitation will be the key in mustering sufficient government and industry support for a new Convention. However, even though the debate is taken forward on that premise, two related issues need to be settled. First, it will be necessary to determine how the available funds will be allocated between various types of claims. Under OPOL, half of the funds is allocated for pollution damage and the other half is available for preventive measures. The priorities for various states may well be different. Some states might see recovering expenses incurred by governmental bodies for clean-up expenses and preventive measures as a matter of priority, while for others compensation for pollution damage

79. Whether there is market capacity to insure such risks with unlimited liability is another debate which will require further study.

suffered by individuals deserves special treatment. What the order of ranking should be is not an easy question to answer, but it is one that could be used strategically during the negotiations. Secondly, it will be a matter of further debate whether, following the footsteps of the CLC/Fund regimes and Hazardous and Noxious Substances (HNS) Convention 1996,⁸⁰ there is a need to create further layers of liability in the shape of a fund. The author believes that this will be inevitable given the fact that the scale of an offshore incident could be very large. Creating a second and possibly third layer of liability⁸¹ has also the advantage of spreading the cost of the new regime between various parties and thus making it more acceptable for a larger number of interest groups. It will never be an easy question to determine which party will assume liability in the second and third layer, but obviously the state in which the offshore installation is located, and other contracting states (basing contributions on the proportion of oil extracted amongst states that are party to the Convention), immediately spring to mind.⁸²

Finally, the politicians in states that have coastline in the North Sea should keep in reserve the option of developing a regional liability agreement, should an attempt to achieve a global solution to the problem fail. There is much to be said for regional solutions to the threat of pollution from offshore installations. Regional conventions will enable the introduction of higher liability limits for offshore operations located in environmentally sensitive areas such as the Arctic.⁸³ Regional agreements may also have more prospect of success since neighbouring states are more likely to have similar economies and legal systems. It is also a relevant consideration that reducing the number of parties at the table will inevitably reduce the transaction costs involved in drafting an agreement. OPOL, which operates broadly in a regional context, is a great example of how a regional solution could operate in practice.

CONCLUDING REMARKS

It has been demonstrated throughout this chapter that in the case of a catastrophe similar to the *Deepwater Horizon* incident arising in the North Sea or any other British waters, the current legal regime is not well equipped to deal with civil liability issues that might arise. States that have coastline in the North Sea, including the UK, might be under the mistaken impression that the OPOL regime offers adequate protection to the victims of pollution arising from offshore installations. Similarly, the offshore sector might be comforted in believing that the liabilities they may face in case of a disaster are limited to rather small sums by virtue of the operation of OPOL. It is obvious that any party occupying such a stand turns a blind eye to the fact that OPOL is a voluntary contractual regime which could be challenged in the courts.

It is submitted that an effective compensatory regime can be put in place by developing an international liability regime for offshore installations. The author is not under the illusion that this will be an easy task. However, the climate is right and such a project is achievable under

80. Some changes made to the HNS Convention with a Protocol in 2010. The Convention is not yet in force.

81. It will make sense to make the additional layers optional, allowing the states to participate depending on their priorities.

82. In fact, this resembles the model that has been adopted on the Convention on Third Party Liability in the Field of Nuclear Energy (also known as the Paris Convention) 1960. An alternative might be to leave the financial burden on the shoulders of the importers of hydrocarbons sourced from offshore installations. This might, at first sight, seem to be a case of double taxation, given that importers also contribute to the 1992 Fund; but it can be justified on the premise that the risk of pollution exists not only when extracting such hydrocarbons from the seabed but also when exporting them by tankers.

83. It is estimated that the Arctic holds 90 billion barrels of oil. See A.V. Wagner, *It's Getting Hot in Here, So Take Away All the Arctic's Resources: A Look at the Melting Arctic and Hot Competition for Its Resources* 21 Villanova Environmental Law Journal 189, at p. 200 (2010).

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the auspices of the IMO. For success, it is essential that the international community learns from its previous mistakes. It is also vital that full engagement with the offshore industry is forged – perhaps by laying the foundations of the new international regime on an arrangement such as OPOL, which the industry is familiar and comfortable with. No one can guarantee absolute success, but as long as the international community's reliance on energy resources continues, the coastal states should strive to ensure that a satisfactory global compensation regime is in place to offer adequate compensation for the victims of any environmental disaster that could emerge from offshore installations.