



Singapore port

However, it is not all about FPSOs entering the market. The fact remains that many FPSOs are not redeployable after decommissioning, since the on board production and separation facilities are, in most cases,

unique to the hydrocarbons particular to an individual field. It is estimated that 33 FPSOs are nearing the end of their life and many of those are destined for scrap. This situation has a profound impact on P&I risk exposure. As FPSOs near their demise, the capital expenditure, injected by oil companies and contractors, and required for maintenance and upkeep, reduces. This inevitably results in an enhanced risk, especially with regards to the likelihood of a costly oil pollution and/or wreck removal incident. The club counters this risk through a rigorous survey programme designed to act as a second pair of eyes to highlight problems, such as structural deficiencies or a drop in operating standards, so that they can be rectified before resulting in a casualty and therefore cost for both member and club. Proactively gauging and managing operational risk is central to the club's philosophy.

In conclusion, the role of the FPSO or FLNG in the APAC region will be integral to offshore production solutions for the foreseeable future, and with careful safety and loss management and an intelligent survey programme, the liability exposures for such units can be controlled. For those seeking insurance for such units, the Standard Club can provide P&I cover up to a limit of \$1bn. In total, the club insures 57 FPSOs, of which two are jack-ups units and seven are tankers under conversion. In terms of market share, this represents 30% of the global fleet. To get a comprehensive idea of the full cover provided, the Standard Offshore Rules (SOR) can be found on the [website](#).

Definition of a ship – applicability of CLC 1992 and Fund Convention 1992 and 1976 LLMC to FPSO and FSU



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This article examines the ability of a FPSO and a floating storage unit (FSU) to limit liability in a pollution situation under the Civil Liability Convention 1992 (CLC 1992), the International Convention on the Establishment of an International Fund for Oil Pollution 1992 (the Fund Convention 1992) and the Convention on Limitation of Liability for Maritime Claims 1976 (1976 LLMC), as amended by the 1996 Protocol.

There is no existing international regime, which can expressly, and with certainty, respond to pollution from these offshore units. The need to consider such an initiative had been tabled by the Indonesian Government at the IMO following the *Montara* oil spill offshore Australia. However, the most recent discussions at the IMO in April 2012 concluded that for national sovereignty reasons, pollution from offshore units were more appropriately dealt with by bilateral, multilateral or regional agreements, and that the IMO would commence work to provide guidelines for such agreements.

In the absence of an international regime, do the existing CLC 1992 and Fund Convention 1992 or the 1976 LLMC, which are for the benefit of the maritime community, extend to these offshore units when they operate off the coasts of signatory states? There is no clear legal guidance in the interpretations of these conventions. FPSOs and FSUs are increasingly being used in the offshore oil and gas industry and may pose a danger of oil pollution. Should these units be treated like tankers and also benefit from the limitation provisions in these conventions? The definitions of ship within the respective conventions governs these units' right to limit.



FPSO

FPSOs process hydrocarbons received from the seabed and the resultant oil or gas is stored until it can be offloaded onto an offtake tanker or transported through a pipeline to a terminal. FPSOs can be converted tankers or can be purpose-built, and their shapes can vary from being ship-shaped, to box-shaped barges with varying dimensions. As technology advances, so too do the design and capabilities of these units. They can be designed for the life of the field in which they are located. Some of them are designed to disconnect from their risers to avoid adverse weather conditions and a few are designed for grazing marginal fields and transporting the oil to refineries. However, once they are moored, they are considered to be permanently or semi-permanently attached to the seabed, albeit floating.

FSUs are usually converted tankers that store oil received from a producing platform or FPSO, or are connected directly to a live well.

CLC 1992 and the Fund Convention 1992:

These two IMO conventions complement each other and provide for strict liability (save for very limited defences) and compulsory insurance for shipowners in respect of oil pollution damage. They allow victims of pollution direct access to a shipowner's insurer, but in return, the shipowner is allowed to limit his liability. The CLC 1992 is the first tier of funding and this is provided by the shipowners via their P&I clubs or similar insurers. At present, 125 member states have signed up to this convention, with the notable exception of the USA (see comments below).

Presently, the maximum limit under CLC 1992 is SDR89.77m or about \$136m. A second tier of funding is provided by the Fund Convention 1992 ratified by 105 member states with levies from oil companies or recipients of oil, and is limited to SDR203m or about \$307.5m (there is a further third tier known as the supplementary fund, with only 26 member states signed). The combined limits of the first two tiers practically guarantees a fund of some \$443.5m, which is of great comfort to victims of pollution damage as well as shipowners that are able to limit their liabilities.

The preamble makes it clear that the purpose of the CLC 1992 is to respond to the "*dangers of pollution posed by worldwide maritime carriage of oil in bulk*" to ensure adequate compensation is available to victims of oil pollution from ships. A ship is defined as any seagoing vessel and seaborne craft constructed or adapted for the carriage of oil in bulk as cargo, provided the ship is capable and does actually carry oil in bulk as cargo and during any voyage.

This means that the oil has to be carried, i.e. transported during a voyage. The current definition does not capture permanent or semi-permanent units such as FPSOs or FSUs, even though these units maybe ship-shaped or function as 'stationary' tankers. It is contended that they would fall within the definition of ship when they are disconnected for operational or weather reasons, and navigating to shelter from weather conditions or for repairs/dry-docking or transiting to a terminal to discharge cargo (although some academic comment has been made that the first two scenarios may not be considered to be a voyage).

The Greek Supreme Court in the *Slops* case (case number 23/2006) held that a permanently anchored storage unit whose propeller was removed and engine was deactivated and sealed should be regarded as a ship within the meaning of the CLC 92, since it stored product in bulk and could move under tow. The unit had been in situ for some five years operating as a 'floating facility' receiving and processing waste oil, when she had a fire on board and some of her 5,000m³ oily water was spilt. This decision has been widely criticised as wrong, but the definition of ship was given a wide interpretation by the court presumably due to expediency in order to compensate the clean-up operators for costs incurred due to the insolvency of the owners of the *Slops* and the lack of liability insurance.

The Fund Convention 1992 was obliged because of this decision to pay for the costs from the ground up.

There has been recent debate within and pressure from the shipping community to extend the definition of ship to include FSUs (not connected to a live well) as it is correctly recognised that compensation to victims of oil pollution is necessary. Resistance to this widening of the definition is coming from the largest contributors to the Fund Convention 1992, including Japan and Korea, which are importers of oil with no or negligible offshore units in their waters. This debate continues and the momentum towards such a change is growing, with a Working Group being convened by the Fund Assembly at the IMO to review this issue in April 2013.

In contrast, the **US's Oil Pollution Act 1990 (OPA 90)** sets out the liability and compensation regime in the event of oil pollution and expressly applies to both ships and offshore facilities, which include FPSOs and FSUs. Such offshore facilities have an unlimited liability for clean-up costs but can separately cap their liability for all 'other damages' as a result of pollution to \$75m. There is an argument that these units could be classified as ships and thereby avail themselves of a lower limit according to their tonnage for both pollutant removal and other damages. However, in the event of a casualty, we would anticipate a narrow definition would be given in favour of victims of pollution.

1976 LLMC as amended by the 1996 Protocol:

The definition of a ship comes under more scrutiny in the 1976 LLMC and enacting national legislation. Whether a FPSO or FSU is a ship takes into consideration various factors such as its shape of the ship, its capability and frequency to navigate and the frequency thereof, and what it was doing at the time of the casualty.

The 1976 LLMC entitles a shipowner (as defined) to limit its liability for certain claims calculated according to the tonnage of the ship, with a separate calculation for property damage and higher limit for personal injury or death. The 1996 Protocol increases these limits further and following the decisions of the IMO's legal committee in April 2012 we will see the limits increase significantly (by 51%) in April 2015. The six heads of claims set out in **Article 2** include:

- injury or death and/or property damage on board or in direct connection with the operation of the ship;
- claims resulting from infringement of rights other than contractual rights occurring in direct connection with the operation of the ship; and
- claims in respect of measures taken by third parties to avert or minimise loss and further loss caused by such measures.

These heads of claims can respond to typical claims encountered in a casualty situation, including oil pollution. **Article 3** excludes claims for oil pollution that fall within the meaning of the CLC 1992. However, if these units are not ships within the meaning of the CLC 1992, they are not caught by the Article 3 exclusion.

'Ship' is defined in the 1976 LLMC as any seagoing ship and **Article 15 (5)** expressly excludes the application of the Convention to floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil (referred to as offshore craft exclusion). While a seagoing ship is a ship that is used in navigation on the seas (see comments below), there is a view that a FPSO (but not a FSU) is a floating platform constructed for the purpose of exploring or exploiting the natural resources of the seabed or the subsoil and thus is caught by the Article 15 (5) offshore craft exclusion.



Mobile Offshore Production Unit

The UK's **Merchant Shipping Act 1995 (MSA)**, which enacts the 1976 LLMC, however deletes the Article 15 (5) offshore craft exclusion. The MSA provides that the right to limit under the LLMC applies to ships. By Article 1 (2) of the 1976 LLMC, this right is limited to 'seagoing ships'. So in the UK, whether a FPSO can limit depends on whether it is a ship. The MSA further defines ship (Section 313) to "include every description of vessel used in navigation". Similarly Singapore's MSA deletes the Article 15 (5) offshore craft exclusion and further defines ship to mean "any kind of vessel used in navigation by water, however propelled or moved and includes ... an offshore industry mobile unit". As a starting point, the deletion of the Article 15(5) offshore craft exclusion looks promising for FPSOs and FSUs to be treated as ships. Are these units 'used in navigation' in order to fall within the definition of ship?

Used in navigation:

Earlier English law cases equated 'used in navigation' to transporting people and property by water (*Steedman v Schofield* 1992 2 LLR). In *Perks v Clark* (2001 2 LLR), the Court of Appeal held that a jack-up rig that was towed from one location to another for the purpose of drilling for oil was indeed a ship and concluded that so long as navigation is a significant part of the function of the unit, "the mere fact that it is incidental to some more specialised function such as dredging or provision of accommodation does not take it outside the definition". However, the court did concede that there was "an issue of the degree as to the significance of the navigation" and that this would be a question for a fact-finding tribunal. As such, the courts have moved away from the 'real work' or primary purpose test (which might have otherwise disqualified the rig from being a ship).

The English courts have concluded that it is sufficient for navigation to be part of the unit's function and indeed that the unit is capable of and used in navigation, however infrequently. As to degree of significance, this is difficult. Some FPSOs are positioned on location for the intended life of the field, or unit itself, but are arguably capable of navigating. Indeed they can be used to navigate to the field location and, once disconnected, navigated for disposal or unplanned repairs following a casualty. Such a unit does not cease to have the capability or expectation to navigate once it is in the relevant field location.

The position is simpler for FPSOs which are designed to be easily disconnectable from the risers due to weather conditions and therefore do navigate. The *Cossack Pioneer* (2005 AATA) is a case in point where the Australian Administrative Appeals Tribunal found a disconnectable FPSO to be a ship within the meaning of "a ship used in navigation by water" pursuant for the **section 6 of the Navigation Act 1912**; however, bizarrely, it may not be considered a ship under the Australian enactment of the 1976 LLMC due to the Article 15 (5) offshore craft exclusion.

To conclude, while FPSOs and FSUs are not considered to be ships within the meaning of the CLC 1992 and Fund Convention 1992, there is more scope for each unit to be considered a ship for the purpose of the 1976 LLMC, provided that in the case of a FPSO, the Article 15 (5) offshore craft exclusion is deleted. This is very much dependent upon local law. There are no definitive cases on the application of the 1976 LLMC to these units and this article points out the difficulties that arise in seeking to analyse whether the LLMC is capable of applying to them. In the final analysis, it will depend upon the courts around the world to give meaning to the definition of ship, inviting an inconsistent approach and highlighting the need for an international standard.