STEPHENSON HARWOOD

Offshore Energy Law

Liability for oil pollution from FPSOs: The North Sea

Liability for oil pollution from an FPSO in the North Sea is governed by English tort law principles. The cause of action most likely to be relied upon by parties injured by a FPSO pollution incident is negligence. Injured parties may, however, not need to establish liability in negligence. Operators in the North Sea have signed up to a voluntary oil pollution compensation scheme known as OPOL. This was entered into in 1975, initially as an interim regime pending the agreement and ratification of the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources. The Convention never came into force so OPOL continues.

As a voluntary scheme, OPOL came into effect by and is a creature of contract. The most important clause of OPOL is Clause IV which includes the following language:

"If a Discharge of Oil occurs from one or more Offshore Facilities, and if, as a result, the Party who was the Operator of said Offshore Facility or Facilities at the time of the Discharge of Oil takes Remedial Measures and/or any Public Authority or Public Authorities take Remedial Measures and/or any Person sustains Pollution Damage, then the Party who was the Operator….shall be responsible for the cost of said Remedial Measures which it takes and shall reimburse the Public Authority the cost of said Remedial Measures taken and shall pay compensation for said Pollution Damage up to an overall maximum of U.S.$250,000,000 per Incident..."

OPOL commits the operator to pay up to US$250m per Incident. The US$250m commitment is made up of US $125m to cover pollution damage claims and US $125m for remedial measures.

The OPOL regime is not fault or tort based. It is a strict liability regime with the obligation to pay not based on any finding of fault.

Under OPOL, the primary responsibility is on the operator of the relevant FPSO but the parties to OPOL agree to contribute to the payment of claims if the operator primarily responsible fails to meet its obligations. Accordingly the scheme collectively offers a high degree of security that compensation will be paid and clean-up costs funded (up to the US$250m limit).

The existence of OPOL and the OPOL limits do not prevent claimants from pursuing their claims in the courts; in excess of the OPOL limits this is their only option.

Individual operators purchase Energy Exploration and Development Insurance (also known as Control of Well insurance) to cover the cost of pollution from wells (typically with limits up to USD500m) and the FPSO owners and operators purchase P&I insurance to cover their liability arising from pollution from the FPSO. These insurances provide the cash flow to allow operators to meet their liabilities under OPOL and potentially the liabilities that exceed OPOL.

One does, at times, encounter discussions about whether FPSOs are ships and the implications of this in connection with The Convention on Limitation of Liability for Maritime Claims (LLMC) and the International Convention on Civil Liability for Oil Pollution Damage (CLC) which establish the rights of ship owners to limit liability. These discussions tend not to pay sufficient regard to the following:

- OPOL (OPOL creates a voluntary compensation scheme, operators cannot sign up to OPOL and then seek to limit under LLMC or CLC as that would undermine OPOL if the applicable limit was less than the OPOL limit).
- Article 15(5) of LLMC states that LLMC does not apply to "*floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof*." On our reading of Article 15(5) LLMC, by its express terms, does not apply to FPSOs (even if one could successfully argue that FPSOs are ships).
- CLC is concerned with oil pollution damage resulting from maritime casualties involving oil-carrying ships. We consider it would be very difficult for oil companies/ FPSO owners to succeed in an argument CLC applies to limit liability because there is a strong argument that an FPSO operating in a field is not engaged in carriage of oil which is need to benefit from the protection afforded by the CLC. In October 1998, the 1992 Fund Assembly established a working group to study (amongst other things) whether, and if so to what extent, the CLC applies to FPSOs. The working group decided that (a) FPSOs should be regarded as 'ships' under the CLC only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate; and (b) FPSOs would fall outside the scope of the CLC when they leave an offshore oil field for operational reasons or simply to avoid bad weather.

The working group's findings were endorsed by the Assembly (see https://iopcfunds.org/wp-content/uploads/2018/12/1999_ENGLISH_ANNUAL_REPORT.pdf On this interpretation, there is very narrow scope for CLC to apply to FPSO and thereby permit limitation of liability, because in our experience FPSOs are not used to carry oil on a voyage to or from ports. The working groups findings as endorsed by the Assembly are not legally binding but they are likely to be considered persuasive authority before the English Courts.

Outside of the North Sea the liability for pollution arising from a FPSO is a matter of the applicable local law. Many jurisdictions impose strict liability on operators for pollution incidents. Oil companies and FPSO owners should have regard to the local law and give due consideration to the adequacy of existing insurance arrangements. Allocating pollution liability appropriately in the knock for knock clauses is important but may be insufficient; BP's liability arising from the Deepwater Horizon incident was estimated at US$65bn.

Contact us

Simon Moore
Partner
T: +44 20 7809 2164
E: simon.moore@shlegal.com

Simon specialises in contentious and non-contentious matters in the offshore oil and gas and insurance industries.

He has advised on offshore oil and gas projects and conducted litigation and arbitration around the world. Projects Simon has acted on include, Kwame Nkrumah FPSO (Ghana), Benguela-Belize CPT (Angola), BP Thunder Horse (GoM), BP Mad Dog (GoM), BP Mad Dog 2 (GoM), Agbami FPSO (Nigeria), Usan FPSO (Nigeria), Senje Berge FPSO (Nigeria), Akpo FPSO (Nigeria), Coral FLNG (Mozambique), Pazflor FPSO (Angola), Frade FPSO (Brazil), Icthys FPSO (Australia) and Balder FPSO (North Sea).

Simon successfully acted for the underwriters in the marine insurance case the "*B Atlantic*" before the UK Supreme Court in May 2018 and was awarded the Solicitor of the Year Award (Private Practice) by the Law Society in October 2018.

Simon is co-author of the leading text on law and practice relating to design and construction of vessels for offshore oil & gas: Offshore Construction Law and Practice, published by Informa Law for Routledge.

Simon also authored the Decommissioning Contracts chapter in the text, Oil and Gas Decommissioning: law policy and comparative practice (Second Edition), published by Globe Law and Business.

STEPHENSON HARWOOD