LECTURE 8

FIXED OR FLOATING OBJECTS (FFO) CLAIMS

1.0 INTRODUCTION

A 'fixed object' refers to a structure that remains stationary in water and is not intended for waterborne mobility. Based on the above explanations, such a structure could either be human-made or a natural resource with economic value. Examples of such fixed objects include subsea pipelines, docks, jetties, fixed offshore platforms, power cables, telecommunication cables, as well as natural resources like coral reefs. Any of these items can damage ships if it is in contact with her, and such damage could potentially lead to claims for restoration expenses and natural resources losses.

On the other hand, a 'floating object' typically denotes a human-made structure, distinct from a ship, designed to be buoyant. This category includes items such as buoys, semi-submersible drilling rigs, and floating storage and off-loading vessels (FSOs) that may have waterborne mobility. In some instances, determining whether a specific floating object qualifies as a ship can be challenging, especially when it serves multiple purposes.

While engaged in their trading operations, vessels may occasionally encounter not just other vessels but also fixed or floating objects (FFO). In such instances, they could potentially encounter claims from the proprietors or operators of these structures in the event of any resulting damage.

RESPONSIBILITY FOR DAMAGE TO FIXED OR FLOATING OBJECTS

Distinguishing between incidents involving ship collisions and those causing damage to Fixed or Floating Objects (FFO) holds legal significance. If the affected object is categorized as a ship, responsibility is typically assessed in line with international agreements such as the 1972 International Regulations for Preventing Collisions at Sea (COLREGS) and the 1910 International Convention for the Unification of certain Rules of Law with Respect to Collision (The 1910 Collision Convention). Conversely, there is no international convention governing liability for damage to stationary or floating objects.

A claim relating to FFO damage is, therefore, usually resolved within the jurisdiction where the damage occurred, under local legal provisions. Such liability may arise from:

- *Negligence under tort law* (*non-contractual liability*)
- *Contractual obligations*
- *Local statutes or regulations*

LIABILITY IN TORT

In most countries, the law places a duty on shipowners to exercise care to prevent their ships from causing harm to others, including through their agents and personnel, such as pilots and harbor tugs involved in port operations. Hence, if a ship fails to exercise sufficient care and comes into contact with a stationary or floating object, the ship's owner is typically held accountable for the losses sustained. When a moving ship makes contact with a stationary object, particularly a fixed or immobile floating object, it's often presumed that the ship is at fault for the contact. For instance, if a ship collides with a jetty, buoy, or dolphin, the shipowner is likely to be held liable for any damage caused to that object.

However, depending on the applicable local law, the shipowner may evade liability if it can be demonstrated that the contact was not due to any fault on the part of the ship, such as an extraordinary event beyond the ship's control, like a tsunami forcing the ship against a berth. Alternatively, the shipowner might be able to reduce liability, or even avoid it altogether, if it can be proven that the owner of the stationary or floating object contributed to the negligence. The fact that an object is stationary on or in the water does not absolve its owners of their own responsibilities. Owners or operators of such objects are usually obligated to record the object's position on navigational charts, provide adequate lighting and sound signals, and issue warnings to ships about potential dangers. Therefore, if it's found that implementing these safeguards could have prevented or reduced contact, it might impact the allocation of liability for the incident.

LIABILITY UNDER CONTRACT:

Liability for damage to fixed and floating objects may also arise under contractual agreements, such as those between the operator of an oil platform and the owner of an anchor handling vessel providing services to the platform. However, many offshore service contracts contain provisions for mutual hold harmless agreements, often referred to as "knock-for-knock terms." These terms specify that each party agrees to assume the risk of damage to their property, even if caused by the other party's negligence.

In many parts of the world, a ship can only use a dock, port, berth, terminal, or similar facility if it enters into a contract with the facility's owner or operator based on standard "terms and conditions of use." Even without a formal contract, these terms may be legally binding if the shipowner has used the facility in previous instances under similar terms, or if local law deems that using the facility implies acceptance of its standard terms.

While these "terms and conditions of use" vary in terms of liability and its extent, they usually impose strict liability on the user for any damage, allowing the facility's owner or operator to seek indemnification from the ship, even if the incident was solely their fault, such as due to negligence during berthing operations by harbor tugs or the mooring master.

LIABILITY UNDER STATUTE OR OTHER REGULATIONS

In some countries, like in England, even if it can be demonstrated that the contact and damage weren't a result of their negligence or fault. For example, under Harbors, Docks and Piers Clauses Act 1847 of English law, a shipowner may be held liable for damage caused by their ship to harbors, docks and other fixed structures, even in the absence of their ship's fault. In other words, it is a strict liability that is imposed on shipowners.

RECOVERABLE DAMAGES

When a ship makes contact with a fixed or floating object, the owner or operator of that object is typically entitled to recover the following damages:

(i) The reasonable cost of temporary and permanent repairs to the object and any associated equipment. If the object is beyond economic repair, its insured value, market value, or replacement cost may be considered.

(ii) Compensation for the loss of use of the object, including the revenue loss suffered by its owner or operator due to the object's unavailability as a result of ship-caused damage.

(iii) Third-party liabilities, whether arising from contracts, statutes, or tort, that the owner or operator of the object may incur as a result of the contact damage.

(iv) Various reasonable costs and expenses incurred by the owner or operator of the object due to the damage, such as survey and inspection fees.

2.0 THE RIGHT TO LIMIT LIABILITY

The ability to limit liability hinges on whether the country where the claim arises is a party to international limitation conventions or has local legislation granting this right. Most countries are parties to either the 1976 Limitation Convention (or its 1996 Protocol) or the 1957 Limitation Convention. Article 2.1 (a) of the 1976 Limitation Convention grants a shipowner the right to limit liability for various claims related to damage to property, including harbor works, basins, waterways, and aids to navigation, directly connected with ship operations and resulting consequential losses.

When damage occurs to fixed or floating objects, it can lead to substantial claims, especially when the object is costly and essential for continuous production processes. These claims may encompass physical damage and loss of revenue due to production interruptions, potentially resulting in significant financial implications. However, in many cases, local laws or usage terms impose strict liability on shipowners, making it challenging to avoid liability entirely. Therefore, understanding the shipowner's rights to limit liability is crucial.

However, shipowners are likely to be able to limit liability under the 1976 Convention for physical damage to harbor works, navigational aids, and any consequential loss of use. Even though the Convention does not explicitly mention other fixed or floating objects like oil exploration platforms, it's probable that such objects will be considered "property" under Article 2.1 (a), allowing shipowners to exercise the same limitation rights. Similar rights are provided under the 1957 Limitation Convention.

The limitation of liability applies to all claims arising on distinct occasions. This can lead to complexities if the ship comes into contact with the fixed or floating object multiple times (e.g., during heavy swell or inclement weather). In such cases, claimants may argue that the shipowner cannot limit liability for all claims with a single fund but must establish separate funds equivalent to the ship's liability limit for each distinct occasion. Whether there is one or more distinct occasions primarily depends on whether subsequent damage is an inevitable result of the initial incident.

In rare situations where the fixed or floating object is held liable for damage to the ship, the owners or operators of the object typically cannot limit their liability under international conventions because only "ships" have this right under such conventions. Nevertheless, local laws may provide a right to limitation for the owners of fixed or floating objects. For example, the United Kingdom Merchant Shipping Act 1995 allows certain entities like harbor authorities, conservancy authorities, and dock owners to limit their liability based on the tonnage of the largest UK-registered ship that has visited the relevant installation in the past five years.

Limitation in the United States differs from international conventions. While the U.S. is not a party to these conventions, shipowners can potentially limit liability under the Limitation of Liability Act (46 U.S.C. 30501, et seq.), provided that the conduct in question was not committed with the shipowner's "privity or knowledge." However, U.S. courts are generally hesitant to allow limitation and can refuse it for various factual or legal reasons. Additionally, some U.S. cases suggest that the Limitation of Liability Act may not apply to damage to federal navigation installations, such as locks.

When ships encounter fixed and floating objects, damage can occur either to the ship or the object itself. This results in various types of claims, including property claims, liability claims, delay claims, and claims for loss of income. Different insurance coverages, such as Hull and Machinery (H&M), Hull Interest/Increased Value (IV) insurance, P&I, or Defense, may come into play, depending on the nature of the damage. It is crucial for the insured (the party insured) to understand which claims are covered by which insurance policies and to promptly notify the relevant insurer of any claims to avoid jeopardizing their right to recovery. Furthermore, if the insured is indemnified by the insurer, the insurer may exercise subrogation rights to recover from any third party responsible for the loss or damage.

HULL AND MACHINERY INSURANCE

H&M insurance typically covers damage to the ship and associated salvage services resulting from contact with a fixed or floating object (FFO), subject to the insured sum. If the ship becomes a total loss due to such an incident, shipowners are generally covered for the insured ship value under H&M insurance and, where applicable, IV insurance. Liability for wreck removal is typically covered by the ship's P&I insurance.
The terms of H&M insurance policies can vary significantly in how they provide coverage for damage caused by the ship to an FFO. These terms also differ in specifying the qualifying perils for coverage and the covered consequential losses.

Nordic, German, or French terms generally cover damage caused by physical contact between the ship's hull and the FFO, with Nordic and German terms providing liability coverage for FFO wreck removal and financial losses, including loss of profit. German terms are broader, covering damage caused to an FFO by the ship's anchor, mooring or towing lines, gangways, even without physical contact with the ship (e.g., surge damage).

In contrast, English, American, and Japanese terms typically do not provide coverage for FFO damage. This distinction also applies to P&I insurance. Depending on the terms of the insurance, the scope of coverage can vary significantly. Therefore, shipowners must understand the scope of their insurance policies to ensure proper coverage in case of damage to FFOs.

INCREASED VALUE (IV) INSURANCE

IV insurance aims to provide full indemnity in case of the total loss of the ship, especially when the market value of the ship exceeds the insured value.
IV insurance also offers additional coverage for the insured's liability for FFO damage when the H&M insurance's sum insured is insufficient to cover such liability. This additional coverage is generally capped at 25% of the H&M insurance's sum insured and is limited to liabilities within the scope of the underlying H&M insurance.

P&I INSURANCE

P&I insurance indemnifies the insured member for liabilities related to FFO damage that fall outside the coverage provided by H&M insurance or exceed the sums insured under H&M (and IV insurance). The scope of P&I coverage for this liability depends on the coverage available under the ship's H&M and IV insurance.

P&I insurance covers the insured's legal liability for damage to FFO, including consequential losses, arising from tort claims or local statutes and regulations. However, coverage is subject to certain restrictions. . Damage must result from physical contact between the ship and the FFO, including the ship's hull, fixed structure, anchors, chains, mooring or towing ropes, and other components.

Moreover, P&I insurance does not cover liability resulting from contracts or indemnities entered into by the assured member or on their behalf, unless these terms have been approved by the P&I insurer. This approval is crucial as onerous terms, especially those depriving the assured of liability limitations under applicable law, are unlikely to be approved by the insurer. Understanding the scope and limitations of insurance coverage is essential for shipowners to effectively manage their liabilities in cases of FFO damage.

LOSS OF HIRE INSURANCE

When a ship comes into contact with a fixed or floating object (FFO) and sustains physical damage, it might require relocation to a repair facility, rendering it inoperative until the necessary repairs are completed.

In such instances, Loss of Hire insurance is designed to offer coverage for any income loss incurred by the policyholder during the downtime caused by the damage and subsequent repairs. It's important to note that this insurance does not provide coverage for income losses resulting from other circumstances, even if they are related to the incident. For example, if the ship is detained by local authorities or seized by the owner of the damaged FFO, such losses would not be covered.

LEGAL AND OTHER EXPENSES COVER

In cases where the ship is implicated in causing damage to the FFO or is accused of such actions, the policyholder will typically need to cover legal and other expenses to defend against potential claims. These claims may be brought by the FFO owner, local authorities, or other third parties claiming losses. Typically, the legal and other expenses will be covered by the insurance policies that address the relevant liabilities, such as H&M (Hull and Machinery), IV (Increased Value), or P&I (Protection and Indemnity) insurers. However, there may also be expenses related to claims not covered by insurance, such as those retained by the policyholder according to agreed deductibles. In such cases, these expenses may be recoverable through Defense cover, which is commonly offered by most P&I clubs as a separate insurance class. It's important to note that the policyholder is usually responsible for a portion of these incurred expenses, typically around 25 percent.

3.0 CLAIMS MANAGEMENT

The majority of claims arising from incidents involving contact with fixed or floating objects are minor and fall into the category of "bumps and scrapes" that occur in the regular course of ship operations, especially during berthing at a dock or jetty. These minor claims are typically settled directly between the parties involved, often without significant involvement from their respective insurers or other parties.

However, some claims can be substantial, particularly when they involve significant damage to a high-value FFO and result in significant business interruption. Therefore, it is strongly advised that parties involved in such incidents promptly consult their P&I or H&M insurers. This early consultation allows for the implementation of necessary protective measures without delay. In many cases, the timely involvement of an experienced surveyor or naval architect, along with a knowledgeable local lawyer, can help prevent cost escalation and minimize the detention of the ship.

Shipowners should also consider consulting their P&I insurers before finalizing contractual terms of use to ensure that these contracts do not impose unusually burdensome conditions that could jeopardize their insurance coverage.