

LIMITATION OF LIABILITY FOR POLLUTION DAMAGE FOR OFFSHORE VESSELS AND UNITS IN THE NORTH SEA (NORWEGIAN SECTOR)



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The failure of the blowout preventer on the *Deepwater Horizon* caused a massive on-going oil spill in the Gulf of Mexico and the largest pollution incident in US history. This is a pertinent time to ask what would the consequences be for operators of offshore production facilities if a similar incident were to occur in the Norwegian sector of the North Sea? What is the liability exposure for the various interests involved and can that liability be limited?

When considering the potential liability and limitation for offshore vessels and units, it is necessary to first distinguish between pollution damage and other types of damage. In Norway, liability for and limitation of pollution damage is partly regulated by the Petroleum Activities Act 1996 (Petroleum Act) and partly by the Norwegian Maritime Code 1994 (Maritime Code). The focus of this article will be on pollution damage, but with passing reference to the rules on limitation for other types of damage.

The starting point is to identify the source of the pollution and the relevant vessel or unit involved. Consideration must then be given to the applicable statutory liability and limitation regime. As statutory rules generally only regulate third-party liability, consideration will also inevitably need to be given to any applicable contractual scheme as this may well determine where the liability finally rests. However, and whilst undoubtedly important, an overview of the relevant contractual schemes is beyond the scope of this article.

POLLUTION DAMAGE WITHIN THE SCOPE OF THE PETROLEUM ACT

Pursuant to the Petroleum Act, a licensee (being the holder of a licence to carry out petroleum activities at the relevant oil field) is strictly liable for pollution damage. Pollution damage covers damage or loss caused by pollution as a consequence of the discharge of petroleum from a facility, including wells, together with the costs of any reasonable measures taken to avert or limit such damage. Facilities in this respect are defined as installations, plants and other equipment for petroleum activities, but do not include supply and support vessels or ships that transport petroleum in bulk other than when such vessels are loading from the facility. Ships used for drilling and for storage in conjunction with production are also regarded as part of the facility, as are pipelines too.

Provided that the pollution damage falls within the scope of the Petroleum Act, the licensee has, save for certain *force majeure* events such as natural disasters or an act of war, no right to limit their liability.

Claims against a licensee for pollution damage may only be pursued in accordance with the regime laid down by the Petroleum Act. Liability for such claims is channelled to the licensee and cannot be brought against anyone who by agreement with the licensee or his contractor(s) has performed tasks or work in connection with the petroleum activities. This channelling provision protects most parties involved in the relevant petroleum activity but will, for example, not include ships that transport petroleum (apart from when they are loading), or ships or units that are involved in petroleum activities other than where the pollution damage occurred.

The licensee is barred from seeking recourse against any party exempted from liability by the channelling provision, save where the party in question has acted wilfully or is grossly negligent. In the latter case, the licensee may seek recourse, but for such recourse claims, the relevant party may invoke the right to limit liability under the Maritime Code.

POLLUTION DAMAGE OUTSIDE THE SCOPE OF THE PETROLEUM ACT

Outside the scope of the Petroleum Act, two different liability and limitation regimes apply with respect to pollution damage. Firstly, Chapter 10 of the Maritime Code incorporates the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC 92). Secondly, the Convention on Limitation of Liability for Maritime Claims of 1976 (as amended by the 1996 Protocol) is incorporated in the Maritime Code Chapter 9 (LLMC 1976).

The starting point under Chapter 10 of the Maritime Code is that owners of ships, drilling rigs and other mobile installations are strictly liable for damage or loss resulting from pollution caused by oil escaping or being discharged from the ship or installation, including costs for any preventive measures. However, outside the principle of strict liability, the regulation of liability and limitation will depend on the type of oil, the type of ship or unit involved, and where the loss or damage occurred.

If the pollution is caused by persistent oil released or discharged from a ship transporting cargo in bulk and the resulting pollution causes damage in Norway, the rules in CLC 92 are applicable. The standard CLC 92 rules on limitation of liability, channelling of liability and mandatory insurance apply, and where applicable, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1992 (1992 Fund) may also be called upon.

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However, if the claim is one that also falls within the scope of the Petroleum Act, then the limitation provisions in CLC 92 cannot be used by a licensee or an operator for claims relating to such pollution damage, and no recourse claim may be made against owners of ships, drilling rigs and other mobile installations provided that they have not acted wilfully or been grossly negligent.

SPECIFIC LIMITATION RULES FOR OFFSHORE UNITS UNDER LLMC 1976 RELATING TO CLAIMS THAT FALL OUTSIDE THE SCOPE OF THE PETROLEUM ACT AND CLC 92

If persistent oil is released or discharged from a ship, drilling platform or other similar mobile installation not transporting oil as bulk cargo (i.e. outside the scope of CLC 92), then the provisions of LLMC 1976 will apply. This Convention is also applicable where pollution of non-persistent oil occurs. Under LLMC 1976, there are no channelling provisions, mandatory insurance or, if relevant, excess cover under the 1992 Fund.

Liability for wreck removal and other clean-up costs arising out of a maritime casualty is generally subject to limitation under LLMC 1976. Under the 1996 Protocol, countries may reserve the right to exclude liability for wreck removal and clean-up costs from the scope of the 1996 Protocol, which a number of states have done. Norway adopted this reservation in 2002 and, in 2006, more than doubled the limitation amount which could be claimed under the 1996 Protocol for such costs. The implementation of the higher limits was mainly driven by the Norwegian government's wish to have all clean-up costs covered by shipowners and their insurers. Depending on the relevant damage, the shipowner may have to establish two funds: one for ordinary LLMC 1976 claims and a separate fund for wreck removal and clean-up related costs.

After the *Server* casualty in January 2007, the limits for wreck removal and clean-up costs were again increased to more than double the existing limits and currently are as follows (the figures do not show limits for personal injury claims):

Gross tonnage	LLMC 1976 (SDR* million)	1996 Protocol (SDR million)	Clean-up fund limits (SDR million)
1,000	0.25	1	2
6,000	1.1	2.6	24
20,000	3.4	8.2	54
70,000	10.1	24.2	104

* SDR: special drawing rights

SPECIAL LIMITATION AMOUNTS FOR DRILLING PLATFORMS AND SIMILAR MOBILE CONSTRUCTIONS

According to article 15 no. 5 of LLMC 1976, the Convention does not apply to "floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil thereof". As a result, in 1979, special rules were incorporated into the Maritime Code Chapter 21, Drilling Platforms and Similar Mobile Constructions, Section 507. Insofar as the relevant unit is a drilling platform or similar mobile construction and "not regarded as [a] ship[s] and [is] intended for use in... exploitation... of subsea natural resources", the Maritime Code Chapter 9 applies but with the specific limits of SDR36m for personal injury, and SDR60m for other claims and clean-up costs, respectively.

SUMMARY

It is clear from this brief summary that were an event like the *Deepwater Horizon* to occur in the Norwegian sector of the North Sea, then a web of legislation and conventions will come into play to determine where the liability ultimately falls, and how far licensees and operators of offshore production facilities and vessels can limit their liability. Whether the ultimate payer is the deep pocket of an oil company or an international fund or an insurer, the route by which such liability is imposed is often a complex one.