

LECTURE 1

COMPENSATION FOR POLLUTION DAMAGE FROM SEABED MINERAL EXPLORATION AND EXTRACTION

1.0 INTRODUCTION

With advancements in technology, the offshore industry has intensified efforts to explore and extract seabed mineral resources in deeper waters. This expansion has led to an increase in operational fields. Due in part to strict regulations imposed by coastal states, the industry has maintained a strong safety record.

Until recently, offshore installations were regarded as minor contributors to marine pollution compared to other sources. However, public perception has shifted following two major incidents. In August 2009, the Montara Wellhead platform, located off northern Australia, experienced an uncontrolled hydrocarbon release, resulting in a fire and widespread pollution that impacted 70,000 km² of ocean over ten weeks. Shortly thereafter, in April 2010, the Deepwater Horizon drilling rig suffered a catastrophic explosion off the Louisiana coast, leading to one of the most severe pollution disasters in history. The spill continued for 87 days, severely damaging the marine environment and causing significant financial losses for the fishing and tourism sectors.

These incidents underscore the potential severity of pollution from well blowouts and raise concerns about the adequacy of existing compensation mechanisms should a similar event occur in UK waters. The UK hosts over 100 active oil and gas fields, primarily in the North Sea. A more recent spill at the Gannet Alpha platform in 2011, though relatively minor, highlighted the need to reassess whether current legal frameworks can effectively address major offshore pollution events. With offshore companies increasingly targeting deeper North Sea reserves, such as BP's controversial Shetland drilling project, there is growing concern about the ability to manage and mitigate potential large-scale spills.

This paper aims to examine the current legal framework and potential legal challenges in handling offshore-originated pollution incidents. Given the lack of an international compensation regime and the complexities of applying existing maritime laws to offshore installations, legal difficulties may arise. The second section will explore possible international treaty-based solutions to strengthen protections for affected parties, recognizing the transboundary nature of marine pollution and the need for a coordinated international response.

LEGAL FRAMEWORK AND THE ROLE OF OPOL

In the UK, operators cannot obtain offshore licenses without participating in the Offshore Pollution Liability Agreement (OPOL). Established in 1975 as a voluntary contractual arrangement among major oil companies, OPOL was initially intended as

an interim measure pending the adoption of an international liability framework. The 1977 Convention on Civil Liability for Oil Pollution Damage from Seabed Mineral Exploration and Exploitation (CLEE) sought to provide a comprehensive legal standard but failed to gain sufficient ratification to take effect. As a result, OPOL remains the primary mechanism for addressing offshore pollution liability and now extends to offshore facilities in several European countries, including Denmark, Germany, France, Ireland, and Norway.

OPOL mandates that operators demonstrate financial capability to cover potential claims, either through insurance, self-insurance, or other financial means. Under OPOL, liability is strict—subject to limited exceptions—and capped at \$250 million per incident. This amount covers both preventive measures and pollution damage, and funds can be reallocated between these categories if necessary. However, OPOL does not regulate financial arrangements between operators and subcontractors, instead requiring claimants to assign their rights to the operator to ensure compensation is efficiently distributed.

LIMITATIONS OF OPOL AND COMPENSATION CONCERNS

While OPOL provides a structured claims mechanism, its financial limitations may prove insufficient in the case of a large-scale disaster. The Deepwater Horizon incident, for example, resulted in costs reaching billions of dollars, far exceeding OPOL's \$250 million cap. Additionally, the scope of recoverable claims under OPOL remains ambiguous. Compensation is restricted to pollution-related losses with a direct causal link to contamination, raising concerns about the eligibility of economic losses suffered by businesses indirectly affected, such as hotels and fisheries.

International conventions, such as the 1992 Civil Liability Convention (CLC), provide a broader definition of pollution damage, allowing claims for "pure economic loss." OPOL's narrower scope could disadvantage claimants who suffer financial harm without direct contamination of their property. Similarly, compensation for damage to global commons, such as the high seas, and ecological harm to marine wildlife remains uncertain under OPOL's framework.

Further, OPOL's definition of "oil" applies strictly to crude oil, potentially excluding damages caused by other contaminants commonly discharged from offshore platforms, such as lubricating oil or drilling fluids. This limitation could restrict the scope of recoverable claims, leaving certain environmental damages unaddressed.

NATIONAL AND INTERNATIONAL LEGAL CHALLENGES

As a voluntary agreement, OPOL lacks formal legal standing beyond contractual obligations among participating operators. Although the UK mandates OPOL participation for offshore licensing, claimants may still seek compensation through national courts by bypassing OPOL and directly suing operators or subcontractors, particularly in cases of extensive pollution.

Such lawsuits would require demonstrating that the operator failed to take reasonable preventive measures, leading courts to assess whether existing national or international laws apply.

One key legal question is whether offshore platforms fall under existing maritime liability conventions. The UK's Merchant Shipping Act (MSA) 1995 incorporates the 1976 Convention on Limitation of Liability for Maritime Claims, which generally excludes offshore platforms from liability limitation. However, inconsistencies in the UK's legislative framework may leave room for interpretation regarding floating platforms.

Legal precedent suggests that fixed offshore platforms would not be classified as ships, meaning their owners might not benefit from liability limitations. The status of floating platforms, such as semi-submersible rigs, remains legally uncertain and warrants further judicial clarification.

In several instances, British courts have ruled that an object primarily designed to function while affixed to the seabed does not fall under Admiralty jurisdiction as a ship. A notable case illustrating this principle is **Wells v. Owners of Gas Float Whitton (No. 2)**. In this case, a "gas float"—a boat-shaped structure moored in tidal waters—became stranded during a storm. Measuring 15 meters in length and 6 meters in width, it lacked essential navigational components such as oars, a mast, or a rudder. Unmanned and carrying a gas cylinder, the gas float's classification as a ship for salvage purposes was questioned. Although a County Court initially awarded a salvage reward of £15, the House of Lords ultimately ruled that the gas float did not qualify as a ship under salvage law. The fact that it had been towed to its location was deemed irrelevant. Lord Herschell, addressing the matter, emphasized that the structure was neither intended for navigation nor for transporting cargo or passengers, describing it instead as a lighted buoy or beacon.

Based on such legal precedents, offshore platforms that are securely anchored to the seabed are unlikely to be classified as ships for limitation purposes. These platforms generally lack propulsion and navigation systems, and while they are towed to their designated locations, their primary function is performed while stationary—similar to the gas float in Wells. However, the legal status of floating platforms differs. Semi-submersible rigs, for instance, often operate under their own power in deep waters and accommodate professional seafarers as part of their crew. Likewise, jack-up rigs, although stabilized on the seabed during drilling, remain mobile and can be relocated within the same oil field.

Historically, certain floating structures capable of limited movement have been excluded from the definition of a ship. One such case is **Merchants' Marine Insurance Co Ltd v. North of England Protection & Indemnity Association**, which involved a collision between a pontoon and a ship, the Fernhill. The pontoon, permanently moored in a naval dockyard by six chains and connected to both the riverbank and warships via semi-permanent gangways, was nonetheless movable.

Despite its resemblance to a ship and the presence of a crew, the court ruled that it was not a ship for the purposes of liability under the P & I Club's rules. Justice Roche articulated that the pontoon's primary function was to float and lift heavy objects rather than to navigate, making movement an occasional necessity rather than a defining characteristic.

However, whether this ruling extends to floating offshore oil platforms remains uncertain. Unlike the pontoon in *Merchants' Marine*, floating platforms are regularly moved for operational reasons, such as repositioning due to seismic surveys. Additionally, the court's decision in *Merchants' Marine* was specifically related to insurance liability, whereas different criteria may apply when assessing ships for limitation purposes. The omission of Article 15(5) from the UK's implementation of the 1976 Convention on Limitation of Liability for Maritime Claims suggests an intention to include vessels engaged in seabed exploration and exploitation under limitation provisions.

Moreover, some cases have deemed structures similar to pontoons as ships for limitation purposes. In *The Titan*, a floating crane that operated while stationary was nonetheless classified as a ship for limitation of liability. Even in *Merchants' Marine*, Justice Roche acknowledged that floating cranes could qualify as ships if they moved in a manner that constituted navigation while performing their functions.

The crucial question in defining a ship under the Merchant Shipping Act 1995 is whether the craft is "used in navigation." The Court of Appeal's ruling in ***R v. Goodwins*** clarified that navigation entails an ordered movement over water from one place to another for a specific purpose. Similarly, in ***Steedman v. Schofield***, navigation was defined as the "nautical art or science of conducting a ship from one place to another," excluding movement for recreational purposes.

Case law also affirms that self-propulsion is not a prerequisite for navigation; external forces, such as towing, can suffice. Applying this reasoning, floating platforms could be argued to engage in navigation, as they undergo planned movement, sometimes using their own power, to reach drilling sites. These platforms also transport drilling equipment and personnel, and even when positioned on-site, some mobility on navigable waters is often necessary.

While navigation is not the primary function of floating platforms, occasional navigation has been deemed sufficient for classification as a ship in certain cases. The absence of a legal requirement for exclusive navigation strengthens the argument that floating platforms could be classified as ships.

Tentatively, courts in various common law jurisdictions have recognized floating offshore platforms as ships in maritime contexts. For example, in ***Global Marine Drilling Co v. Triton Holdings Ltd***, the semi-submersible drilling rig *Sovereign Explorer* was arrested in Scotland, and its classification as a ship was central to the legal proceedings. These cases indicate that the classification of floating platforms as ships is subject to legal interpretation and the specific maritime context in which the question arises.

DEFINITION OF “SHIP” IN SCOTLAND FOR ARREST PURPOSES

In Scotland, the term "ship" for the purpose of arrest is defined under Section 48 of the Administration of Justice Act 1956. This definition aligns with Section 313 of the Merchant Shipping Act (MSA) 1995, outlining that a ship includes "any description of vessel used in navigation not propelled by oars." Examining extensive case law on the matter, Lord Marnoch determined that the Sovereign Explorer met the criteria for a ship under Section 48, as it was capable of navigating on water, making its arrest legally valid. Similar interpretations have been upheld in both Canadian and American courts. For instance, in **Bow Valley Husky (Bermuda) Ltd v. Saint John Shipbuilding Ltd**, the court ruled that the MODU Bow Drill III, a drilling platform, was capable of navigation and therefore classified as a ship under maritime tort law. Likewise, in *Claborne McCarty v. Service Contracting*, a Louisiana district court emphasized that specialized crafts, such as submersible drilling barges, must possess some degree of mobility on navigable waters, confirming their classification as vessels under the Jones Act and general maritime law.

Denying the classification of floating offshore platforms as ships for liability limitation purposes would contradict prevailing legal perspectives. When determining eligibility for liability limitation, factors such as the extent of damage or environmental impact should not influence the decision. The right to limitation is a legal safeguard for maritime operators and their employees. If a particular craft qualifies under the legislation and a claim falls within Article 2 of the Limitation Convention, then limitation should apply. Notably, the omission of Article 15(5) of the Limitation Convention from UK implementation suggests an intent to extend limitation rights to all types of navigational crafts, including floating platforms. Pollution-related claims involving floating platforms and property clean-up expenses would likely fall within Article 2(1) of the Limitation Convention as they arise directly from platform operations.

CHALLENGES IN APPLYING THE LIMITATION CONVENTION 1976 TO FLOATING PLATFORMS

Even if floating platforms qualify as ships under UK law for liability limitation, applying various provisions of the Limitation Convention 1976 remains problematic, primarily because the Convention was not originally designed for such crafts. A major challenge lies in determining the gross tonnage of an oil rig for limitation calculations. This issue becomes even more complex when pollution originates from a pipeline connected to an oil rig, raising the question of whether the pipeline should be considered part of the ship for limitation purposes under paragraph 12 of Schedule 7, Part II, of the MSA 1995.

APPLICATION OF THE CLC AND FUND CONVENTIONS 1992 TO OFFSHORE CRAFTS

Floating production storage and offloading (FPSO) units and floating storage and offloading (FSO) vessels play a critical role in offshore oil production. FPSOs process

hydrocarbons received from well-heads, store oil, and transfer it to tankers or pipelines, whereas FSOs serve as storage units without processing capabilities. Some FPSOs and FSOs are repurposed oil tankers, while others are purpose-built.

If pollution originates from an FPSO or FSO, claimants may argue that such crafts qualify as ships under the Civil Liability Convention (CLC) and Fund Convention 1992. A successful claim under these regimes could provide more substantial compensation compared to the limitations set under the Limitation Convention 1976. This classification hinges on whether FPSOs and FSOs are considered vessels intended for navigation under paragraph 12 of Schedule 7, Part II, of the MSA 1995.

Under the CLC and Fund Convention 1992, a ship is defined as "a sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo." A vessel that can transport both oil and other cargo is only considered a ship when actively carrying oil or on a voyage immediately following such carriage, provided no oil residues remain onboard. The revised definition expands coverage beyond its previous version, potentially encompassing FPSOs and FSOs. However, no official documentation indicates that FPSOs and FSOs were specifically considered when this amendment was made. The revision aimed to extend compensation provisions to bunker spills from tankers in ballast.

The CLC and Fund Convention 1992 primarily focus on compensating oil spill damages during bulk transportation. Thus, FPSOs and FSOs likely fall under its jurisdiction only when transporting oil outside their operating oilfields, rather than while anchored or engaged in production activities. This viewpoint was affirmed during the 1998 Assembly meeting of the 1992 Fund, leading to a Working Group report in 1999. The Assembly concluded that FPSOs and FSOs qualify as ships under the 1992 Conventions only when engaged in oil transport to or from external ports or terminals. However, they are excluded when relocating within oilfields for operational reasons or to avoid adverse weather conditions.

This stance aligns with the conventions' objectives but does not bind national courts, as implementation may vary across jurisdictions. A notable divergence occurred in Greece with The Slops case. Initially constructed for oil transport, The Slops was later converted to process oily waste, remaining permanently anchored. In 2000, it suffered an explosion, causing significant pollution. The 1992 Fund Executive Committee denied compensation, asserting that The Slops was not engaged in oil transport and functioned solely as a storage unit. This decision aligned with the Assembly's 1999 stance.

However, Greek courts ruled otherwise. The first-instance court sided with claimants, but the Court of Appeal reversed the decision in favor of the Fund. The Greek Supreme Court later overturned this ruling (17:5), determining that The Slops met the definition of a ship under the CLC and Fund Convention 1992. This case highlights potential inconsistencies in judicial interpretations across different jurisdictions.

RECOVERABILITY OF PURE ECONOMIC LOSS

Under English law, claimants seeking compensation for economic losses due to pollution may not necessarily benefit from pursuing tort claims against operators. British courts have historically been reluctant to award damages for pure economic loss in negligence cases, unlike some other common law jurisdictions. Although exceptions exist, such as under the Nuclear Installations Act 1965, a shift in the judiciary's stance on this matter is unlikely in the near future.

An alternative legal avenue is a public nuisance claim, provided the claimant meets specific criteria. The defendant must have committed an unlawful act or failed to fulfill a legal duty, resulting in harm to public life, health, property, or comfort. Additionally, the claimant must demonstrate that their damages are distinct and substantial compared to general public harm. For instance, fishermen affected by a pollution incident from an offshore installation or tourism businesses suffering from cancellations could argue for compensation under public nuisance. However, such claims remain largely untested in English law concerning marine pollution, and judicial willingness to extend public nuisance to such cases remains uncertain.

The existing framework for compensating pollution damage from offshore mineral exploration and extraction presents several challenges. OPOL, though valuable for ensuring immediate compensation, has financial limitations that may prove inadequate in the case of a major spill. Additionally, uncertainties regarding recoverable claims and the legal status of offshore platforms under national and international regimes create potential complications for affected parties seeking redress.

A comprehensive international framework remains necessary to address liability and compensation effectively. Given the cross-border nature of offshore pollution, a regional or global treaty-based approach would provide more certainty and protection for victims. In the meantime, a review of OPOL's financial limits, scope of liability, and integration with existing maritime conventions may be necessary to enhance its effectiveness as a compensation mechanism in the evolving offshore industry.

