

Arctic Oil Exploration in a Fractured Geopolitical Climate: Legal Challenges and the Need for a Unified Civil Liability Regime

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Introduction: The Allure of Arctic Oil

As the world's demand for energy continues to grow, the Arctic has emerged as a highly coveted region for oil exploration, offering vast reserves of untapped resources. The combination of advanced extraction technologies and rapidly receding ice due to climate change has made accessing these reserves more feasible than ever before, intensifying and, for others, reactivating regional interest in Arctic oil. For energy-hungry nations, the Arctic presents a promising opportunity to secure new energy supplies.

However, the allure of Arctic oil is tempered by the significant environmental risks that come with exploration in such a remote and fragile ecosystem. The Arctic's unique environmental conditions make it especially vulnerable to the impacts of oil spills, pollution, and habitat disruption, all of which pose serious threats to its delicate ecosystems. The prospect of oil exploration in this region therefore raises urgent concerns about how to balance sustainable

resource development with environmental protection. Occupations reliant on fishing, tourism, and marine recreation may be particularly affected, for example, and pollution could threaten traditional subsistence activities for indigenous communities in the Arctic. Pollution damage may also extend to the central Arctic Ocean, a maritime area beyond national jurisdiction.

Incidents such as the *Montara* and *Deepwater Horizon* oil well blowouts have globally raised serious concerns about the safety of offshore petroleum development and the accountability of operators. As countries navigate the challenges of accessing Arctic oil, the environmental risks associated with these activities highlight the need for robust legal and regulatory frameworks that can effectively mitigate the impacts of oil exploration on one of the world's most sensitive natural landscapes. One of such being a civil liability framework for offshore petroleum development in the Arctic.

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² This paper is based on research conducted for a submitted PhD thesis, capturing significant findings and insights from that work. The full thesis can be found at Adanna Omaka, 'A Civil Liability Regime for Offshore Petroleum Development in the Arctic Region' (2024) <[https://research.bangor.ac.uk/portal/en/theses/a-civil-liability-regime-for-offshore-petroleum-development-in-the-arctic-region\(28bdd839-73dd-4f69-a886-0fca81ae6007\).html](https://research.bangor.ac.uk/portal/en/theses/a-civil-liability-regime-for-offshore-petroleum-development-in-the-arctic-region(28bdd839-73dd-4f69-a886-0fca81ae6007).html)>.

The interconnected nature of the Arctic ecosystem also highlights the potential transboundary implications of pollution incidents in the Arctic continental shelf and raises questions concerning the routes of legal redress available for citizens that wish to make pollution damage-related claims and in which jurisdiction they should pursue such claims. These questions may be further complicated by states' claims to extend maritime territory, particularly where these claims overlap or are not formally established, as it may be uncertain which state's territory is damaged or from which state's territory the pollution originates.

While oil spill response techniques are important, but as they can only recover up to forty percent of spilled oil,¹ civil liability is crucial in managing spill damage. In the same vein, while pollution prevention is ideal, legal liability ensures prompt and adequate mitigation actions to address impacts on ecosystems, communities, and individuals. A regional civil liability regime would not only promote accountability and ensure fair compensation but also foster cooperation among Arctic states.

By establishing liabilities, there is clear delineation of the obligations and duties of various parties involved in oil-related activities. This includes oil companies, operators, and other entities engaged in offshore petroleum development. Further, providing clarity as to the liabilities of operators creates a sense of responsibility and arguably acts as a deterrent, encouraging these entities to adopt robust preventive measures and adhere to best practices to minimise the risk of oil spills. Where private citizens are concerned, a definitive understanding of liabilities also allows them to understand their rights and avenues for seeking redress or compensation if they have been affected by an actor in the offshore petroleum development industry.

An effective civil liability framework for pollution damage might include key components such as, defining the tort or the civil wrong, channelling liability, standard of liability, damages recoverable, cap on liability, financial assurance, priority of claims, limitation period for bringing claims. Further, due to the high likelihood for transboundary pollution damage a civil liability framework should address the subject of conflict of laws.

¹ Doug Helton, 'What Have We Learned About Using Dispersants During the Next Big Oil Spill?' (NOAA Office of Response and Restoration, 20 April 2015) <<https://response.restoration.noaa.gov/about/media/what-have-we-learned-about-using-dispersants-during-next-big-oil-spill.html>> accessed 20 October 2024.

Fragmented Legal Landscape for Civil Liability from Offshore Petroleum Development

The legal landscape governing Arctic oil exploration is highly fragmented, characterised by a mix of international agreements and distinct national regulations that vary significantly across Arctic states. While some international treaties provide a broad basis for environmental protection and maritime governance in the Arctic, they lack the specificity needed to address the complex realities regarding civil liability of oil exploration in this unique environment. For instance, the United Nations Convention on the Law of the Sea (UNCLOS), as a *lex generalis*, sets forth general principles for maritime activities, including a mandate for environmental protection when countries enjoy their sovereign rights to explore and exploit petroleum their maritime territories. Yet, the UNCLOS does not specify actionable measures for managing civil liability for transboundary pollution from oil spills or drilling incidents in the Arctic.

Further, through article 235, the UNCLOS leaves the matter of prompt and adequate compensation or other relief for pollution damage to be resolved by coastal states, while also asking states to cooperate to develop international and/or regional agreements on this issue, taking into account the special characteristics of the region. Despite the establishment of international frameworks such as the 1990

International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), the 2013 Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOSPA), and the 1974 Nordic Environmental Protection Convention (NEPC), research shows that there remains a notable gap in comprehensively addressing civil liability claims arising from offshore petroleum development activities in the Arctic region.

While these frameworks provide for pollution prevention and response, they lack provisions for establishing liability regimes to ensure prompt compensation for damages. Additionally, industry initiatives like the OPOL Agreement, though containing elements of a liability regime, are voluntary and have limited applicability in the Arctic. None of the regimes therefore contain all the essential components of an effective civil liability regime, and as a result, individuals affected by offshore spills cannot rely solely on these frameworks for redress.

At the national level, Arctic countries have created tailored legal regime to oversee offshore oil and gas operations in ways that align with their individual environmental and economic priorities. However, research has shown that the domestic civil liability regimes of individual Arctic states are not aligned enough to comprehensively and effectively satisfy the need for a clear and unified regime addressing civil liabilities

arising from offshore petroleum development activities in the Arctic region.

For example, using the key components of an effective civil liability framework and balancing them against the five littoral countries of the USA, Canada, Greenland, Norway, and Russia due to their territorial claims in the Arctic Ocean, these frameworks vary widely, with a concerning prevalence of vague and ambiguous legal provisions, unrealistic financial compensation limits, diverse legal systems, inconsistent rules applicable across the region, and challenges stemming from different languages and currencies. These uncertainties lead to challenges in the application and interpretation of regulations, inadequate enforcement mechanisms, and create a breeding ground for potential legal disputes, especially in the event of transboundary pollution incidents.

Past oil spill incidents, like the *Montara* spill, illustrate the complexities involved in transboundary oil pollution damage claims. Though the spill occurred in 2009, some resolution was only achieved in 2022 through an extrajudicial settlement without any admission of liability.² This

settlement, though significant, highlights the enduring complexities associated with addressing transboundary incidents.

Along another axis, research has also considered whether the domestic laws of the Arctic countries can foster greater legal certainty in the region, not directly through their civil liability rules, but by way of their conflict of laws regimes, which involves jurisdictional questions, choice of law dilemmas, and issues with recognising and enforcing foreign judgments.³ Conflict of laws considerations are important components of an effective civil liability regime. The hypothetical scenario used in the research to explore these aspects involves a foreign claimant filing a claim for transboundary harm in the courts of another Arctic state where the polluting incident originated, using the five littoral countries of the USA, Canada, Greenland, Norway, and Russia due to their territorial claims in the Arctic Ocean.⁴

Consequently, the research findings reveal a complex legal landscape, characterised by jurisdictional constraints, challenges in determining applicable laws, and difficulties in enforcing foreign

² Bloomberg and Energy Voice, 'Indonesia to file \$1.7bn Montara oil spill lawsuit against Thailand's PTTEP' (Energy Voice, 25 November 2022) < <https://www.energyvoice.com/oilandgas/asia/463399/indonesia-to-file-1-7bn-montara-oil-spill-lawsuit-against-thailands-pttep> > accessed 23 October 2024.

³ Adanna Omaka, 'A Civil Liability Regime for Offshore Petroleum Development in the Arctic Region' < <https://research.bangor.ac.uk/portal/files/71973720/2024OmakaAphd.pdf> > pages 141-173.

⁴ *ibid* pages 89-138.

judgments.⁵ Each Arctic nation has its own unique legal framework governing domestic court jurisdiction over foreign claimants, the choice of law for substantive issues, and the recognition and enforcement of foreign judgments, resulting in significant differences in approach and criteria. Procedural obstacles, cost considerations, and language barriers can further complicate efforts to secure compensation.

Additionally, cases involving multinational corporations and their subsidiaries introduce further complexity, especially with potential debates over parent company liability, which can further complicate conflicts of laws and hinder a cohesive approach to managing civil liability associated with oil exploration across the Arctic region as a whole.

Equally important as identifying the disparities among domestic regimes on conflict of laws, research highlights a shared understanding among Arctic nations regarding jurisdiction, comity, and reciprocity.⁶ This common ground offers a foundation for future collaboration, essential for effectively addressing transboundary issues like pollution

damage and promoting consistency in legal proceedings across the Arctic region.

Establishing a Comprehensive Regional Legal Regime for Pollution Damage from Arctic Offshore Petroleum Activities

In proposing a solution to address these identified issues, three distinct options are considered based on research findings: modifying existing international law, creating a regional treaty centred on civil liability, and establishing a multilateral agreement focused on private international law as an interim solution.⁷

The first option involves modifying existing international law, notably the CLC and Fund regime. However, there is likely to be challenges around the political will required for amendment, achieving consensus among state parties on provisions, and ultimately, whether this option would ensure all 'gaps' are sufficiently closed. It is also unlikely that modifications to an international agreement could be tailored to the Arctic. Even when this occurs, amending other conventions, such as the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Pollution from Ships (MARPOL), demonstrates the complexity

⁵ *ibid.*

⁶ *ibid.*

⁷ *n* 5 pages 188-208.

involved in modifying existing IMO treaties.

The second option involves negotiating a comprehensive regional treaty on civil liability tailored to the unique challenges and characteristics of Arctic petroleum development, which would require ratification and enforcement by participating states. In theory, this approach would offer a more effective and targeted solution to civil liability issues in the region. Unlike vessel-source pollution, it is recognised that pollution from offshore drilling is better addressed through regional conventions rather than global ones. However, challenges such as opposition from stakeholders, sovereignty concerns, and defining key liability issues may hinder its establishment, at least in the short-term. The recent geopolitical shifts following Russia's invasion of Ukraine, coupled with the breakdown of Arctic cooperation, may yet further complicate the creation of a regulatory environment of the exploration and exploitation of natural resources in the region. However, there is a risk of ineffective management of offshore risks without international cooperation.

The third approach entails creating a multilateral private international law agreement aimed at providing clarity and predictability in legal standards, facilitating efficient resolution of disputes and enhancing access to justice. This option encompasses not only the recognition and enforcement of judgments

but also addresses critical aspects such as choice of law and jurisdiction, offering a holistic solution to civil liability issues in the region. Additionally, this agreement would enhance access to justice by providing clear rules and procedures, lowering barriers to litigation, and ensuring victims can seek redress and compensation, thus promoting fairness and accountability in the legal system.

For instance, EU countries benefit from private international law treaties like the EU Brussels I Regulation (recast), the Lugano Convention, and the Rome II Regulation. Although these EU private international law treaties are not specifically designed for offshore petroleum pollution cases, they illustrate how multilateral agreements can facilitate claims by establishing clear rules and procedures for determining jurisdiction, applicable law, and recognition of foreign judgments within a regional context. However, there may still be some challenges, such as reconciling divergent legal traditions among Arctic states and ensuring the agreement respects national laws and sovereignty while promoting international cooperation.

All three options have their merits and challenges, requiring careful consideration of feasibility, effectiveness, and the willingness of Arctic states to cooperate and compromise. However, the third option may be more feasible in the short-term, as foreign judgments concerning the matter of civil liability from

pollution damage are predominantly compensatory rather than punitive in nature. It may be quicker to achieve consensus on procedural matters rather than substantive ones, and so could provide a good interim solution for any transboundary claims that may arise.

Even so, a regional civil liability treaty remains the most ideal long-term solution for Arctic offshore petroleum activities, offering tailored regulations, enhanced cooperation, and streamlined procedures. Additionally, a regional treaty enhances cooperation among Arctic states, promoting a collaborative approach to managing civil liability issues as mandated by UNCLOS. Addressing these issues is easier with a smaller number of states involved. Moreover, states are more likely to cooperate in enforcing collectively negotiated rules, leading to more effective cross-border enforcement. By engaging with stakeholders—including government agencies, industry representatives, and indigenous communities, identifying existing areas of agreement, and through commitment from Arctic states, a regional treaty holds promise for significantly improving civil liability management and ensuring the sustainable development of petroleum resources in the Arctic region.

Conclusion

Overall, research demonstrates that there are advantages of a regional-level approach to govern civil liability in the Arctic region, emphasising the benefits of cooperation and coordination among Arctic states for future policy developments that can effectively address the dual pressures of environmental protection and resource exploitation. Due to their shared maritime spaces and collaborative history, Arctic states are likely to trust one another to honour regional arrangements and enforce laws requiring compensation for victims harmed by private actors, promoting greater accountability and justice. Notably, discussions and negotiations for multilateral agreements already occur through forums like the Arctic Council.⁸ This familiarity with diplomatic engagement can serve as a foundation for addressing civil liability issues in the region.

Further, the Arctic Environmental Protection Strategy (AEPS) already demonstrates the willingness of these states to cooperate on environmental governance and ensure the long-term health of the Arctic environment and its inhabitants. While the AEPS is a political commitment rather than a legal one and

⁸ Arctic Council, 'About' <<https://arctic-council.org/about/>> accessed 13 October 2024.

predates the formation of the Arctic Council,⁹ it remains an important strategy for the Council.¹⁰ Recent agreements, such as the International Agreement to Prevent Unregulated Fishing in the High Seas of the Central Arctic Ocean, further illustrate this readiness for formal cooperation on regional environmental issues. Other agreements, like the MOSPA, an Arctic version of the OPRC, have also been negotiated under the Council. While these do not directly address civil liability for petroleum development, they establish a foundation for cooperation within the Council and align with the Council's priority topics. Therefore, the Arctic Council can still contribute significantly by facilitating dialogue, cooperation, and information sharing among Arctic states.

Nevertheless, further learning and awareness is much needed, along with significant policy considerations, due to years of inaction on the subject on an international level. Additionally, regional governance can inspire similar efforts elsewhere, ultimately contributing to improved global governance.

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