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Annual Review of developments in English oil and gas law

2023 Edition

Contents

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Welcome to the 2023 edition of the CMS Annual Review of developments in English oil and gas law.

Another unprecedented year has passed in the energy industry. That said, the energy trilemma remains at the heart of many issues with which the industry is grappling.

Amongst waves of unprecedented events, the challenge of meeting the goals of energy security, climate change/ sustainability and affordability, remain at the heart strategic thinking as to the industry's future.

The war between Russia and Ukraine has continued, with little sign of relenting. As a result, an industry that was recovering from a global pandemic and adjusting to climate change targets, continues to face significant supply side disruption and questions concerning energy affordability and security.

As winter 2023/2024 draws closer, Europe will face renewed challenges on natural gas demand/supply balance. Although, with European storage levels high there would appear to be some breathing space.

In the above context, the relative importance of LNG, in providing supply and liquidity to energy markets, has continued to grow. LNG has featured in two important Court of Appeal decisions in the past 12 months, as the court considered an arbitral appeal on a natural gas sales agreement and the lawfulness of UK government providing export finance for an LNG project.

This year has also seen a number of cases concerning climate change, including protestor action. It seems likely that climate change issues will remain at the forefront of court challenges to energy projects for the foreseeable future, with a run of case law now developing.

Alongside the issues resulting from the energy trilemma and market disruption, the English courts have continued to consider day-to-day issues faced by the industry concerning matters such as projects and supply chain, contractual construction and the sale and shipping of crude oil and oil products.

In addition, new day-to-day issues have begun to arise – such as the calculation of security under decommissioning security agreements; an issue that has become significant in mature basins such as the United Kingdom but is beginning to gain resonance across multiple producing jurisdictions.

The courts have also continued to uphold their commitment to international arbitration and alternative dispute resolution. The past twelve months have seen courts grant a series of orders and injunctions preventing proceedings in local courts where an arbitration clause existed and upholding arbitral awards. In addition, the English courts have used the departure of the United Kingdom from the EU to take a different stance to EU law on the enforcement of arbitral awards arising from intra-EU investment disputes.

As always, this Oil and Gas Annual Review seeks to capture as much relevant material as possible. As previously, any given case summary might be relevant to a number of issues. Because of this, many articles that are contained within specific chapters of this year's Oil and Gas Annual Review could equally be applicable to other chapters. Articles are in themed chapters for convenience only.

I would like to thank the many contributors across CMS for their articles, comments and assistance. As usual, it has been a truly global effort.

It is not possible to mention all of those who have contributed to this year's edition by name. However, I would like to give particular thanks to Anna Rose, William Crossley, Jessica Scott, Julia Czaplinska-Pakowska and Aleksandra Gajewska, for their considerable efforts in assisting with the collation of this year's Annual Review. I would also like to thank Valerie Allan for providing the update on the UK regulatory regime – which is a critical issue for those dealing with the oil and gas sector on the UK Continental Shelf. I would also like to thank Phil Reid for his insight into the complex area of taxation in the energy industry.

This Oil and Gas Annual Review has been prepared by our lawyers to be relevant to you, with a direct focus on legal developments affecting companies in the oil and gas industry.

We hope that you find it interesting and of assistance in dealing with the legal challenges and opportunities faced in the industry.

If you have any questions or feedback when reading it, please do not hesitate to contact us.

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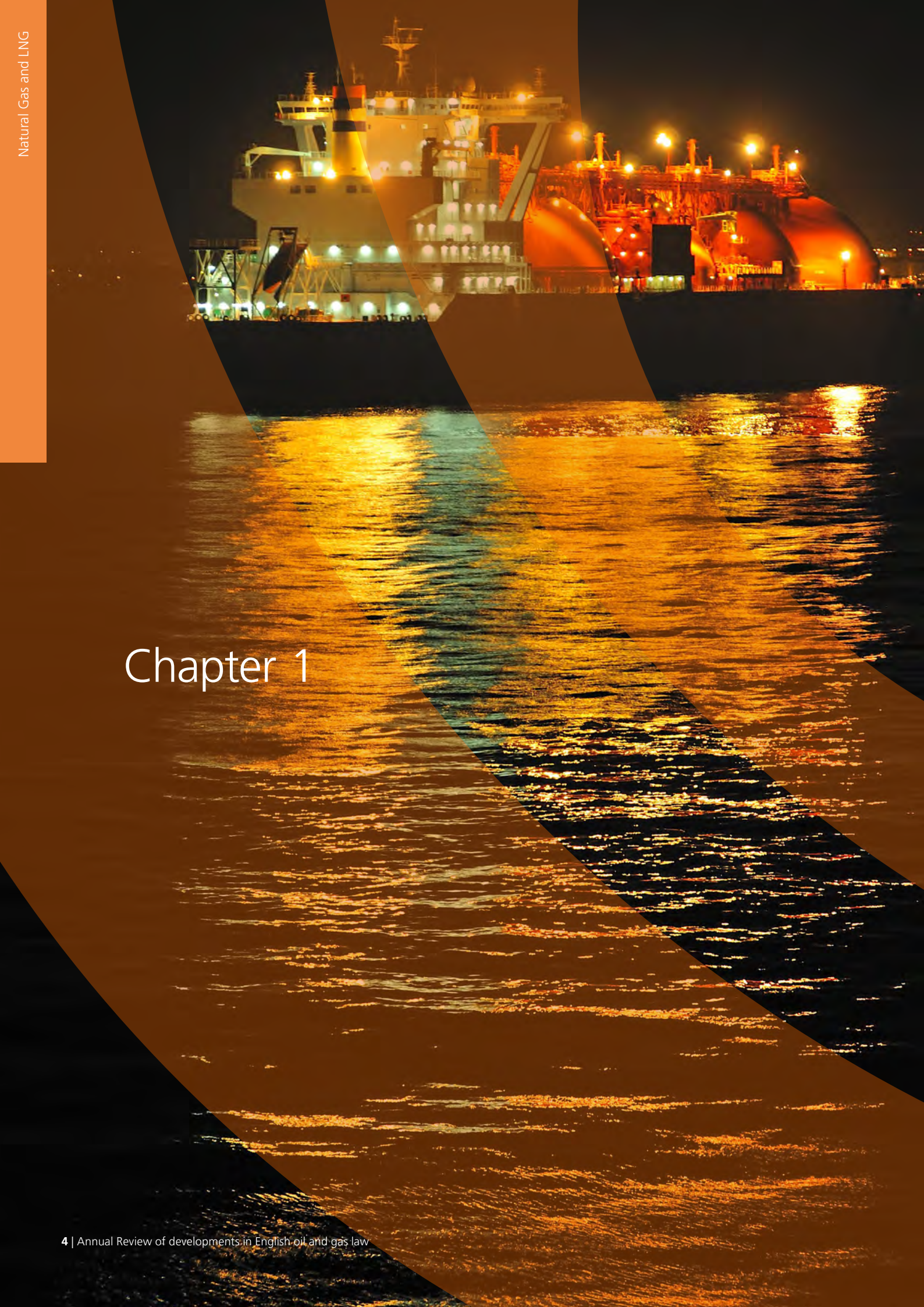


Chapter 1

Natural Gas and LNG

The past twelve months have seen interesting decisions from the Court of Appeal in the context of natural gas sales agreements and LNG project funding, including a refusal of the Court of Appeal to intervene in decision-making of public bodies where such decisions have environmental impact:

— In *R (on the application of Friends of the Earth Limited v (1) The Secretary of State for International Trade / UK Export Finance (UKEF) (2) Chancellor of the Exchequer; interested parties (1) TotalEnergies E&P Mozambique Area 1 Limitada; (2) MOZ LNG1 Financing Company Limited* [2023] EWCA Civ 14 the Court of Appeal unanimously dismissed Friends of the Earth's challenge to a decision of UK Export Finance with regard to export credit support in relation to an LNG facility in Mozambique. In refusing to overturn the decision, the Court of Appeal took a narrow view of the standard of review required to be implemented by public authorities, confirming there is a substantial margin of appreciation afforded to them in the exercise of their '*multifaceted*' decision-making process.

— In *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor* [2023] EWCA Civ 826 the Commercial Court and Court of Appeal considered the interrelationship between damages sought and arbitral jurisdiction in the context of a natural gas sales agreement.

— In *Sui Northern Gas Pipelines Ltd v National Power Parks Management Company (Private) Ltd* [2023] EWHC 316 (Comm), the Commercial Court upheld the validity of an arbitral award in which the tribunal decided that invoices relating to take-or-pay payments under two gas sales agreements were invalidly issued.

Court of Appeal dismisses challenge to LNG Project funding

In *R (on the application of Friends of the Earth Limited) v (1) The Secretary of State for International Trade / UK Export Finance (UKEF) (2) Chancellor of the Exchequer; interested parties (1) TotalEnergies E&P Mozambique Area 1 Limitada; (2) MOZ LNG1 Financing Company Limited* [2023] EWCA Civ 14, the Court of Appeal unanimously dismissed Friends of the Earth's challenge to a decision of UK Export Finance ('**UKEF**') to provide up to USD 1.15bn export credit support in relation to a USD 20bn Area 1 liquefied natural gas ('**LNG**') facility in Mozambique.

Facts

A summary of the facts and the decision of the High Court can be found in an article which was included in the *CMS Annual Review of developments in English oil and gas law* (2022 Edition) at page 36 onwards.

Following a High Court dismissal of a judicial review challenge to the decision of the first defendant, UKEF, supported by the second defendant, the Chancellor of the Exchequer, to provide up to USD 1.15bn in export finance and financial support in relation to an LNG project in Mozambique, the claimant, Friends of the Earth ('**FoE**') appealed to the Court of Appeal.

In summary of UKEF's purpose, it exists (under statutory delegated powers) to ensure that no viable UK export fails for lack of finance. UKEF provides no finance for investment itself, nor does it have any net cost to the taxpayer; instead it operates like a financial institution, carrying out banking and insurance business in support of UK exports.

The UKEF investment decision being challenged by FoE was UKEF's decision to provide up to USD 1.15bn in export finance and financial support to a development of offshore deepwater gas production facilities, 50km from the coast of northern Mozambique, connected to an onshore gas receiving and liquefaction facility (the '**Project**'). The Project is operated by Total E&P Mozambique Area 1 Limitada and financed by MOZ LNG1 Financing Company Limited, who both appeared in FoE's judicial review proceedings as interested parties, making submissions in common cause with the two defendants.

The Issues

The question at issue was whether the UK Government had acted unlawfully in approving UKEF's investment in the Project. The Divisional Court had been split in its view (with Stuart Smith LJ dismissing UKEF's application, and Thornton J indicating that she would have allowed the application), resulting in FoE's application being dismissed.

FoE appealed to the Court of Appeal on the following three grounds:

1. The respondents were required to adopt a view that was more than merely '*tenable*' as regards whether UKEF's decision was aligned with the UK's obligations under the Paris Agreement.
2. There was no rational basis upon which the respondents could conclude that the investment decision was compatible with the Paris Agreement.
3. The respondents failed in their duty of enquiry; UKEF's climate change report in relation to the Project did not contain a quantification of the Project's scope 3 emissions arising from the use of LNG that would be produced by the Project (the Project would produce 805m tonnes of CO2 over its lifetime, using 0.1-0.2% of the world's remaining carbon budget – this was not set out in UKEF's climate change report).

In response to these contentions, the respondents submitted that the Paris Agreement is an unincorporated international treaty, but one that in any event the decision to fund the Project was in compliance with.

The respondents asserted that, as an unincorporated treaty with no legislative foothold in domestic law, the Paris Agreement did not give rise to a legally enforceable right. In this regard, there is no jurisprudence as to the precise legal meaning of the Paris Agreement. As such, questions as to the interpretation of an unincorporated treaty were for the public authority itself to determine, and decision-makers could not be challenged if they adopted a tenable view as to a point of unincorporated international law.

Decision

'Tenable'

As a starting point, the Court of Appeal was of the view that the obligations imposed by the Paris Agreement, whilst more than merely aims and aspirations, were not '*hard-edged obligations that one might more commonly expect to find in a commercial agreement to be interpreted under domestic law.*'

The Court of Appeal agreed with the respondents that the Paris Agreement is pre-eminently an unincorporated international treaty which does not give rise to domestic legal obligations. Whilst the question of whether funding the Project was aligned with the UK's international obligations under the Paris Agreement was justiciable, the Paris Agreement was only one of a range of factors to which the respondents determined to have regard in reaching the decision.

As such, the Government was only required to reach a '*tenable*' view that funding the Project was aligned with the UK's obligations under the Paris Agreement. If it was tenable, the court should not and could not hold that an error of law had been made. In respect of this test the reasons why the decision, in this case, is to be judged by the '*tenability*' standard, rather than the '*correctness*' test, can be summarised briefly as follows:

1. The respondents in this case chose, but were not compelled by domestic law, to take into account the UK's obligations under an unincorporated treaty that formed no part of it.
2. There is a lack of clear guidance as to how unincorporated treaties like the Paris Agreement should be construed as a matter of domestic law.

3. The Paris Agreement, therefore, was one of a range of factors to which the respondents decided to have regard in reaching the decision. It is not for the courts to allocate weight as between competing factors. Moreover, to make it necessary for the domestic courts definitively to construe unincorporated treaties every time the executive decided to have regard to them in making decisions would be problematic and unworkable.
4. The fact that the respondents said they had concluded that their decision was compliant with the UK's obligations under the Paris Agreement does not affect this conclusion. It must be open to the executive to say that it wants to comply with an unincorporated treaty, even though there may be different views as to what precisely it means. It must also be able to say, without successful challenge, that it thinks on balance and in good faith that a particular decision is compliant, even if it later changes its policy or is shown to have been wrong in the view that it took.

In this instance, UKEF's view was a tenable one. The fact that UKEF had expressly stated that its decision-making was compatible with the Paris Agreement obligations was not relevant to the issue of tenability. The Court of Appeal held that it must be open to decision makers to say that they wish to comply with an unincorporated treaty, even if there are different views as to its meanings.

Further, it must also be able to say, without successful challenge, that it thinks on balance and in good faith that a particular decision is compliant, even if it later changes its policy or is shown to be wrong in the view that it took.

'Rationality'

The Court of Appeal did not agree with FoE that it was irrational for the Government to conclude that the investment decision was compatible with the Paris Agreement. The Scope 3 emissions were always fully understood to be significantly larger than the Scope 1 and 2 emissions, albeit there was significant uncertainty as to the Scope 3 emissions that the Project would produce. Also, it was not clear to what extent the Project would continue to fossil fuel transition – in fact, an overall net reduction in emissions was a possibility at the time the decision was made. It could not, therefore, have been irrational for the respondents to decide to provide finance for the Project, when they were being advised that the Project could, in some scenarios, align with the UK's obligations under the Paris Agreement.

'Duty of inquiry'

Finally, the Court of Appeal found that UKEF had not breached its Tameside Duty to *'ask the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly' (Secretary of State for Education and Science v Tameside MBC* [1976] UKHL 6). It is for the decision maker to decide upon the level of inquiry to undertake, as long as they amount to reasonable inquiries. UKEF's inquiries were well within the margin of appreciation afforded to decision makers.

The Government was not required to obtain a quantification of the indirect Scope 3 emissions occurring in the Project's value chain in making the investment decision. In fact, the Project was going ahead whether or not UKEF contributed to its financing. The decision was, therefore, not one that could have reduced or avoided the Project's Scope 3 emissions.

As such, the Court of Appeal dismissed FoE's appeal.

Comment

This decision adds to a growing trend of UK court decisions in declining to find that emissions-intensive energy projects are unlawful on the basis of their environmental impact alone. As was the case in the Divisional Court; Sir Geoffrey Vos MR stressed that the Court of Appeal's judgment was not to be construed as supporting or opposing any political view of the issue in dispute – instead the only task was to establish whether there was an error of law at play.

The Court of Appeal's decision should give some comfort to those investing in large public-finance supported energy transactions as regards the English court's interventions in decision making where decisions have an environmental impact.

As regards UKEF, in March 2021, the UK Government issued its Guidance: *Aligning UK international support for the clean energy transition*, which set out the detail of the new policy. The guidance said that the UK Government would '*no longer provide new direct financial or promotional support for the fossil fuel energy sector overseas*' other than in limited

circumstances. It was expressed to apply to both Official Development Assistance (or '**ODA**') and UKEF support.

However, for other bodies, of particular note in the Court of Appeal's judgment is the following paragraph:

'Friends of the Earth's argument that the respondents had, in effect, to show that their decision was compliant, as a matter of law, with the UK's obligations under an unincorporated international agreement like the Paris Agreement points strongly, in our judgment, to the appropriateness of the tenability test in these circumstances. ***The compliance question is hugely complex as the CCR demonstrates. It is beset by uncertainties as to future events that were not and, in many cases, could not be known.*** *It would be unworkable and impracticable if the Government could only make such a decision if it were able to demonstrate that its view of the factual and legal position was correct.* ***In fact, the decision-makers knew that there were possible legal challenges whatever it decided****.'*

Indeed, it seems inevitable that there will be further legal challenges in the public and private sectors as regards project financing decisions that appear to be in conflict with climate change goals (whether linked directly or indirectly). In this regard, there is likely to be some hesitance or caution on the part of government bodies to support or consent to projects, or provide financing to projects, where there is (or may be) a potential for negative environmental impact.

In addition to the spate of judicial reviews against UK Government financial support and consents, NGOs are also using company law to target the actions of directors responsible for investment decisions. Examples include recent news that directors of an international oil company are to be sued in their personal capacity by ClientEarth for a failure to devise a strategy in line with the Paris Agreement, in alleged breach of directors' duties under the Companies Act 2006.

It is apparent that activists and interest groups will continue to use the 'hook' of (i) the need for government consent and (ii) directors' duties to attempt to seek to prevent projects in the energy sector from being sanctioned. As part of this strategy, judicial review, anchored to the Climate Change Act 2008 and the Paris Agreement, will continue to be used as a mechanism to call into question governmental approvals, consent or support for energy sector projects with an alleged environmental impact.

Divisional Court Judges: Stuart-Smith LJ and Thornton J.

Court of Appeal Judges: Sir Geoffrey Vos, Master of the Rolls, Bean LJ and Sir Keith Lindblom, Senior President of Tribunals.

Damages under gas sales agreements

In *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor* [2023] EWCA Civ 826 the Commercial Court and Court of Appeal considered the interrelationship between damages sought and arbitral jurisdiction in the context of a natural gas sales agreement. The issue in dispute and its result, as well as how the outcome may have been different under certain energy industry model forms, will give practitioners pause for thought.

Facts

In April 2001, Crescent Petroleum Company International Limited ('**CPCIL**') and the National Iranian Oil Company ('**NIOC**') entered into a Gas Sale and Purchase Contract (the '**GSPC'**) for the long-term supply of gas from Iran to the UAE. The GSPC was subsequently assigned to Crescent Gas Corporation Limited ('**CGC'**) (CPCIL and CGC are together, '**Crescent**').

CGC had in turn entered into a gas supply agreement with a partly owned subsidiary, Crescent National Gas Association Ltd ('**CNGC**') pursuant to which CGC undertook to supply volumes of gas on similar terms to those set out in the GSPC (the '**GSA**'). CNGC in turn entered into contracts to supply gas to various third-party end users, one of which was the Sharjah Electricity and Water Authority ('**SEWA**').

NIOC failed to perform its obligations under the GSPC and as a result Crescent commenced an arbitration in 2009, seated in London. During the course of the arbitration, it was agreed that the arbitration proceedings would be bifurcated between jurisdiction, liability and remedies. Having determined that it had jurisdiction, on 31 July 2014, the Tribunal issued an award in which NIOC was found to be in continuing breach of the GSPC from 1 December 2005 until the date of the award (the '**Liability Award**'). NIOC sought to challenge the award under Subsections 67 and 68 of the Arbitration Act 1996 (the '**Act**'), however, such applications were dismissed by the Commercial Court in March 2016 and July 2016 respectively.

Following the Liability Award, the arbitration proceeded to the remedies phase.

Arbitral Award

During the remedies phase of the arbitration, CGC advanced claims for the following heads of loss:

1. CGC's loss of profits arising from the sale of gas to CNGC under the GSA;
2. CGC's damages in respect of CGC's liability to CNGC in respect of CNGC's loss of profits on contracts with end-user customers; and,
3. a declaration of an entitlement to an indemnification in respect of future claims made against it by SEWA or CNGC in respect of any claims by third parties (the '**Indemnity Claim**').

In its counter memorial, NIOC raised a jurisdictional objection to the award, before the Tribunal, concerning the CGC liabilities to CNGC. NIOC considered that for the Tribunal to hear any claims relating to CNGC's alleged lost profits would 'trespass on the jurisdiction of another tribunal' given that CNGC was not a party to the arbitration clause in the GSPC.[1]

NIOC's jurisdictional objection

In terms of the Tribunal's jurisdiction rationae personae, NIOC claimed:

1. that the Tribunal's jurisdiction in this case is derived from the arbitration agreement in the GSPC;
2. CNGC is not a party to the GSPC nor has it been alleged that CNGC is a party to the GSPC;
3. any claim for losses suffered by CNGC must therefore be framed as a claim by a party to the GSPC;
4. Crescent has raised a claim for CGC's damages resulting from its alleged liability to CNGC for its lost profits; and
5. in order for the Tribunal to consider such a claim it would first be necessary for the Tribunal to determine whether and to what extent CGC is liable to CNGC.

In respect of the Tribunal's jurisdiction *rationae materiae*, NIOC claimed:

1. under the arbitration agreement in the GSPC, the Tribunal has jurisdiction to rule upon any '*dispute, controversy or claim arising out of or relating to the GSPC*'. The Tribunal's jurisdiction, does not, NIOC claimed, extend to making any determination whatsoever as to whether and to what extent CGC may be liable to CNGC; and

[1] *National Iranian Oil Company v Crescent Petroleum Company International Limited & Crescent Gas Corporation Limited* [2022] EWHC 2641 (Comm), pp. 30-31

2. CGC and CNGC are party to a separate agreement which is subject to the jurisdiction of its own separate arbitration agreement.

Accordingly, Crescent's claim relating to CGC's alleged liability for lost profits allegedly suffered by CNGC should be dismissed for lack of jurisdiction.

Crescent's response

In defence of NIOC's objection, Crescent submitted that the Tribunal is entitled to determine CGC's loss under the GSPC by reference to another contract, being the contract between CGC and CNGC. In support of its submission, Crescent relied on *Re R and H Hall Ltd and WH Pim (Junior) & Co.'s Arbitration* [1928] All ER 763 and *Mustill and Boyd: Commercial Arbitration 2001 Companion*,[2] which stated:

'The position is, we suggest, similar to that which does from time to time arise in practice, where in order to resolve a dispute between A and B an arbitrator has to decide an issue arising under a contract between B and C. There is nothing inarbitrable about such an issue, and the arbitrator commits no impropriety by deciding it, although his award will have no effect at all on C. Nor does he exceed his jurisdiction in doing so, for he is not purporting to act as arbitrator in relation to the contract between B and C, in relation to which he was not appointed, but instead he is deciding under the contract between A and B an issue which, albeit involving C, does properly arise under that contract.'

Tribunal's Partial Remedies Award

On 27 September 2021, the Tribunal dismissed NIOC's jurisdictional objection and issued a partial remedies award (the '**Partial Remedies Award**') pursuant to which, the Tribunal awarded CGC:

1. USD 1.3bn in respect of its loss of profits from the on-sale of gas to CNGC; and
2. USD 1bn in respect of CGC's liability to CNGC for CNGC's lost profits on the sales to customers of gas and liquid profits.

The Tribunal chose to defer the Indemnity Claim for further consideration.

In coming to its decision regarding NIOC's jurisdictional objection, the Tribunal stated that NIOC's argument was '*misconceived*'. In this regard, the Tribunal provided that CGC was not inviting it to resolve any dispute between CGC and CNGC, rather it was asking the Tribunal to reach a conclusion that CGC is liable to CNGC in a certain amount, and to award damages against NIOC to compensate CGC for that liability.

[2] p. 73

Commercial Court Decision

On 25 October 2021, NIOC applied to challenge the Partial Remedies Award under Section 67 of the Act on the basis that it considered the Tribunal '*had no substantive jurisdiction to determine whether and/or to what extent CGC was liable to CNGC under the terms of a separate contract and to make the award in respect of the existence and/or amount of CGC's alleged liability to CNGC*'.

In response, Crescent sought to claim that:

1. NIOC's Section 67 claim was precluded by Section 73 of the Act on the basis that in its Section 67 challenge NIOC had raised a different objection that was now based on the limited scope of the GSPC arbitration agreement (the '**Preliminary Issue**'); and
2. that NIOC's Section 67 application should be summarily dismissed on the basis it had no real prospect of success (the '**Application for Summary Judgment**').

In relation to the Preliminary Issue, the Commercial Court came to the conclusion, with reference to Knowles J's decision in *Province of Balochistan v Tethyan Copper Co Pty Ltd* [2021] EWHC 1884 (Comm) that enough had been done by NIOC to raise the ground of objection on which it now sought to rely, in the arbitral proceedings. Accordingly, Crescent's Section 73 application was dismissed.

Crescent's application for summary judgment was founded on two grounds:

1. first, Crescent submitted that NIOC's claim that CGC's liability for CNGC's losses fell outside the scope of the arbitration agreement in the GSPC was inconsistent with the findings of the Tribunal, which had *res judicata* effect, that CGC's liability to CNGC was the natural and ordinary consequence of non-delivery and that the liability of CGC was harm directly resulting from NIOC's breach; and
2. second, the admissible expert evidence relied on by NIOC in establishing its claim was not enough to demonstrate that its claim had any realistic prospect of success and therefore NIOC's objection based on the limited scope of the arbitration agreement was bound to fail.

In relation to Crescent's first ground, although the Commercial Court found that there was an inconsistency between NIOC's case and the findings of the Tribunal in the Partial Remedies Award, it was not persuaded that this meant the Section 67 application was bound to fail.

In relation to the second ground, however, the Commercial Court found that NIOC's challenge had no realistic prospect of success. In coming to this decision, the Commercial Court took a strict approach to interpreting the phrase '*[a]ny dispute, controversy or claim arising out of or relating to*' and concluded that:

1. the CNGC losses at least '*relate to*' the GSPC; and
2. it was clearly within the '*mutual intention and consent*' of the parties to the GSPC that such a dispute should be determined by arbitration.

Accordingly, on 21 October 2022 the Commercial Court granted summary judgment on NIOC's Section 67 application in favour of Crescent on the basis that it had no realistic prospect of success (the '**21 October Judgment**').

Additional Reasons for rejecting Section 67 application

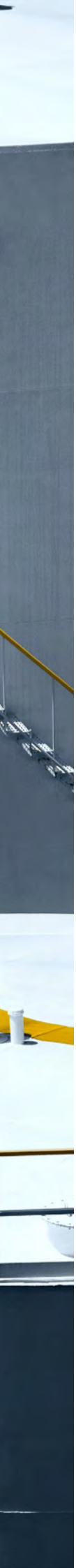
On 16 November 2022, the Commercial Court provided additional reasons for rejecting NIOC's Section 67 challenge on 21 October 2022. Such additional reasons were provided:

1. in response to NIOC's Points of Difference filed on 20 October 2022 in which it identified as a ground of appeal, for which permission would be sought, a contention that the reasons given in the 21 October Judgment were '*inadequate and cursory*'; and
2. following a hearing on 9 November 2022.

At the hearing, NIOC made an application for permission to appeal the 21 October Judgment. With reference to *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] EWCA Civ 605 the Commercial Court, however, suggested that the correct course of action was first for the court to consider whether further reasons should be given. In addition, giving additional reasons, the Commercial Court proceeded on the basis that when a judge gives additional reasons he '*should not feel himself constrained to stand by his earlier findings… if on revisiting his evaluation of the evidence he comes different conclusions.*'

Notwithstanding the foregoing, the Commercial Court rejected NIOC's argument that it had raised two separate grounds of challenge and only one had been addressed in the 21 October Judgment. In his view, there was only one ground for challenge raised by NIOC which concerned the scope of the arbitration clause as a matter of construction for which the Commercial Court provided a response to in the 21 October Judgment. In his view, NIOC had not raised an argument that the Tribunal lacked jurisdiction *rationae personae* and accordingly, the Commercial Court was not required to respond to the same.

The Commercial Court granted permission for NIOC to appeal against the dismissal of their Section 67 claim and to cross-appeal the Section 73 decision.



Court of Appeal Decision

The Court of Appeal unanimously dismissed NIOC's appeal to the Section 67 decision, stating NIOC had no real prospect of success. They also held that the Court of Appeal did not have jurisdiction to grant permission to appeal on Crescent's cross-appeal on the Section 73 decision.

Following the decision in *Athletic Union of Constantinople v National Basketball Association (No. 2)*[3] only the first instance court can grant permission to appeal a decision[4] under Section 67 unless the decision is not a judicial decision or the decision is made without jurisdiction.[5] Neither exception was relevant so the cross-appeal was dismissed. Therefore, Butcher J's decision on the relationship between Section 67 and Section 73 of the Act is the current correct interpretation of the law.

In relation to the Section 67 decision, rather than conducting a '*mini-trial*', the Court of Appeal held that the Commercial Court had approached the summary judgment application correctly, as it was '*clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible*' considering the similarities with *Three Rivers (No 3)*.[6]

Further, there could be no doubt that the Commercial Court had correctly applied the principles of Iranian law that it identified; giving paramount effect to the words of the arbitration agreement, there could be no doubt that the liability to CNGC's claim fell within its scope. It was a claim arising out of or relating to the contract or its breach, giving those words (which are not suggested to be terms of art in Iranian law) their natural and ordinary (and inevitable) meaning. There is no ambiguity which needs to be resolved by adopting a restrictive approach to the interpretation of the clause and none was suggested. It is in any event hard to discern any '*restrictive*' meaning of '*arising out of or relating to*' which would exclude the liability to CNGC's claim from the scope of the clause.

Comment

There are several points of interest here:

1. the extent to which issues that relate to damages may properly be said to raise jurisdictional points; and
2. the breadth of the meaning of the words '*arising out of or relating to*' in arbitration agreements.

In respect of the first issue, the damages being sought in respect of CGC's liability to CNGC for CNGC's lost profits on the sales to customers of gas and liquid profits, in English law, might (arguably) be classified as losses arising under the second limb of *Hadley & Anor v Baxendale & Ors* [1854] EWHC J70. The reason being that they are not damages that would arise according to the usual course of things, from such breach of contract itself. These are often referred to as 'consequential loss'.

As explained in the online CMS Guide to Consequential Loss in the Energy Sector, there are significant differences in the meaning attributed to 'consequential loss' in Islamic and Iranian law.

The reason that this is relevant for drafters is, although not relevant in this case, the AIPN Model Dispute Resolution Agreement (2017) states that: '*The Parties waive their rights to claim or recover, and the* [Arbitral Tribunal] [Arbitrator] *shall not award, any consequential, punitive, multiple, exemplary, or moral damages*….'

The approach was also evident in the drilling unit contract in dispute in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] SGCA 24 where the arbitration clause required: '*Unless otherwise expressly agreed in writing by the Parties to the arbitration proceedings: … (ix) Indirect, consequential or exemplary damages (Including loss of profit, loss of production, etc.) shall not be allowed except those payable to third parties for which liability is allocated among the Parties by the arbitration award…*'.

[3] [2002] EWCA Civ 830
[4] *Aden Refinery Co Ltd v Ugland Management Co Ltd* [1987] QB 650
[5] *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 1 WLR 3555
[6] *Three Rivers DC v Bank of England* [2003] 2 A.C. 1

The implications of such drafting might not be immediately apparent to non-aficionados of international arbitration. However, two key issues arise:

1. first, if an arbitration clause requires that an arbitrator '*shall not*' (or similar) award damages for '*consequential loss*' the issue arises as to whether the arbitrator lacks jurisdiction to do so. If an arbitrator lacks jurisdiction to award '*consequential loss*', damages awards that are not subject to appeal on error of law might otherwise be appealable or unenforceable on jurisdictional grounds.
2. second, the arbitration agreement is severable and may be governed by a different law to the main body of the contract. If the main body of the contract and an arbitration clause contain consequential loss exclusions, it is possible different laws governing interpretation of those words apply.

In respect of the fist point, this will be of real significance under some arbitration rules. For example, the LCIA Rules and ICC Rules prohibit appeals on points of law (so far as the law of the seat allows). However, the laws of some seats, such as England, will mean that jurisdictional issues will be heard de novo even where the arbitral tribunal has made its own ruling under the doctrine of kompetenz-kompetenz. As such, even if the choice of law is the same in the arbitration clause and a substantive exclusion clause elsewhere in the contract, the elevating of the 'consequential loss' exclusion to a jurisdictional status in the arbitration clause has the impact of creating a jurisdictional 'double-lock' to ensure that any decision on 'consequential loss', or a resies of quantum issues more widely, remains capable of appeal (assuming the law of the seat allows such appeal on jurisdiction). Further, issues in relation to enforceability may arise if there is an allegation that the arbitrators have exceeded their jurisdiction.

If the gas sales agreement in the above arbitration had contained an AIPN dispute resolution clause, the issue before the Commercial Court and Court of Appeal may have been more complex.

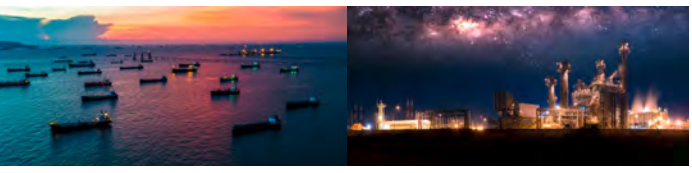
On the second point, English courts continue to give a wide construction and interpretation to the words '*arising out of or relating to*' in arbitration agreements. This decision is the latest in a series of decisions that have given a wide interpretation to those words.

Three further points of interest:

1. the case also provided a rare example of when a Section 67 challenge that turns on a disputed point of foreign law may be suitable for summary judgment.
2. further, following the issuance of the Commercial Court's additional reasons in November 2022, we are reminded that the court, in certain circumstances, is entitled to give additional reasons for its original decision when considering an application to appeal.
3. the Court of Appeal judgment reinforces the court's approach to summary judgment in order to avoid a complete rehearing, saving time and money.

Commercial Court Judge: Butcher J.

Court of Appeal Judges: Males LJ, Nugee LJ and Falk LJ.

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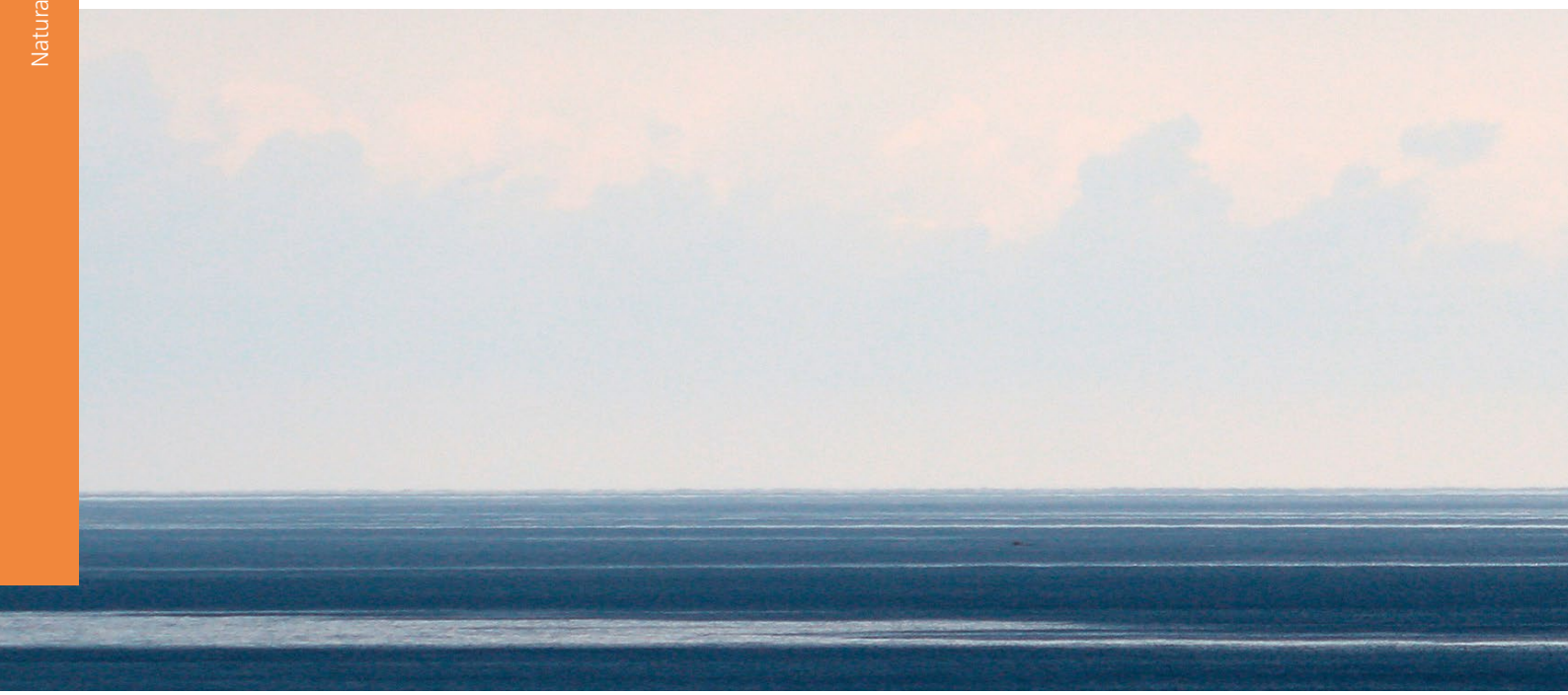


Invoicing under a take-or-pay clause

In the recent case of *Sui Northern Gas Pipelines Ltd v National Power Parks Management Company (Private) Ltd* [2023] EWHC 316 (Comm), the Commercial Court considered the validity of an arbitral award in which an arbitral tribunal decided whether invoices relating to take-or-pay payments under two gas sales agreements were validly issued and should be paid by the buyer. In deciding the invoices were not valid, the arbitral award gives a cautionary note to sellers on the importance of correctly applying the machinery for take-or-pay payments.

Facts

On 29 October 2016, Sui Northern Gas Pipelines Ltd ('**SNGPL**') agreed to supply and National Power Parks Management Company (Private) Ltd ('**NPPMCL**') agreed to take or pay for gas to be used at two power plants operated by NPPMCL (known as the Balloki plant and the Haveli plant) ('**GSAs'**).

The GSAs are in materially identical terms. Each had a term of 15 years, extendable for a further 15 years upon NPPMCL's notice.

The critical provisions in each GSA are Sections 3.6 and 9.1, and a definition relevant to interest. These provided as follows:

'Section 1.1 Definitions…

Delayed Payment Rate' – One month KIBOR plus two percent (2% per annum), compounded semi-annually, calculated for the actual number of Days which the relevant amount remains unpaid…

…

Section 3.6 Diversion of Gas and Take or Pay

(a) From and after the Commercial Operations Date GT1 and during a Month in the Delivery Period, the Buyer shall take and if not taken pay for the portion of the Firm Gas Allocation pertaining to that Month (the 'Monthly Take-or- Pay Quantity') divided by number of days in that Month multiplied by the difference between the number of the days in that Month and (i) the number of days (or fractions thereof) of Force Majeure Events declared by the Seller or the Buyer, (ii) the number of days (or fractions thereof) of non- delivery of Gas by the Seller in that Month for any reason, including a breach or default by the Seller or maintenance undertaken by the Seller pursuant to Section 12.1, and (iii) the number of days of Scheduled Outages in that Month notified to the Seller pursuant to Section 12.2 (in relation to the maintenance and scheduled outages, each to the extent not already catered for under the Firm Gas Order).

(b) In case Monthly Take-or-Pay Quantity is not fully utilized by the Buyer in the Complex, the Buyer may request the Seller to divert any unutilized Monthly

Take-or-Pay Quantity to any other power plants (after seeking their consent) and the Seller shall arrange for such diversion at the cost and risk of Buyer subject to available capacity in its pipelines. Any amounts received by the Seller from the other power plants in consideration of supply of the diverted Gas shall, after making deduction of any additional charges incurred by the Seller in arranging the sale, be paid by the Seller to the Buyer within 3 Business Days of receipt of such amounts (along with a copy of the invoice evidencing the selling price of the unutilized Monthly Take-or-Pay Quantity). If other power plants refuse or the Seller due to technical constraints or any other reasons is unable to supply the diverted Gas to the other power plants, the Seller shall have the right to supply such Gas to any of its consumers and the amounts recovered from those consumers shall, after making deduction of any additional charges incurred by the Seller in arranging the sale, be paid by the Seller to the Buyer within 3 Business Days of receipt of such amounts (along with a copy of the invoice or any other document evidencing the selling price of the unutilized Monthly Take-or-Pay Quantity).

…

Section 9.1 Billing

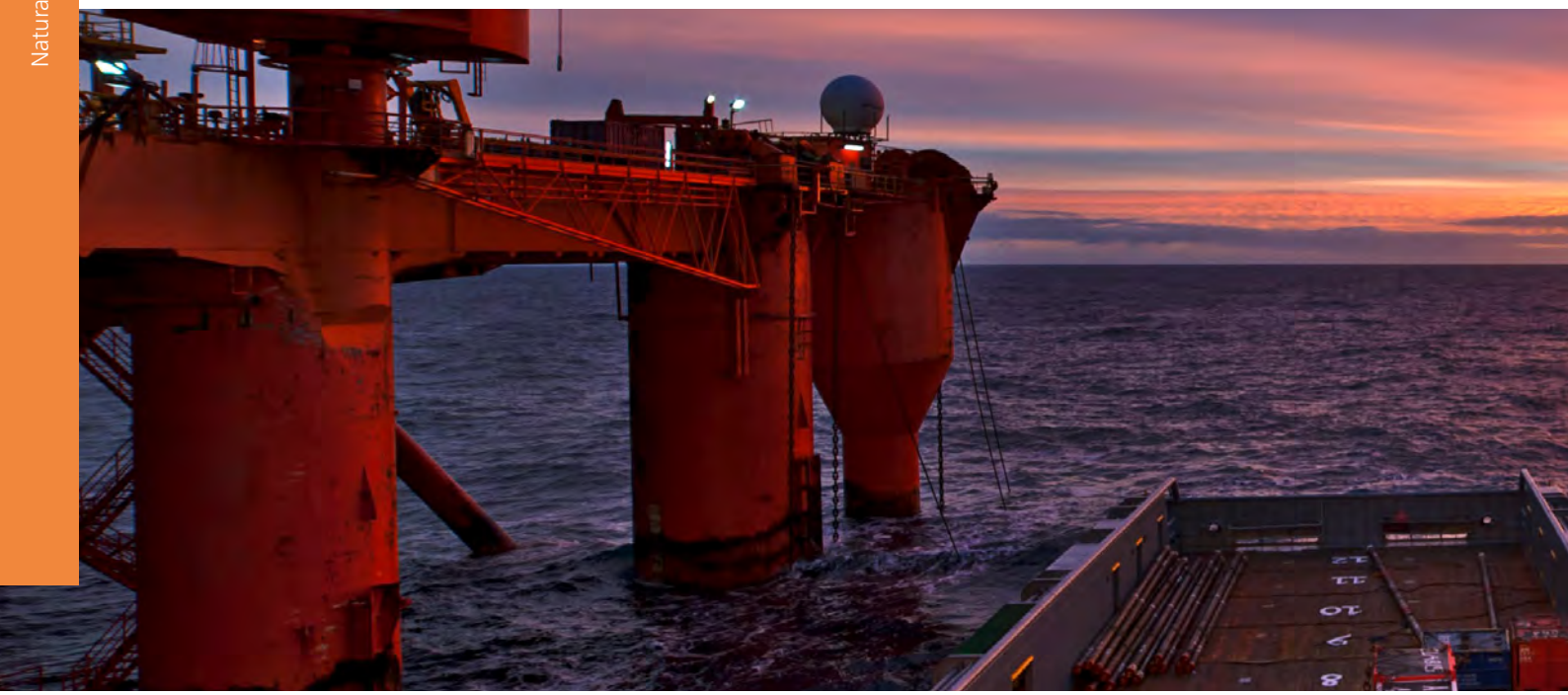
The Seller's bills for the supply of Gas during a Billing Cycle, including any adjustments under Section 9.7, shall be furnished to Buyer on the first Business Day following each Billing Cycle. Invoices for Monthly Take or Pay Quantity shall be billed monthly.'

Both plants commenced operations on different dates in 2017. NPPMCL did not take the specified quantity of gas every month. However, SNGPL did not issue any invoices in relation to the gas not taken until May 2018, when, for each plant, a single invoice was issued in relation to several months in 2017 and 2018 (the '**Invoices**'). These Invoices did not seek payment of the full price of the quantities of gas not taken. Instead, each Invoice sought an amount calculated by SNGPL as reflecting the difference between the full price and the sum realised by diverting the gas to other customers who paid on a different (lower) tariff. This was referred to in the arbitrations as the 'Tariff Differential Loss'.

The Tariff Differential Loss was, in effect, the inverse of the sum that Section 3.6(b) provides should be paid back to NPPMCL. SNGPL did not invoice in full and then reimburse. Instead, it invoiced only for what it contended was the net difference between the full price and the sum that would otherwise have been reimbursed. Furthermore, it did so some months later and by way of a single Invoice for each plant, covering November 2017 to March 2018.

NPPMCL did not pay these Invoices. On 7 June 2018, SNGPL encashed a Gas Supply Deposit, which NPPMCL had given under the terms of the GSA.

The disputes in respect of each of the GSAs were referred to LCIA Arbitration.



Arbitral Award

NPPMCL sought: (1) a declaration that SNGPL had not been entitled to issue the Invoices; and (2) an order that SNGPL should repay the monies encashed from the Gas Supply Deposit. NPPMCL argued that the Invoices were not issued in accordance with the GSAs and that SNGPL had delayed for a substantial period before issuing the invoices.

SNGL denied that the Invoices were inconsistent with the GSAs and counterclaimed for payment in respect of further unpaid invoices in addition to the Invoices.

The Tribunal decided that '**...***the GSA requires* [SNGPL] *to issue invoices for the Monthly Take-or-Pay Quantity on a Monthly basis.'* Further, that '… [SNGPL's] *failure Monthly to invoice for Take-or-Pay quantities pursuant to Sections 3.6 and 9.1 meant that* [NPPMCL] *was unable to discharge any Take-or-Pay obligation that it might have had under the GSA'*. As a result, SNGPL was not entitled to recover the amounts it sought and was not entitled to draw down from the Gas Supply Deposit in satisfaction of the Invoices.

SNGPL challenged the tribunal's award under section 68(2) of the Arbitration Act 1996 ('**AA 1996**') in the Commercial Court.

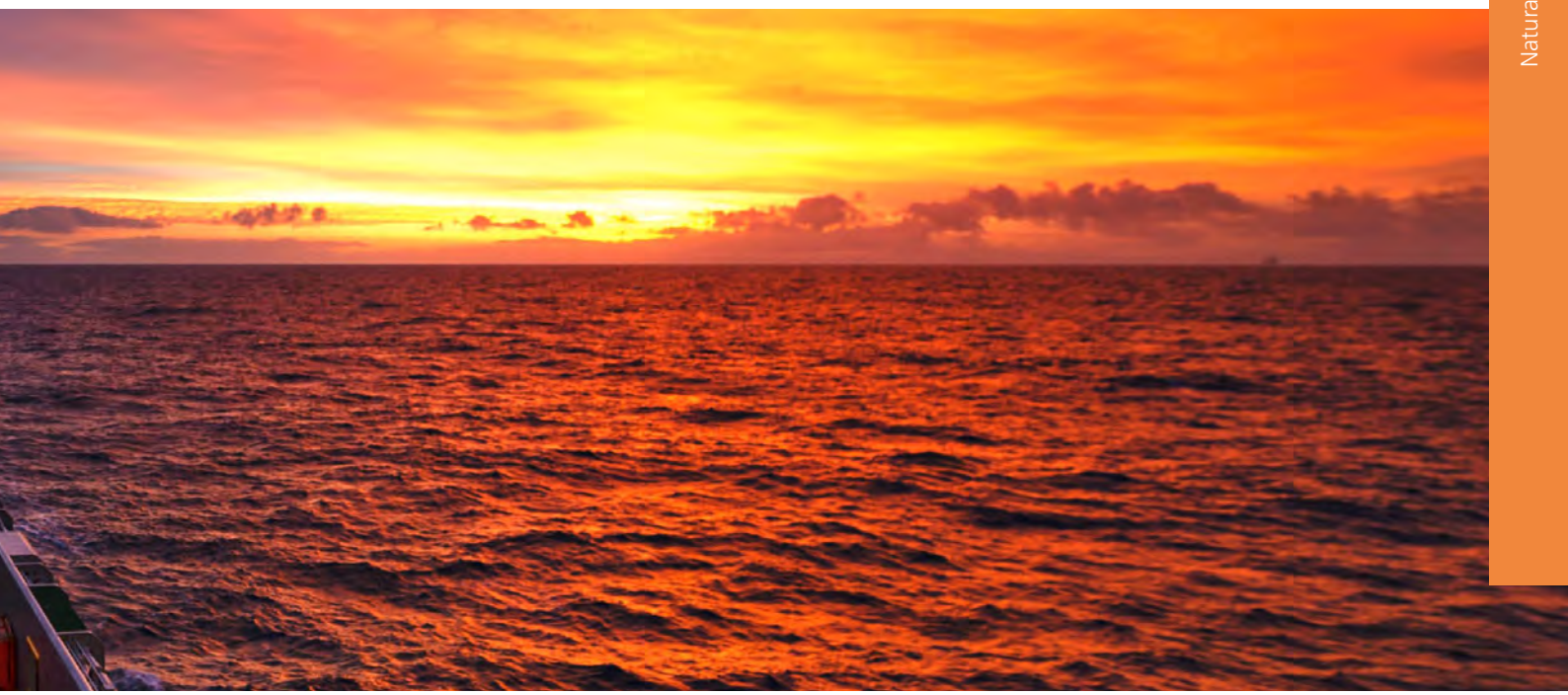
Commercial Court Decision

In SNGPL's challenge of the award, it asserted that the arbitral tribunal's award was based on a point of construction that the parties had not argued – that is, whether invoices must be issued before the end of the relevant month to be contractually compliant (and therefore payable).

The Commercial Court held that, if the award had the effect contended by SNGPL, and if the SNGPL could establish injustice, that the arbitral tribunal's award in these circumstances would constitute a breach of section 33 of the AA1996, which provides that a tribunal shall *'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'*.

Nevertheless, the Commercial Court decided that SNGPL's understanding of the award was wrong. The Commercial Court found that the award did not decide that invoices must be issued before the end of the relevant month, just that they should be issued monthly (i.e., one invoice per month).

The Commercial Court also stated that even if SNGPL's contention had been correct and the arbitral tribunal had been in breach, it would only have remitted the award back to the tribunal, and not set it aside.



Comment

Take-or-pay clauses require a purchaser to pay for a minimum quantity of goods or services, whether or not those goods or services are taken. Take-or-pay clauses are very common in the energy industry, in gas sales contracts, power purchase contracts, and other long-term arrangements. Sums due under take-or-pay clauses commonly form part of the seller's financing arrangements.

In the GSAs considered in this arbitration, the purchaser has the benefit of a provision in the take-or-pay arrangements that meant:

1. the buyer may request that the seller diverts any unutilized monthly take-or-pay quantity to any other power plants (after seeking their consent);
2. the seller shall arrange for such diversion at the cost and risk of buyer, subject to available capacity in its pipelines; and
3. any amounts received by the seller from the other power plants in consideration of supply of the diverted gas shall, after making deduction of any additional charges incurred by the seller in arranging the sale, be paid by the seller to the buyer.

At the core of the above dispute seems to be whether: (i) the seller, rather than operating the above machinery, was entitled to treat a take-or-pay clause as a form of grossing up provision if it was able to sell the gas elsewhere (so it was only required to invoice the buyer for the net shortfall in its revenue); and (ii) if so, whether it was entitled to simply invoice a buyer for such net revenue loss (or gross up) on a non-monthly basis.

The issue for the seller is that the GSAs were not structured to allow it to invoice periodically, at its convenience, for net revenue losses. The GSAs required the monthly invoicing of the take-or-pay sum to the buyer – with any revenue received from re-sales following, if and when received, to be transferred to the buyer. As a result, the arbitral tribunal found that the seller had not issued valid invoices. Although the entire arbitral award was not public, it seems that the arbitral tribunal were concerned that the seller was not operating the contractual machinery as required by the contract – including the buyer making a nomination of requesting the seller to re-sell the gas.

If there is a take-away from the arbitral award, it seems to be a cautionary note to sellers with take-or-pay clauses to ensure that they invoice buyers in accordance with the strict contractual machinery in place.

Once an award has been rendered, the Commercial Court decision echoes other recent court decisions in which the courts continue to be reluctant to interfere with tribunal awards and apply a high threshold to any challenges under section 68 of the AA 1996 (see, for example, the cases of *Reliance Industries Ltd v The Union of India* [2018] EWHC 822*, BPY v MXV* [2023] EWHC 82)*, and Cipla Ltd v Salix Pharmaceuticals Inc* [2023] EWHC 910 (Comm)).

Judge: Bright J.

Chapter 2

Projects and Supply Chain

Since last year's Annual Review there have been a number of significant cases relevant to oil and gas projects and supply chains. An interesting non-energy related case also provides useful guidance on liquidated damages:

— In *Geoquip Marine Operations AG v Tower Resources Cameroon SA and Anor* [2023] EWCA Civ 304 the Court of Appeal reversed a Commercial Court decision, holding that the provider of a vessel was entitled to standby costs when it was unable to work due to the charterer not having obtained the relevant licence extension.

— In *Dalton Group Limited v City of Edinburgh Council* [2023] CSOH 4 the Scottish Outer House considered whether a loss of profit claim for repudiatory conduct was capped by the notice period specified by a termination for convenience clause where the innocent party had affirmed the contract, rather than terminated it. The innocent party's affirmation of the contract resulted in its loss of profit claim being preserved for the remaining life of the contract.

Do termination for convenience clauses cap loss of profit claims?

In *Dalton Group Limited v City of Edinburgh Council* [2023] CSOH 4, the Scottish Outer House has considered whether a loss of profit claim for repudiatory conduct was capped by a termination for convenience clause. The limiting effect of such clauses has been upheld previously, but this appears to be the first case in which the question has been considered in circumstances where the contract was affirmed by the innocent party, rather than terminated. Although not an oil and gas case, it will be of interest to practitioners. The innocent party's affirmation of the contract resulted in its loss of profit claim being preserved for the remaining life of the contract and is an approach worthy of consideration by other parties in similar circumstances.

Facts

Dalton Group entered into a contract with Edinburgh City Council to be its exclusive purchaser of scrap metal. A dispute arose regarding the degree of contamination of the scrap being purchased – with Dalton alleging numerous incidents of hazardous gas pressurised cannisters being present in the scrap. There was an email exchange between the parties, following which Dalton claimed deliveries of scrap stopped, whereas the Council claimed Dalton refused to accept the scrap.

Dalton claimed that the Council had wrongfully repudiated the contract and brought proceedings to recover its lost profits over the remainder of the contract term. Before the Court of Session heard evidence to determine the issues, the Council raised a preliminary issue concerning the effect of a termination for convenience clause in the contract allowing the Council to terminate at any time by giving 3 months' notice. Given the Council had this right to terminate, it argued that damages should be assessed by the least burdensome method of lawful termination and therefore limited to 3 months' worth of loss of profit, rather than loss of profit for the time left to run under the contract.

In response, Dalton relied on the doctrine of election which gives a party faced with repudiatory conduct a choice to either (1) accept the repudiation and therefore treat the contract as terminated; or (2) affirm the contract and insist upon performance. Dalton claimed that it had affirmed the contract and had remained ready to accept scrap metal from the Council. Accordingly, Dalton argued that the contract had not been terminated and so the termination for convenience clause was irrelevant.

Decision

The Court of Session noted the well-established position that in an action for damages for breach of contract, the claiming party is entitled to recover damages which would put it in the position that it would have been in had the defending party fulfilled its contractual obligations. Where, therefore, the breach of contract consists of a wrongful termination, the claiming party's damages *'will be assessed on the basis that the defending party would have lawfully terminated the contract*.'

In the present case, however, Dalton's position was that the contract had never been terminated (whether lawfully or unlawfully), because it had not accepted the Council's wrongful repudiation (in line with a party's choice to affirm the contract when faced with a repudiatory breach). The Court of Session noted that the Council could have exercised the termination provisions of the contract, but chose not to. The Court of Session therefore concluded that '*in a case where the contract has not been terminated, damages do not fall to be assessed by reference to the least burdensome method of terminating the contract*.'

As a result, the Council faced a full claim for loss of profit, not limited to the notice period of 3 months specified by the termination for convenience clause.

Comment

A party terminating a contract for repudiation or otherwise for default by the other party will usually be entitled to compensation for loss of the contractual bargain. This will often take the form of a loss of profits claim for the remaining term of the contract. However, complications can arise where the defaulting party nonetheless had a contractual right to terminate for convenience. Is the innocent party still able to claim for loss of profits for the remaining duration of the contract on the assumption that the right to termination for convenience would not have been exercised?

The cases on this issue are not entirely consistent. In *Comau v Lotus Lightweight* [2014] EWHC 2122 (Comm) the Commercial Court took a strict approach, finding that a termination for convenience clause eliminated a right to claim for loss of profit. The Commercial Court noted that to find otherwise would ignore the limited nature of the innocent party's *'expectation interest'* in the contract*: '*[it] *was never entitled to profits on the whole of the goods and services to be supplied pursuant to the Agreement but was only ever entitled to such profit as it might have gained prior to any 'termination for convenience'*.'

A somewhat different line was taken by the TCC in *Willmott Dixon v London Borough of Hammersmith and Fulham* [2014] EWHC 3191 (TCC). There, a factual enquiry was deemed necessary to determine, in all of the circumstances, if and when the defaulting party would have exercised its right to terminate for convenience.

Whilst the Court of Session's decision does not resolve the tension between the *Comau* and *Willmott Dixon* cases, it provides a potential strategy for parties on the end of repudiatory conduct where the defaulting party has the benefit of a termination for convenience clause. Accepting the repudiation and bringing the contract to an end will allow the defaulting party to argue that its liability is limited by reference to the termination for convenience clause. Affirming the contract, however, will avoid this result and, depending on the circumstances, may allow the innocent party to preserve a full loss of profit claim as illustrated in the present case.

This decision also provides a good example of the importance of carefully considering contractual options whenever breaking ties with a contractual counterparty. It is apparent from the judgment that the Council will seek to defend the balance of the proceedings on the basis that Dalton had itself repudiated the contract by wrongly refusing to accept deliveries of scrap metal from the Council. If that were the case, there may have been a different outcome if the Council had notified Dalton that, in the event it was incorrect as to Dalton's repudiation, it was also terminating the contract for convenience. That would potentially have limited any claim by Dalton to the 3 month notice period provided by the termination for convenience clause.

More generally, it is important that parties take a step back and assess the broader implications of any significant breaches of contract alleged between them. It can often be difficult to determine if a party has repudiated a contract as opposed to merely breaching it. What is more, a party needs to be aware that its actions or inactions may innocently or carelessly terminate a contract, opening it up to costly legal consequences. For example, if a party is looking to terminate its contract early, it needs to be alive to key practical issues and clearly communicate its intention to terminate (in line with the contract provisions). Furthermore, if the party wants to prevent a breached contract from continuing, it needs to be careful not to inadvertently affirm the contract through conduct.

Judge: Lord Harrower.

Entitlement to Standby Costs

In *Geoquip Marine Operations AG v Tower Resources Cameroon SA and Anor* [2023] EWCA Civ 304, the Court of Appeal reversed a Commercial Court decision, deciding that the provider of a vessel was entitled to standby costs when it was unable to work due to the charterer not having obtained the relevant licence extension. As the contract was modelled on LOGIC terms, it will be of particular interest to those in the industry.

Facts

The relevant facts are set out at page 42 of the *CMS Annual Review of developments in English oil and gas law* (2022 Edition). To reiterate:

On 12 September 2019, Geoquip Marine Operations AG ('**Geoquip**') and Tower Resources Cameroon SA ('**Tower Cameroon**') entered into a letter of intent, whereby they agreed to work in good faith to prepare, mutually agree upon and execute a Contract for Services in the NJOM field, Offshore Cameroon. It was to be commenced upon Geoquip's service vessel (the '**Vessel**' or the '**Investigator**') completing its schedule of work in Nigeria (where the Vessel then was) not earlier than 1 October 2019 and not later than 1 January 2020.

On 30 October 2019, Geoquip (as the '**Contractor**'), Tower Cameroon (as the '**Company**'), and Tower plc (as the '**Guarantor**') entered into a contract for the provision of geotechnical survey services to be provided by Geoquip (the '**Contract**'). The duration of the Contract was two months.

The Contract was structured into four sections: (1) Form of Agreement and Appendix 1; (2) (a) General Conditions of Contract – LOGIC Edition 2 – October 2003, and (b) Special Conditions of Contract; (3) Remuneration; and (4) Scope of Work.

The General Conditions, as amended by the Special Conditions, required (amongst other things):

'4.5 In order to ensure that performance and completion of the Work are not delayed or impeded the Contractor shall be responsible for the timely provision of all matters referred to in Clauses 4.1 and 4.4 and, where provided for elsewhere in the Contract,

for the timely request of Company-provided materials, services and facilities. However, ***Contractor cannot be responsible for the timely delivery of Company-provided materials, services and facilities. If such are delivery [sic] late and cause delay in the performance and downtime of the Contractor's equipment, Company shall pay Standby time for such downtime*** *…'*

The remuneration section provided (amongst other things):

'*The offer is subject to the Investigator arriving in Cameroon between 15th November and the 31st December 2019, and* ***the contract is also contingent on the permits and license extension required for the site survey having been delivered prior to departure of the vessel to Cameroon.***'

'The offer is ***subject*** *to contract signing by 15th November 2019 and* ***advanced payment of $250,000 to arrive in Geoquip's Swiss bank account prior to departure of the vessel to Cameroon***.'

On 20 November 2019, Tower Cameroon communicated to Geoquip that the formal license extension was expected that week and that a security plan for the Vessel had been agreed with Cameroon's armed forces, the *Battalion d'Intervention Rapide* (the '**BIR**').

On 29 November 2019, Geoquip told Tower Cameroon that the Vessel was ready to depart from Nigeria to Cameroon. Tower Cameroon told Geoquip that the Vessel should not be moved until Tower Cameroon had the licence extension letter in hand, as the Contract was contingent on that.

On 2 December 2019, the Vessel arrived in Cameroon for routine maintenance. On 24 December 2019, Tower Cameroon told Geoquip that the licence extension letter had just been signed. The letter was not the final, formal, licence extension. It was only a recommendation from the Minister to the President, who would then issue a Presidential decree which would have constituted the formal extension.

Five days later, on 29 December 2019, despite still not having the formal extension in hand, Tower Cameroon paid the USD 250,000 deposit to Geoquip.

On 8 January 2020, Tower Cameroon was informed that the BIR would not provide security for the Vessel because it had not been authorised to do so by the Société Nationale des Hydrocarbures (the '**SNH**'), the state-owned oil company, which had not seen a formal licence extension.

Nevertheless, on 15 January 2020, the Vessel sailed to the work site, arriving on 16 January 2020. Security was provided by an independent naval security team. The BIR then required the Vessel to return to port, as the SNH had still not seen any presidential decree granting the licence extension.

On 27 January 2020, Geoquip and Tower Cameroon concluded a written contract extension agreement, which provided for an extension of the Contract by two months. All the other terms and conditions remained the same.

On 30 January 2020 and 6 February 2020, Geoquip invoiced Tower Cameroon for standby costs, as provided for in Clause 4.5 of the Contract. The invoices were not paid and, on 13 July 2020, Geoquip issued proceedings against Tower Cameroon.

Commercial Court Decision

The Commercial Court's decision is set out at page 43 of the *CMS Annual Review of developments in English oil and gas law* (2022 Edition).

In summary, the Commercial Court decided against Geoquip on the issue of standby costs. The rationale for doing so was that the Contract, as specified in the Remuneration section, was '*contingent on the permits and license extension required for the site survey having been delivered prior to departure of the vessel to Cameroon.*' Because the formal licence extension was never received, the Contract never came into force and therefore the parties did not have any contractual duties.

Geoquip appealed the decision.

Court of Appeal Decision

The Court of Appeal allowed the appeal. As a result, Geoquip was awarded USD 1.6m in respect of standby charges.

It was accepted that the requirement for a licence extension before the departure of the Vessel to Cameroon, on which the Contract was expressed to be contingent, was a condition precedent. Without the licence extension, the Contract would not come into effect. However, it was common ground between the parties in the Court of Appeal that, when Tower Cameroon paid and Geoquip accepted the USD 250,000 deposit, both parties waived reliance on the condition precedent and the Contract entered into force. The Court of Appeal considered that the Commercial Court had not appreciated the effect of this waiver. It may have been right to conclude that Clause 4.5 was not objectively intended, when signed, to provide for

standby charges in the event that Tower Cameroon failed to secure a licence extension and the necessary permits. However, that was on the premise that the Contract only came into effect upon the satisfaction of the condition precedent. The Court of Appeal decided that it was '*quite obvious that the parties would not have thought for a moment, when they waived the condition precedent, that* [Tower Cameroon's] *obligation to secure a licence extension and other permits and to pay standby charges if it failed to do so timeously were in any way abrogated by that waiver.*'

As to whether Clause 4.5 of the Contract applied, Tower Cameroon argued that the terms '*services*' and '*facilities*' should be interpreted in line with the meaning given to the term '*facilities*' in Clause 4.1 – an interpretation that would exclude the provision of security, permits and the licence extension. The Court of Appeal rejected this construction and held that the words in Clause 4.5 must be given their natural meaning. Ultimately, it was decided that the wording of Clause 4.5 was '*more than sufficient to include* [Tower Cameroon's] *express commitment to provide security, permits and the licence extension.*'

The fact that the condition precedent of obtaining a licence extension and other permits was waived did nothing to change Tower Cameroon's wide obligation under Clause 4.5.

Ultimately, as the condition precedent had been waived, Geoquip, under Clause 4.5 of the Contract, was entitled to recover costs of standby time if Tower Cameroon's failure to obtain a licence extension and/or provide security caused a delay.

Comment

There are some important points to note in relation to this decision. The two key take aways are:

1. First, in relation to the impact of the payment of the deposit on the condition precedent that there be a licence extension; and
2. second, the Court of Appeal's approach to defining '*materials, services and facilities*' to encompass the commitment to provide permits and licences.

In respect of the waiver of the condition precedent, whether a waiver arises will always be specific to the facts. However, the waiver of conditions precedent is likely to have a profound impact on rights and obligations of the parties going forwards. Wherever possible, effect of waivers should be carefully considered before given, and the waiver documented between the parties.

In respect of the second point, the words: '4.5 *In order to ensure that performance and completion of the Work are not delayed or impeded the Contractor shall be responsible for the timely provision of all matters referred to in Clauses 4.1 and 4.4 and, where provided for elsewhere in the Contract, for the timely request of Company-provided materials, services and facilities*' are standard LOGIC wording. However, the additional words: '*However, Contractor cannot be responsible for the timely delivery of Company-provided materials, services and facilities. If such are delivery [sic] late and cause delay in the performance and downtime of the Contractor's equipment, Company shall pay Standby time for such downtime …*' are from the Special Conditions.

With respect to the Court of Appeal, it is far from evident that the words used in the LOGIC General Conditions are intended to cover licences and permits. In fact, Clause 18.2 specifically deals with licences and permits requiring: '*The CONTRACTOR shall obtain all licences, permits, temporary permits and authorisations required by the applicable laws, rules and regulations for the performance of the WORK, save to the extent that the same can only be legally obtained by the COMPANY*'. As such, to construe Clause 4.5 (as in the LOGIC wording) as covering licences and permits makes little sense when the contract is construed as a whole.

For that reason, it may be that the findings of the Court of Appeal are particular to Clause 4.5 as amended by the specific intention underlying the words added by the Special Conditions.

Commercial Court Judge: Peter MacDonald Eggers KC (sitting as a Deputy Judge of the High Court).

Court of Appeal Judges: Sir Geoffrey Vos, Lady Justice King LJ and Lady Justice Falk LJ.

Chapter 3

Decommissioning, Tax and Insolvency

This year saw significant decisions on decommissioning security deeds, capital allowances and on the recovery of monies paid out of insolvent entities:

— In *Integral Petroleum SA v Petrogat FZE & Ors* [2023] EWHC 44 (Comm), the Commercial Court made an important decision concerning the recovery of monies removed from an oil company, by de facto directors, leaving it unable to satisfy its debts. In the context of any solvency concerns relating to counterparties or joint venture partners in the industry, the decision will be of broad interest to those concerned with being left with debts owed by empty shells.

— In *HMRC v SSE Generation Ltd* [2023] UKSC 17, the Supreme Court confirmed that SSE Generation Ltd was entitled to claim capital allowances in respect of the construction of a hydro-electric power station, bringing to an end a long-running dispute with HMRC. The case provides clarification for other energy companies who may be wishing to claim capital allowances on expenditure incurred on similar projects.

— In *Apache North Sea Ltd v (2) Esso Exploration and Production UK Ltd (3) Shell U.K. Ltd (4) BP Exploration Operating Company Ltd* [2023] EWHC 1345 (Comm), the Commercial Court gave a rare insight into the calculation of security under a Decommissioning Security Agreement. In doing so, some important guidance was given on the correct approach to be adopted by operators in preparing the annual proposed plan.

Insolvency: Expanding relief for creditors – section 423 and fraudulent transfers

In *Integral Petroleum S.A. v Petrogat FZE & others* [2023] EWHC 44 (Comm), the Commercial Court made an important decision concerning the recovery of monies removed from an oil company by de facto directors, leaving it unable to satisfy its debts. In the context of any solvency concerns relating to counterparties or joint venture partners in the industry, the decision will be of broad interest to those concerned with being left with debts owed by empty shells.

Facts

Petrogat FZE ('**Petrogat**') is a company in the oil and petroleum industry based in the United Arab Emirates. Mr Kanybek Beisenov is the owner of Petrogat and its sole registered director. The daily operations of Petrogat, however, are managed by Mr Mahdieh Sanchouli and Ms Hosseinali Sanchouli, who act as the *de facto* directors (the '**De Facto Directors**').

Integral Petroleum S.A. ('**Integral**') is also a company in the oil and petroleum trading industry, based in Geneva.

In September 2017, Integral and Petrogat entered into an agreement pursuant to which Petrogat was to supply oil to Integral. Upon receiving a tip-off, Integral obtained an injunction to prevent Petrogat from misappropriating the oil. However, in breach of the injunction, Petrogat diverted 37 tanks of the oil to Iran. As a result, the De Facto Directors were found in contempt of court and subsequently imprisoned.

Simultaneously with the contempt proceedings, Integral initiated an arbitration against Petrogat seeking an injunction compelling Petrogat to deliver the misappropriated oil and/or damages for conversion. In September 2019, Integral was awarded damages for the non-delivery of the cargo totalling USD 439,448.37. An additional award was issued by the arbitral tribunal in November 2019 for interest on the amount awarded along with costs.

On 22 November 2019, Integral was given leave to enforce the awards in the same manner as a judgment and entered judgment against Petrogat in the amounts set out in those awards. The judgment was enforced, and a receiver was appointed to overlook the equitable execution of Petrogat's assets. During this process, the receiver discovered that, in January 2019, Integral's assets were either withdrawn or transferred to a different company, named 'Company A', which was incorporated in the UAE and owned and/or controlled by Mr Beisenov and the De Facto Directors.

As a result of the events described above, in May 2021, Integral filed an application, without giving prior notice, for a worldwide freezing order against Petrogat, Mr Beisenov and the De Facto Directors (together the '**Defendants**') in support of a substantive claim under section 423 of the Insolvency Act 1986 (the '**IA 1986**'). The claim alleged that the transfers made to Company A constituted fraudulent transfers aimed at defrauding creditors. The worldwide freezing order was initially granted and subsequently extended. The Defendants contested the claim.

In March 2022, following an application by Integral, the Commercial Court ordered that unless Petrogat disclosed the identity of Company A, their defence would be struck out, and they would not be able to defend the claim. As Petrogat refused to disclose the information, their defence was struck out accordingly.

In the present application, Integral applied for judgment on the claims under CPR 3.5(5) (judgment without trial after striking out) and sought the following orders:

1. declaring that the transfer made to Company A were transfers defrauding creditors within the meaning of section 423 of the IA 1986; and
2. that the Defendants pay to Integral the sum of USD 1,700,613.52, being the sums outstanding under the Tribunal's awards plus interest and costs (notwithstanding that such claims had already been enforced against Petrogat in November 2019).

Decision

Although Integral's application was opposed, it largely succeeded.

Section 423 of the IA 1986 states:

> '*(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—*
>
> *(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;*
>
> …
>
> *(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.*
>
> *(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—*
>
> *(a) restoring the position to what it would have been if the transaction had not been entered into, and*
>
> *(b) protecting the interests of persons who are victims of the transaction.*
>
> *(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—*
>
> *(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or*
>
> *(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.*
>
> ….
>
> *(5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as 'the debtor'.'*

The Commercial Court determined that the withdrawals and transfers made to Company A constituted transactions defrauding creditors within the definition provided by section 423 of the IA 1986. In coming to his decision, David Edwards KC applied the principles for granting relief under section 423 of the IA 1986 as summarised in *Re Dormco SICA Ltd (in liquidation)* [2021] EWHC 3209 (Ch):

1. It is the purpose of the transaction which is to be addressed not that of the person who received the benefit (*Moon v Franklin* [1996] B.P.I.R. 196).
2. the question of whether the transaction was entered into for a prohibited fact is a question of fact based on an evaluation of all of the relevant facts.
3. it is sufficient to prove that the prohibited purpose was not the purpose intended but rather a consequence (*Inland Revenue Commissioners v Hashimi* [2002] EWCA Civ 981).
4. insolvency is not a prerequisite, although the financial position of a party could be relevant to the decision of the purpose of the transaction and, depending on the facts, the absence of insolvency may make a prohibited purpose unlikely (*Moon v Franklin* [1996] B.P.I.R. 196).

In relation to the relief which may be ordered, under section 423(2) of the IA 1986, the court has wide discretionary powers of relief to (a) restore the position to what it would have been had the transaction not been entered into; and (b) protect the interests of the victims of the transaction (see also *Chohan v Saggar* [1994] B.C.L.C. 706 (at 714)). In addition, Sales J in *4 Eng Ltd v Harper* [2009] EWHC 2633 (Ch) pointed out that the objective of section 423(2) can be achieved by the exercise of the Court's '*wide margin of judgment* [when deciding] *what order is appropriate*' having regard to the non-exhaustive list of relief in section 425 of the IA 1986.

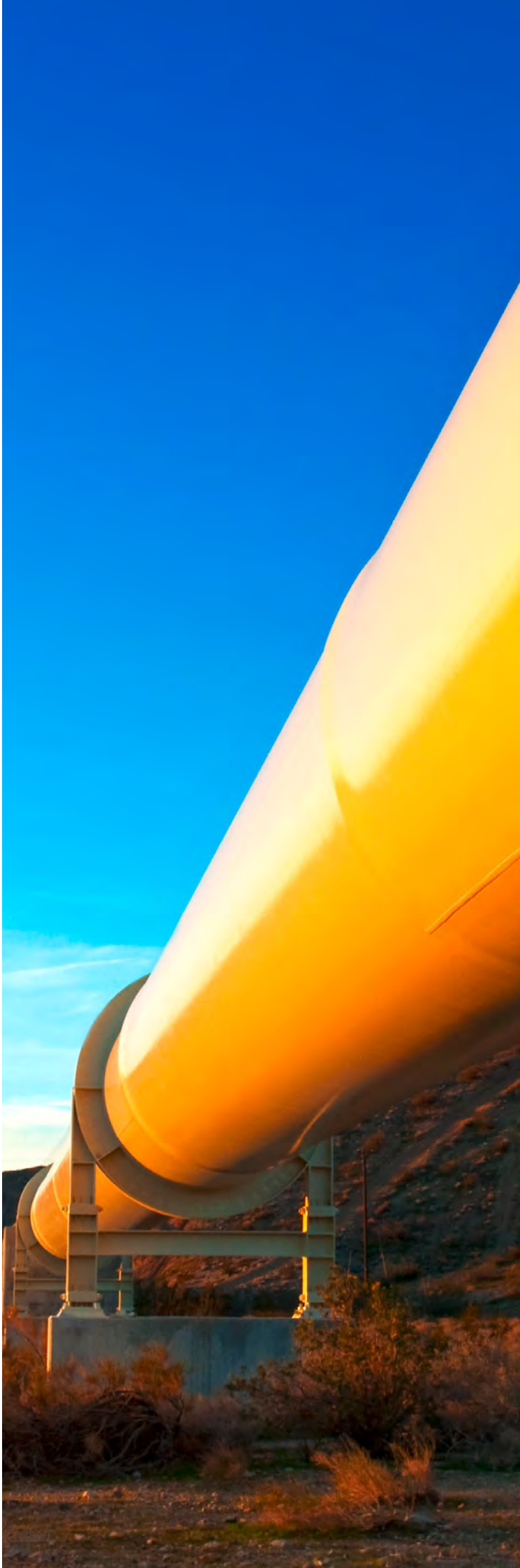
Accordingly, the Commercial Court found that a significant portion of the transferred sums were transactions at an undervalue. However, relief can only be granted under section 423 if it can be shown that the transaction was entered into for a 'prohibited purpose'.

In order to determine whether the transaction was entered into for a prohibited purpose, there needs to be proof of a '*subjective, positive intention on the part of the company entering into the transaction to achieve a Prohibited Purpose, which is a question of fact*' (Commercial Injunctions (7th Ed.) 13-031). In addition, it is not necessary to show that the prohibited purpose was the only, dominant or predominant purpose (*JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176 at [14]) and proof that the consequence of the transaction was to put assets beyond the reach of creditors is not, in itself, enough. However, evidence that this was the foreseeable and foreseen result may, nonetheless, support an inference that the transaction was in fact entered into for a prohibited purpose.

Taking into account the facts of the case, including the admitted nature of the transactions, the timing of the transactions, the evasiveness of the Defendants and the Defendant's refusal to identify Company A, the Commercial Court dismissed various explanations presented by the De Facto Directors concerning the transfers and decided that they were carried out for at least one of the '*prohibited purposes*' specified in section 423(3) of the IA 1986. Since Integral had a pending arbitration claim against Petrogat during the transfers, the Commercial Court acknowledged Integral as a victim of these transactions under section 423(5) of the IA 1986.

The De Facto Directors, along with Mr. Beisenov, were jointly held responsible for paying Integral the amount of the transfers up to the sum determined in the judgment. Referring to the cases of *Re Paramount Airways Ltd* [1993] 1 Ch. 223 and *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd* [2018] EWCA Civ 1660, the Commercial Court established that section 423 of the IA 1986 is not limited to individuals or assets within England and Wales. However, an English Court can only exercise its discretion to issue an order against a foreign company and foreign nationals that live outside of England and Wales if a sufficient connection with England and Wales is evident. In this case, such a connection was present due to:

1. The underlying contract between Integral and Petrogat being governed by English law and requiring disputes to be resolved by LCIA arbitration seated in London (which is where the arbitration took place);
2. the fact the transactions were made for the purpose of frustrating the enforcement of awards made and/or likely to be made in an English arbitration (which were reflected in an English judgment); and
3. that Petrogat was subject to an English receivership order.



Although Company A appeared to be the primary target for relief, the Defendants had refused to identify Company A, making it impossible for proceedings to be commenced against it. The question then turned as to whether the court has the discretion to make an order against a party that has derived no benefit from the impugned transaction. In this regard, the Commercial Court deemed it appropriate to grant relief against the Defendants, despite them not being the direct recipients of the transfers, on the basis that:

1. As a result of the deliberate conduct of the Defendants and in breach of court order, Company A has not been identified;
2. accordingly, there is no way of knowing what happened to the funds that were transferred to Company A; and
3. what is known, is that Company A is owned and operated by the Defendants and the funds were transferred to Company A to enable Company A to carry on its business which would have inevitably increased Company A's asset value and the value of the interest of its owners.

Accordingly, the Commercial Court found that the Defendants had derived enough benefit from the transfers to warrant the issuance of orders against them under section 423 of the IA 1986 and ordered that the Defendants be jointly and severally liable for the amount of the transfer up to the amount of Integral's outstanding judgment. The ordered sums were to be paid directly to Integral and not to the receivers involved in the case.

Comment

Being left with a counterparty that is unable to pay its debts is often a worst-case scenario. The oil and gas industry seeks to mitigate the risk of such occurrence through the operation of security for oil sales (such as letters of credit), decommissioning security trusts, forfeiture rights for joint operating agreements and a variety of other mechanisms.

However, notwithstanding such protections, it is possible to be left with an insolvent counterparty unable to pay its debts. To an extent, such risks are inherent in commercial relations. That said, English law will not accept a company being purposefully stripped of its assets with the intention of putting those assets beyond the reach of creditors. Where this occurs, the IA 1986 provides rights and remedies to victims.

This case clarifies that section 423 is not restricted to individuals or assets within England and Wales, but the Court will consider the jurisdictional connection. It also underscores the liability of indirect beneficiaries who derive sufficient benefit from the transfers and highlights that ordered sums should be paid directly to the victims. Overall, the case emphasises creditor protection and accountability for such wrongful transfers.

Judge: David Edwards KC (sitting as a Judge of the High Court).

Tax: Capital allowances and project expenditure

In *HMRC v SSE Generation Ltd* [2023] UKSC 17, the Supreme Court confirmed that SSE Generation Ltd ('**SSE**') was entitled to claim capital allowances in respect of the construction of a hydro-electric power station, bringing to an end a long-running dispute with HMRC. The case provides clarification for other energy companies who may be wishing to claim capital allowances on expenditure incurred on similar projects.

Facts

Capital expenditure is not generally deductible from income for the purpose of calculating trading profits subject to corporation tax. However, the Capital Allowances Act 2001 ('**CAA 2001**') provides for capital allowances to be claimed in relation to certain categories of expenditure, including on plant and machinery. Subject to specific exclusions set out in Chapter 3, Part 2 CAA 2001, the general rule is that a company will be entitled to claim capital allowances where it has incurred capital expenditure on the provision of plant and machinery for the purposes of a '*qualifying activity*' (which includes the company's trade).

This particular case concerned the extent to which SSE was entitled to claim capital allowances on expenditure incurred when constructing the hydro-electric power station at Glendoe, Fort Augustus in Scotland (the '**Glendoe Scheme**'). The Glendoe Scheme is a state-of-the-art facility first opened by HM The Queen in 2009 and the only large-scale hydro-electric station of its type built in the UK in the last 50 years. Similar to other hydro-electric power stations, the Glendoe Scheme generates electricity by taking water at high pressure from a dammed area in order to drive a water turbine, which in turn engages a generator (with the used water then discharged into Loch Ness). The unique aspect of the Glendoe Scheme is that many of its assets are underground, thereby optimising water pressure but also minimising the environmental impact.

HMRC disputed a substantial proportion of the allowances claimed by SSE in respect of the Glendoe Scheme on the basis that, in their view, the relevant assets should be disqualified from relief by virtue of Chapter 3, Part 2 CAA 2001. Broadly, those provisions include exclusions from plant and machinery allowances for the following main categories of expenditure:

1. expenditure on the provision of a building, including the items set out in 'List A' (Section 21 CAA 2001);
2. expenditure on the provision of a structure or other asset within 'List B' (Section 22(1)(a) CAA 2001); and
3. expenditure on works involving the alteration of land (Section 22(1)(b) CAA 2001).

Before the Supreme Court, the critical provision was Item 1 of List B, Section 22 (emphasis added):

*'A **tunnel**, bridge, viaduct, **aqueduct**, embankment or cutting* as HMRC argued, the disputed items were a '*tunnel*' or an '*aqueduct*' for these purposes, the associated expenditure (approximately GBP 200m) would be disqualified from capital allowances'. To the extent that the disputed items were so disqualified, SSE relied upon the saving provisions in List C, section 23 of the CAA 2001.

First-tier Tribunal (Tax Chamber), Upper Tribunal (Tax and Chancery Chamber) and Court of Appeal Decisions

Meaning of 'tunnel'

The First-tier Tribunal (Tax Chamber) ('**FTT**') held that SSE was entitled to claim allowances for some of the disputed items, but upheld HMRC's view on others. The FTT considered that the words in List B are not '*specialist terms*' but instead have '*ordinary English meanings*'. In ascertaining those meanings, the FTT held that it was '*legitimate to consider the way in which they have been grouped in the legislation, the assumption being that structures and assets which are specifically grouped together are likely to share some basic common theme*'. In relation to Item 1 of List B, the FTT concluded that the relevant theme was one of the structures related to transportation infrastructure, and that the ordinary meaning of the word '*tunnel*' in this context was a '*passage bored through ground which permits people or forms of transport to pass to and fro*'. On that basis, the FTT held that none of the disputed items was a '*tunnel*'.

HMRC lodged an appeal before the Upper Tribunal (Tax and Chancery Chamber) ('**UT**') in respect of some of the items which the FTT had found did give rise to capital allowances. The UT dismissed HMRC's appeal, while disagreeing with the FTT's analysis in certain respects and remade the decision largely in SSE's favour. In respect of the meaning of '*tunnel*', the UT considered that the ordinary meaning was '*any form of subterranean passage*' but that the statutory context requires that the term should be given a narrower meaning than its ordinary dictionary definition.

The Court of Appeal agreed with the FTT on the ordinary meaning of the word '*tunnel*' and that the context was one involving a transportation theme.

Meaning of 'aqueduct'

The FTT noted that the term '*aqueduct*' has two potentially relevant definitions under the Oxford English Dictionary:

a. '*an artificial channel for the conveyance of water from place to place; a conduit; esp. an elevated structure of masonry used for this purpose*'; and
b. '*the similar structure by which a canal is carried over a river, etc.*' (which has a more obvious transportation association).

The FTT held that, in the statutory context, the former meaning was correct – and that the transportation of water itself was enough to be consistent with the '*transportation*' theme of Item 1, List B (rather than requiring the water to be the means of transportation of other things, as in the case of a canal).

The UT disagreed, deciding that 'aqueduct' should be given its other dictionary meaning, and therefore limited to a bridge or viaduct-like structure which carries a canal (rather than merely conveying water to a destination).

On that basis, the UT concluded that none of the disputed items was an 'aqueduct' for relevant purposes.

On appeal by HMRC, the Court of Appeal expressed some difficulty in reaching its decision on the basis that the definition adopted by the UT would '*exclude many spectacular and elegant structures that have been left to us from ancient times and are commonly thought of and referred to as aqueducts*'. However, the Court of Appeal held that the principle of noscitur a sociis (the principle of legal construction whereby a word or phrase is construed by its immediate context – i.e., the words immediately surrounding) should apply to limit the ordinary meaning to a particular type of aqueduct with a transportation theme.

Supreme Court Decision

The Supreme Court unanimously dismissed HMRC's appeal, holding that the disputed items were neither a '*tunnel*' nor an '*aqueduct*' within the meaning of List B. On that basis, it did not need to consider SSE's cross appeal based on the saving provisions in List C, section 23 of the CAA 2001.

In relation to '*tunnel*', the Supreme Court decided that the Court of Appeal (and tribunals) had been correct to consider the statutory context. The Supreme Court agreed with SSE that, in the drafting of List B, a choice had been made to group the relevant structures in separate lists and that it was reasonable to conclude that those grouping choices were made for a thematic reason. That theme linking Item 1 of List B was that of structures related to the construction of transportation routes or ways, such that a '*tunnel*' in this context is a '*subterranean passage through an obstacle for a way (such as a railway, road, or canal) to pass through*.'

HMRC's approach, on the other hand, gave no effect to that statutory context and did not offer any explanation for the groupings made in List B.

On that same thematic basis, the Supreme Court held that '*aqueduct*' means a '*bridge-like structure for carrying water, which includes but is not limited to carrying a canal*.' According to the Supreme Court, this was the common ordinary meaning and the general transportation theme did not compel the more limited meaning of a bridge-like structure carrying a canal which was given to it by the UT and Court of Appeal (thereby addressing one of HMRC's arguments, which was that the Court of Appeal's definition was arguably limited to historic structures).

Comment

The Supreme Court's decision brings welcome clarity for similar businesses when considering the viability of further infrastructure projects to develop energy projects in the UK. The decision also reinforces the importance of context when determining the meaning of words used in statute.

This long-running dispute was essentially brought about as a result of the unique design of the Glendoe Scheme. Had the disputed elements of the Glendoe Scheme been built above ground (i.e., at the expense of engineering ingenuity and environmental concerns), they would have likely qualified for capital allowances on HMRC's case.

Judges: Lord Reed, Lord Briggs, Lord Hamblen, Lord Leggatt and Lord Stephens.

Decommissioning: Proposed Plan and Calculation of Security under DSA

In Apache North Sea Limited v (2) Esso Exploration and Production UK Limited (3) Shell U.K. Limited (4) BP Exploration, Operating Company Limited [2023] EWHC 1345 (Comm) the Commercial Court gave a rare insight into the calculation of security under a Decommissioning Security Agreement. In doing so, some important guidance was given on the correct approach to be adopted by operators in preparing the annual proposed plan.

Facts

Apache North Sea Limited (the '**Claimant**' or '**Apache**') is a licensee and the current operator of the Forties Field, the Brimmond Field, the Tonto Field and the Maule Field – all within UKCS North Sea blocks. Neo Energy Central North Sea Limited (the '**First Defendant**' or '**NEO**') is a licensee; Esso Exploration and Production UK Limited (the '**Second Defendant**' or '**Esso**'), Shell U.K. Limited (the '**Third Defendant**' or '**Shell**') and bp Exploration Operating Company Limited (the '**Fourth Defendant**' or '**bp**') were each previously licensees of some or all of these fields.

All (five) parties entered into a decommissioning services agreement (the '**DSA**') on 19 February 2019, relating specifically to the Forties and Brimmond Fields (the '**Fields**'). In broad terms, the DSA requires the Claimant and the First Defendant as the current licensees to provide security on an annual basis to be held in trust in respect of decommissioning costs, with the amount calculated as set out in the DSA. The Second, Third and Fourth Defendants are Second Tier Participants, meaning that they have a right to call on the amounts held in security if they are required to meet decommissioning costs in relation to the Fields in the event the current unit owners fail to do so.

In order to calculate the appropriate amount of security to be provided, the DSA requires that a Proposed Plan for decommissioning be prepared by Apache, as operator, and agreed between the parties to the DSA. The Proposed Plan is prepared in the year prior to the year to which the security relates; the year to which a Proposed Plan relates is referred to as the '**Relevant Year**' or '**RY**'. Appendix 5 of the DSA sets out a number of assumptions that are to be adopted in the preparation of each Proposed Plan. The 2022 Proposed Plan ('**RY2022**') (prepared in 2021) was agreed without challenge. RY2022 envisaged that:

1. annual oil production would decline from 8.0 million barrels in 2022 to 1.7m barrels in 2045;
2. there would be approximately GBP 238m of capital expenditure between 2022 and 2029; and
3. the Fields would cease production in 2037.

RY2022 did not account for the effect of inflation on decommissioning costs for the purposes of identifying when the Fields would cease production.

The 2023 Proposed Plan ('**RY2023**') produced by Apache in June 2022 differed from RY2022, and was not agreed by the parties. RY2023 envisaged that:

1. annual oil production would decline from 7.1 million barrels in 2023 to 1.0m barrels in 2040;
2. approximately GBP 9m of capital expenditure would be invested between 2023 and 2030; and
3. the Fields would cease production in 2026.

In identifying this date for cessation of production (2026) in RY2023, Apache purported to account for the effect of inflation on decommissioning costs.

In the context of rising energy costs and industry profits, the UK Government announced the UK Energy (Oil & Gas) Profits Levy Act 2022 (the '**EPL**') in Parliament on 26 May 2022, and introduced it on 5 July 2022. The EPL gained Royal Assent on 14 July 2022 and took retrospective effect from 26 May 2022.

Between 25 and 29 August 2022, Esso, Shell and bp each made separate written recommendations to Apache that RY2023 ought to be amended – in essence, there were collectively the following four Recommendations (the '**Recommendations**'):

1. EPL should be accounted for (in the modelling);
2. the production profiles and capital expenditure plans should mirror those contained in RY2022;
3. the modelling added by Apache in relation to the effect of inflation on decommissioning costs should be removed; and
4. the rate of tax for income received on funds held under trust should read 45%, not 40%.

No amicable resolution could be achieved with Apache on these points. In such circumstances, the DSA makes provision for the issues to be determined by an expert. Specifically, Clause 4.3 of the DSA permitted Esso, Shell and bp as Second Tier Participants to submit the Recommendations to expert determination. They did so by way of written notices dated 5, 6 and 7 October 2022.

Clause 11 of the DSA sets out in detail the process to be adopted on expert referral. Crucially, this includes (at Clause 11.10) the statement that '*The Expert shall apply, and adhere to, the law provided that the Expert shall not interpret or construe the law, such interpretations and construction being reserved for decisions in accordance with Clause 15.9.*' Clause 15.9 in turn provides for the exclusive jurisdiction of the English Courts to determine any disputes. Apache contended that there were key questions of contractual construction arising as a result of the Recommendations and that Clause 11.10 meant that those questions needed to be determined by the court before there could be any reference to an expert. Consequently, Apache raised court proceedings against NEO and each of the Second Tier Participants. NEO played no part in the court proceedings; the Second, Third and Fourth Defendants disputed Apache's analysis of the dispute resolution provisions within the DSA – and whether there were issues of contractual construction at all.

Issues

The trial proceeded on the basis of a List of Issues that the Commercial Court was asked to determine. Broadly speaking, the construction issues raised by Apache arose from the following key provisions in the DSA:

(i) Clause 4, which sets out the requirements and timelines for the Proposed Plan and provides for reference to the Expert where agreement cannot be reached in respect of the written recommendations;

(ii) Clause 6, which provides for the calculations to be carried out, including in circumstances where there had been changes in assumptions used at particular times;

(iii) Clause 11, which sets out the requirements and timeline for a matter referred to the Expert; (iv) Clause 15, which provides that disputes are governed by English law and the courts of England have exclusive jurisdiction; and (v) the assumptions themselves which are found in Appendix 5 of the DSA. Many of the assumptions within Appendix 5 make reference to the Reasonable and Prudent Operator Standard which is defined in the DSA as follows: '*Reasonable and Prudent Operator' means a Person seeking in good faith to perform its contractual obligations and, in so doing and in general conduct of its undertaking, exercising that degree of skill, diligence, prudence and foresight which would reasonable and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking in the UK Continental Shelf under the same or similar circumstances or conditions, and the expression 'standard of a Reasonable and Prudent Operator' shall be construed accordingly*'.

Decision

The key question that the Commercial Court was required to determine was whether or not the issues raised were questions of construction that were required to be determined by the court, or were properly questions for the expert, subject to a right for the parties to raise issues of mistake as to law following the expert's determination.

Expert Determination or Court

The Commercial Court agreed with the Defendants that the terms of Clause 11.10 did not require any such questions to first to be determined by the court. Clause 11.10 simply reflected the fact that the expert's decision on points of law were not binding but to be determined ultimately by the court. The Commercial Court considered this was a commercial approach '*because the issue* [of construction or interpretation of the law] *may not in the event have a material impact on the ultimate outcome. It eliminates the risk that a court will be required to determine academic points or points other than in relation to material facts and enables disputes to be resolved in a manner that is relatively inexpensive and speedy.*' In reaching the view that this was the approach that the DSA envisaged, the Commercial Court also considered the wider terms of the expert appointment process which it considered pointed to an expectation that the expert determination process would come before any court proceedings and that the expert's decision would not be binding in the case of a '*mistake of law*'. It was appropriate for the expert to proceed with a determination on the basis of the expert's understanding of the DSA – Clause 11.10 '*…does not oblige the parties or entitle any party to insist on the resolution of such issues before the event but only as the correction of an error of law as has been expressly agreed by clause 11.10*'.

The Commercial Court was satisfied that, contrary to Apache's submissions, Clause 15.9 of the DSA means that any error of construction or any failure to adhere to the law by the expert will entitle a party dissatisfied with the outcome to challenge it by proceedings brought before the Courts of England and Wales to be resolved applying English law, but it does not preclude an expert from proceeding with his mandate in the first instance, on the basis of his understanding of the relevant terms of the DSA.

Since the parties had set out in detail the particular issues of construction which had been raised, the Commercial Court also considered each of those questions, notwithstanding that (as the court pointed out) the expert process should have proceeded first and questions only raised with the Court to the extent that these were real (rather than hypothetical) issues arising from that process.

Comments on Assumptions Generally

As to the assumptions that the operator, Apache, was to apply in preparing the Proposed Plan, the Commercial Court confirmed in each case that (on the terms of the DSA) those should be either:

1. as expressly mandated by a provision in the DSA; or
2. otherwise, where required to meet the Reasonable and Prudent Operator standard.

It was not disputed that Clause 4.3 of the DSA requires the expert to:

1. determine whether the elements challenged by the Recommendations had been calculated in accordance with the DSA; and, if he determined they had not,
2. determine the estimates that should have been made.

In that regard, the Commercial Court also rejected Apache's contention that there was a 'threshold' test that the expert should first consider, namely that no Reasonable and Prudent Operator could have reached the conclusions under challenge and could only reconsider (and ultimately determine) the estimates for incorporation into the Proposed Plan if that threshold test was met. To the contrary, the Commercial Court considered that both questions were required to be considered by the expert applying the Reasonable and Prudent Operator standard.

Specifically, regarding the particular assumptions that had been challenged, the Commercial Court decided that RY2023 is required to contain a date when it is estimated Decommissioning will (a) be commenced and (b) be completed – a judgment informed by the life of field production estimates referred to in Clause 4.1.1 of the DSA. That estimate is required to be '… *prepared in accordance with Paragraph 7.9 of Appendix 5…' i.e. '… based on Proved Reserves plus Probable Reserves in respect of all reservoirs within the Field as prepared by the Operator to the standard of a Reasonable and Prudent Operator …*'. The Commercial Court noted that '**Proved Reserves**' and '**Probable Reserves**' are terms defined within paragraph 7.9 of Appendix 5. 'Proved Reserves' are '… *quantities of petroleum which, by analysis of geoscience and engineering data, can be estimated with reasonable certainty to be commercially recoverable, from a given date forward from known reservoirs and under defined economic conditions, operating methods and government regulations …*', where what is 'commercially recoverable' is defined by (a) the '*given*' date from which the forecast runs; (b) known reserves and (c) '… *defined economic conditions…*'. The Commercial Court noted that none of the foregoing are defined terms in the DSA and the economic conditions that Apache should have assumed are those applying the Reasonable and Prudent

Operator standard, as submitted by the Second, Third and Fourth Defendants.

Recommendation (a): EPL should be accounted for (in the modelling)

The Commercial Court found that Apache's omission of the EPL from RY2023 was contrary to Clause 11.9 of the DSA (which requires the Proposed Plan to be calculated in accordance with all legislation in force during the calendar year in which the Proposed Plan was prepared i.e. in force prior to 31 December in that year, even if not prior to the date when RY2023 was first prepared in June). As such, '*the Claimant's submission that the Expert must reach his determination without regard to the impact of the 2022 Act is entirely mistaken*.'

Recommendation (b): The production profiles and capital expenditure plans should mirror those contained in RY2022

The Commercial Court also found in favour of the Second, Third and Fourth Defendants regarding (future) capital expenditure. The Second, Third and Fourth Defendants argued that in applying the Reasonable and Prudent Operator standard, an operator would not assume minimal capital expenditure against a background of rising oil and gas prices. The Commercial Court agreed with this in principal but said '*…what expenditures it will be appropriate to include is a matter for judgment (applying the Reasonable and Prudent Operator standard)…*'. Any such dispute should be resolved by the Expert applying the Reasonable and Prudent Operator standard.

The Commercial Court found that whether future market prices of oil and gas products should be included as part of the defined economic conditions dictating '*commercial recoverability*' was also to be determined when applying the Reasonable and Prudent Operator standard. For the Commercial Court, '*in any event on proper analysis this is not a construction issue*.'

Separately, the Commercial Court confirmed that, where the DSA provided for express assumptions to be applied, then those assumptions should be applied and not adjusted without an express basis in the DSA to do so.

Recommendation (c): The modelling added by the Claimant in relation to the effect of inflation on decommissioning costs should be removed

In the view of the Commercial Court, there is no provision in the DSA or Appendix 5 that requires the operator, here Apache, to include either the

decommissioning costs or inflation on decommissioning costs when setting out the economic conditions that Apache assumed when calculating Proved Reserves. It would be absurd to require the Expert to approach the issue in a different way from that which Apache was required to adopt when preparing the original production profiles. The Commercial Court confirmed that life of Field assessment for use when arriving at an estimate for Net Value requires decommissioning costs to be excluded. The Commercial Court determined that inflation on those costs ought only to be a relevant consideration for Apache when calculating RY2023:

1. if so mandated by a provision elsewhere in the DSA to; or
2. if the appropriate to take account of inflation applying the Reasonable and Prudent Operator standard.

Recommendation (d): Tax

For completeness, the Commercial Court was not required to consider the Recommendation relating to the rate of tax as this was agreed between the Parties prior to trial.

Directions of the Court

The Commercial Court directed the parties to use best endeavours to agree directions in terms reflecting the conclusions reached in the decision and in such language that would benefit the parties, the expert the parties have agreed should be appointed to resolve the current dispute, and any experts appointed in the future to resolve similar disputes.

Comment

Standard form Decommissioning Security Agreements developed by OEUK ('**OEUK DSAs**') provide a standardised approach to the provision of security for all parties with potential liability for the costs of decommissioning on the United Kingdom Continental Shelf ('**UKCS**'). These standard forms are widely used, although sometimes with amendments. As the UKCS approaches the end of its operational life, first, the provision of substantial security payments (through the operation of the terms of decommissioning security agreements that increase security as production nears cessation) will dramatically increase, and second, decommissioning liabilities will ultimately be realised. As a result, decommissioning security agreements will take on a more significant status. Clause 4 of the OEUK DSA includes an obligation for the operator to prepare a plan (the '**Proposed Plan**') setting out anticipated decommissioning arrangements and costs, and to provide this to the other parties by a specific date each year. When preparing the Proposed Plan, the operator is required to apply a set of assumptions, contained in Appendix 5 of the OEUK DSA, in its assessment of the constituent elements of the calculation of Decommissioning Costs which in turn determines the amount of security that is to be posted by the current owners. In the absence of bespoke agreement on particular assumptions by the Parties, the assumptions provided in Appendix 5 of the OEUK DSA are the ones used and agreed by the parties.

The OEUK DSA also provides for referral to an expert in similar circumstances to those in this case (although it is worth noting that the specific terms of Clause 11.10, carving out issues of 'interpretation and construction' of the DSA from the expert's jurisdiction, is not part of the OEUK DSA). When including provisions for expert determination, it is important that these are clear to ensure there is little room for ambiguity as to when an expert has jurisdiction to determine a dispute and the precise scope of that jurisdiction.

The OEUK DSA permits approving parties a 60-day window to submit their objections to the plan as drafted, and a further 90-day window to reach amicable resolution with the operator. If no such resolution is reached within that timeframe, and as this case has affirmed, the appropriate next course of action is for the objecting party to refer the matter for expert determination. It is for the expert, applying the requirements set out in the relevant decommissioning security agreement, including (where provided for) applying the Reasonable and Prudent Operator standard, to determine the merits of the proposed plan and, only once this has been submitted, may a party challenge proceedings before the Courts of England and Wales (as is permitted under Clause 15.9 of the OEUK DSA).

It is reported that the matter is subject to an appeal.

Judge: Pelling HHJ.

Chapter 4

Time Bars

Time bars are an important element of a variety of contracts in the oil and gas industry, this year has seen some relevant decisions concerning time bars and limitation periods:

— In *Kajima Construction Europe (UK) Limited & Anor vs Children's Ark Partnership Limited* [2023] EWCA Civ 292, the Court of Appeal clarified the approach to be taken to court proceedings commenced in breach of a tiered dispute resolution procedure due to an approaching limitation period.

— In *Anron Bunkering DMCC v Glencore Energy UK Ltd* [2023] EWHC 295 (Comm), the Commercial Court decided that the period relevant to the time bar for an unjust enrichment claim may begin to run at a date different to termination.

Tiered dispute resolution clauses and limitation periods

In *Kajima Construction Europe (UK) Limited & Anor v Children's Ark Partnership Limited* [2023] EWCA Civ 292, the Court of Appeal decision provided welcome guidance as to the approach to be taken to tiered dispute resolution procedures. As a number of oil and gas model form agreements contain multi-tier dispute provisions, this decision also provides a useful reminder to contracting parties of the importance of clarity and certainty in dispute resolution procedures.

Facts

Children's Ark Partnership Limited ('**CAP**') was engaged by Brighton and Sussex University Hospital NHS Trust (the '**Trust**') to design, build and finance the redevelopment
of the Royal Alexandra Hospital for Sick Children in Brighton (the '**Project Agreement**'). CAP, in turn, engaged Kajima Construction Europe (UK) Limited ('**Kajima**') to design, construct and commission the Hospital (the '**Construction Contract**').

The Project Agreement Dispute Resolution Procedure ('**DRP**') included the following:

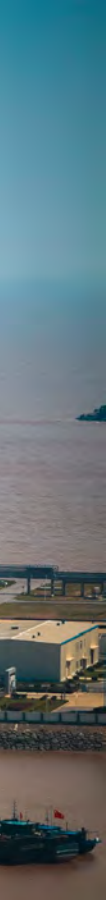
'*Subject to paragraph 2 and 6 of this Schedule, all Disputes shall first be referred to the Liaison Committee for resolution. Any decision of the Liaison Committee shall be final and binding unless the parties otherwise agree.*'

The Liaison Committee was defined, in the Project Agreement, as being comprised of representatives from the Trust and CAP. Further provisions relating to the operation and aims of the Liaison Committee were included in Clause 12 of the Project Agreement.

The DRP in the Construction Contract was, with the exception of the title, identical to the DRP in the Project Agreement. However, the Liaison Committee was defined in the Construction Contract as '*the committee referred to in clause 12…of the Project Agreement*' and the provisions of Clause 12 of the Project Agreement were not carried through into the Construction Contract. With no further clarity offered elsewhere in the drafting, Kajima was, *prima facie*, not entitled to have a representative on the Liaison Committee, even in respect of disputes under the Construction Contract.

In 2019, the parties entered into a Standstill Agreement to allow investigations and works to be carried out in respect of certain fire-stopping defects. The limitation period was subsequently extended on several occasions over the next two years.

Remedial works were ongoing but not complete when Kajima advised CAP that it would not agree to a further extension. Facing the expiry of the limitation period and the possibility of a significant claim from the Trust,



CAP issued Technology and Construction Court ('**TCC**') proceedings against Kajima without first referring the dispute to the Liaison Committee, as per the DRP.

Shortly after filing its claim, CAP applied to stay the proceedings to allow the parties to comply with the DRP. Kajima cross-applied to set aside or strike out the claim on the basis that CAP had failed to comply with the DRP.

Technology and Construction Court ('TCC') Decision

The TCC decided that the DRP was unenforceable due to a lack of clarity but, even if it had been enforceable, it would only have stayed the proceedings rather than strike them out. Striking out would have pushed CAP's claim outside the limitation period and in the TCC's view such result was unwarranted given (i) the reasonableness of the parties' conduct; (ii) the fact that the parties had not simply overlooked the expiry of the limitation period (indeed Kajima was well aware that a claim was likely and had had the opportunity to bring protective proceedings against its own subcontractors); and (iii) the fact that CAP's claim against Kajima could not be quantified until the Trust's claims against CAP were known.

Kajima appealed.

Court of Appeal Decision

The Court of Appeal upheld the TCC's decision that the DRP was unenforceable. The Court of Appeal explained that the reasons for this were that the DRP was not certain enough to be enforceable on its own without further agreements being entered into by the parties. There was no meaningful description of the process to be followed, no contractual commitment to engage in any particular ADR procedure and it was impossible to determine a definable minimum duty of participation from the parties. As such, the Court of Appeal concluded that it was impossible to say when the condition precedent to engage in ADR would have been satisfied. In addition, Kajima itself was not obliged to take part in the process and had no right to do so in any event. It was therefore impossible to see how the process could be said to '*provide a means of resolving disputes or disagreements between the parties amicably*'.

As was the case in *Tang and Another v Grant Thornton International Limited and others* [2012] EWHC 3198 (Ch), it was therefore concluded that the DRP as a whole was too uncertain to be enforceable, because it was unclear what procedure was to be followed. Following the Court of Appeal's conclusion that the DRP was unenforceable, the appeal was dismissed. However, the Court of Appeal went on to discuss whether the case would have been stayed or struck out in any event on a strictly obiter basis.

Is a stay the 'default remedy'?

At first instance, the TCC had described a stay of proceedings as '*the appropriate or default remedy*', but went on to note that it could see no reason why '*the court could not determine that a different form of relief was appropriate having regard to the particular facts.*' On appeal, Lord Justice Coulson (with whom Lord Justice Holroyde agreed) was quick to clarify that:

'*a stay of proceedings is not a default remedy in the sense of an automatic or inevitable relief which the court will grant to A, when B ignores the contractual dispute resolution procedure. The right remedy will always turn on the facts of the case.*'

However, a stay was in his view, the *'usual (as opposed to the inevitable) order that the court will make when proceedings are started in breach of a mandatory contractual dispute resolution mechanism.'*

While agreeing with the overall decision on the facts of this case, Lord Justice Popplewell disagreed with the suggestion that a stay should be the '*usual*' remedy. In his view, everything depended on the facts and, for example, if proceedings had been commenced in breach of an agreed DRP and compliance with the DRP would have provided the defendant with a limitation defence, '*both those factors are important considerations in favour of striking out rather than staying the claim.*'

When might it be appropriate to strike out?

The Court of Appeal agreed with the reasons given by the TCC for staying the proceedings rather than striking them out. The Court of Appeal emphasised the reasonableness of CAP's conduct after being left in a difficult position by Kajima's refusal to extend the standstill agreement whilst the remedial works were still ongoing and the quantum of the Trust's claim was not yet known. In addition, it was noted that the TCC Pre-Action Protocol advises claimants to commence claims that are close to their limitation periods and to then seek a stay from the courts so that they can then comply with any contractual DRP.

Lord Justice Popplewell emphasised that the conclusion to stay the proceedings was based on the assumed need to complete the Liaison Committee process before commencing proceedings. Taking a harder line than the other two Judges, he considered that a mere requirement to commence such a process would have led to a different result in the circumstances of this case:

'*If the condition precedent under consideration in this case were the commencement of the mediation process rather than its completion, I would strongly incline to the view that the appropriate remedy would be to strike out the claim. To do otherwise would be to allow CAP to rely on its breach of contract to deprive Kajima of a limitation defence; and to do so when in the period following*

notification that the Standstill Agreement was not going to be renewed, there was ample time to comply with the condition and no practical obstacle to doing so.'

Comment

This decision, although not originating from a case that is focussed on the oil and gas industry, provides useful guidance for players in this market given that multi-tiered DRPs are commonly found in many model form agreements such as the AIPN 2017 Model Dispute Resolution Agreement, the AIPN Model Joint Operating Agreement, the AIPN Model Form Gas Sales Agreement and the CRINE LOGIC Mobile Drilling Rigs Contract. The key lesson to takeaway for such parties is ensuring that DRPs are drafted with specific, clear, and certain enough provisions to avoid them being voided for uncertainty. The International Bar Association Guidelines should therefore be considered when drafting or reviewing multi-tiered DRPs. These guidelines recommend that:

i) first, the clause should specify a period of time for negotiation or mediation, triggered by a defined and undisputable event (e.g., a written request or notice).

ii) second, the clause should avoid rendering arbitration (if used) permissive, not mandatory.

iii) third, the clause should define the disputes to be submitted to negotiation or mediation and to arbitration or court in identical terms.

The decision of the Court of Appeal in this case also provides valuable appellate guidance as to the approach to be taken where a party commences proceedings in breach of a multi-tiered DRP. As noted in the Court of Appeal's judgment, most cases to date have allowed proceedings to be stayed whilst the dispute resolution procedure is complied with. The Court of Appeal's decision makes clear that this is not a '*default*' rule however and that striking out may be appropriate where the failure to comply with the procedure has deprived the defendant of a limitation defence. In such cases the key question will be whether the claimant has acted reasonably in commencing proceedings out of step with the dispute resolution clause.

High Court Judge: Smith J.

Court of Appeal Judges: Coulson LJ, Holroyde LJ and Popplewell LJ.

Time-bars for reclaiming advance payments

In *Anron Bunkering DMCC v Glencore Energy UK Ltd* [2023] EWHC 295 (Comm), the Commercial Court dismissed an unjust enrichment claim, relating to the sale of gasoline, on the basis that it was time-barred. In reaching this conclusion, the Commercial Court indicated that termination of the underlying contract may not be a necessary ingredient in establishing unjust enrichment. Also, the period relevant to the time-bar for an unjust enrichment claim may begin to run at a date different to termination.

Facts

On 15 July 2015, Glencore Energy UK Ltd ('**Glencore**') and Anron Bunkering DMCC ('**Anron**') entered into a contract for sale of 60,000 m.t. of unleaded gasoline by Glencore to Anron, to be delivered to Hodeida, Yemen (the '**July Contract**'). The parties entered into a second contract on 27 November 2015, under which Glencore agreed to sell two further instalments of 30-35,000 m.t. of unleaded gasoline (the '**First Instalment**' and the '**Second instalment**') to Anron, again for delivery to Hodeida (later varied by the parties to Mukalla, Yemen) (the '**November Contract**').

The delivery of unleaded gasoline agreed in the July Contract was completed in November 2015. With regard to the November Contract, Glencore delivered c. 12,500 m.t. of unleaded gasoline to Anron by 27 April 2016 (the '**Partial First Instalment**'). Following the discharge of the above, Glencore's vessel sailed away with the remaining cargo to Fujairah, UAE, where the cargo was discharged and placed into storage before being sold to a third party pursuant to a contract dated 4 May 2016. The remaining quantity under the November Contract was never delivered by Glencore. In around late December 2015, Anron elected to accept Glencore's repudiation with regard to the Second Instalment of the November Contract.

Between July and November 2015, Anron paid Glencore a total advance payment of USD 48.8m and further USD 3.3m was paid to Glencore in April 2016. In June 2016, Glencore provided Anron with statements of account showing that:

1. An overpayment of a total of USD 8.7m had been made against the July Contract;
2. the overpayment was allocated to the November Contract;
3. in effect, Glencore received a total amount of just under USD 12m against the November Contract;
4. after deducting costs in respect of performance of the First Instalment of the November Contract, a balance of USD 1,957,479.40 remained on Anron's account;
5. the balance has been expunged by various entries in the account; and
6. eventually, the account showed debt of just under USD 750,000 payable to Glencore.

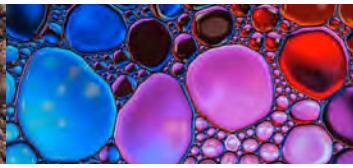
On 6 June 2022, Anron issued the proceedings, claiming (in restitution for unjust enrichment) that amounts have been incorrectly deducted from Anron's account, such that Anron is entitled to recover USD 1,958,219.40.

Glencore issued an application for a summary judgment, arguing that Anron's unjust enrichment claim is time-barred, on the basis that the relevant payments were made, and the alleged non-delivery occurred, more than six years before the claim was issued.

Decision

The Commercial Court considered Anron's claim for unjust enrichment to be '*founded on simple contract*' within the meaning of section 5 of the Limitation Act 1980, such that the relevant limitation period was six years (*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47).

The Commercial Court then confirmed that in claims for recovery of sums that were transferred to another on a basis that subsequently fails, the cause of action accrues when the failure of basis occurs.



In this context, the Commercial Court went on to consider, specifically with regard to the First Instalment of the November Contract, when the failure of basis occurred. The Commercial Court recognised that in *BP Oil International Ltd v Vega Petroleum Ltd* [2021] EWHC 1364 (Comm), [2022] 1 Lloyd's Rep 89, it was indeed found that termination was one of the necessary hurdles to be established in bringing an unjust enrichment claim. However, the Commercial Court agreed with Glencore that this position has been restated in subsequent case of *Dargamo Holdings v Avonwick Holdings* [2021] EWCA Civ 1149, in which the Court of Appeal identified the test as whether '*the state of affairs contemplated as the basis or reason for that payment* [had] *failed to materialise*.'

On that basis, the Commercial Court decided that, in the appropriate circumstances, it may indeed be concluded that the basis failed to materialise even without any party terminating the contract. The Commercial Court considered this case to fall into this category, indicating that the basis failed to materialise when any real possibility of delivery of the remainder of the first instalment of the November Contract had gone; that was on 4 May 2016 (at the latest) when the goods destined for Anron had been sold to a third party. It was, therefore, concluded that from 4 May 2016 Glencore was no longer entitled to hold the advance payments, since the state of affairs contemplated as the basis for such payments (i.e. the delivery of goods) had failed to materialise.

Accordingly, having found that Anron's cause of action in unjust enrichment had arisen by 4 May 2016, the Commercial Court decided that the claim should have been brought by 4 May 2022 at the latest. In this case, as the claim was brought over a month later, the Commercial Court decided that it was time-barred.

Comment

It should be noted that this decision was made in the context of the summary judgment application and that Anron served no evidence in response to the application, nor was it legally represented at the hearing. Against that background, the judgment does not provide any details regarding the sums that were deducted from Anron's account and the circumstances of Glencore's repudiation regarding the second instalment of the November Contract are also unclear.

Notwithstanding the above, two points of interest arise from the Commercial Court's decision:

1. Termination: First, the Commercial Court confirmed that following the Court of Appeal's decision in Dargamo, it is no longer a requirement that the contract in question must be terminated in a sale of goods case before a claim in unjust enrichment can be brought. It has been emphasised that in late delivery cases, it may not be possible to conclude that there is a failure of basis unless the contract is brought to an end, such that the delivery ceases to be a possibility. However, there will be other circumstances where it is clear that 'the basis or reason for…payment [had] failed to materialise' without any party terminating the contract. Once that test is met, advance payments may be reclaimed. That was an important point here, as the overpayments were made under the July Contract that has not been terminated (the November Contract was terminated).
2. Cause of action: Second, the judgment offers an interesting perspective on the question of when the cause of action in unjust enrichment claims begins to accrue. Notwithstanding that Anron: (1) accepted Glencore's repudiation and terminated the November Contract in December 2015, and (2) paid Glencore the sums that included the disputed overpayment in April 2016, the Commercial Court did not consider any of these events the causes of action for Anron's unjust enrichment claim under the July Contract. In fact, in the Commercial Court's view, the cause of action did not occur until later, in May 2016, when Glencore entered into a contract with a third party for the sale of the cargo that was originally destined for Anron under the November Contract. It was a result of this action that it became apparent that the 'basis for payment' had failed to materialise i.e. the delivery of goods under the November Contract to which the overpayment had been reallocated.

It remains to be seen whether similar reasoning will be applied in unjust enrichment cases in the future. In any case, this decision is also a reminder that, to the extent possible, parties should be aware that time-bars may be complex to calculate in overpayment cases where the overpayment has been allocated to a subsequent sale and purchase between the same entities that then fails to materialise. In this context careful consideration should be given to: (1) the commercial implications of not immediately reclaiming an overpayment; and (2) if the sum is not immediately repaid, the correct limitation period for seeking recovery.

Judge: Simon Colton KC (sitting as a Deputy High Court Judge).

CMS Expert Guide to Consequential Loss in the Energy Sector

Although not every jurisdiction recognises 'consequential loss' at law, clauses excluding 'consequential loss' can be encountered in energy contracts in almost every jurisdiction. However, the concept does not necessarily translate with ease across jurisdictions. In fact, the courts in common law jurisdictions are questioning whether the approach traditionally taken in the jurisdictions from where the contract originates is correct.

Against this background, the clear message for all working in the sector is that care must be taken in the approach to the exclusion or inclusion of consequential loss as a part of the risk make-up of the contract in question. Further, when using the words 'consequential loss' it is critical to understand how this might be impacted by the choice of governing law.

To assist practitioners in this sector, the CMS Expert Guide to Consequential Loss provides a summary of the approach to consequential loss in 39 jurisdictions and outlines key trends in this area. The guide answers questions such as:

- Do the words 'consequential loss' have a given meaning in law?
- Are the words 'consequential loss' used in contractual exclusion of liability clauses?
- If so, what meaning is attributed to the words 'consequential loss' in contractual exclusion clauses?
- Where a clause includes other heads of loss alongside 'consequential loss', how will the law approach such clauses?
- Do consequential loss exclusion clauses have an impact on non-damages claims?

'One of Lexology's best read publications by in-house counsel'

Access the guide here:

cms.law/en/int/expert-guides/cms-guide-to-consequential-loss-clauses-in-the-energy-sector

Chapter 5

Protestor Action and Environment

Environmental protestor action has continued over the past year, resulting in the High Court extending existing injunctions or granting new injunctions in respect of persons unknown. Additionally, the Supreme Court dealt with the scope of a private nuisance claim, in an environmental context:

— In *Shell UK Ltd v Persons Unknown (entering or remaining at the Claimant's Site known as Shell Haven, Stanford-Le-Hope) (Rev3)* [2023] EWHC 1229 (KB), Shell was granted an extension and amendment to the injunction previously granted in *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (QB). The High Court's decision shows its willingness to apply flexibility to injunctions of this type.

— In *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) the High Court established that injunctions restricting disruptive environmental protestor actions can be granted on both an interim and final basis against both named and unnamed defendants if they are properly formulated, supported by evidence and are subject to strict requirements for alternative service. The final injunction was granted for a period of five years.

— In *Jalla and Another v Shell International Trading and Shipping Co Ltd and Another* [2023] UKSC 16, the Supreme Court was asked to determine whether there was a continuing private nuisance and a consequent continued course of action in the context of an oil spill. The Supreme Court found that there must be a repeated activity or a continuing state of affairs for which the defendants were responsible for there to be a continuing private nuisance. Whether a continuing nuisance exists or not, will be dependent on the facts of the case.

Revisiting striking a balance between competing rights in interim protestor injunctions

In *Shell UK Ltd v Persons Unknown (entering or remaining at the Claimant's Site known as Shell Haven, Stanford-Le-Hope) (Rev3)* [2023] EWHC 1229 (KB), Shell sought the extension of injunctions, previously granted in May 2022, against 'Persons Unknown' in respect of three of its sites following protest activity. The High Court granted the extensions and also considered the possibility of amendment to the description of 'Persons Unknown' in one of the injunctions, the ability of a non-party to apply to vary or discharge orders under CPR 40.9 and the applicability of s.12(3) of the Human Rights Act 1998 to such injunctions.

Facts

The three sites over which the existing injunctions applied are Shell Haven Oil Refinery (the 'Haven'), Shell Centre Tower in London (the 'Tower') and Shell-branded petrol stations across England and Wales ('Petrol Stations'). An article was included in the CMS Annual Review of developments in English Oil and Gas Law (2022) at page 94 onwards covering the initial application for injunction over the Petrol Stations and setting out the facts in detail.

For the purposes of this article, it is sufficient to understand that, in May 2022, injunctions were sought and attained by Shell, in respect of all three sites, following protests by environmental activists. The injunctions were granted against '*Persons Unknown*' which, in respect of the Petrol Stations' injunction, was defined as follows:

'*Persons Unknown damaging, and/or blocking the use of or access to any Shell petrol station in England and Wales, or to any equipment or infrastructure upon it, by express or implied agreement with others, in connection with environmental protest campaigns with the intention of disrupting the sale or supply of fuel to or from the said station*.'

The specific definition of '*Persons Unknown*' in the Petrol Stations' injunction is relevant as, in this case, Shell sought permission to amend the definition to remove 'environmental'. Shell submitted that the amendment was necessary as recent evidence demonstrated that protests were not necessarily limited to being environmental, highlighting a protest by Fuel Poverty Action at a Shell petrol station in Cambridge.

On 24 April 2023, before the hearing of the applications Ms Jessica Branch, a member of Extinction Rebellion ('**XR**'), served a witness statement and skeleton argument asking to be heard at the hearing for extension of the existing injunctions. The High Court heard Ms Branch's submissions on a provisional basis as

it was necessary to decide whether such submissions would be permitted under Civil Procedure Rule ('**CPR**') 40.9:

'*A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied.*'

Ms Branch's submissions raised issue with the terms of the injunctions which affected her right to peacefully protest due to her concern that she would be in breach of the injunctions simply by participating in protests at a petrol station where the protest could be held to have the intention of disrupting the sale or supply of fuel and therefore fall within the ambit of the injunction. Additionally, Ms Branch's submissions raised concerns regarding s.12(3) of the Human Rights Act 1998 and its application in relation to the wording of the injunctions:

'*No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*'

Decision

Extension of the Injunctions and the HRA 1998

In considering whether to extend the injunctions, the High Court undertook a multi-stage process, first applying the test from *American Cyanamid v Ethicon* [1975] AC 396, and found that there remained a serious question to be tried in respect of all three Shell locations. For the Haven and the Tower, the injunctions were obtained on the basis of '*the Claimant's underlying claim of trespass to their land and private nuisance*'; the High Court found that the position remained as it was when the injunctions were first granted and that there was '*a real and imminent risk of the offending conduct occurring*'. For the Petrol Stations, the injunction was obtained on the basis of '*the tort of conspiracy to injure by unlawful means*'. The High Court agreed with Johnson J for the reasons set out in his judgment (*Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (QB)) that there was a serious issue to be tried on the claim.

The High Court's next consideration was whether damages would be an inadequate remedy for the claimants (Shell) and whether a cross-undertaking in damages would adequately protect the defendants (Persons Unknown). The High Court decided that damages would not be an adequate remedy for the claimants considering the potential sums involved, the difficulty in quantifying and the practicality of obtaining damages. Evidence from Shell confirmed that a cross-undertaking in damages would be provided in the event that it became necessary. The High Court found that such a cross-undertaking in damages would adequately protect the defendants. When considering the balance of convenience, the High Court found that it was in favour of continuing the relief.

The following tests, as applied in *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303, were then considered in relation to all three sites:

'*Is there a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction?*

Do the prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the Claimant's rights?

Are the terms of the injunctions sufficiently clear and precise?

Do the injunctions have clear geographical and temporal limits?

The Defendants having not been identified, are they in principle, capable of being identified and served with the orders?

Are the Defendants identified in the claim forms and the injunctions by reference to their conduct?'

The High Court was satisfied that the above tests, as set out in the *Canada Goose* case, were met and so

turned to three final questions stemming from the Human Rights Act 1998. The High Court found that the interferences, caused by the injunctions, to the defendants' rights of free expression and assembly (Articles 10 and 11, Schedule 1, Human Rights Act 1998) were necessary and proportionate to the need to protect the claimants' rights (over land and to carry on business). Furthermore, the High Court was satisfied that all practicable steps had been taken to notify the defendants (Persons Unknown) pursuant to section 12(2) Human Rights Act 1998 of the application for relief in the form of the injunctions and that the provisions of section 12(3) of the Human Rights Act 1998 concerning restraining '*publication*' did not apply on the facts.

Following the above considerations, the High Court extended the injunctions as sought by the claimants.

Amendment of 'Persons Unknown' definition

As set out above, the claimants sought permission to amend the definition of '*Persons Unknown*' in the Petrol Stations injunction to ensure that non-environmental protests, for example, by Fuel Poverty Action, would be covered by the terms of the injunction with the removal of the word '*environmental*'.

The High Court considered evidence provided by the claimants '*which illustrated the growing trend in recent months of broader interest groups, beyond environmental groups, engaging in protest actions against Shell petrol stations*' and the High Court's powers to amend part of a statement of case under CPR Rule 3.4(2). The High Court was satisfied that the CPR test was met and went on to consider whether the amended injunction should be extended as requested (in accordance with the *Canada Goose* tests highlighted above) in light of the more widely defined group of defendants following the amendment. The High Court was satisfied that these tests were also met.

Non-party submissions under CPR 40.9

When considering whether to permit Ms Branch to make submissions in respect of the extension application, the High Court turned to the '*gateway*' tests set out in *Esso Petroleum Company Limited v Breen and Persons Unknown* [2022] EWHC 1105 (QB) requiring the Court to be satisfied that the individual seeking to be heard under CPR 40.9 was '*(i) 'directly affected' by the injunction; and (ii) had a 'good point' to raise*.'

The High Court found that Ms Branch satisfied the '*direct effect*' test as the injunctions were capable of materially adversely affecting her recognised legal interests, those being, amongst others, Article 10 and 11 rights under the Human Rights Act 1998 to free expression and assembly. On the basis of the evidence of Ms Branch's witness statement and skeleton argument, the High Court also found that Ms Branch had good points to make in respect of all three injunctions and therefore satisfied the '*gateway*' tests.

The High Court also recognised the need for flexibility of approach in such cases with the application of CPR 40.9. In this respect, the High Court agreed with and adopted the approach in *National Highways Limited v Persons Unknown* [2022] EWHC 1105 (QB) where Bennathan J considered it proper for the Court to be flexible in cases '*where orders are sought against unnamed and unknown Defendants and where Convention rights are engaged*.'

Comment

The judicial treatment of an application to amend and extend injunctions from the High Court will be useful to those seeking injunctive relief, extensions of such relief and possibly those who may seek to challenge such orders from the Court.

First, in relation to extensions of injunctions, the High Court helpfully works through and provides comment on the full suite of tests from case law to be met in order for injunctions to be granted and/or extended against persons unknown. It is clear that the Court will carefully consider the specific terms of any injunction requested and whether it is genuinely required, following the established tests. Additionally, whilst finding that Section 12(3) of the Human Rights Act 1998 was not determinative on the facts, the High Court found that it does apply in general in cases concerning protest. As such, those drafting similar injunctions will wish to take into account the impact of human rights law and the restrictions on seeking to restrain publication contrary to s.12(3) of the Human Rights Act 1998.

Second, the High Court's findings in relation to CPR 40.9 and the ability of non-parties to apply to have a judgment or order, such as an injunction, set aside or varied may result in further involvement from environmental groups in hearings which would otherwise be relatively procedural. In particular, the High Court's recognition of the need for '*flexibility*' may encourage further submissions from interested parties.

Finally, the High Court's consideration and granting of permission for the claimants to amend the definition of '*Persons Unknown*' in respect of the Petrol Stations injunction shows that such relief can be relatively agile in the event that new threats come to the fore which were not considered in previously granted injunctive relief.

Judge: Hill J.

The scope of private nuisance in the context of oil spills

In *Jalla and Another v Shell International Trading and Shipping Co Ltd and Another* [2023] UKSC 16, the Supreme Court clarified the scope of the tort of private nuisance in the context of an oil spill. The Supreme Court was asked to determine whether there was a continuing private nuisance and hence a continued cause of action due to the defendants' failure to carry out clean-up operations following the spill. If there was no continuing nuisance, the limitation period would have expired. The Supreme Court held that there was no continuing nuisance in these circumstances as the leak was a one-off isolated event and the claims were therefore time-barred, upholding both the High Court and the Court of Appeal's earlier rulings to that effect.

Facts

The claimants were two Nigerian citizens[1], living and working on the Nigerian coast, who brought a claim against the defendants, Shell International Trading and Shipping Co Ltd ('**STASCO**') and Shell Nigeria Exploration and Production Co Ltd ('**SNEPCO**') for an alleged continuing nuisance in respect of an oil spill causing land and waterway pollution on 20 December 2011, approximately 120km off the coast of Nigeria (the '**Bonga Spill**'). The Bonga Spill was contained within approximately six hours. The alleged damage included fish stock depletion and damage to farmland and drinking water.

The claimants alleged that the Bonga Spill was not properly cleaned up, which was alleged to have caused damage to the shoreline and their livelihoods. Although the defendants disputed these allegations, for the purposes of the appeal, which focused on limitation as a preliminary issue, it was assumed that some oil had reached the shoreline.

[1] Whilst initially the claimants sought to pursue the claims as a representative action (or 'opt-out' claim) under CPR 19.6 on behalf of 27,830 other individuals, by the time the appeal reached the Supreme Court, it had already been determined that the claim was not suitable to proceed as a representative action and therefore there were only two claimants in the proceedings at the Supreme Court stage.

High Court Decision

Having determined without conducting a mini-trial that the date on which the oil reached the shoreline, assuming it did, was within days of 24 December 2011 and that the actionable damage sufficient to trigger the limitation period for the purposes of the claims occurred (for many of the claimants) was before 4 April 2012, the High Court concluded that the claims were likely to be statute-barred for many appellants, unless continuing nuisance could be established.

On the issue of continuing nuisance, the High Court observed that the argument pursued by the claimants was that a fresh cause of action accrues each day against STASCO as damage or interference with the use of land occurs daily so long as proper remediation and clean-up works have not been done.

The claimants sought to rely on *Delaware Mansions Limited and Others v Lord Mayor and Citizens of The City of Westminster* [2001] UKHL 55, which established that the continuous encroachment of tree roots onto the claimants' land causing damage to their property was a continuing nuisance. However, the High Court distinguished this precedent on the basis that it was '*quite different from the 'normal' case where there is a release (be it of water, gas, smells, or other detrimental things) and that release causes damage or interferes with user of land*', in which case '*there is one occurrence of nuisance for which all damages must be claimed at once even if the consequences of the nuisance persist.*'

The High Court considered that the present case fell into the category of 'normal' nuisance and therefore to accept the claimants' argument would '*be a major and unwarranted extension of principle*' of continuing nuisance.

The High Court therefore rejected the argument, concluding that the limitation period should not be extended by reference to the concept of a continuing nuisance. Consequently, the causes of action were to be treated as having accrued when the claimants first suffered sufficient damage for the purposes of a nuisance claim. On that basis, the limitation period may have expired for many claimants.

Court of Appeal Decision

In a unanimous decision, the Court of Appeal upheld the High Court's findings as to continuing nuisance and agreed with its observations regarding the difference from *Delaware Mansions*, adding that in the case of tree roots, the cause of the nuisance was the existence of the tree, and its abatement was the tree's removal, not dealing with the damage it caused to the property. The cause of the nuisance in the present case was the release of the oil, and its abatement was containing the leak, which had been done within hours of its first occurrence. There was no authority for the argument that a one-off, isolated escape, can give rise to a continuing nuisance.

Supreme Court Decision

Lord Burrows delivered a judgment on behalf of a unanimous Supreme Court upholding the judgments of the lower courts, although he noted that the lower courts may have overcomplicated the issue.

The Supreme Court observed that, in general terms, continuing nuisance is where there is a repeated activity by the defendant or an ongoing state of affairs which causes continuing undue interference with the use and enjoyment of the claimant's land. The Supreme Court added that the interference might be similar on each occasion, but the important point was its continuing nature day after day, or on a regular basis. For example, smoke, noise, smells and vibrations if they repeatedly occur on a regular basis.

Having set out the general principles of the tort of continuing nuisance, the Supreme Court then applied them to the circumstances of the case to determine if they amounted to a continuing nuisance. It observed that there was no repeated activity or a continuing state

of affairs for which the defendants were responsible, and which was causing continuing interference since the alleged leak was a one-off isolated event contained within a matter of hours from its occurrence. Unlike the cases where continuous nuisance was found to exist, there was no fresh damage caused by the alleged leak on an ongoing basis. The Supreme Court pointed out that treating the continuing presence of oil on the claimants' land as an ongoing state of affairs and therefore as continuing nuisance would undermine the law of limitation, as a cause of action would occur each day for an indefinite period of time until the clean-up was performed. This would be undesirable because the law of limitation serves important policy principles. Further, accepting the claimants' arguments would serve to convert the tort of private nuisance into a failure by the defendant to restore their land. Finally, that would produce difficulties in assessing damages.

After dismissing the claimants' arguments on continuing nuisance, the Supreme Court also addressed some arguments made by the defendants to the effect that, in any event, there could be no continuing nuisance if the defendant had lost control over the source of the nuisance and therefore had no ability to prevent it. Rejecting those arguments, it restated the general principle that the creator of a nuisance can always be sued if they had control of the land at the time the nuisance was created, irrespective of a subsequent change of ownership or loss of control.

Finally, the Supreme Court refused to give permission to cross-appeal to the defendants on the issue of whether private nuisance can be committed where it emanates from the sea and be based on a one-off event. While the Supreme Court had agreed to hear arguments on those points, it was not necessary for it to determine them given its findings on continuing nuisance, and in any event, the defendants should have sought permission to cross-appeal the first instance judgment if they wanted to advance those arguments at the appellate phase. The Supreme Court, therefore, did not dispose of these issues, allowing the defendants to raise them in the event that there was ever a full trial of the full facts.

Comment

The Supreme Court judgment provides a helpful clarification of the scope of the tort of continuing nuisance in the context of an oil spill. Defendants that face potential lawsuits in respect of historic spills occurring many years ago may be reassured to know that they are protected from an action in private nuisance by the law of limitation.

Beyond the limitation issues, the clarification by the Supreme Court that a continuing nuisance requires an activity that is repeated or an ongoing state of affairs which causes undue interference on a regular basis is helpful concerning similar cases involving one-off spills of liquids. However, the case law summarised by Lord Burrows in the judgment illustrates that whether or not a continuing nuisance will be found to exist in other cases would be heavily facts-dependent, and that the general principles the Supreme Court formulated might not lead ~to readily predictable outcomes.

The Supreme Court did not express any views on whether an oil spill from the sea could constitute a private nuisance, the Supreme Court only expressed views as to whether failing to perform clean-up operations amounts to a continuous nuisance. As such, a key issue remains open for decision at a later stage.

High Court Judge: Stuart-Smith J.

Court of Appeal Judges: Lewison LJ, Newey LJ and Coulson LJ.

Supreme Court Judges: Lord Reed, Lord Briggs, Lord Kitchin, Lord Sales, Lord Burrows.

Injunction restricting disruptive environmental protest actions

In *Transport for London v Persons Unknown* [2023] EWHC 1038 (KB) the High Court handed down a final injunction restricting certain protestor actions. This decision demonstrates that injunctions of this nature, if properly formulated and supported by evidence, can be granted both on an interim and final basis and against both named and unnamed defendants subject to complying with strict requirements for alternative service.

Facts

The claimant, Transport for London ('**TfL**'), is a statutory corporation created by the Greater London Authority Act 1999. It is both the highway authority and the traffic authority for the certain relevant roads.

The decision concerned an application by Transport for London ('**TfL**') for a final injunction in claims initially raised by TfL in October and November 2021 for trespass, public nuisance and private nuisance, in the face of direct protest activity by the campaign group Insulate Britain ('**IB**') blocking key roads in the London area. The final injunction was sought against 129 named defendants and certain 'Persons Unknown', all of whom were connected with IB. TfL asked the High Court to make a final order preventing the defendants from blocking, for the purpose of protests, roads and surrounding areas at 34 specifically identified locations, referred to as '*IB Roads*'. The IB Roads are an important part of London's traffic network and handle a significant proportion of London's traffic, which makes them targets for protests, and interim orders against the protest activity had previously been granted.

It is important to note that at the date of the hearing, the Public Order Act 2023 was not in force, therefore this judgment makes no reference to it.

The Issues

The judgment considered the following issues in deciding whether to grant the final injunction:

1. Whether the claimant's rights would be infringed by the defendants' actions;
2. whether there is a strong probability that the defendants would immediately act to infringe the claimants' rights;
3. if yes, whether the ensuing harm would be so grave and irreparable that damages would be an inadequate remedy; and
4. whether the grant of a final anticipatory prohibitory injunction would be contrary to Article 10 (Freedom of Expression) and Article 11 (Freedom of Assembly) of the European Convention on Human Rights ('**ECHR**').

Decision

The High Court found in favour of TfL in relation to all of the above points and granted the final injunctions as requested. The detailed reasonings is explained below.

1. On the first issue, TfL argued that its rights would be infringed as the defendants intended to commit trespass, public nuisance and/or private nuisance. The High Court was satisfied that all of these torts would be committed in the protests typically staged by IB. This finding, however, does not automatically mean that the protests would be unlawful – that point must be considered by reference to Articles 10 and 11 of the ECHR.
2. The High Court was satisfied on the evidence that there was a 'real and imminent' risk of further protests. IB had repeatedly said they would continue to protest and would not be discouraged by injunctions.
3. The High Court considered evidence of past protests in assessing the ensuing harm. It was satisfied that the deliberate blocking of roads so that vehicles of all types cannot pass would cause serious disruption to many people, risk to life and of violence, economic harm, nuisance and the diversion of public resources. It was held that damages would be an inadequate remedy because: (1) much of it would be unquantifiable; (2) TfL would not be able to recover for losses sustained by others; and (3) the defendants would be unlikely to be able to pay such damages as might be quantifiable.
4. In discussing whether the injunctions infringe rights contained in Articles 10 and 11 of the ECHR, the High Court gave detailed consideration to the difficult balancing exercise required. The High Court found that the balance fell in favour of TfL in this instance – although granting the injunction did interfere with the ECHR rights, the power contained in section 37 of the Senior Courts Act 1981 (which is the basis on which the High Court may grant an injunction where it considers it is just and convenient to do so), the case law which governs the exercise of that power and TfL's duties as a highway and traffic authority under section 130 of the Highways Act 1980 should be exercised in order to protect the rights and freedoms of others, such as other lawful highway users.
5. The High Court also found in this instance that the interference with the ECHR rights was 'necessary in a democratic society' so that a fair balance was struck, taking account of the requirements of

freedom of expression and freedom of assembly and that there was no less restrictive alternative available. The protestors were still able to express their views at different locations and using different means.

6. With regard to Persons Unknown there was a discussion about whether an individual who was unknown and unidentified at the time a final order was granted (referred to as a 'newcomer') could be bound by the terms of a final injunction. The High Court found that they could be bound, where they have knowledge of the terms and where those terms are clear and precise in identifying the Persons Unknown, the prohibited activities and the geographical location to which those apply.
7. TfL were required to take further steps by way of alternative service to ensure the final injunction was widely publicised, including posting on their Twitter feed, notifying the Press Association and placing a notice in the London Gazette.
8. Accordingly, the Court granted a final injunction for a term of five years subject to yearly reviews for supervisory purposes.

Comment

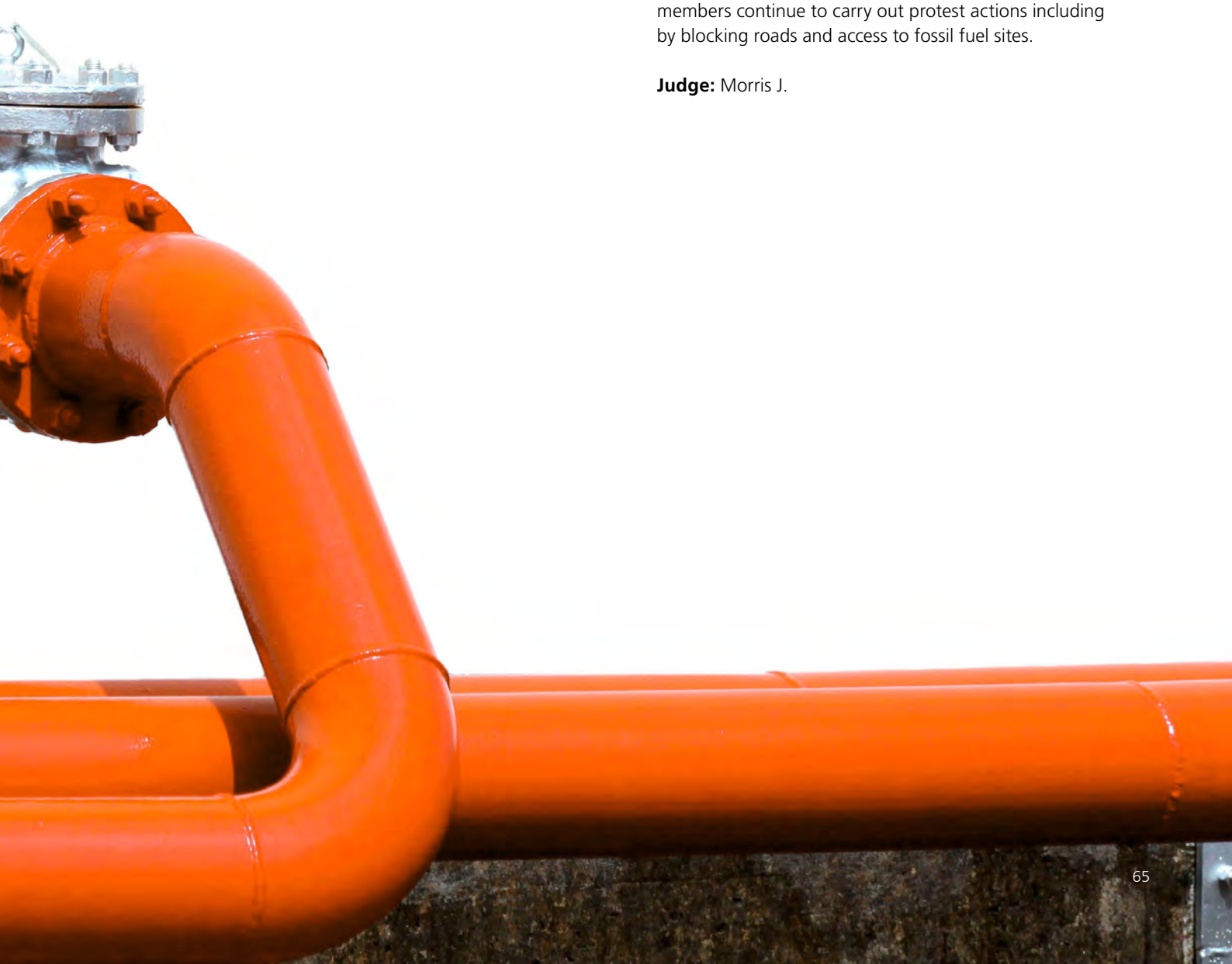
There has been some doubt whether claims of this nature should be progressed procedurally to a final hearing or whether they are more appropriately continued on an interim basis, given issues in relation to identifying and giving defendants the right to challenge. This judgment is helpful in confirming that, in the right circumstances, the court will grant a final order to prevent significant disruptions such as traffic-blocking protests which are considered to be harmful to the public and such activities are not protected by human rights legislation.

Given the annual supervisory review which the High Court has included in its order, in practice there may be little difference between the effect of this order and annually reviewed interim orders, which has been the approach taken in other cases. See for example, the case of *Shell UK v Persons Unknown (entering or remaining at the claimant's site*) (rev 2) [2023] EWHC 1229, also covered in this Annual Review.

It may be argued that such a distinction in the orders concerning Shell and TfL's applications exists due to the policy consideration of protecting the public's rights and those of a public transport provider, with a final injunction period of 5 years consequently affording more certainty to the public compared to extending annually reviewed interim orders. Nevertheless, the delicate balancing act between imposing sufficient sanctions and upholding the consideration of civil rights is a key consideration in both cases, with yearly reviews being imposed regardless of the injunction's duration or status.

It remains to be seen what impact the new police powers created by the Public Order Act 2023 will have and the interplay between those criminal sanctions and the use of civil rights as a deterrent to protect private and public rights. It is clear that the injunctive relief provided in this case and others has some practical effect in deterring the disruptive behaviour displayed by IB. However, it is increasingly apparent that these judicial orders may not be sufficient to deter other protest groups such as Just Stop Oil and This Is Rigged, whose members continue to carry out protest actions including by blocking roads and access to fossil fuel sites.

Judge: Morris J.



Chapter 6

Assignment, Novation and Contracts

Assignments, novations and heads of terms are core industry legal documents. This year, decisions of the Courts illuminate important aspects of all three:

— In *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2022] EWHC 3287 (Comm) the Commercial Court clarified the position regarding involuntary assignments, raised questions in relation to subrogation which goes beyond an insurance context and highlighted the importance of the text when considering anti-assignment clauses.

— In *SRB Civil Engineering UK Limited v Ramboll UK Limited* [2022] (CSOH) 93 the Court of Session extended the '*no greater loss*' rule previously established in construction cases.

— In *Pretoria Energy Company (Chittering) Limited v Blankney Estates Limited* [2023] EWCA Civ 482 the Court of Appeal considered the extent to which 'heads of terms' can be binding on parties.

Effect of Anti-assignment Clauses and Transfers to Insurers

In *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2022] EWHC 3287 (Comm) the Commercial Court considered a contractual prohibition against assignment and whether this applied to an assignment of rights to an insurer under the assignor's insurance policy. The decision raises questions on the effect of prohibitions against assignment generally, the concept of involuntary assignments (including assignments by operation of law), and the impact of anti-assignment clauses on a transfer of rights to an insurer. Although not an oil and gas case, it has direct relevance to the industry.

Facts

Dassault Aviation SA ('**Dassault**') and Mitsui Dussan Aerospace Co Ltd ('**MBA**') entered into an agreement for the manufacturing and sale by Dassault to MBA of two aircrafts and related supplies (the '**Sale Contract**'). The Sale Contract contained a prohibition on assignment:

'*…this Contract shall not be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever, without the prior written consent of the other Party and any such assignment, transfer or attempt to assign or transfer any interest or right hereunder shall be null and void without the prior written consent of the other Party…*'

Dassault was in breach of the Sale Contract due to the late delivery of the two aircrafts, giving rise to a claim by MBA for damages. MBA decided not to pursue a claim against Dassault for damages, as it had obtained insurance cover with Mitsui Sumitomo Insurance Co.

('**MSI**'), including cover for late delivery. This insurance policy was governed by Japanese law. The claim by MBA under the insurance policy for late delivery was accepted and paid by MSI.

It is a principle of Japanese insurance law that an insurer who has made an 'insurance proceeds payment' shall, by operation of law, have *assigned* to it the right to recover such costs against third parties relating to the claim as the assured would have. Having paid out on the insurance claim to MBA, MSI commenced International Chamber of Commerce ('**ICC**') arbitration proceedings against Dassault to recover the cost.

Dassault challenged the jurisdiction of the arbitral tribunal on the grounds that the contractual prohibition on assignment in the Sale Contract made any assignment to MSI ineffective. The jurisdictional challenge by Dassault failed before the arbitrators (who included Lord Collins). Dassault brought a claim to the Commercial Court under s.67 of the Arbitration Act 1996 to review the decision of the arbitral tribunal.

Decision

The Commercial Court bore in mind the well-established principle that '*an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights*' (Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 108).

The Commercial Court decided that the assignment to MSI was ineffective and, as such, the arbitral tribunal did not have jurisdiction to hear the dispute.

In making its decision, the Commercial Court considered the construction of the contractual prohibition of assignment in the Sale Contract. This involved two key questions: (i) whether the prohibition on assignment applied to automatic and involuntary assignments; and (ii) whether an assignment of rights to an insurer is akin to a subrogation. There was also a potential question of public policy.

Automatic and involuntary assignments

In its analysis, the Commercial Court was clear that a contractual prohibition on assignment would not apply to a truly involuntary assignment. Dassault contended that the assignment to MSI was not involuntary as it was a direct result of voluntary actions by MBA, including taking out the insurance policy with MSI and/or making a claim to MSI under the policy for the late delivery of the aircrafts.

The Commercial Court's view was that the contractual prohibition contained in the Sale Contract would be applicable to assignments, whether such assignment occurred by operation of law or not, if it was caused by a voluntary act.

Cockerill J noted that '[i]t *was … in the power of MBA to comply with the provision. It chose – acted voluntarily or consented – to take a step which on a certain contingency would put it in breach of that provision*.' In effect, MBA chose not to prevent the transfer and, as such, Dassault's contention was correct; the assignment was caused by a voluntary act and so was not covered by the '*involuntary*' safe harbour.

Subrogation

The Commercial Court then considered this view within the broader context of an assignment to an insurer being 'akin' to a subrogation. MSI contented that it would have been able to bring a subrogated claim in MBA's name had Japanese law provided for subrogation and, as such, the contractual prohibition on assignment should not prevent an assignment to an insurer akin to a subrogation.

The Commercial Court accepted the force of MSI's argument, finding an instinctive difficulty with saying that subrogation under English law is acceptable, whereas the subrogation equivalent of another legal system is not.

However, ultimately, the Commercial Court concluded that this was insufficient to displace the effect of the wording of the contractual prohibition in the Sale Contract, namely, to prohibit any assignment without the consent of MBA.

Public Policy
As a fall-back position, MSI argued that the assignment clause should not apply to insurance at all (even for voluntary assignments). The argument was that English contract law took the view that it was sensible for parties to seek insurance and that applying a no assignment clause to transfers to insurers would have the effect of limiting access to the insurance market. This was given short shrift by the Commercial Court, which held that it was fairly plain that one could not imply into the clause a blanket exception for insurance – both because it would be contrary to the express words of the contract and because it would fail the business efficacy test (insurance was not necessary, the relevant party could, via the terms of the contract, seek consent, and it was possible to contract out of transfer under Japanese law).

Comment

Clarification Provided
The Commercial Court admitted to reaching its conclusion '*with an unusual degree of hesitation*' and it was certainly the case that the authorities established no clearly applicable principle (it may be the first case to have considered the area in nearly 100 years).

What the authorities did do was delineate a distinction between willing/voluntary and unwilling/involuntary transfers (subject to any refinements required by wording, commercial purpose or context). There was room to argue about exactly where that line would be placed.

The decision clarifies that where a transfer takes place at law in apparent breach of an anti-assignment clause, the emphasis is not on the mechanism of the transfer ('*by operation of law*' is not in and of itself the end of the analysis), but rather whether there is a sufficient '*degree*' or '*taint*' of voluntariness in the transfer (and there were indications in the case law that any '*degree*' or '*taint*' of voluntariness could be caught by an anti-assignment clause).

Subrogation
The subrogation issues raised in the case will be of relevance beyond the context of insurance. For example, under English law, a surety who discharges the obligations of a debtor will take over the creditor's rights.

The decision may be seen as casting doubt on an area many may have thought was settled and uncontroversial. The decision will present a problem for insurance policies governed by laws that require a transfer of rights to an insurer after a pay-out, as opposed to a subrogation of those rights.

Nor is subrogation itself left unscathed: there remains a question of whether it could ever be caught by an anti-assignment clause. The Commercial Court noted that there may be circumstances where subrogation could be caught, particularly where the subrogation permitted an insurer to pursue claims in the name of the insured (especially where confidentiality is important).

Academically, Professor Goode in *Contractual Prohibitions Against Assignment* [2009] LMCLQ 300, only went so far as to say that '*prima facie*' an anti-assignment clause was limited to contractual assignments and would not encompass rights of subrogation.

Whether subrogation and assignment are '*always*' distinct is also questionable. For example, Lord Hoffmann once said: '*it is customary for the assured, on payment of the loss, to provide the insurer with a letter of subrogation,* ***being no more nor less than an express assignment*** *of his rights of recovery against any third party.*' (*Banque Financière de la Cite SA v Parc (Battersea) Ltd* [1999] 1 AC 221, 231F-G) (emphasis added).

The Continuing Importance of the Text of the Anti-Assignment Clause
Ultimately, the nature of assignment or subrogation was seen by the Commercial Court as relevant to establishing whether the anti-assignment clause was engaged. That must be considered alongside the actual text of the clause in question:

'*…the right course is to give effect to the contractual wording and not strain to reach a result which is essentially one of public policy – and which does in truth rewrite the parties' agreement.*'

Therefore, the case provides the familiar lesson on 'boilerplate' clauses – there is no such thing!

Careful thought should be given to the impact of anti-assignment clauses in the context of the business model (including insurance and/or financing) relevant to the parties.

Judge: Cockerill J.

Time for transition: Energy M&A 2023

As the world seeks to balance energy security and affordability with the broadly agreed imperative to address carbon emissions, this report seeks to provide a timely update on how major oil and gas companies are navigating the energy transition based on an analysis of their published data.

This report illuminates how oil and gas majors across three key regions – Europe, North America, and Asia – are responding to the ongoing transition. We see growing alignment around net zero emissions targets for 2050, aggressive methane reduction goals, and more standardised sustainability reporting frameworks. However, companies are pursuing quite differentiated strategies based on their specific geographic and policy contexts, shareholder pressures, and existing asset bases.

Access the guide here:

https://cms.law/en/int/publication/energy-transition

Novation agreements and no loss arguments

In *SRB Civil Engineering UK Limited v Ramboll UK Limited* [2022] (CSOH) 93, the Scottish Court of Session considered 'no loss' arguments made by a consultant arising from the novation of an upstream construction contract. In rejecting the consultant's arguments, the Court of Session appears to have extended principles developed in cases dealing with assignments in connection with the sale of defective buildings. The Court of Session's decision highlights the complex issues that can arise in relation to novation agreements and should encourage parties to address these issues directly through careful drafting and well-structured transactions.

Facts

SRB Civil Engineering Limited ('**SRB**') entered into a Design and Build Agreement (the '**DBA**') with the Scottish Ministers in July 2011 for the design and construction of upgrade works to Junction 1A of the M9. SRB appointed Ramboll to provide design services in relation to the DBA (the '**Ramboll Contract**'). Pursuant to a company reorganisation, it was determined that a related company ('**SRB UK**') should take over SRB's role as contractor under the DBA. A novation agreement was entered into on 12 July and 7 November 2013 by SRB, SRB UK and the Scottish Ministers (the '**Novation Agreement**'). As part of this agreement, the Scottish Ministers released SRB from any further performance of the DBA. The Novation Agreement also absolved SRB from liability for prior breaches in the following terms:

'All rights of action and remedies under or pursuant to the [DBA] vested in [Scottish Ministers] will from the last date of execution of this novation agreement lie against [SRB UK] and not [SRB].'

Meanwhile, in August 2013, defects were found in the pavement of the motorway' which formed part of the works and which SRB/SRB UK attributed to breaches by Ramboll under the Ramboll Contract. SRB assigned its rights under the Ramboll Contract to SRB UK in July 2018 so that SRB UK could be compensated by Ramboll in relation to its liability to the Scottish Ministers in respect of these defects.

SRB UK subsequently brought proceedings against Ramboll for alleged breaches of the Ramboll Contract and breaches of delictual duty (known as tortious duty in England). Ramboll submitted that the action should be dismissed. It claimed that SRB's obligations under the DBA had been extinguished as a result of the Novation Agreement – therefore, any loss which SRB may have suffered was avoided and, as assignee, SRB UK could not recover any greater loss than SRB could recover.

Decision

The Court of Session did not accept that the legal effect of the Novation Agreement was merely to extinguish the obligations and liabilities of SRB to the Scottish Ministers. Instead, it held that such obligations and liabilities were '*transferred*' to SRB UK. Had SRB's liability merely been extinguished by the Novation Agreement, the Court of Session considered that Ramboll's 'no loss' arguments would have had force. However:

'*That is not what happened here. …* [SRB's] *obligations to Scottish Ministers were replaced by* [SRB UK's] *obligations to Scottish Ministers. The effect of the Novation Agreement is that* [SRB UK] *became liable to the Scottish Ministers to make good the Scottish Minister's loss from the start of Design and Build Agreement.*'

Comment

The right to claim damages for breach of contract is ordinarily assignable under English and Scots law – subject to any provisions in the contract to the contrary. It is a generally accepted principle that pursuant to such assignments (or '*assignations*' in terms of Scots law) the assignee takes the claim subject to any defences that exist as between the assignor and the contract-breaker and, as such, the assignee is unable to claim for more than the original assignor could have claimed. The assignee cannot, for example, claim extra losses which arise from its own circumstances and which would not have been suffered by the assignor. We refer to this as the 'no greater loss rule'.

In a construction context, the 'no greater loss' rule has caused difficulties where a defective property is sold to a third-party for full market value with an assignment of rights under the building contract agreed either before or after the discovery of defects by the purchaser. In such cases, it was argued that the assignee purchaser could not claim against the contractor for the defects because the original employer had received full market value and had therefore suffered no loss (the assignee being limited to the amount claimable by the assignor). As a result of these arguments, a slightly modified form of the 'no greater loss' rule has been in building cases – that the assignee could have recovered if there had been no assignment and if the building had not been transferred to the assignee (*Technotrade Ltd v Larkstore Ltd* [2006] EWCA Civ 1079).

The application of the above principles to novation scenarios was highlighted in a Scottish case decided in 2001 – *Blyth & Blyth Ltd v Carillion Construction Ltd* [2002] SLT 961. Carillion was the design and build contractor for a leisure development and agreed to accept a novation of an engineer's appointment between the employer and Blyth & Blyth. Carillion subsequently claimed against Blyth & Blyth in relation to tender documentation the latter had prepared for the employer prior to Carillion's involvement. Carillion claimed that the tender documentation had underestimated the scope and quantity of the work required and had caused Carillion to undervalue the works.

Carillion relied on broad wording in the novation agreement which stated that Blyth & Blyth's liability under its appointment '*whether accruing before or after the date of this Novation shall be to* [Carillion]', and that any services performed by Blyth & Blyth prior to the novation, '*will be treated as services performed for … [Carillion] and [Blyth & Blyth] agrees to be liable to [Carillion] in respect of all such services and in respect of any breach of the Appointment occurring before the date of this Novation as if the [Carillion] had always been named as a party to the Appointment in place of the Employer.*'

The Court of Session considered this wording to be insufficient to give Carillion a claim against Blyth & Blyth for its own losses in relation to pre-novation breaches of the appointment. In the Court of Session's opinion, the novation operated in a similar way to an assignment so that the 'no greater loss' rule applied and Blyth & Blyth's liability in relation to pre-novation breaches was limited by the amount of loss suffered by the employer. As the employer had not suffered any loss as a result of the alleged breaches – indeed, it could only have benefited from Carillion's undervaluation of the works – Carillion was unable to make good its claim.

The decision in *Blyth & Blyth* has been criticised by legal commentators, but has largely been addressed through improvements to the drafting of novation agreements to make clear that the contractor is entitled to recover its own losses in respect of pre-novation breaches by the consultant.

The arguments made by Ramboll in this case bear some similarity to those made in the sale of property cases noted in the introduction, where the seller/assignor had received full market value for the property and was therefore said to have suffered no loss. In the present case, it is a building contract which has been transferred by way of a novation agreement and the releases given to the assignor as part of that novation agreement have resulted in it being absolved from liability and no longer having a loss to pass down to Ramboll. Broadly speaking, therefore, it is the overall transaction which in both scenarios resulted in the removal of the

assignor's loss. It appears that the Court of Session has sought to achieve the same result which applies in the sale of property cases, effectively by asking whether SRB as assignor would have suffered the loss claimed for had it not assigned its claim to SRB UK and had it not entered into the Novation Agreement.

Despite these similarities in outcome, the approach in the present case marks a significant extension of the 'no greater loss' rule established in previous cases. As Ramboll noted, SRB and SRB UK had voluntarily entered into the Novation Agreement with a view to absolving SRB of liability under the DBA. Ramboll had not been consulted in relation to the Novation Agreement and had not agreed to be liable to SRB UK. Whether these objections are properly overcome by the Court of Session's more transactional approach to the 'no greater loss' rule remains to be seen.

The present case also highlights the importance of properly considering the impact of a novation on associated contracts and liabilities. Based on the facts of the case, there appear to be some practical steps the parties could have taken to avoid argument:

— The Ramboll Contract could have been novated to SRB UK at the same time as the novation of the DBA. This would have ensured there was no question as to whom Ramboll owed their obligations under the Ramboll Contract.

— Contemporaneously with the novation of the DBA, SRB UK could have requested Ramboll provide them with a collateral warranty for their services under the Ramboll Contract. This would have established a clear contractual link between SRB UK and Ramboll.

— It may also have been helpful for the assignation of SRB's rights under the Ramboll Contract to have been made at the same time as the novation of the DBA. Although this would not necessarily have changed Ramboll's position in terms of its response to the proceedings, the timing gap in this case between novation and assignation would not be considered standard practice in analogous circumstances and is more likely to provoke a challenge.

Judge: Lord Ericht.

Lockout Agreement or Final Agreement?

Introduction

In *Pretoria Energy Company (Chittering) Limited v Blankney Estates Limited* [2023] EWCA Civ 482, the Court of Appeal considered whether a signed document marked 'Heads of Terms' but not marked 'subject to contract' constituted a binding contract. Such documents are widely used in the oil and gas industry, therefore the approach of the Court of Appeal will be interesting to those drafting such documents.

Facts

The respondent, Blankney Estates Limited ('**Blankney**') owned some unused land at Heath Farm in Lincolnshire (the '**Site**'). Blankney was put in touch with Pretoria Energy Company (Chittering) Ltd ('**Pretoria**'), which needed a site for an anaerobic digestion plant (the '**Plant**').

Following initial email discussions and a written proposal, a final document described as 'Heads of Terms of Proposed Agreement' was signed on 27 November 2013 (the '**Heads of Terms**'). Clause 1 of the Heads of Terms was headed 'Lease' and provided:

'*This is based upon a bare land site, known as the Flax Factory.*

The lease term is for a period of 25 years. It is agreed that the lease will be outside of the 1954 act.

The lease value is GBP 150,000 per annum payable on quarter days with an annual review based on RPI.

Both parties recognise that the lease will need to make suitable arrangements for rolling forward or decommissioning of the lessees' assets remaining on site at the termination date.

The lease will be filed with the Land Registry and therefore will require the appropriate consents and easements.'

The final clause provided:

'These Heads of Terms of Agreement are agreed and signed on the understanding that the formal agreement will be drawn up within 1 month from planning consent being achieved and subject to the consents and easements being obtained. Furthermore, it is agreed that Blankney Estates and Pretoria Energy recognise that the arrangements being negotiated are exclusive to both parties until the 31 July 2014 and thereby agree not to enter into negotiations with third parties to the detriment of the terms contained herein.' (the **'Lockout Provision'**).

Despite planning permission being granted in relation to the Plant and various licences being granted over neighbouring fields, progress slowed. On the expiry of the Lockout Provision, Blankney contacted Pretoria with a view to replacing the Lockout Provision with a new one. However, Blankney lost confidence in Pretoria's commitment and concluded arrangements with a third-party on 24 November 2014.

The Claims

Pretoria accused Blankney of breach of contract, contending that the Heads of Terms was a binding contract pursuant to which a 25-year lease of the Site was agreed. Accordingly, Pretoria argued that Blankney had repudiated the Heads of Terms in September 2014 and Blankney were liable for damages.

Blankney defended the claims, stating that only the Lockout Provision was binding and enforceable.

High Court Decision

At first instance, Joanne Wicks KC, sitting as a deputy High Court judge, held that the parties had not entered into a binding agreement for a lease.

Court of Appeal Decision

The Court of Appeal upheld the High Court's decision and dismissed the application. In doing so, the Court of Appeal agreed to an objective assessment of the Heads of Terms.

The existence of a binding contract for a 25-year lease was incompatible with the limited period of the Lockout Provision. The Lockout Provision plainly contemplated that the parties would be free to negotiate with third parties after the expiry of that period. Although, Pretoria argued that Clause 1 was '*redolent of agreement having been reached on the core terms*' in contrast to the more tentative language used elsewhere. Those words did not begin to answer the substance of the Lockout Provision point: if there was a binding agreement for lease for 25 years, what was the point of the time-limited lock out agreement? The clear purpose of the lock out agreement was that once it expired either party would be free to negotiate with others.

The absence of the phrase 'subject to contract' in the Heads of Terms was not conclusive as to whether there was a final agreement. The Court of Appeal found that it was of considerable significance that the parties had referred to a formal lease being drawn up in the Heads of Terms.

Comment

Heads of terms are widely used in the oil and gas industry. Although the words 'heads of terms' are commonly stated, there is no settled consequence of using those words. For example, heads of terms may be agreed where:

1. the parties are seeking to enter into an arrangement that has no legal force or effect;
2. the parties are seeking to enter into a temporary arrangement that may have a time limited legal force and effect pending the negotiation of a fully termed agreement; or
3. the parties intend the document to have full contractual force and effect.

Further it is also possible that parties may wish some clauses in a 'heads of terms' to have legal force and effect (e.g., confidentiality, lockout agreements), but not others.

Whether there is a binding contract between the parties and, if so, upon what terms, depends upon what they have agreed. It does not depend upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded, or the law requires, as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement (Lord Clark in *RTS Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753 at [45]). Where there is a written heads of terms, the correct approach is to construe the text of the document against the relevant factual matrix.

Lockout agreements are commonly used in the industry. Although the meaning of each heads of terms will turn on its own provisions, there is a logic that the agreement of a lockout period will generally mean that once that period has expired the parties cease to be bound by (at least some) of the terms.

Further, where there is no intention to create legal relations, the inclusion of the words 'subject to contract' may help to avoid disagreements, but it is not conclusive as to whether a document is intended to be legally binding or not.

High Court Judge: Joanna Wicks KC (sitting as a Deputy Judge of the High Court).

Court of Appeal Judges: Lewison LJ, Arnold LJ, Birss LJ.

Chapter 7

Commodity Sales

Since last year's Annual Review there have been a number of significant cases relevant to commodities and sales, including in relation to the operation of force majeure clauses and amendments to model form contracts:

— In *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406 the Court of Appeal overturned the Commercial Court's judgment and found that a 'reasonable endeavours' obligation in a force majeure clause could require a party to overcome a state of affairs which would otherwise constitute a force majeure event by accepting alternative, or non-contractual, performance.

— In *Trafigura PTE Ltd v TKK Shipping Plc Limited (Rev1)* [2023] EWHC 26 the Commercial Court considered an interesting point of law that relates to the true construction and application of Article IV(5)(a) of the Hague-Visby Rules which limits the carrier's liability to a sum based upon the weight of the 'goods lost or damaged'. The issue being what was meant by '*goods lost or damaged*'.

— In *Glencore Energy UK Ltd v NIS JSC Novi Sad* [2023] EWHC 370 (Comm) the Commercial Court decided that a failure to complete 'good faith' negotiations required under a settlement agreement did not permit a party to reopen the underlying claim – rather it entitled it to a potentially lesser sum calculated in accordance with criteria set out in the settlement agreement.

Oil, gas and commodities: Force majeure

In *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406 the Court of Appeal overturned the Commercial Court's decision and found that a 'reasonable endeavours' obligation in a force majeure clause could require a party to overcome a state of affairs which would otherwise constitute a force majeure event by accepting alternative, or non-contractual, performance.

Facts

An article was included in the CMS Annual Review of developments in English oil and gas law (2022 Edition) at page 78 onwards which sets out the facts of the underlying dispute in greater detail. An abridged summary of the facts is reproduced here.

The dispute concerned a contract of affreightment (the '**COA**') between MUR Shipping BV ('**MUR**') (as the '**Owner**') and RTI Ltd ('**RTI**') (as the '**Charterer**'), for the shipment of around 280,000 metric tons of bauxite from Guinea to Ukraine per month.

In April 2018, RTI's Russian parent company was sanctioned by the US Department of the Treasury's Office of Foreign Assets Control. This led MUR to state that it would be a breach of the sanctions to continue with the performance of the COA, noting that the '*sanctions will prevent dollar payments, which are required under the COA*.' MUR therefore invoked the force majeure Clause in the COA.

RTI argued that there was no force majeure event and that the sanctions were not relevant as: (i) MUR was a Dutch company and so it would not be caught by US sanctions as it was not a US entity, and (ii) payments could be made in Euros instead (with RTI covering any associated currency charges).

MUR would not nominate ships under the COA, arguing that it was an express term of the COA that payments were to be made in US Dollars and so the COA could not be performed.

RTI commenced arbitral proceedings against MUR and was successful in its submissions concerning the 'reasonable endeavours' Sub-Clause 36.3(d) of the COA's force majeure Clause as follows:

— *'36.3. A Force Majeure Event is an event or state of affairs which meets all of the following criteria:*

  a. *It is outside the immediate control of the Party giving the Force Majeure Notice;*

  b. *It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port;*

c. *It is caused by one or more of acts of God, extreme weather conditions, war, lockout, strikes or other labour disturbances, explosions, fire, invasion, insurrection, blockade, embargo, riot, flood, earthquake, including all accidents to piers, shiploaders, and/or mills, factories, barges, or machinery, railway and canal stoppage by ice or frost, any rules or regulations of governments or any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges;*

d. *It cannot be overcome by reasonable endeavors from the Party affected*.'

The arbitral tribunal considered that making payment in Euros was a '*completely realistic alternative*', particularly as RTI had offered to bear any additional costs incurred by exchange rate charges, and so MUR should have accepted this proposal rather than claiming force majeure.

MUR obtained permission to appeal the decision to the Commercial Court, on a question of law as to whether 'reasonable endeavours' would require a party claiming force majeure to accept non-contractual performance (i.e., payment in Euros rather than US Dollars).

Commercial Court Decision

Following detailed consideration of submissions on contractual interpretation put forward by the parties and relevant case law in the area of 'reasonable endeavours', the Commercial Court decided that MUR were not required to sacrifice their contractual right to payment in US Dollars.

As such, the Commercial Court confirmed that 'reasonable endeavours' of a party to overcome a force majeure event do not extend to a party being required to tender non-contractual performance, even where there may be an alternative course of action which may avoid the effect of the event said to give rise to force majeure. A more detailed analysis of the Commercial Court's judgment is available in the CMS Annual Review of developments in English oil and gas law (2022 Edition) at page 78 onwards.

Court of Appeal Decision

Whilst recognising the range of elements considered by the arbitrators and the relatively limited scope of the appeal which the Court of Appeal could consider as a result of s.69 Arbitration Act 1969, the Court of Appeal identified the only issue for the Court of Appeal to consider at paragraph 40:

'*[…]whether the force majeure event or state of affairs could have been overcome by reasonable endeavours from MUR as the party affected. It arises on the basis that RTI's contractual obligation was to pay freight in US dollars.*'

Males LJ, in the majority judgment, found that there was no need to discuss the principles of mitigation of damages and frustration which had been covered by the parties and were subject to consideration by the Commercial Court. The judgment focuses instead directly on the wording of the force majeure Clause and the purpose of the payment obligations under the COA. Concerning the payment obligation, Males LJ accepted at paragraph 60:

'[…] *that the contract required payment in US dollars, but the purpose of that payment obligation was to provide MUR as the shipowner with the right quantity of dollars in its account at the right time. RTI's proposal achieved that objective with no detriment to MUR and therefore overcame the state of affairs caused by the imposition of sanctions on* [RTI's parent company]'.

As such, the Court of Appeal held, by a majority, that MUR's acceptance of RTI's proposal for payment in Euros, in addition to RTI covering the costs of conversion to US Dollars, would have overcome the force majeure event and did not constitute non-contractual performance as it met the purpose of MUR receiving the correct amount of US Dollars. Consequently the Court of Appeal allowed the appeal and restored the award of the arbitrators.

Arnold LJ, in his dissenting decision, appreciated that MUR's position on the facts had no 'merit' but that it is entitled to insist upon strict contractual performance, under the 'Gilbert-Ash' principle, this being payment in US Dollars and not Euros. In particular at paragraph 74, Arnold LJ states that '*an event or state of affairs is not 'overcome' within the meaning of clause 36.3(d) by an offer of non-contractual performance.*'

Comment

It is not entirely apparent from the decision of Males LJ whether:

1. The Court of Appeal decided that non-contractual performance may be required by a 'reasonable endeavours' obligation in a force majeure clause provided that it does not conflict with the '*purpose underlying the parties' obligations*'; or
2. whether in finding that the '*purpose underlying the parties' obligations*' was that the seller '*receive the right quantity of US dollars in its bank account at the right time*' the Court of Appeal was deciding that there was not, in fact, an obligation to pay in US Dollars.

Either way, the potential problem with the Court of Appeal's analysis is that it is not what the contract requires. The contract requires payment in US Dollars. The approach taken by the Court of Appeal may have 'merit' in this decision (on the facts), but it has the potential to create confusion in the operation of force majeure clauses. Perhaps an example of hard facts creating bad law.

If it is the Court of Appeal's decision that it is necessary to look to the '*purpose underlying the parties' obligations*' in establishing whether a force majeure clause may require non-contractual performance, the exercise of establishing the purpose (beyond the words of the contract) has the potential to create significant divergence of views in the operating of clauses. In turn, this may result in more disputes.

MUR was granted permission on 6 April 2023 to appeal to the Supreme Court which may result in the 2:1 majority judgment being overturned. In the interim, it may be necessary to revisit the wording of force majeure clauses to ensure that non-contractual performance is not required (if that is the parties' intention).

High Court Judge: Jacobs J.

Court of Appeal Judges: Newey LJ, Males LJ and Arnold LJ.

Limitations on claims against shippers for loss and damage

In *Trafigura Pte Ltd v TKK Shipping Pte Ltd (Rev1)* [2023] EWHC 26 (Comm) the Commercial Court considered an interesting point of law that relates to the true construction and application of Article IV(5)(a) of the Hague-Visby Rules which limits the carrier's liability to a sum based upon the weight of the '*goods lost or damaged*'. The issue being what was meant by '*goods lost or damaged*'.

Facts

The claimant, Trafigura PTE Ltd ('**Trafigura**'), was the owner of a bulk shipment of zinc calcine (the '**Cargo**') which was loaded onto the vessel 'THORCO LINEAGE' the United States of America to the Australia port in May 2018. The defendant, TKK Shipping Plc Limited ('**TKK Shipping**'), was the carrier responsible for its transportation.

During the voyage, the THORCO LINEAGE grounded in French Polynesian territorial waters due to a main engine failure and had to be re-floated by salvors and a small part of the Cargo, 764 metric tons, was physically damaged during the re-floating efforts. The remaining 9,523 metric tons of Cargo was not physically damaged and was subsequently shipped on by Trafigura to its original destination.

Trafigura argued that the grounding was caused by the failure of TKK Shipping to exercise due diligence to make the THORCO LINEAGE seaworthy and claimed against TKK Shipping the sum of USD 7.355m in respect of their contribution to the salvage costs, USD 278,000 in relation to the physically damaged cargo and approx. USD 800,000 in respect of on-shipment and cargo disposal costs.

In its defence, TKK Shipping relied upon Article IV Rule 5(a) of the Hague-Visby Rules, which limits a carrier's liability for '*loss or damage to or in connection with the goods*' to the higher of 667.67 units of account per package or 2 units of account per kilogram of gross weight of the '*goods lost or damaged*'. Article IV Rule 5(a) provides as follows:

'*Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 667.67 units of account per package or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.*'

Following the decision in *The 'LIMNOS'* [2008] 2 Lloyd's Rep 166, the limits in Article IV Rule 5(a) are to be calculated by reference to only the physically damaged cargo, regardless of whether economic damage was also suffered.

If correct, this would have given rise to a limitation sum representing a small fraction of the actual loss claimed by Trafigura. Conversely, if there had been no physical damage to the Cargo, Trafigura's claim for economic loss would be unlimited.

Trafigura commenced an arbitration against TKK Shipping to recover its total loss, and both Parties agreed that the point of law should be determined by the Commercial Court as a preliminary issue based on agreed facts.

Decision

The Commercial Court declined to follow Mr Justice Burton's decision in *The LIMNOS*, and decided that the limits in Article IV Rule 5(a) are to be calculated by reference not just to the physically damaged Cargo, but also to the Cargo that is subject to economic loss.

The Commercial Court stated that, in accordance with the principles of construction in relation to international treaties, it needed to '*ascertain 'the ordinary meaning of the words used, not only in their context but also in the light of the evident object and purpose of the* [Hague-Visby Rules]'.

The ordinary meaning of the words in Article IV Rule 5(a), in the context of carriage of goods by sea, were that '*lost or damaged goods*' would include goods that have been economically damaged. To hold otherwise would be akin to '*closing one's eyes to the risks inherent in such carriage and the typical consequences of such risks*'.

The object and purpose of Article IV Rule 5(a), as evidenced in the travaux préparatoires, was to provide a maximum limit of liability in cases where the value of the goods was exceptional. Although the travaux préparatoires did not address the particular issue of the meaning of the words '*lost or damaged goods*', to construe the words '*lost or damaged goods*' as requiring the presence of physical damage to calculate the limit would not properly reflect the intention behind the Hague-Visby Rules.

The Commercial Court then carefully considered the relevant case law, and in particular, the decision in *The LIMNOS*. In its view, the approach taken in *The LIMNOS* resulted in a number of anomalies, for example, if the steps taken to mitigate the loss are wholly successful so that there is no physical damage to the goods, then there is no limit, which runs contrary to the intention to limit such liability. In its judgment, these anomalies could be avoided by construing '*lost or damaged goods*' to include economic loss, not merely physical damage.

Comment:

The academic commentary has described the decision in *The LIMNOS* as producing '*surprising results*' and was '*not altogether satisfactory*'. It resulted in a state of affairs by which the limitation on damages would be calculated as a percentage of the cargo physically damaged. The most surprising aspect being that if there was very limited physical damage the damages would be limited to a very low sum, but if there was no physical damage the liability for damages would be uncapped/limited.

The decision in *The THORCO LINEAGE* appears to be an attempt at restoring commercial sense and providing clarity in relation to the application of Article IV Rule 5(a) of the Hague-Visby Rules to claims for economic loss (such as diminution in cargo value due to loss of market or where the cargo is subject to a lien in respect of liability for salvage remuneration). In doing so, the effect of the Commercial Court's decision may be to extend the scope of the limitation in the Hague-Visby Rules to circumstances where there is no physical damage to goods, and to alter its method of calculation. As a result, it will have a profound impact on the liability of carriers.

Whether the decision of the Commercial Court does have the above impact remains to be seen. The decision cannot be appealed. As a result, those seeking to apply the limitation in Article IV Rule 5(a) of the Hague-Visby Rules are faced with conflicting decisions of the same court.

Judge: Teare J.

Have you settled?

In *Glencore Energy UK Ltd v NIS J.S.C. Novi Sad* [2023] EWHC 370 (Comm) the Commercial Court decided that a failure to complete 'good faith' negotiations required under a settlement agreement did not permit a party to reopen the underlying claim – rather it entitled it to a potentially lesser sum calculated in accordance with criteria set out in the settlement agreement. The decision of the Commercial Court shines a light into the complexities of settling claims for sums that have not yet been incurred by the innocent party.

Facts

Glencore Energy UK Limited ('**Glencore**'), as seller, and NIS JSC Novi SAD ('**NIS**'), as buyer, entered into a contract for the sale and purchase of crude oil to be delivered at Omisalij, Croatia in January 2019 (the '**Contract**'). The crude oil was to be of standard export quality and within the limits of the Technical Terms and Conditions of the operator of the terminal, Janaf Nafteved JSC ('**Janaf**').

On 30 January 2019, Citigroup issued the Performance Bond, up to the amount of USD 12m. The Performance Bond provided that Citibank would pay NIS on its first demand, upon receipt of written confirmation stating that Glencore had not performed its obligations under the Contract.

After the crude oil was delivered in December 2019/January 2020, the crude oil was found to be contaminated with high levels of organic chloride and thus did not meet the required contractual standard. The contaminated oil was partially stored by Janaf who claimed storage fees from NIS at a default rate. NIS raised a claim against Glencore for breach of contract due to the contaminated oil and the storage fees, charged at Janaf's default rate. Glencore objected to the storage fees.

After negotiations, a settlement agreement was signed in March 2020 settling all claims save for the claim by NIS against Glencore for any liability NIS incurred to Janaf for the storage of the crude oil (the '**Settlement Agreement**'). At Clause 34, the Settlement Agreement said:

'*34. Notwithstanding clause 33 above, the Parties accept that (i) Janaf will be entitled to bring a claim against NIS in respect of storage fees incurred in relation to the Balance Portion and the Sisak Technical Oil from the date of delivery of the Cargo to the Terminal until the Effective Date; and (ii) NIS will be entitled to seek compensation from Glencore for any liability it incurs to Janaf in accordance with 34(i). Glencore will reimburse NIS for such liability up to the extent such liability accurately reflects (i) the actual loss suffered by Janaf and (ii) prevailing market rates for storage during the period when the Cargo was stored in the Janaf system. The Parties will discuss in good faith with a view to agreeing the level of reimbursement.*'

In addition, Clauses 35 and 36 provided:

'35. This Agreement is in full and final settlement of any and all claims between the Parties arising out of and/or in connection with the delivery of the Cargo, save for:

…

b. a claim by NIS against Glencore for any liability that NIS incurs to Janaf for storage of the Balance Portion and the Sisak Technical Oil from 08 January 2020 until the Effective Date (both dates included). Glencore will reimburse NIS for such liability to the extent that such liability accurately reflects (i) the actual loss suffered by Janaf and (ii) prevailing market rates for storage. The Parties will discuss in good faith with a view to agreeing the level of reimbursement.

(the 'Outstanding Claims')

36. Any and all Outstanding Claims between the Parties will be presented and dealt with in accordance with the terms of the 2019 Contract.'

The level of reimbursement was never agreed, and NIS made a claim on the Performance Bond for USD 2.094m NIS claimed that absence of such agreement meant that it could claim against Glencore under the Contract and that the limitations imposed by the Settlement Agreement in relation to actual loss and prevailing market rates would not apply.

The issue that arose was the extent to which the Settlement Agreement circumscribed NIS's right to recover from Glencore the sums it paid to Janaf in respect of storage charges.

1. Glencore argued that the Settlement Agreement meant that NIS could only recover from Glencore storage charges which it paid to Janaf, if and to the extent that those charges: (1) reflected an 'actual loss' suffered by Janaf; and (2) reflected prevailing market rates for storage; and
2. NIS argued that the Settlement Agreement required the parties to discuss in good faith the claim in respect of Janaf's storage costs, but, in the absence of any agreement, NIS was entitled to make a claim for those costs under the Contract, without the Settlement Agreement limiting that entitlement in any way.

Decision

Applying the usual principles of contractual construction and interpretation, the Commercial Court decided that the Settlement Agreement did act to limit the extent of NIS' claim against Glencore for the storage fees.

The Commercial Court was not persuaded by NIS's submission to the effect that Clauses 34 and 35 did not finally settle anything in relation to Janaf's storage charges, because the parties had agreed to preserve NIS's right make a claim pursuant to the Contract if the discussion in good faith was unsuccessful. That

misunderstood the way in which Clause 34 had been put together and gave little or no real meaning to the words: '*Glencore will reimburse NIS for such liability up to the extent such liability accurately reflects (i) the actual loss suffered by Janaf and (ii) prevailing market rates for storage during the period when the Cargo was stored in the Janaf system*.'

NIS's entitlement was to '*to seek compensation from Glencore*.' It did not say that NIS is entitled to be paid compensation for 'any liability' (which was what NIS seemed to be saying it meant). It was implicit in Clause 34 and 35 that NIS might not actually receive compensation for all the liability it had incurred to Janaf.

That construction was consistent with the next sentence: '*Glencore will reimburse NIS for such liability up to the extent*….' That describes Glencore's obligation to reimburse NIS for that liability to Janaf, which is subject to an identified limit.

Accordingly, the Commercial Court considered the meaning of '*prevailing market rates for storage*' and '*actual loss suffered by Janaf*' in order to calculate the storage rate.

Actual Loss and Prevailing Market Rates

Save for its submission that the use of its tanks amounts to an '*actual loss*', NIS did not advance any case that Janaf suffered any '*actual loss*'. As a result, NIS was left seeking to justify the Janaf storage fees purely on the basis that they reflected the prevailing market rates.

NIS did not shrink from that contention. It said, in summary, that the Janaf '*default*' rates under its contract with Janaf were the market rates for storage of this kind at Omisalj and Sisak and hence that the prevailing market rate was USD 1.5 / cbm / decade.

However, the Commercial Court considered that the '*default*' rate charged for the storage was not the '*prevailing market rate*' but a default rate assigned in the context of the need to store the crude oil; a disincentive to delay. The rate was also not negotiated between market partners. Further, an important part of the justification for the 'default' rate was that Janaf might be inconvenienced by unexpected/ unplanned delays in the transportation process: by tanks which were intended to be used as part of the process of transporting oil being blocked up. But, if that had actually happened, Janaf would have suffered an actual loss, which could then have been included in addition to the market rate for the purposes of arriving at Janaf's storage fees under the Settlement Agreement.

The Commercial Court held that the period, location and storage capacity used should all be taken into account when calculating the prevailing market rate. The rate should mirror the actual conditions of storage and discard any factors that do not affect the storage and hence should not affect the rate either.

The Commercial Court decided to apply the standard cargo rate for a three-month period and awarded a reduced sum for storage of USD 1.062m

Comments

Although the judgment considers the specific Settlement Agreement, there are insights as to how settlement agreements will be read in general. When applying the standard principles of construction to a settlement agreement, they will not be read in a way which limits its effect. In addition, a settlement agreement will give effect to the intentions of the parties through the drafting of the agreement.

The Commercial Court's clarification of the definition of the standard market rate and its interaction with actual loss will provide guidance for future claims for storage disputes.

Judge: Sean O'Sullivan KC (sitting as a Deputy High Court Judge).

CMS Expert Guide to International Arbitration

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Chapter 8

Shipping

The Commercial Court has continued to hand down important decisions relating to the sale and shipping of crude oil and oil products. In addition, a non-oil related case has given insights in relation to charterparty provisions seeking to prevent withholding or set-off of hire sums, which will be of interest to all those chartering vessels:

— In *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2023] EWHC 105 (Comm), the Commercial Court considered whether specific words used in a charterparty had the effect of preventing the charterer from refusing to pay the hire rate when it said no sum was due under the 'off-hire' clause. It held, in favour of the owner, that the charterer could not refuse to pay the hire rate.

— In *Vitol SA v JE Energy Ltd* [2022] EWHC 2494 (Comm), the Commercial Court decided that a buyer of fuel oil was wrong to seek to terminate a contract on the basis that the seller was in repudiatory breach for, amongst other reasons, refusing to load the buyer's vessel (in the absence of a mutually-acceptable letter of credit), and found the buyer to be in repudiatory breach instead.

— In *Trafigura Maritime Logistics PTE Ltd v Clearlake Shipping PTE Ltd* [2022] EWHC 2234 (Comm) (the fifth segment of the litigation saga involving the Miracle Hope vessel), the Commercial Court held that an indemnity in an amended Shellvoy 6 voyage charterparty form was not conditional, thus suggesting that, absent clear wording indicating the parties' intention to make an indemnity conditional, the Court will be inclined to decide against conditionality.

— In *CM P-MAX III Limited v Petroleos Del Norte SA (MT Stena Primorsk)* [2022] EWHC 2147 (Comm), the Commercial Court considered a long-standing uncertainty of whether, and if so when, a shipowner can disregard the charterer's voyage instructions without interrupting demurrage under a Shellvoy 6 contract.

When does a 'no deduction' clause operate?

In *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2023] EWHC 105 (Comm) the Commercial Court considered whether specific words used in a charterparty had the effect of preventing the charterer from refusing to pay the hire rate when it said no sum was due under the '*off-hire*' clause. Although not an oil industry case, it will be of significant relevance to those chartering vessels.

Facts

Fastfreight Pte Ltd (the '**Charterer**') and Bulk Trident Shipping Ltd (the '**Owners**') (together, the '**Parties**') entered into an agreement for the chartering of a vessel to transport iron ore from India to China using the '*Anna Dorothea*' (the '**Vessel**') at rate of USD 20,000 per day paid every 5 days in advance (the '**Charterparty**'). At Clause 11 the Parties incorporated wording:

'(a) Payment
Payment of Hire shall be made so as to be received by the Owners or their designated payee in cash in to Owners' bank account in Germany…

Notwithstanding of the terms and provisions hereof no deductions from hire may be made for any reason under Clause 17 or otherwise (whether/ or alleged off-hire underperformance, overconsumption, or any other cause whatsoever) without the express written agreement of Owners at Owners' discretion. Charterers are entitled to deduct value of estimated Bunker on redelivery. Deduction from the hire are never allowed except for estimated bunker on redelivery…'

The paragraph underlined above was printed at line 146 of the amended NYPE terms and was referred to as '*line 146*' in the Parties' submissions.

Further, the Charterparty also provided at Clause 17, headed '*Off Hire*':

'*In the event of loss of time from deficiency and/or default … of officers or crew … or by any other similar cause preventing the full working of the Vessel, the payment of hire and overtime, if any, shall cease for the time thereby lost. Should the Vessel deviate .. during a voyage, contrary to the orders or directions of the Charterers, … the hire is to be suspended from the time of her deviating .. until she is again in the same or equidistant position from the destination and the voyage resumed therefrom. …*

If upon the voyage the speed be reduced by defect in, or breakdown of, any part of her hull, machinery or equipment, the time so lost, and the cost of any extra bunkers consumed in consequence thereof, and all extra provide directly related and actually paid expenses (always limited to one shift maximum) expenses [sic] *… may be deducted from the hire only after having reached an agreement with the Owners on the figures (costs, times, bunkers).*'

The Charterparty also incorporated a set of Additional Clauses, including:

'Clause 67. BIMCO terms
Notwithstanding anything within this charter party, the riders, the recap, and/or the 'BIMCO infections or contagious disease clause for time charter parties' and/ or its equivalent, in the event any member of the crew or persons (except those on charterers' behalf) on board the vessel is found to be infected with a highly infectious or contagious disease and the vessel has to (i) deviate, (ii) be quarantined, or (iii) barred from entering any port, all time lost, delays and expenses whatsoever shall be on owners' account and the vessel shall be off-hire.

…

Owners are fully aware that vessel is fixed for one trip via East Coast India to China.'

The Vessel and its cargo sailed to China from India and arrived at their destination port on the 4 May 2021 but was unable to dock and unload due to three crew members testing positive for Covid-19 on 1 May 2021. As a result, the Vessel was not redelivered to the Owners until the 28 August 2021.

Except for a period of five days between 22 and 26 May 2021, the Charterers did not pay any hire for the vessel between 4 May and 28 August 2021. They contended that the vessel went off-hire on 4 May 2021 and remained off-hire thereafter on the basis that three crew members had positive rapid lateral flow tests for Covid on 1 May 2021. The Charterers relied in this regard on Clause 67 quoted above.

The Owners disputed the claim made by the Charterers for two reasons:

1. First, they disputed the factual basis of the claim, arguing that the Vessel was not off-hire during this time period at all, also arguing that even if the Covid-19 infection had rendered the Vessel off-hire the crew had recovered by the 13 May 2021.

2. Second, the Owners argued that under Clause 11 of the contract the Charterers could not rely upon alleged periods of off-hire to avoid paying if they did not have the express permission of the Owners in writing: In other terms, if the Owners disputed the vessel being off-hire, the Charterers must pay hire.

The Charterers argued that they were entitled to make such deductions as the meaning of the term deduction meant '*deduction from hire that is due*'. They argued that because the Vessel was off-hire during this period none of the hire was due so their deduction fell outside the meaning of the Clause. They also argued that to interpret the meaning of the Clause in a way which forced them to pay hire would create a surprising and unusual situation where they were required to pay hire for a period where no hire was due.

Arbitration Award

The arbitrators found in favour of the Owners. In doing so they decided:

1. Fundamental to the charterers' case was their contention that *'deduction'* in the line 146 insertion must mean *'deduction from hire that is due'*.

2. Were that limited, literal meaning to be given to the words it would largely, if not entirely, emasculate the clause, for it would be sufficient for a charterer simply to assert off-hire in order to justify non-payment. That cannot be right.

3. The terms of 'line 146' make the position entirely clear. In this respect:
   - First there are the opening words: '*Notwithstanding of the terms and provisions hereof …*'.
   - Then there is the express prohibition against deductions: '*for any reason under Clause 17 or otherwise*'.
   - If that were not sufficiently clear, the Parties agreed that it should apply whether there was actual or only alleged off-hire '*whether/or alleged off-hire*'.
   - The Charterparty capped all that with: '*or any other cause whatsoever)*'; all '*without the express written agreement of Owners at Owners' discretion*'.
   - Finally, the position was put beyond doubt by the words: '*Deduction from the hire are never allowed except for estimated bunker on redelivery.*'

4. The Charterers suggested that this consequence would be surprising, as it would mean that Charterers have to pay hire, essentially by way of security, for a period when no hire might be due. However, whether or not it is surprising, that is what the Parties agreed.

5. It is not hard to see why rational commercial actors would reach such a result. Indeed, such provisions are becoming increasingly common, no doubt because of the very frequent tendency of time charterers to withhold hire whenever they can on grounds which not infrequently turn out to be spurious.

Commercial Court Decision

The question of law on which permission to appeal was granted was: '*Where a charterparty clause provides that no deductions from hire (including for off-hire or alleged off-hire) may be made without the shipowner's consent: Is non-payment off-hire a 'deduction' if the Vessel is off hire at the instalment date*?'

The Commercial Court concluded that, at least on the Charterparty terms and facts in the present case, the answer was '*yes*'; that the arbitrators were correct to make their award in favour of the Owners; and that the appeal should be dismissed.

The Commercial Court considered:

1. That an assertion by the Charterer that there were ambiguities present so as to make it necessary to resort to presumptions of the kind referred to in *FG Wilson (Engineering) Ltd* [2012] EWHC 2477 (Comm) at 83 was incorrect. It was clear that Clause 11 expressly qualified any right for the Charterer to not pay due to the vessel being off-hire as dependent on the Owners' written consent.
2. Clause 11 accomplished this whether the off-hire was actual or alleged, the use of the word alleged made it clear that the purpose of the clause was to ensure payment was made to the Owners while any disputes were resolved thereby protecting the Owners' income.
3. The Owners had valid reasons to include Clause 11 as it served to protect their income from false claims made by the Charterer, in addition their discretion to grant consent to deductions was limited in such a way that they must exercise it rationally and for a contractually appropriate purpose which the Owners were doing in this case (see *SK Shipping Europe v Capital VLCC 3 Corporation (The 'C Challenger')* [2020] EWHC 3448 (Comm)).
4. *Tradax Export v Dorada Compania Naviera (The 'Lutetian')* [1982] 2 Lloyd's Rep. 140, which the Charterers had used to support their assertion that hire was not owed as the Vessel had been off-hire, did not apply as there was no provision involved in that case similar to Clause 11.

Comment

The arbitrators considered that provisions of the type found in the Charterparty seeking to prevent the withholding or set-off of hire sums were '*increasingly common, no doubt because of the very frequent tendency of time charterers to withhold hire whenever they can on grounds which not infrequently turn out to be spurious.*'

If that is the intention, the law requires that '*if set-off is to be excluded by contract, clear and unambiguous language is required*' (see *FG Wilson (Engineering) Ltd v John Holt* [2012] EWHC 2477 (Comm) at 83 per Popplewell J). In effect, this principle is simply an extension of the principle in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717H per Lord Diplock. That said, where clear and unambiguous language is used, English law will uphold the no withholding or no set-off provision.

Also of interest is that, where the owner is granted a discretion to allow withholding or set-off, the law may imply an obligation on the owner to exercise that power for a contractually appropriate purpose (viz. a genuine dispute as the amount of any deduction) and rationally (see *SK Shipping Europe v Capital VLCC 3 Corporation (The 'C Challenger')* [2020] EWHC 3448 (Comm) where Foxton J considered a clause providing that *'[c]harterers shall not deduct any monies from hire/earnings without Owners' written confirmation*').

Charterers will doubtless wish to avoid terms similar to Clause 11 being agreed in their charterparties, or attempt to limit the circumstances in which they apply. That said, owners should also be cautious that any formulation that allows the charterer to seek the owner's consent to set-off may result in an exercise of contractual discretion by the owner that requires the owner to treat the request rationally and for a contractual purpose. In turn, such exercise of discretion, by the owner, in considering whether to consent may make the owner's decision making process, in refusing consent to set-off, open to review (and document disclosure) in the event of a dispute on the grounds that it was not rational or exercised for an inappropriate purpose.

Finally, the scope of the application of Clause 11 by the arbitral tribunal and the Commercial Court may give parties pause for thought before agreeing similar clauses. It must be debatable whether payment not becoming due and owing in accordance with the hire rate terms amounts to a 'deduction'. Arguably there is nothing to deduct from (as it was never due). Here the arbitral tribunal and Commercial Court seem to have been swayed by the express reference in Clause 11 to Clause 17, which creates a link between circumstances where the hire rate was not payable and the no-deduction/set-off clause. As a result, it is far from clear that this decision will be followed in other cases (especially if a similar contractual link does not exist).

Arbitrators: Michael Baker-Harber (now, sadly, deceased) and Bruce Harris.

Judge: Henshaw J.

Recaps, final terms and repudiatory breach

In *Vitol SA v JE Energy Ltd* [2022] EWHC 2494 (Comm), the Commercial Court decided that a buyer of fuel oil was wrong to consider the seller in repudiatory breach for refusing to load the buyer's vessel (in the absence of a mutually-acceptable letter of credit), and for not having the vessel loaded by the buyer's desired deadline. In seeking to terminate the agreement, the Commercial Court considered that the buyer was itself in repudiatory breach, entitling the seller to terminate the relevant contract and claim damages. Although the outcome of the case relied heavily on the specific facts, the case nonetheless serves as a useful reminder of the relationship between oral oil sales, recaps and final contractual terms. It also highlights the risks in seeking to terminate for an alleged repudiatory breach.

Facts

Vitol S.A. ('**Vitol**') is one of the world's largest energy and commodity trading companies. Its business activity in Ghana includes the supply of crude oil for processing into refined products at Ghana's only oil refinery, the Tema Oil Refinery ('**TOR**'), and the sale of oil products produced at the TOR.

JE Energy Ltd ('**Jeda**') is a Ghanaian crude oil and petroleum products trading company.

Negotiations and Contract

Following discussions on 9 and 10 December 2019 between Vitol and Jeda, the two companies entered into a contract whereby Vitol agreed to sell, and Jeda agreed to buy, 30,000MT of fuel oil (plus or minus 10% at Jeda's option) to be delivered *'FOB Tema'* in Ghana (the '**Contract**').

The Contract was recorded in writing in a short *'deal recap'* on 10 December 2019 (the '**Deal Recap**'), which confirmed that the parties agreed a *'laycan' of '23–24 December 2019'*. It also confirmed that a letter of credit ('**LC**') would be provided in Vitol's favour as payment security, which Vitol told Jeda would only be accepted if it was issued or confirmed by an international recognised bank approved by Vitol.

Both parties had envisaged that the Deal Recap would be supplemented by fuller terms in due course and, on 16 January 2020, Vitol provided Jeda with a long-form contract (the '**Sale Confirmation**'). Vitol and Jeda exchanged emails about, and proposed amendments to, the Sale Confirmation, until no disagreements appeared to remain on 23 January 2020.

Post-Recap negotiations

After concluding the Contract on 10 December 2019, the parties started discussing a suitable provider for the LC, as well as acceptable terms of such LC. With regards to providers, Jeda volunteered either Access Bank UK or Citibank London; Vitol rejected Access Bank (which it did not consider to be of an acceptable financial standing) and selected Citibank. With regards to terms, on Jeda's request, Vitol provided its required LC wording to Jeda to transmit to Citibank.

Jeda had bought the fuel oil on speculation with the intention of selling it on to a sub-buyer. However, by the time the contractually-agreed laycan closed on 24 December 2019, it still did not have a sub-buyer in place, had not attempted to open an LC, and had not sought to arrange for a vessel to load the fuel oil.

On 10 January 2020, Jeda finally concluded a sub-sale for the fuel oil with AFCO Energy Pte Ltd ('**Afco**'), with Afco proposing HAFNIA PEGASUS as the performing vessel (the '**Vessel**'). Based on the agreed price with Afco, Jeda were at risk if the market declined (which, in the event, it did).

On the same day, Jeda informed Vitol that the expected loading date was 17 January 2020 (later revised to 18 January 2020), and that the LC in Vitol's favour would come from Access Bank (rather than Citibank), but be confirmed by Standard Chartered Bank ('**SCB**'). Jeda sent proposed wording for the LC to Vitol on 11 January 2020, which Vitol amended, following which Jeda confirmed that the parties '*were agreed on a mutually acceptable wording*' (which included that the value of the LC would be USD 17.5m, and that the LC would be confirmed).

The Vessel arrived in anchorage on 16 January 2020, with anticipated berthing between 18 and 20 January 2020. An LC in Vitol's favour was issued by Access Bank on 17 January 2020, however, there were a number of issues:

— The value of the LC was USD 500,000 short of the USD 17.5m value that had been agreed between Jeda and Vitol (because Jeda had reached its credit limit with Access Bank);

— the LC was not in the form agreed with Vitol (as Jeda had agreed changes to some terms with Access Bank without involving or notifying Vitol); and

— the LC was not confirmed by SCB.

With (in Vitol's view) no adequate LC in place, despite berthing on 17 January 2020, the Vessel was placed on '*financial hold*' by Vitol, meaning that loading operations could not commence. On 19 January 2020, with the Vessel still on financial hold, it was required to vacate the port to make way for another vessel.

On 22 January 2020, Jeda arranged for an amended, compliant LC, to be issued by Access Bank, and confirmed by SCB. Following a request by Vitol, in light of the above delays to loading, Jeda had arranged for this LC to contain an amended '*latest shipment*' date of 31 January 2020 (meaning that payment would not be guaranteed under the LC if the Vessel shipped after this date).

On the same day, Vitol lifted the financial hold, and advised Jeda that they were pushing for the Vessel to re-berth as soon as possible. Despite Vitol's efforts, the Vessel was only cleared to re-berth on 31 January 2020 (as the port prioritised the berthing of two other vessels). However, with loading operations likely to take three to four days it was apparent the latest shipment date in the LC would need to be amended again. Vitol placed the Vessel back on financial hold pending such amendment.

In the event, Jeda did not seek such amendment. Instead, on 1 February 2020, it gave notice to Vitol that it considered their Contract '*null and void*', on the basis that Vitol had breached its obligations by not permitting the loading of the Vessel by 31 January 2020 (which, in the proceedings, it appeared to argue amounted to a repudiatory breach).

On 10 February 2020, after it was apparent that Jeda would not be seeking an amended LC (and had instead offered to purchase the fuel oil from Vitol under a new contract at a much-reduced price), Vitol gave notice that it considered Jeda's notice of 1 February 2020 to be a repudiatory breach, and terminated the Contract on that basis.

Issues

The Commercial Court was asked to consider whether Jeda was indeed in repudiatory breach. As part of this, amongst other things, the Commercial Court was asked to consider:

1. Whether Jeda was contractually required to nominate a performing vessel to arrive within the '*laycan*' dates in the Contract; and
2. whether, once the Vessel was back at the anchorage, Vitol's obligation was to load within a reasonable, non-frustrating time (and whether that period had or had not lapsed on 31 January 2020).

Decision

In relation to whether the Sale Confirmation formed part of the contract between Vitol and Jeda:

1. The Commercial Court considered that the Sale Confirmation formed part of the Contract.
2. This was on the basis that English law allows for parties to '*sort out details against the background of a concluded contract*.'
3. Further, a lack of any objection to an offer of terms can be taken as acceptance of those terms (see *Pagnan v Feed Products* [1987] 2 Lloyd's Rep 601 at 614; and *Statoil ASA v Louis Dreyfus Energy Services LP: The Harriette N* [2008] 2 Lloyd's Rep 685, at [70]).
4. As such, and despite Jeda's arguments to the contrary in the legal proceedings, the Commercial Court was satisfied that Jeda's lack of further objections proved that the parties were in agreement.

Was Jeda contractually required to nominate a performing vessel to arrive within the 'laycan' dates in the Contract?

The Commercial Court decided that Jeda was required to nominate a vessel to arrive within the laycan dates in the Contract. In reaching this conclusion, the Commercial Court decided that when used in charterparties, a '*laycan*' typically means *'the earliest day upon which an owner can expect his charterer to load and the latest day upon which the vessel can arrive at its appointed loading place without being at risk of being cancelled.*' This *'classic definition'* was found to be more consistent with the terms of the Sale Confirmation (forming part of the Contract – see above), and with the 2015 BP Oil International Limited General Terms and Conditions for Sales and Purchases of Crude Oil and Petroleum Products, which were incorporated by reference into the Contract.

Therefore, Jeda was required to nominate a performing vessel to arrive by 24 December 2019. Jeda's failure to comply meant that Vitol had the right to cancel, or terminate, the Contract. Having decided not to terminate, Vitol had the right to demand performance and (all other things being equal), had a reasonable (non-frustrating) time in which to load the cargo after Jeda had provided a vessel.

Whether, once the Vessel was back at the anchorage, Vitol's obligation was to load within a reasonable, non-frustrating time (and whether that period had or had not lapsed on 31 January 2020)

With regards to issue (2), Jeda argued that by Vitol requesting to change the latest shipment date in the LC to 31 January 2020, and by Jeda providing an updated LC on 22 January 2020 containing such a change, the parties agreed that Vitol would load the Vessel by 31 January 2020.

However, the Commercial Court dismissed this argument. Vitol had simply required the LC to be amended so as to ensure the LC would be cashable; it had not agreed to a new contractual shipment deadline under the Contract.

As at 20–22 January 2020 it was assumed that the cargo would be loaded by 31 January 2020. Once it became clear that there was a risk that this was

no longer going to be the case, Vitol asked for the LC to be amended. Jeda was required to amend the terms pursuant to the payment provisions in the Sale Confirmation. These provide, insofar as material, as follows:

'*... If for any reason the delivery, loading and/or discharge of the Product, as the case may be, will not take place within any relevant period which may be referred to in the LC, Buyer shall promptly provide a new documentary letter of credit or amend the existing LC in terms acceptable to Seller. Buyer will remain responsible for payment in the event that payment is not made under the LC for any reason …*'

As a result, there was no amendment to the Contract. Jeda was required to provide an updated LC by the existing contractual terms.

As a result of the foregoing, Vitol was not in breach of any relevant obligation and Jeda was in repudiatory breach when it decided to treat the Contract as null and void.

Damages

Having found Jeda in repudiatory breach, the Commercial Court awarded around USD 3.3m in damages to Vitol, assessed in accordance with section 50(3) of the Sale of Goods Act 1979 ('*Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept*').

When making such assessment, the following factors were taken into consideration:

— There is an assumption that the party in breach would have performed the contract in the way most beneficial to their interests (see McGregor on Damages (21st Ed.) at §10-111). Vitol's claim was therefore limited to 27,000MT of fuel oil, to take account of the fact that Jeda had the option to reduce the contractually-agreed cargo amount by 10%.

— When determining the market price, section 50(3) above contemplates a hypothetical sale by a hypothetical seller (with, for example, Vitol's personal ability to negotiate sales being irrelevant). However, where 'normal proof' of the market price is not available, courts have been permitted to accept other evidence (see Benjamin's Sale of Goods (11th Ed.) at §16-076). In the current case, as Vitol was the only seller of fuel oil from Tema, the Commercial Court determined that the market value of the fuel oil that Jeda had contracted to buy was the price Vitol was able to charge another buyer for the oil at or around the relevant time.

Comment

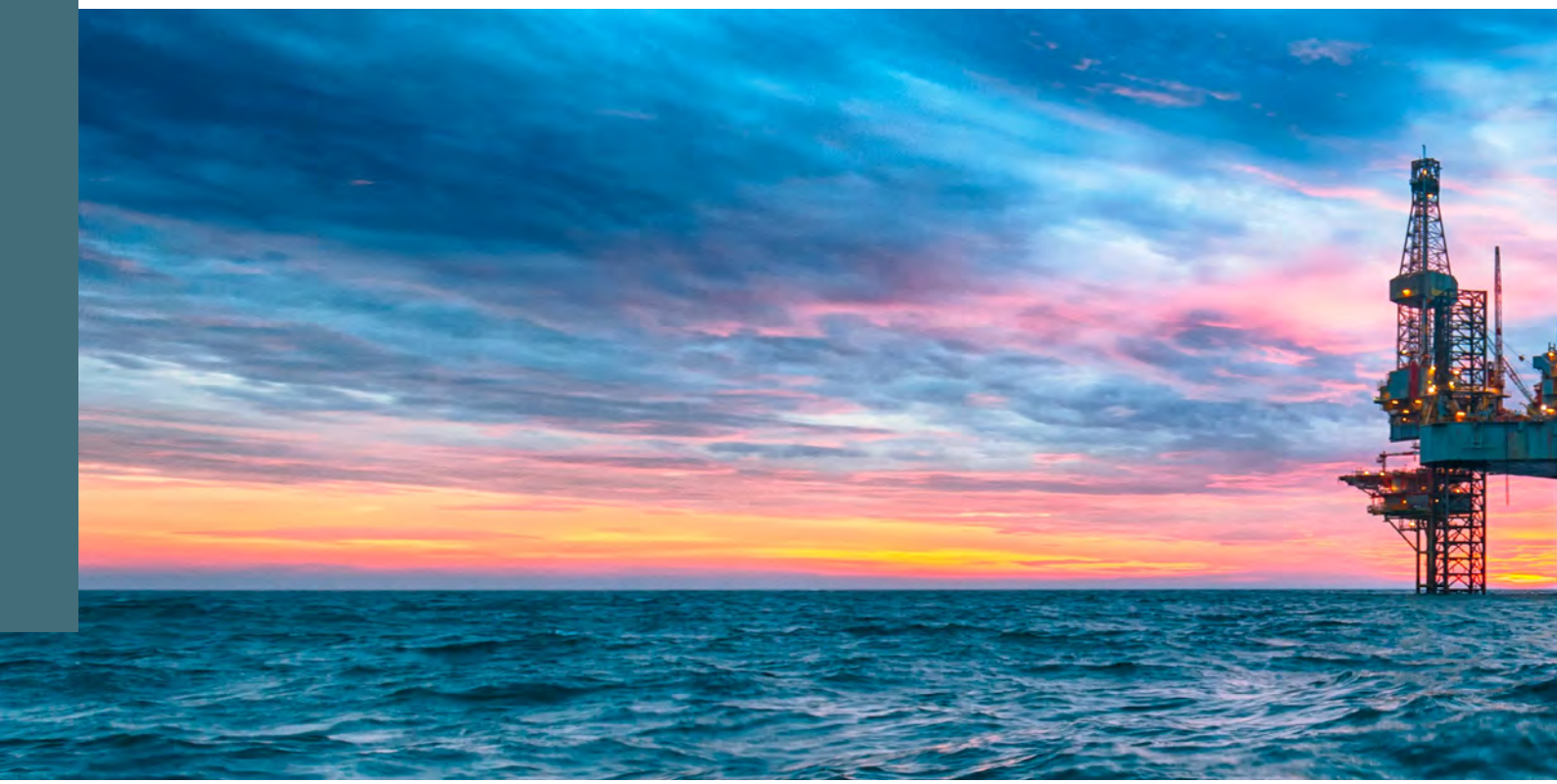
Oil sales agreements are often agreed by telephone, followed by a written (short form) recap. In turn, parties often envisage that the recap will be supplemented or superseded by a fully termed contract in due course. The importance of the fully termed contract is that it will contain many additional, well defined, terms that deal with aspects of the sale and purchase that are absent in the recap. Whether, and on what terms, fully termed contracts are entered into is a feature of commercial disputes between oil traders.

The 'take-away' from this case is that silence from a party receiving a proposal of final terms is capable of constituting acceptance of those terms. Much will turn upon the words and conduct of the parties. Therefore, parties to such proposals should not assume that silence will amount to a rejection.

The foregoing, as seen in this case, may have a material impact. The acceptance, by silence, of the Sale Confirmation meant that specific terms relating to the renewal and extension of the LC were incorporated into the Contract. In turn, that mean that the buyer was required to extend the LC without effectuating any amendment to the seller's obligations.

That notwithstanding, once a project or transaction is underway and delays accrue, companies should take care to ensure they do not inadvertently vary the contractual performance date, by discussing or making arrangements for performance to take place at a later date.

Judge: Lionel Persey KC (sitting as a Judge of the High Court).



Letter of Indemnity Liabilities – Approach Cautiously!

In *Trafigura Maritime Logistics PTE Ltd v Clearlake Shipping PTE Ltd and between (1) Clearlake Chartering USA Inc and (2) Clearlake Shipping Pte Ltd v Petroleo Brasileiro SA* [2022] EWHC 2234 (Comm) (the fifth segment of the litigation saga involving the Miracle Hope vessel), the Commercial Court had to consider whether an indemnity in an amended Shellvoy 6 voyage charterparty form was conditional. The decision gives an insight into the risks of amending model form contracts.

Facts

At different stages, this dispute has involved multiple parties, with four parties involved in this claim (1) Trafigura Maritime Logistics Pte Ltd ('**Trafigura**'), (2) Clearlake Chartering USA Inc ('**CUSA**') (3) Clearlake Shipping Pte Ltd ('**CSPL**') and (4) Petroleo Brasileiro SA ('**PBSA**').

On 26 April 2019, Ocean Light Shipping Inc (the '**Owner**') time-chartered the vessel known as the 'Miracle Hope' (the '**Vessel**') to Trafigura.

On 21 August 2019, Trafigura voyage-chartered the Vessel to CUSA, to carry a cargo of crude oil between ports on the Brazilian Seaboard and ports in the Far East (the '**Trafigura Charter**'). On the same day, CUSA then sub-chartered the Vessel to PBSA.

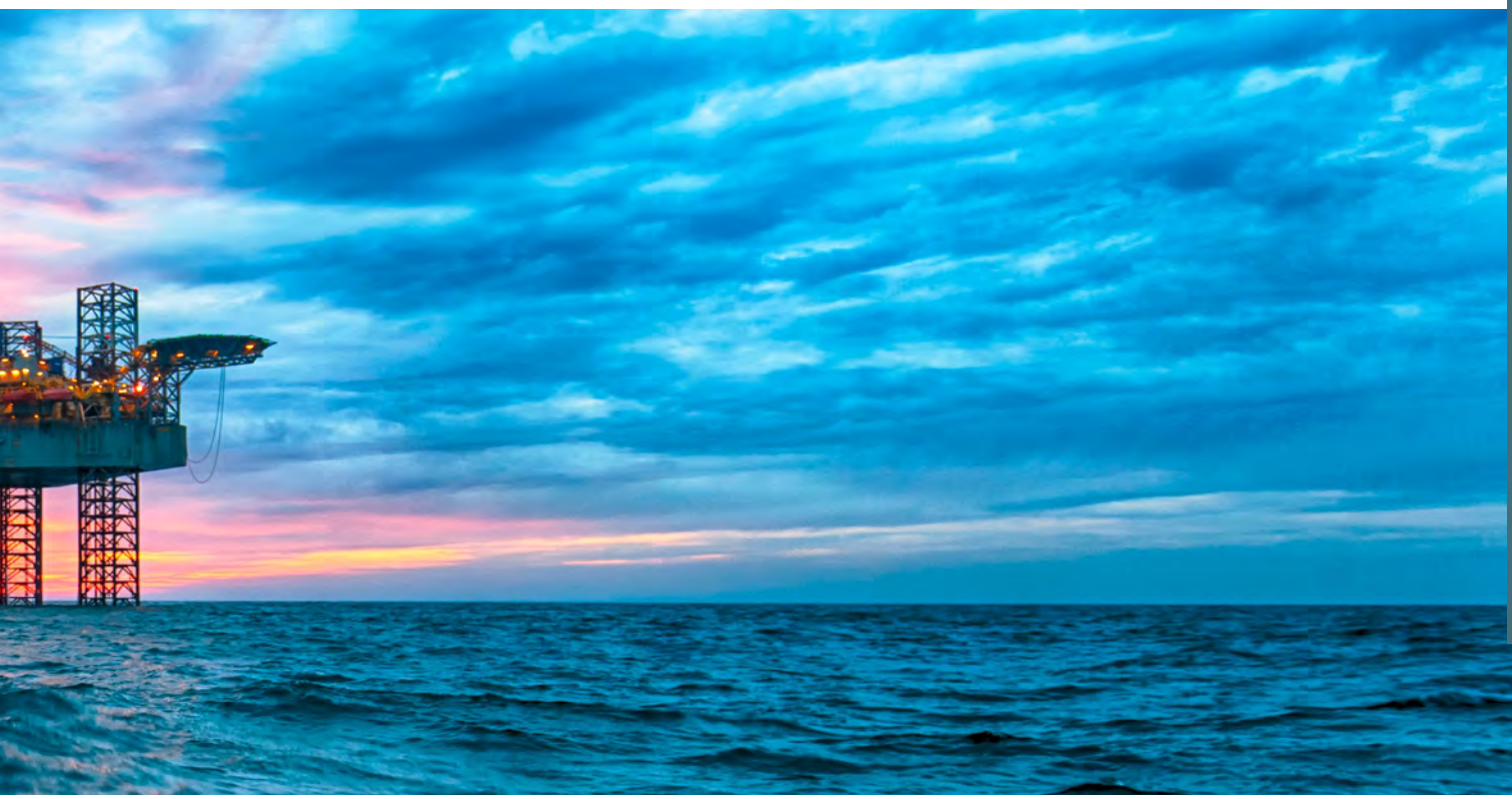
Both the Trafigura Charter and the sub charter by CUSA incorporated an amended version of the Shellvoy 6 voyage charterparty form provided by or on behalf of PBSA.

In September 2019, Petrobras Global Trading BV ('**PGT**'), a subsidiary of PBSA, sold around 1 million barrels of crude oil to Hontop Energy (Singapore) Pte Ltd ('**Hontop**') in China.

Hontop financed the purchase through an irrevocable letter of credit issued by Natixis Bank. The irrevocable letter of credit named PGT as beneficiary and provided for payment against various documents to be presented by PGT including a full set of the original bills of lading ('**OBLs**'), or, alternatively, by a letter of indemnity.

On 31 October 2019, as is relatively common in the trading of liquid hydrocarbons, when the Vessel arrived at the discharge port, the OBLs were not available to Hontop (as the receiver) and accordingly, Hontop sought discharge without presentation of the OBLs on the basis that:

1. PBSA, as sub-charterer, provided an indemnity to CUSA; and



2. CSPL provided an indemnity up the charter train to Trafigura, although it was CUSA and not CSPL that had chartered the Vessel from Trafigura.

In respect of the indemnity, Clause 33(6) of the Trafigura Charter and the sub-charter by CUSA to PBSA was in these terms:

'*Notwithstanding any other provision of this Charter, Owners shall be obliged to comply with any orders from Charterers to discharge all or part of the cargo provided that they have received from Charterers written confirmation of such orders.*

If Charterers by telex, facsimile or other form of written communications that specifically refers to this clause request Owners to discharge a quantity of cargo either:

a. without bills of lading and/or

b. at a discharge place other than that named in a bill of lading and/or

c. that is different from the bill of lading quantity

then Owners shall discharge such cargo in accordance with Charterers' instructions in consideration of receiving ***an LOI as per Owners' P&I Club wording to be submitted to Charterers before lifting the 'subs'****. Following indemnit* [sic] *deemed to be given by Charterers on each and every such occasion.*

1. As soon as all original bills of lading for the above cargo which name as discharge port the place where delivery actually occurred shall have arrived and/or come into Charterers' possession, Charterers shall produce and deliver the same to Owners, whereupon Charterers' liability hereunder shall cease. Provided however, if Charterers have not received all such original bill by 24.00 hours on the day ***13 (thirteen)*** *calendar months after the date of discharge, then this indemnity shall terminate at that time unless before that time Charterers have received from Owners written notice that:*

a. some person is making a claim in connection with Owners delivering cargo pursuant to Charterers' request or

b. legal proceedings have been commenced against Owners and/or carriers and/Charterers and/or any of their respective servants or agents and/or the vessel for the same reason.

When Charterers have received such a notice, then this indemnity shall continue in force until such claim or legal proceedings are settled. Termination of this indemnity shall not prejudice any legal rights a party may have outside this indemnity.

1. Owners shall promptly notify Charterers if any person (other than a person to whom Charterers ordered cargo to be delivered) claims to be entitled to such cargo and/or if the vessel or any other property belonging to Owners is arrested by reason of any such discharge of cargo.

2. *This indemnity shall be governed and construed in accordance with the English law and each and any dispute arising out of or in connection with this indemnity shall be subject to the jurisdiction of the High Court of Justice of England...'*

(wording in bold added by the parties).

On the same day, PGT as the seller issued a letter of indemnity to Natixis under the irrevocable letter of credit. Following a slight delay, PBSA instructed that the cargo be discharged and, on 16 November 2019, without presentation of the OBLs, the cargo was discharged and delivered to Hontop.

The Vessel departed the port shortly thereafter. No objection was made at the time to the fact that the cargo had been delivered to Hontop and not PGT, as the lawful holder of the OBLs.

PBSA, however, maintained that the instruction to discharge the cargo from the Vessel was not an instruction to deliver the cargo to Hontop.

On 2 December 2019, it was agreed between Trafigura, CUSA and CSPL that the Trafigura Charter would be '*amended*' so as to substitute CSPL for CUSA as charterer, at which point CSPL became liable for all past and future obligations and liabilities accrued by the charterer under the Trafigura Charter. However, CUSA remained the desponent owner to PBSA.

On 4 March 2020, Natixis wrote to PBSA and PGT demanding that they obtain and deliver the OBLs by 10 March 2020. On 7 March 2020, the Vessel left Taiwan for Singapore to take on fuel. In the meantime, Trafigura entered into negotiations with a third party for a spot fixture of the Vessel. This charter (the '**P66 Fixture**') was for a voyage from a port in West Africa to a discharge port on the west coast of the USA and was considered to provide '*significant commercial advantage*' as it provided the opportunity of '*an onward charter at a high charter rates with limited non-revenue earning movements*'. On 13 March 2020, the P66 Fixture became a binding charter and provided that the Vessel should arrive in the load port on 4/5 April 2020.

On 12 March 2020, the Vessel docked in Singapore, where it was arrested by Natixis in *in rem* proceedings which it had commenced in Singapore and in which it alleged mis-delivery of the cargo by the Owner and demanded security of the sum of USD 76.05m in return for the release of the Vessel.

The Owner, Trafigura and Clearlake each asserted down the chain that they were entitled to be indemnified by each charterer. No such indemnities were forthcoming and on 18 March the P66 Fixture was cancelled on the basis it would not arrive at the load port on time.

As a result of the foregoing, Trafigura commenced proceedings on 23 March 2020 and mandatory injunctions were sought and granted to:

1. Trafigura against CSPL; and
2. Clearlake against PBSA.

The injunctions required CSPL and PBSA to provide security to Natixis so as to secure the release of the Vessel and provide funds to defend the claims raised by Natixis in Singapore. Following some delay, PBSA paid the required sum to the court in Singapore and the Vessel was released from arrest on 11 May 2020.

Following the release of the Vessel, Trafigura entered a voyage and storage charter with an associated company, which was completed, and the cargo discharged by 1 November 2020 (the '**Traf CP**').

Issues

CSPL borrowed money to pay the sums required by the Singapore court. In the event, CSPL was not required to pay the sums to the Singapore court, as these were paid by PBSA. CSPL however, sought the costs of borrowing from PBSA under the indemnity between CUSA and PBSA.

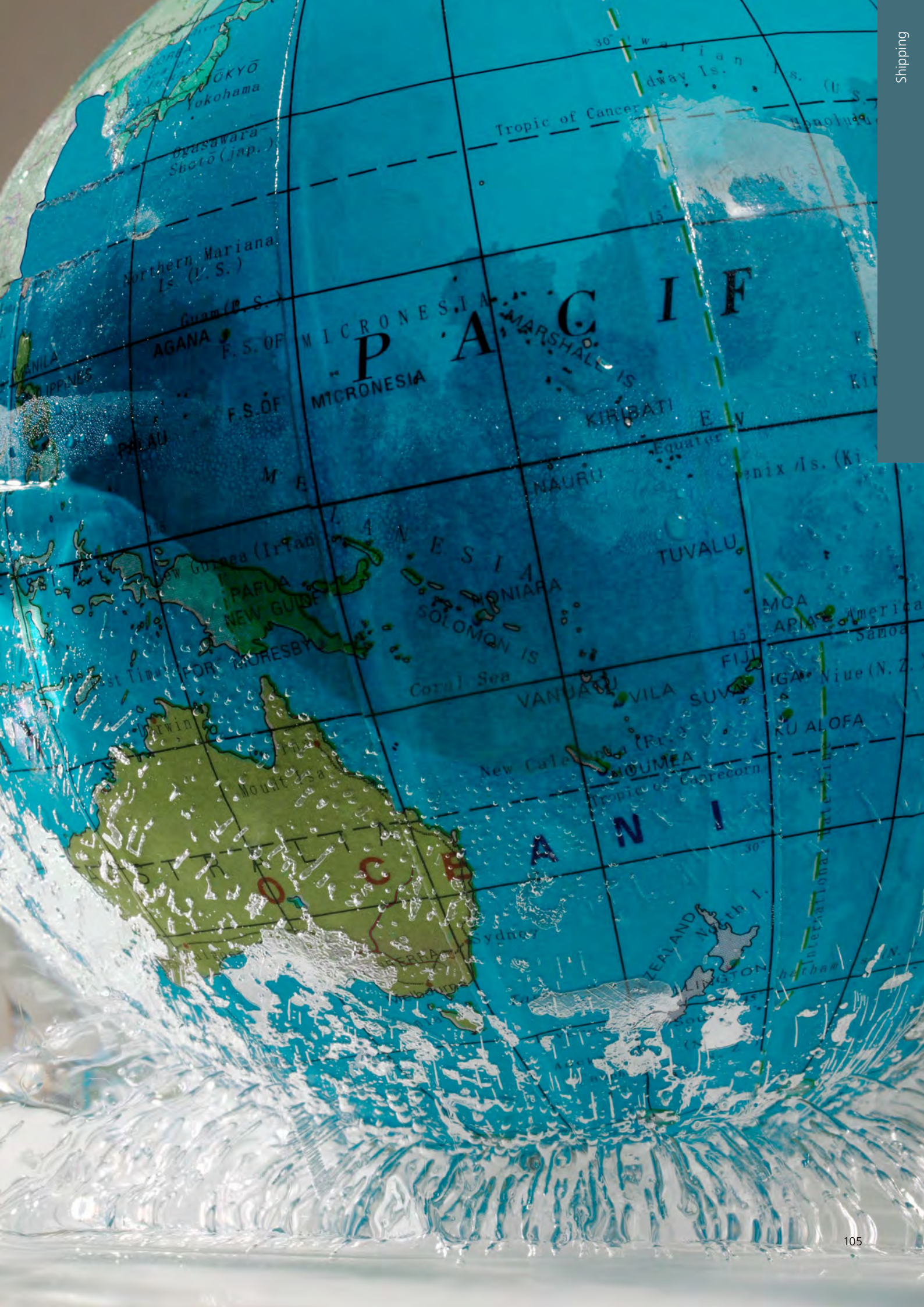
Trafigura also claimed under the CSPL indemnity:

1. the loss of gross profit from the P66 Fixture;
2. the loss of gross profit from the charter that it alleges would have followed the P66 Fixture; and
3. the expenses it incurred as a result of the Vessel's arrest, less the profit made under the Traf CP.

Decision

Defence 1

The bold italicised words in the indemnity had been inserted into the draft and did not form part of the original form. The form used contemplated (before it was amended) that where discharge without Bills of Lading was requested, then the owner or disponent owner would discharge in accordance with that request on the basis of a deemed indemnity by the charterers in the terms set out in Clause 33(6)(c)(i) to (iii) as qualified by (iv) to (vii). The amendment struck out Subclauses (c)(i) to (iv) however. The amendment contemplated that the disponent owners' P&I Club wording would be submitted to the charterers before '*lifting the subs*' i.e. before the voyage or sub-charters became binding between the parties. It was common ground that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this did not occur and that the wording relied on by Trafigura was only sent to the charterers on 14 October 2019, after the '*subs*' had been lifted – i.e. after the voyage and sub charterparties had become binding between the parties. As a result, PBSA suggested that there is no binding obligation to indemnify as between CSPL and Trafigura.

The Commercial Court did not accept this argument.

In respect of the Commercial Court's approach to construction and interpretation, none of the parties pretended that either charterparty was a competently drawn document, much less one that can fairly be described or approached for construction purposes on the basis that they were drafted by skilled professionals. In those circumstances, it was likely that contextual issues will play a much more significant role in any construction issues than would otherwise be the case. Further, business common sense was likely to play a significant part in arriving at a true construction of the document.

Applying the above approach:

1. It was next necessary to consider the effect of the '*Owners*' wording not being provided before the '*subs*' were lifted – i.e. before the contract was made unconditional.
2. It was not accepted that the failure to supply the wording before the charters became unconditional meant that the intention of the parties was that the charterers would be entitled to demand discharge or delivery without presentation of the original bills under Clause 33(6) without providing an indemnity.
3. Whilst the purpose of including the words '… *the Owners' P&I Club wording to be submitted to Charterers before lifting the 'subs*'' after the contract became unconditional (when by definition what then became a term of the charters could not be complied with) is unclear, it is on balance more consistent with the intention being that discharge without presentation could only be required against the provision of an indemnity rather than the alternative.
4. The intention of the parties and the true construction of Clause 33(6) applying the principles summarised earlier was that the words '… *before lifting the 'subs*'' are surplus and of no effect as and from the time when the parties agreed that the contract would become unconditional. Had the intention been that there would be no operative indemnity then they would have omitted the inserted words before lifting subs.

When reaching this decision, the Commercial Court considered what would have been intended by '*reasonable people*' in the parties' position and decided that the parties had a choice of either '*providing an indemnity… as per Owners' P&I Club wording … or not doing so and presenting the original bills of lading*.' As CSPL had failed to present the OBLs, they had chosen the first option of providing an indemnity.

The Commercial Court also noted that whilst the purpose of the clause was unclear, there was nothing to suggest that the parties had intended the words to constitute a condition precedent. If this were the case, the parties would not have lifted the subs until the words were produced. The fact that they did so, indicated their choice to '*waive compliance*.'

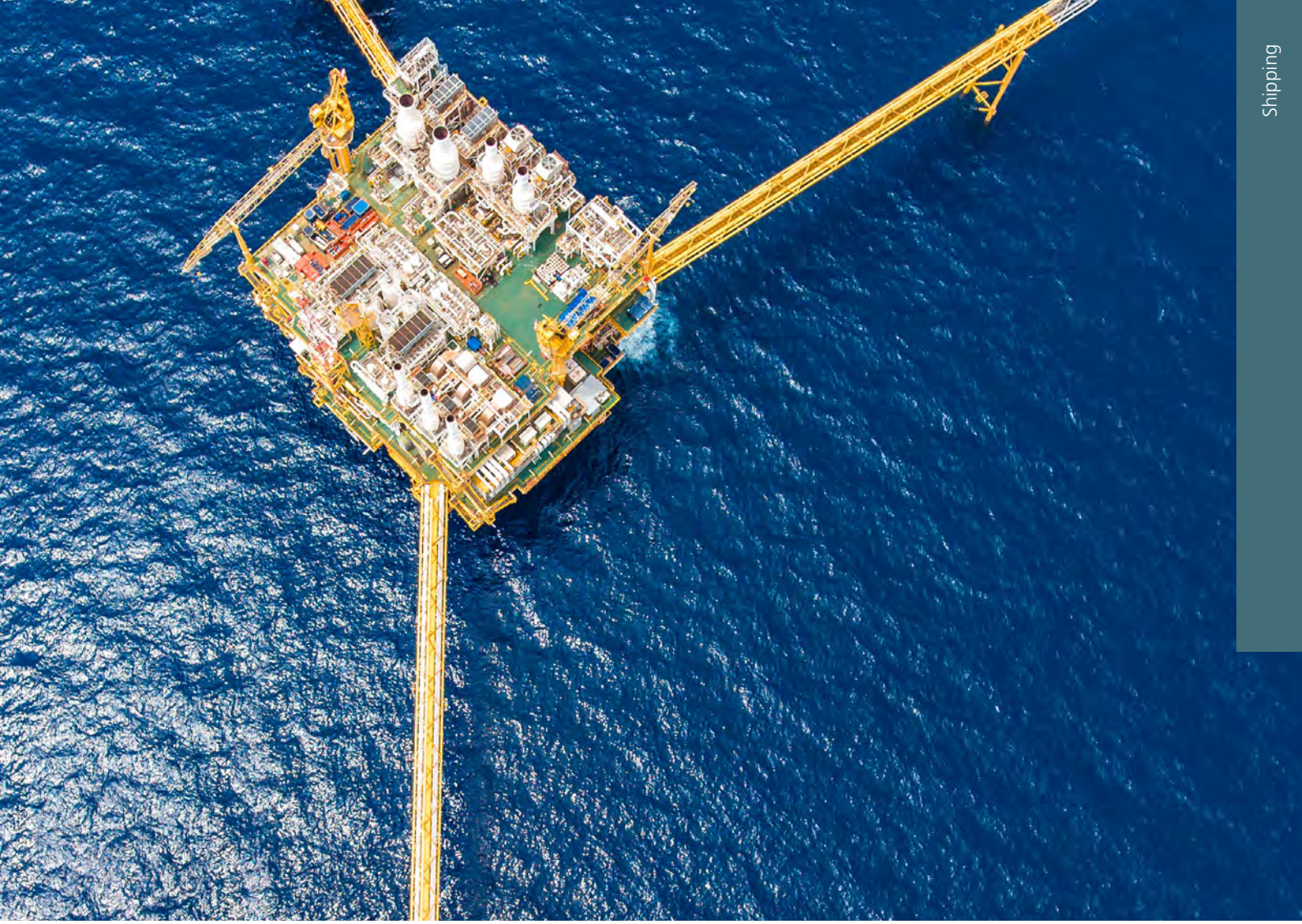
Defence 2- Delivery vs Discharge

PBSA also argued that:

1. The LOI dealt with '*delivery at the port,*' whilst the instruction it gave was to discharge, rather than deliver the cargo.
2. 'Discharge' is generally understood to be the physical act of removing the cargo from the vessel whereas 'delivery' refers to the actual transfer of the cargo's possession to the receiver.
3. The Owner should therefore have discharged the cargo at the discharge point but retained control of it (preventing any indemnity for 'wrongful delivery' from arising).

The Commercial Court disagreed with this argument. Whilst the Commercial Court accepted that in principle there is a distinction to be drawn in shipping law between discharge and delivery, it is entirely wrong to conclude that such a distinction was relevant here.

Amongst other things, it was clear from the unamended language at least that the words discharge and delivery were used in that clause interchangeably – see by way of example the phrase '… *delivering such cargo …*' in Subclause (i); and '… *delivered cargo …*' in Subclause (ii) compared and contrasted with the use of the phrase '*discharge such cargo …*' in the opening line of Clause (c) and the word 'discharge' in Clause (iii) in the same context. The amendment made to the clause did not make any difference, particularly given the context. In truth the word discharge and deliver or delivery are used interchangeably by the parties in these charters and in the context in which they are used mean the same thing.



Comment

The amendment of model form contracts can be a useful way to avoid the need for bespoke contractual arrangement – using the model form as a starting point and amending it to reflect the parties' intentions.

However, such an approach is also redolent with risk. Model form agreements are designed to work as a whole, so amending elements of them by way of deletion and addition has the potential to create internal inconsistencies – resulting in differences in opinion on what the parties have finally agreed.

Although English law will usually start from the proposition that the natural and ordinary meaning of words should prevail with the assumption that words are not intended to be superfluous, there are circumstances where the law will take a more commercial approach. That may be particularly the case where a model form has been amended such as to obscure any clear intention.

The Commercial Court seemed concerned that an interpretation that required the P&I wording to be provided before the 'subs' for the indemnity to 'kick-in', would have had the commercial effect of making it a condition precedent to the existence of the indemnity. Absent clear wording that this was the intention of the parties, the Commercial Court was more inclined to decide the words were superfluous rather than words of conditionality.

Although not emphasised in the decision of the court, English law can be slow to construe contractual obligations as conditional.

Judge: Pelling HHJ.

‘Safety’ and an owner’s right to refuse the charterers’ voyage instructions

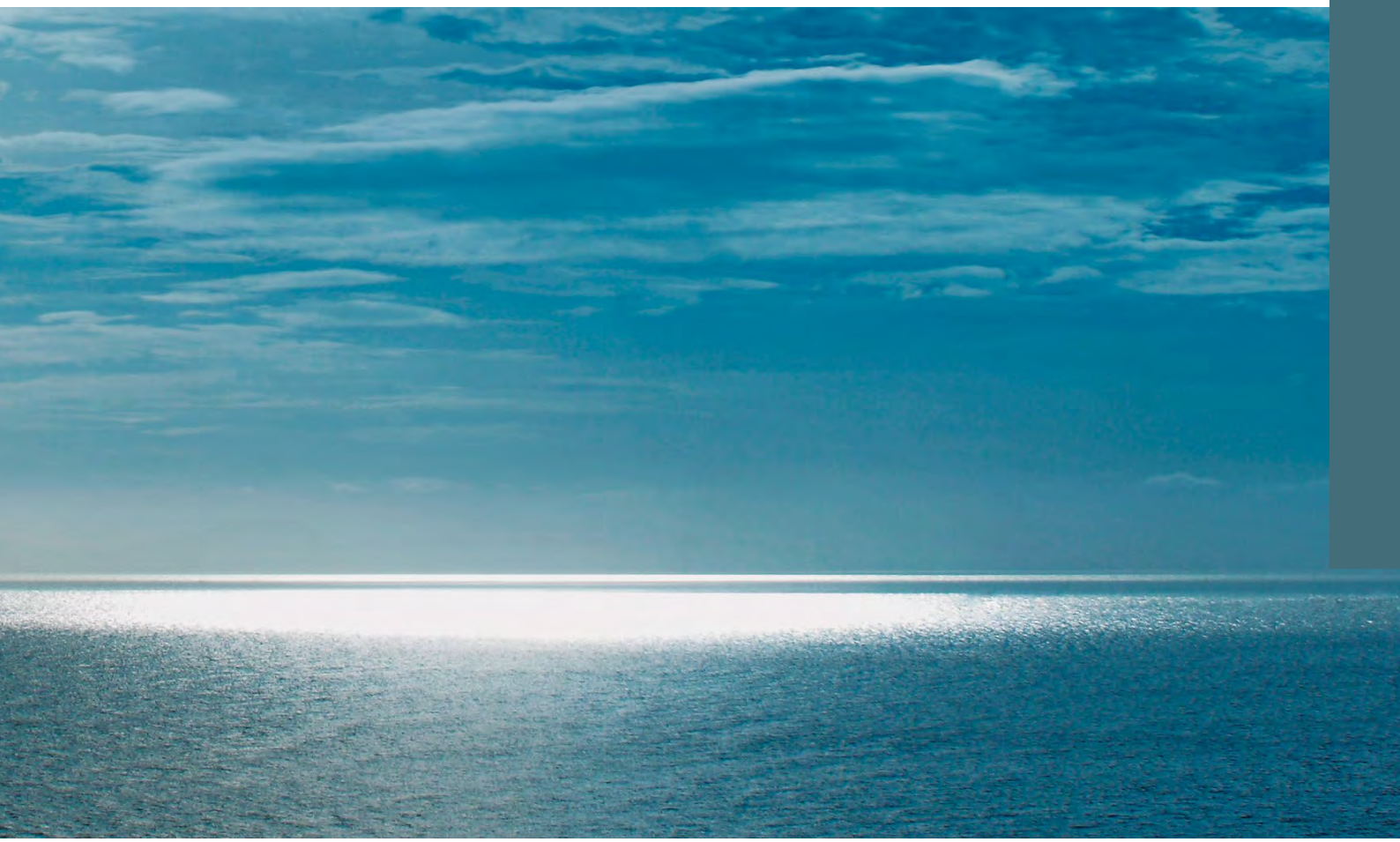
In *CM P-MAX III Limited v Petroleos Del Norte SA (MT Stena Primorsk)* [2022] EWHC 2147 (Comm) the Commercial Court considered a long-standing uncertainty of whether, and if so when, a ship owner can disregard the charterer’s voyage instructions without interrupting demurrage under a Shellvoy 6 contract. An answer was provided where the Commercial Court found that shipowners can legitimately reject the charterer’s requests to berth if it is reasonable to believe that the load cannot be safely discharged.

Facts

CM P-Maxx II Limited, the claimant and owner, (the ‘**Owner**’) chartered the MT Stena Primorsk (the ‘**Vessel**’) to Petroleos Del Norte SA (the ‘**Charterer**’) under the terms of an amended form Shellvoy 6 contract for the carriage of a cargo of oil (the ‘**Charter**’).

The following extracts from Part 2 of the Charter stated:

1. Clause 3(1): *‘Subject to the provisions of this Charter the vessel shall perform her service with utmost despatch and shall [having loaded the vessel] proceed as ordered on signing bills of lading to such berths as Charterers may specify, in any port or ports within Part I clause (E) nominated by Charterers, or so near thereunto as she may safely get and there, always safely afloat, discharge the cargo.’*
2. Clause 3(2): *‘Owners shall be responsible for and indemnify Charterers for any time, costs, delays or loss including but not limited to use of laytime, demurrage, ….. due to any failure whatsoever to comply fully with Charterers’ voyage instructions… Owners shall adhere to Charterers’ voyage instructions as long as such orders are considered safe by the Master of the ship.’*
3. Clause 4: *‘Charterers shall exercise due diligence to order the vessel only to ports and berths which are safe for the vessel and where the vessel will always be afloat….’*



4. Clause 7: *'The cargo shall be loaded into the vessel at the expense of Charterers and, up to the vessel's permanent hose connections, at Charterers' risk. The cargo shall be discharged from the vessel at the expense of Owners and, up to the vessel's permanent hose connections, at Owners' risk. Owners shall, unless otherwise notified by Charterers or their agents, supply at Owners' expense all hands, equipment and facilities required on board for mooring and unmooring and connecting and disconnecting hoses for loading and discharging which meet the most recent Oil companies International Marine Forum (OCIMF) standards. If requested by Charterer, Vessel shall load and/or discharge more than one grade simultaneously if Vessel is technically capable of doing so. Any delay resulting from the failure by Owners to provide such personnel, equipment and facilities shall not count as laytime or, if the vessel is on demurrage, as demurrage.'*
5. Clause 9: *'If at any time before cargo operations are completed it becomes dangerous for the vessel to remain at the specified berth as a result of wind or water conditions, Charterers shall pay all additional expenses of shifting from any such berth and back to that or any other specified berth within port limits…. time spent shifting shall count against laytime or if the vessel is on demurrage for demurrage.'*
6. Clause 13(1)(a) provided that time at the port of discharge will commence to run 6 hours after the NoR has been tendered by the master or Owners' agents to charterers or their agents and or the vessel is securely moored at the specified loading or discharging berth, whichever occurs first. If the owners *'fail to obtain free pratique unless this is not customary prior to berthing…..either within the 6 hours after notice of readiness originally tendered or when time would otherwise normally commence under this Charter, then the original notice of readiness shall not be valid.*'
7. Clause 14: *'Time shall not count when: …..(c) lost as a result of: (i) breach of this Charter by Owners….'*
8. Clause 15(2): *'… Any delays for which laytime/ demurrage consequences are not specifically allocated in this or any other clause of this Charter and which are beyond the reasonable control of*

Owner or Charterer shall count as laytime or, if Vessel is on demurrage, as time on demurrage. If demurrage is incurred, on account of such delays, it shall be paid at half the Demurrage Rate.'

9. Clause 25(1): *'If the vessel, with the quantity of cargo then on board, is unable due to inadequate depth of water in the port safely to reach any specified discharging berth and discharge the cargo there always safely afloat, Charterers shall specify a location within port limits where the vessel can discharge sufficient cargo into vessels or lighters to enable the vessel safely to reach and discharge cargo at such discharging berth, and the vessel shall lighten at such location. All lightering expenses to be for Charterers' account.'*

In addition to the Charter, the Owner issued a standard form questionnaire (the '**Questionnaire**') to the Charterer which outlined the Owner's Under-Keel Clearance Policy (the '**UKC**').

The cargo was loaded onto the vessel at Bilbao and subsequently proceeded to the Paulsboro Port (the '**Port**') for discharge. Before arriving at the Port, due to tidal conditions, the Master sought a waiver to the UKC policy in order to berth and discharge the cargo. The Vessel's technical operators, Northern Marine Management ('**NMM**'), granted the waiver on a '*one-off basis*' on the assumption that the Vessel's draft would be equal to or less than the Port's declared safe draft at high tide. The waiver would permit the Vessel to berth despite breach of the UKC policy.

On 31 March 2019, the Vessel berthed. Shortly after arrival, however, the Master was informed that discharge would proceed (initially) at a reduced discharge rate. Accordingly, the Master decided to return the Vessel to anchorage on the basis that the slower rate of discharge, alongside tidal fluctuations, would be insufficient to maintain a safe UKC.

On 1 April 2019, the Charterer identified an alternative berth where it was possible to discharge the cargo at a higher rate. Accordingly, the Charterer requested the Owner to execute the discharge at this berth at the next high tide at 21:00 on 1 April. As the UKC requirement was not met, the Master requested a second waiver, claiming that a discharge was possible. However, the NMM declined the request, on the basis that there would be '*very little margin for safety*', any (prolonged) delays would have '*severely compromised*' the UKC with a '*risk of the vessel touching bottom*' and that there were insufficient controls to mitigate the risks.

Lightering took place on 4 April 2019 and the Vessel eventually returned to the original terminal and was discharged by 6 April 2019.

Issues

The Owners brought a demurrage claim against the Charterers in the value of USD 143,153.64.

The Charterers sought to defend the claim on the following basis that time was suspended due the fact that the Owner was in breach of the Charter.

Decision

On issues of construction and interpretation of the Charter the Commercial Court considered:

1. The obligation to proceed with *'utmost despatch'* pursuant to Clause 3(1) of the Charter is not absolute and is limited by the need to remain *'safely afloat'*.
2. While Clause 3(2) of the Charter requires the owner *'to comply with the Charterer's voyage instructions,'* this obligation is not absolute. Rather, as is provided for in the clause itself, adherence is only required to the extent that the orders are considered *'safe'* by the Vessel's Master.
3. Following *The Fontevivo* [1975] 1 Lloyd's Rep. 339, a charterer needs to establish *'fault on the part of the owner or those the owner is responsible for'* to suspend time. However, such fault need not be a breach of contract.
4. In addition, where an owner acts in accordance with the charter, it will be difficult to determine how they are at fault.
5. Not only is the UKC policy integral to the Charter, but it is governed by Part 1 of the Charter and so takes precedence over Part 2 where the general terms are to be found.

The Commercial Court found that there was '*broad agreement between the experts*' that on 31 March the Master's decision was '*a perfectly responsible … one made on safety grounds*'. It was agreed between the parties that the Master was justified in deciding to leave the berth on 31 March due to safety reasons. The issues in dispute, therefore, centre around the events of 1 April 2019 and, in particular, whether the decision not to proceed to the berth on 1 April placed the Owner in violation of the Charter. If so, Clause 14 of the Charter specifies that the lost time shall not be charged to the Charterer.

In this regard, the Commercial Court found that NMM was entitled to conclude that it was not appropriate to grant a waiver to allow the vessel to birth at 21:00 on 1 April 2019. Accordingly, there was no fault on the part of the Owner, the Master or NMM on 1 April 2019.

Accordingly, the Owner was awarded demurrage in the amount claimed.

Comments

Although not '*front and centre*' of the decision, the construction given to the Charter in this case appears to have an eye on ensuring that safety is paramount in the operation of charters. The scheme of the Charter permitted the Charterer to instruct the Owner to berth the Vessel. However, the Charterer's obligation to follow such instruction was not absolute. Read as a whole, the Charter only required instructions to be followed if the Master considered them safe. There would be no 'fault' (or breach) of the Owner refusing to follow an instruction that was considered unsafe by the Master.

Judge: Bird HHJ.

Chapter 9

Dispute Resolution and Arbitration

In the past twelve months English courts have handed down a number of cases relevant to resolving disputes which will be of interest to those in the oil and gas industry. These include important decisions relating to the upholding of arbitration awards and construing settlement agreements:

— In *Maranello Rosso Limited v Lohomij BV and ors* [2022] EWCA Civ 1667, the Court of Appeal has given guidance on the construction of a settlement agreement that is expressed to release claims unknown to either party at the date of settlement, confirming that claims in conspiracy (as well as fraud and dishonesty) were released even though the settlement agreement did not expressly mention such claims.

— In *Nigerian Agip Exploration Ltd v GEC Petroleum Development Co Ltd* [2023] EWHC 414 (Comm), the Commercial Court granted a series of orders and injunctions preventing proceedings in local courts. In doing so, it demonstrated that it will take action to prevent wrongful commencement of legal proceedings in local courts where an arbitration clause exists.

— In *Infrastructure Services Luxembourg SARL & Anor v Kingdom of Spain (Rev1)* [2023] EWHC 1226 (Comm), the Commercial Court affirmed the United Kingdom's obligation to honour awards rendered under the International Centre for Settlement of Investment Disputes Convention.

When is deliberate wrongdoing settled?

In *Maranello Rosso Limited v Lohomij BV and ors* [2022] EWCA Civ 1667, the Court of Appeal has given guidance on the construction and interpretation of a settlement agreement that is expressed to release claims unknown to either party at the date of settlement, confirming that claims in conspiracy (as well as fraud and dishonesty) were released even though the settlement agreement did not expressly mention such claims. Although not an oil and gas case, it has a wide application to all settlement agreements.

Facts

The dispute concerned the sale by an auction house of a large collection of rare Ferraris, some of which were extremely valuable. Maranello (the '**Seller**') had purchased the collection using finance provided by Lohomij BV ('**Lohomij**') and then immediately consigned the cars to the auction house for onward sale, believing that they would attract a higher price when sold individually and would thus achieve a considerable profit.

In the event, not all of the cars were successfully sold, and the Seller was dissatisfied with the price achieved for those that did sell. The Seller's solicitors, Spring Law, wrote to the auction house advancing claims in negligence and breach of duty. Without specifying any further causes of action, the letter also referred to allegations of duress, bad faith, illegality, and conflict of interest in that there was a pre-existing connection between Lohomij and the auction house.

The Seller and Lohomij entered into negotiations and concluded a settlement agreement that, so far as relevant, released:

'all claims… whether present, actual, prospective or contingent, whether or not known to the Parties… and whether arising in contract, tort, under statute or otherwise… which relate to, arise from, or otherwise connected with… the sale of the Collection… including all claims alleged in Spring Law's letter.'

In return for the release, Lohomij advanced further funds, extended the date for repayment of the existing balance, and waived its facility fee of GBP 13.6m.

Subsequently, two of the beneficial owners of the Seller attended a meeting with a non-executive director of the auction house, at which he allegedly made remarks that led them to believe there had been a conspiracy between Lohomij and the auction house to sell the cars at an undervalue. The alleged motive for this course of action was partly to allow the cars to be acquired by associates of the parties, and in part to boost the auction house's reputation in the US by auctioning some of the cars there rather than in the UK, where they were likely to achieve a higher price. The Seller commenced proceedings for conspiracy to injure its interests by unlawful means.

High Court Decision

At first instance, the High Court decided that the conspiracy claim fell within the scope of the settlement agreement and had therefore been released. The Seller appealed.

The Court of Appeal was required to decide:

1. whether the scope of the settlement agreement extended to claims for unlawful means conspiracy; and
2. if so, whether it was nevertheless unenforceable on the basis that the defendants had engaged in '*sharp practice*'.

Court of Appeal Decision

The Court of Appeal decided that the settlement agreement did extend to claims for unlawful means conspiracy. In reaching this conclusion, the Court of Appeal drew the following principles from earlier case law:

— Settlement agreements are to be construed according to the same principles as any other contract.

— The aim is to ascertain the objective intention of the parties by considering the language used against the background of the surrounding circumstances or '*factual matrix*'.

— In commercial cases, part of the surrounding context is generally that the parties assume honest dealing on the part of their counterparty and do not readily release unknown claims in respect of fraud. Some caution is therefore required before concluding that such a claim has been released (known as the '*cautionary principle*'). However, the parties are free to enter into such a release if they so choose.

— The '*cautionary principle*' does not mean that a settlement must make express reference to claims for fraud or dishonesty in order to release them. A release may take place without express words if the language and surrounding context make it sufficiently clear that this was the intention. The scope of the release must be construed by reference to the specific claim that is being brought, not by reference to predetermined categories of claim such as fraud, dishonesty, conspiracy etc.

— A key question is whether the claim being brought is one that would have been in the contemplation of the parties when the settlement was made.

Applying these principles, the Court of Appeal noted that the letter before claim made *'clear and express allegations'* amounting to breach of fiduciary duty, illegality, threats and duress, and referred several times to the connection between Lohomij and the auction house. The allegations of conspiracy involved the same allegations, simply reformulated under a different cause of action. In Court of Appeal's view, it could not have been intended that the Seller should be able to bring such a *'recast'* claim after benefiting from the waiver of the very substantial facility fee and the extension of the

loan facility as a result of entering into the settlement. This led to the *'inevitable conclusion'* that the claim for unlawful means conspiracy was released.

'Sharp practice'

Some previous authorities referred to the possibility that a release might not be given effect if a party sought the release in the knowledge that there was a claim of which the other party was unaware.

The High Court held, at first instance, that this ***'****sharp practice'* principle did not apply in the present case. Rather, it was unconscionable for the Seller to settle a claim in circumstances where, on its own case, it had objective grounds to suspect deliberate wrongdoing, and then to make the same allegations under a *'very slightly different guise'* when the only new information it claimed to have related to the motivation behind actions that it already knew about. The Court of Appeal agreed with this reasoning, characterising the unconscionability of the Seller's actions as *'obvious'*.

The appeal was dismissed, with the result that (subject to any further appeal) the Seller cannot pursue its claim against the defendants.

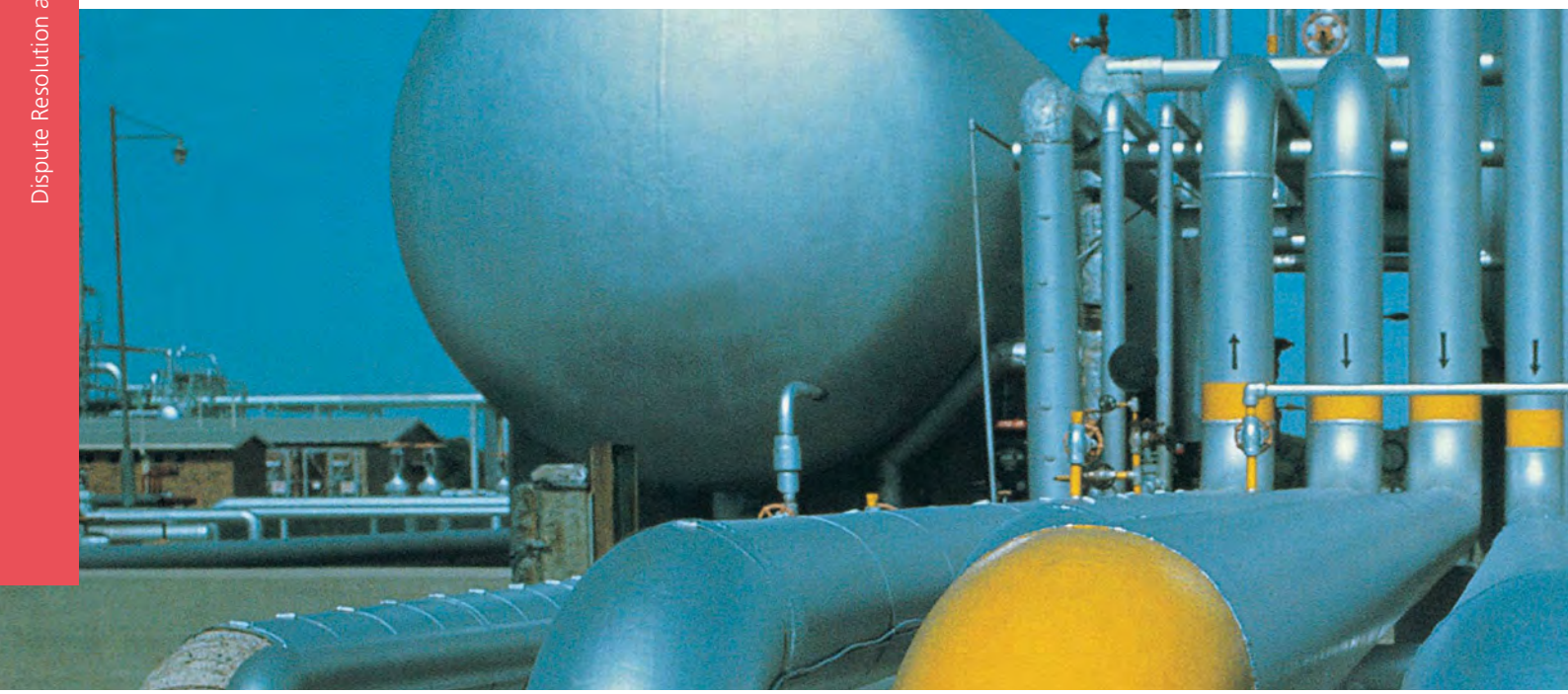
Comment

The importance of paying careful attention to the wording of the release in a settlement agreement, particularly with regard to unknown claims, is well known. However, this judgment provides a useful overview of the principles that a court will apply in construing such a release. In particular, it shows that allegations of fraud and dishonesty are automatically outside the scope of a settlement (save for express words) but may be released by general words if the context points to that conclusion.

In that regard, the case draws additional attention to the potential release of pre-action correspondence, and especially the letter before claim, in establishing the factual matrix as to what allegations the parties had in contemplation at the time of settlement. In this regard, it will be important to keep in mind, and consider, the allegations made in such correspondence when drafting settlement agreements.

High Court Judge: Keyser HHJ.

Court of Appeal Judges: Asplin LJ, Arnold LJ and Phillips LJ.



In Defence of Arbitration

In *Nigerian Agip Exploration Ltd v GEC Petroleum Development Co Ltd* [2023] EWHC 414 (Comm), the Commercial Court granted a series of orders and injunctions preventing proceedings in local courts. In doing so, the Commercial Court demonstrated that it will take action to prevent the wrongful commencement of legal proceedings in local courts where an arbitration clause exists. Further, it will back its decisions with sanctions (if needed).

Facts

Nigerian Agip Exploration Limited ('**Agip**'), is a Nigerian subsidiary of Eni SpA, an Italian energy company with multi-national business interests and operations. GEC Petroleum Development Company Limited ('**GEC**') is a Nigerian company involved in the exploration and development of oil and gas reserves in Nigeria.

GEC were granted an offshore oil prospecting licence by the Nigerian Government, given the number OPL 2009 ('**OPL 2009**')

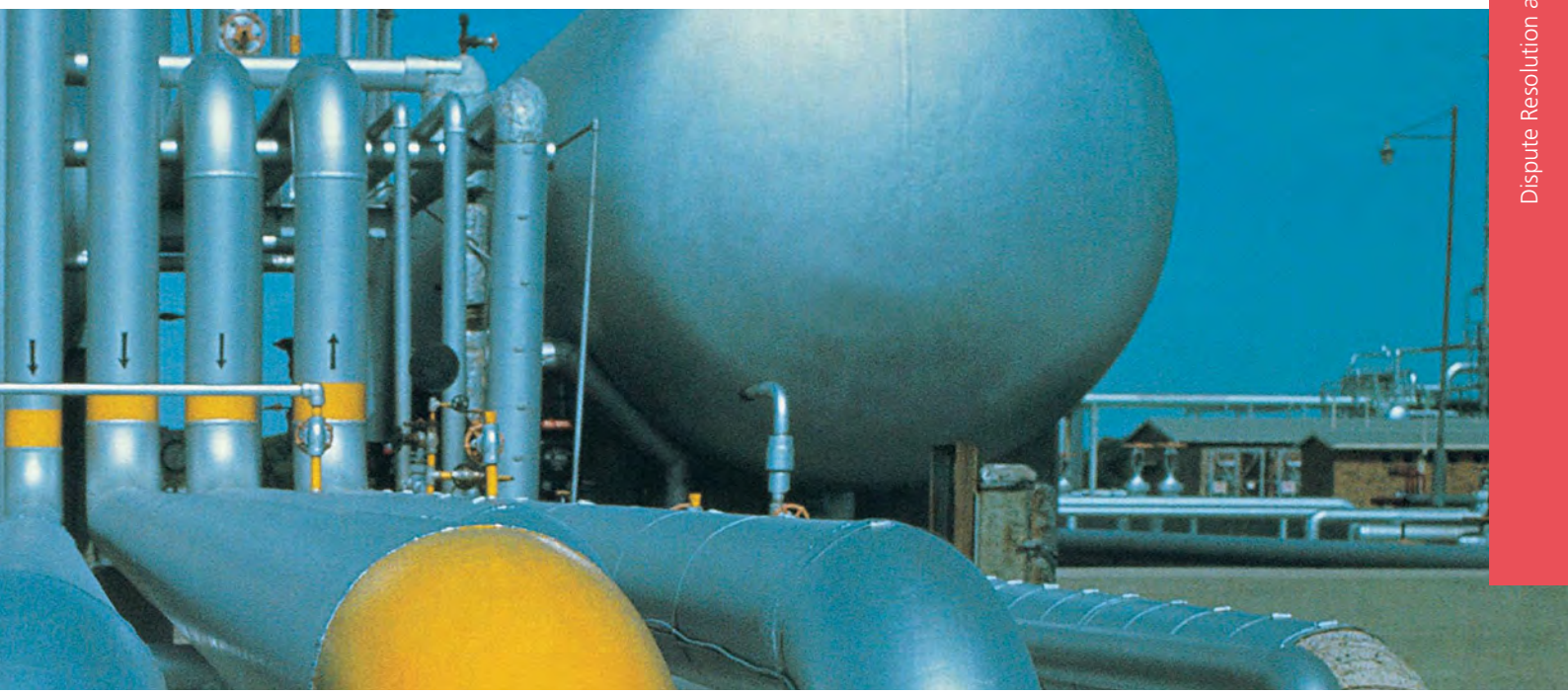
By a series of agreements, Agip and GEC entered into business together in relation to OPL 2009. The agreements between these parties were: a Farm In Agreement dated 16 July 2010; a Joint Operating Agreement dated 11 April 2014; and a Technical Service Agreement dated 11 April 2014 (together, the '**Agreements**'). All Agreements contained arbitration clauses stating that in the event of a dispute the seat of arbitration would be London under the ICC rules.

An arbitration began in August 2018. The subject matter of that arbitration was that Agip alleged that GEC misrepresented their financial capabilities. Agip claimed damages exceeding USD 200m and, in the alternative, it claimed over USD 30m in damages for a breach of contract.

In late 2020, GEC commenced proceedings in the Nigerian court against Agip (the '**2020 Nigerian Proceedings**'). The ICC arbitrators were not joined as defendants.

Commercial Court proceedings were then commenced by Agip in 2021 in response to the 2020 Nigerian proceedings (in which GEC had obtained *ex parte* an injunction addressed to the ICC arbitrators which had directed them to not proceed (the '**2021 Commercial Court Proceedings**').

In March 2021, the Commercial Court granted Agip an interim anti-suit injunction in order to prevent the 2020 Nigerian proceedings. Whilst GEC discontinued the 2020 Nigerian proceedings in compliance with the court order, it refused to provide undertakings or participate in the Commercial Court proceedings. Agip therefore proceeded with a hearing in April 2021 and an interim injunctive relief was granted (in a modified form) (the '**2021 Order'**). Agip made no attempt to list proceedings for final relief. The final arbitral award was



delivered in October 2022, after which GEC commenced new proceedings in the Federal High Court of Nigeria (the '**2022 Nigerian Proceedings**'). Shortly thereafter, Agip returned to the Commercial Court to obtain a further interim injunction to prevent the Nigerian proceedings.

Arbitral Award

In the arbitration proceedings, the tribunal: (1) dismissed Agip's claim for misrepresentation, on the grounds that inducement and loss were not related to misrepresentation; and (2) allowed Agip's alternative claim for beach of contract, in the amount of USD 22m (the '**Arbitral Award**'). By that point, GEC had ceased to participate in the arbitration and in the 2022 Nigerian Proceedings, and GEC sought an order setting aside the Arbitral Award together with an order to renounce it.

Further, GEC alleged misconduct by the arbitral tribunal on three bases:

— GEC was denied a fair hearing, opportunity to present its case and the tribunal had demonstrated impartiality;

— the tribunal exceeded jurisdiction as the final award held decisions on issues that were not related to the Farm In Agreement; and

— the tribunal failed to disclose the fact that the presiding arbitrator sometimes practiced in the same chambers as a leading counsel who represented the claimant in the first set of Commercial Court proceedings.

Commercial Court Decision

Final injunctive relief was granted at the hearing in February 2023. The Commercial Court dismissed GEC's claims made in the 2022 Nigerian Proceedings, on the basis that:

— there was no evidence to suggest the presiding arbitrator had knowledge of the 2021 Commercial Court Proceedings;

— the fact that leading counsel practiced in the same chambers as the presiding arbitrator had been disclosed;

— the arbitrator did demonstrate impartiality (as reflected in the final arbitral award); and

— the claims regarding the jurisdiction of the Farm In Agreement had already been dismissed by the tribunal.

GEC did not believe it was acting in breach of the interim injunction by commencing the 2022 Nigerian Proceedings, however, the Commercial Court found that it was '*impossible*' to argue that the commencement and continuation of the 2022 Nigerian Proceedings was anything but a breach of the 2021 Order. The interim injunctive relief was still applicable as the wording covered '*current or future disputes… arising out of or relating to*' the Agreements. The Commercial Court brought attention to the plain wording of the 2021 Order which clearly covered the 2022 Nigerian Proceedings which challenged the Arbitral Award, the subject of which were the Agreements. The 2021 Order

also stated that any further disputes relating to the same must be under the ICC Arbitration Rules of the seat of London or before the Courts of England and Wales. Additionally, GEC failed to demonstrate any reasons as to why they should be allowed to engage in proceedings contrary to arbitration clauses in the Agreements.

Given GEC's conduct, the Commercial Court was satisfied that Agip's delay in obtaining the final relief, would have had no material impact on whether it should be granted. Agip acted swiftly in response to both the 2020 Nigerian Proceedings and 2022 Nigerian Proceedings and did not engage with either set of proceedings to the extent that the granting of an injunctive relief should be affected.

In accordance with *C v D* [2007] 2 Lloyd's Rep 367, where parties have agreed a seat for arbitration, any challenge to an award given in that arbitration is to be made in the courts of that seat. The Commercial Court, in this instance, was satisfied that a challenge to the arbitral award where the seat of arbitration was London, should be exclusively dealt with by the English courts. Therefore, GEC was in breach of its obligations under the arbitration clauses in the Agreements by commencing proceedings in Nigerian courts.

The injunctive relief was ultimately granted on the basis that there were continuous breaches of the arbitration clauses (contained within the Agreements) and there was a further attempt to proceed in the Nigerian court which was also in breach of the 2021 Order. All aspects of relief set out in the draft order were granted. The final relief constituted a specific mandatory injunction requiring that the 2022 Nigerian Proceedings immediately cease and a continuing prohibitory injunction in respect of the commencement, pursuit or assistance of further proceedings other than arbitration seated in London or before the English courts. Costs were granted on an indemnity basis.

Comment

This decision is significant as it demonstrates (i) the importance of the seat chosen for arbitration and the role of the accompanying supervisory court and (ii) the robustness of the English courts, when an arbitration is seated in London, when dealing with parties wrongfully seeking to circumvent an arbitration clause by starting proceedings in a local court. In addition to the English courts demonstrating their pro-arbitration stance, the case also demonstrates that (where necessary) the English courts are willing to use injunctive relief to prevent to the wrongful circumvention of an arbitration clause. This is of practical significance as breaching an injunction is a criminal contempt. The willingness of the English courts to support arbitration clauses with injunctive relief, alongside the role of London as an international hub for business and travel, where persons breaching an injunction may be arrested, means that anti-suit injunctions issued by the English courts are capable of having a real impact. The Commercial Court has sent a clear message that by seating an arbitration in London, the parties will benefit from real legal support in defending their right to keep disputes in arbitration and prevent proceedings being wrongfully commenced in local courts.

Further, costs being awarded on an indemnity basis in this case shows the English courts' intentions towards parties who impede the arbitration process; the English courts are likely to take a strict and no-nonsense approach towards those who frustrate the arbitration process as previously agreed between the parties.

Judge: Baker J.

New title in oil and gas

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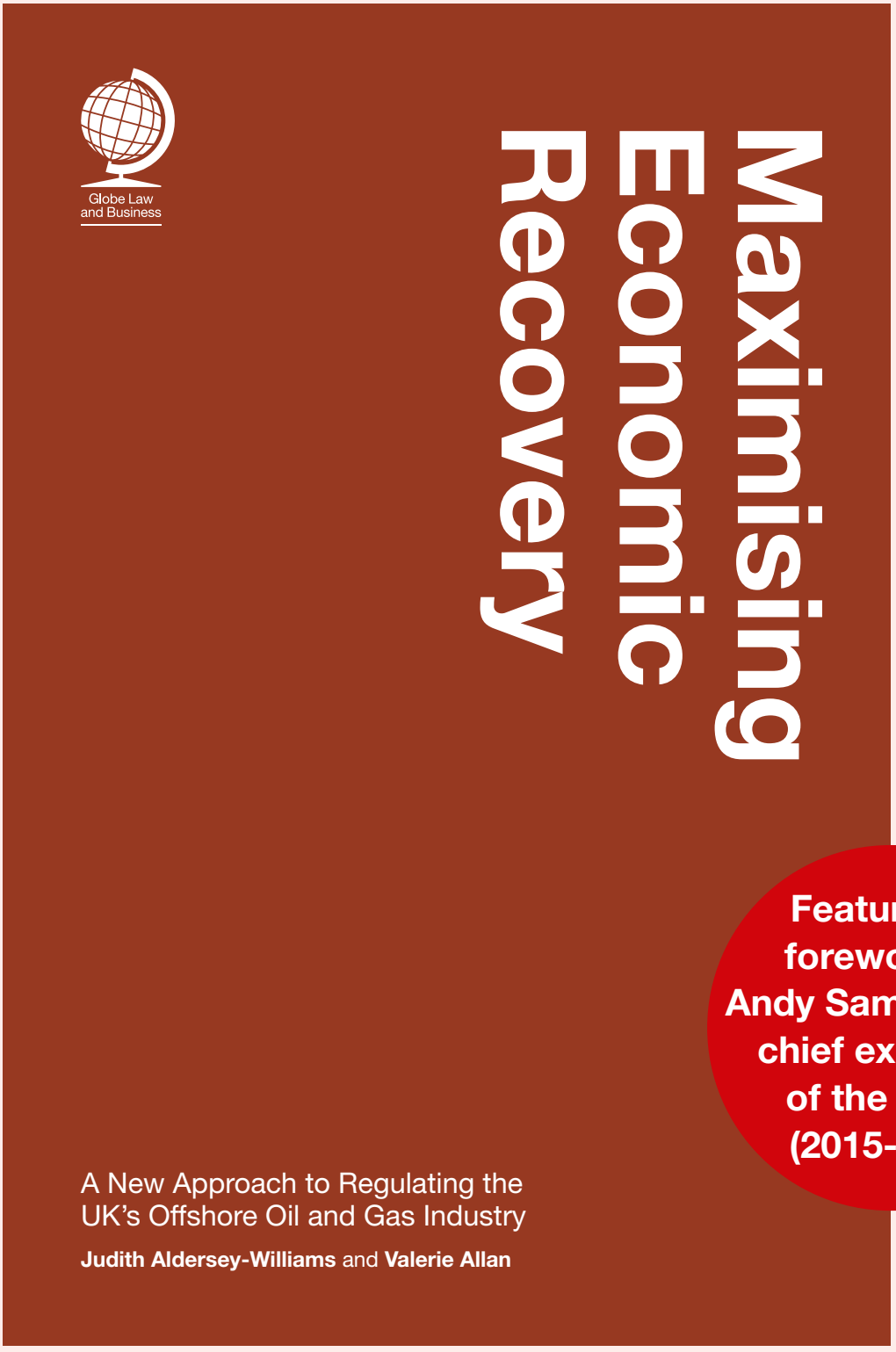

Maximising Economic Recovery will be of interest to legal practitioners active in energy law whether in private practice or in house, academics with an interest in energy regulation and regulators looking at the UKCS as a model for other jurisdictions.

Featuring a foreword by Andy Samuel CBE, chief executive of the NSTA (2015-2022)

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Enforcing an Energy Charter Treaty Award

In *Infrastructure Services Luxembourg SARL & Anor v Kingdom of Spain (Rev1)* [2023] EWHC 1226 (Comm), the Commercial Court affirmed the United Kingdom's obligation to honour awards rendered under the International Centre for Settlement of Investment Disputes Convention ('**ICSID Convention**'), including intra-EU awards rendered under the Energy Charter Treaty 1994 ('**ECT**'). In the context of the current uncertainty concerning the future of the ECT, the decision may offer some comfort to energy investors.

Facts

Eiser Infrastructure Ltd, now Infrastructure Services Luxembourg S.à.r.l ('**Infrastructure Services**') is incorporated under the laws of the Grand Duchy of Luxembourg; Energia Solar Luxembourg S.à.r.l ('**Energia**'), a wholly owned entity of Infrastructure Services, is incorporated under the laws of the Netherlands (together, the claimants). Luxembourg and the Netherlands are both Member States of the European Union ('**EU**').

In 2007, the Spanish Government enacted a regulatory regime that sought to incentivise renewable energy in Spain. Infrastructure Services and Energia invested in projects based on the 2007 Spanish regime.

However, in 2013, as part of the move by Member States within the EU toward establishing a single market, incentives under the 2007 Spanish regime were reduced.

On 22 November 2013, the claimants commenced an arbitration against Spain by referring the dispute to ICSID, claiming that Spain had breached its fair and equitable treatment obligations under Article 10(1) of the ECT as a result of these changes. The hearing commenced in October 2016 in Paris and on 15 June 2018 under the auspices of ICSID.

Infrastructure Services and Energia were successful and obtained an award in their favour (the '**Award**'). Spain then attempted to have the Award set aside under the ICSID annulment procedure claiming that the tribunal had exceeded its powers by exercising jurisdiction over the arbitration in breach of EU law – essentially stating that any intra-EU arbitration under the ECT is precluded by EU law (as would be any international arbitration to which a Member State is a party). A stay was imposed on the Award which was eventually lifted on 21 October 2019.

Following the above, the claimants sought to enforce the Award against Spain's assets located in numerous jurisdictions, notably Australia. This included an *ex parte* application to register the Award in England under the Arbitration (International Investment Disputes) Act 1966 (the '**1966 Act**') (the regime governing the recognition and enforcement of ICSID Convention awards in the UK). Section 1(2) of the 1966 Act states: '*A person seeking recognition or enforcement of* [an ICSID Convention] *award shall be entitled to have the award registered in the High Court…*'.

On 29 June 2021, the registration order (the '**Order**') was granted. This case concerns Spain's application to have the Order set aside.

Decision

The Commercial Court rejected Spain's arguments and refused to set aside the Order.

Spain's core argument was that Spain was entitled to adjudicative immunity, depriving the Commercial Court of jurisdiction to make the Order under Section 1 of the State Immunity Act (the '**1978 Act**'), in which: '*A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act*'.

Section 2(2) of the 1978 Act provides that: '*A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission*'.

Under Section 9(1) of the 1978 Act: '*where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration*'.

Spain's argument was based on the fact that it did not agree to submit its dispute with the claimants (who were incorporated in the Netherlands and Luxembourg) to arbitration. The claimants' counter-argument was that by submitting to the ICSID Convention, and in particular Article 54 which states that '*each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State*', Spain has agreed to submit the dispute to arbitration.

In respect of the relationship between international investment treaties and EU law, the Commercial Court considered three notable decisions.

— First, *Slovak Republic v Achmea BV* Case C-284/16; ECLI:EU:C:2018:158 (Judgment, Grand Chamber) ('**Achmea**') which considered a conflict between Articles 267 and 344 of the Treaty of the Functioning of the European Union ('**TFEU**') and Article 26 of the ECT arising under a Bilateral Investment Treaty between the Kingdom of Netherlands and the Czech and Slovak Federative Republic. In *Achmea* it was ultimately found that the intra-EU application of the ECT was inconsistent with EU law and that an international agreement should not affect the autonomy of the EU legal system.

— Second, *Republic of Moldova v Komstroy LLC (successor in law to Energoalians)* Case C-741/19; EU:C:2021:655 (Judgment, Grand Chamber) ('**Komstroy**') arising from a contract for the sale of supply and electricity to the Republic of Moldova where it was decided that the provisions of Article 26 of the ECT and the mechanism for referring a dispute between an investor and Member State to arbitration cannot apply within the EU as such an arbitration provision is incompatible with law under the EU treaties.

— Third, *Micula & Ors v Romania (European Commission intervening)* [2020] UKSC 5 ('**Micula**') in which the Supreme Court lifted a stay on the enforcement of an ICSID arbitral award and enforced an ICSID arbitration award worth approximately EUR 300m in the United Kingdom (despite an ongoing state aid investigation by the European Commission). In *Micula* the Supreme Court decided that the ICSID Convention is self-contained and should not be subject to external review from a domestic court or authority while also suggesting there may be additional defences available against enforcement of ICSID awards '*in certain exceptional or extraordinary circumstances*'.

While the Commercial Court empathised with Spain's '*juridicial dilemma*' with its obligations under the ECT for dispute resolution (which incorporates the ICSID Convention), now found to be in conflict with the law of the EU as set out in the EU treaties, it decided that the Court of Justice of the EU ('**CJEU**') is not '*the ultimate arbiter under the ICSID convention*'. The United Kingdom's own treaty obligations under the ICSID Convention, are owed to all signatories of the ICSID Convention. The United Kingdom had acquired treaty obligations in becoming party to the ICSID Convention which expressly included bringing into domestic law a procedure for awards under the ICSID Convention to be recognised in law as binding, and enforceable, as though such awards were judgments of a competent court within the Contracting State. That treaty obligation has resulted in primary legislation that gave rise to the domestic mechanism established under the 1966 Act.

The availability of defences to a foreign state faced with an application to register an arbitral award under the ICSID Convention is far narrower than those that would be available if an award were being enforced under the

New York Convention. *Micula* makes it clear that for an additional defence to be available to a state, it must '*not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under articles 50 to 52 of the Convention*'. Further, the position at EU law cannot alter the United Kingdom's own independent treaty obligations under the ICSID Convention. Therefore, Spain has no ability to deploy such defences in this application. As a result, Spain's application could not succeed.

Further, Spain has no immunity to these proceedings under the 1966 Act because it has already submitted to the jurisdiction of the court by reason of its accession to the ICSID Convention, which is a written agreement to arbitrate and hence within the exceptions of the 1978 Act.

If relevant, in relation to any alleged conflict of treaty provisions, the Commercial Court examined the nature of the alleged conflict between the ICSID Convention / ECT and EU law. Applying the Vienna Convention on the Law of Treaties ('**VCLT**') it decided:

1. the ICSID Convention and the ECT are plainly multilateral treaties.
2. there has been no amendment of the ICSID Convention pursuant to Article 40 of the VCLT, nor has there been a modification under Article 41.
3. in terms of any conflict, this is governed by Article 30. Here, Article 30(4) would apply, because the ICSID Convention has nation parties to it who are not Member States.
4. therefore, the ICSID Convention, for as long as Spain is a party to it, should govern the way in which valid ICSID awards against Spain are dealt with in other domestic courts.
5. if one considers the matter in a chronological and linear fashion, starting with the ICSID Convention itself, Spain acceded to that freely and so did the United Kingdom. Spain – or any other Member State in my judgment – cannot rely upon the Achmea and/or the Komstroy cases to dilute the United Kingdom's own multilateral international treaty obligations. It certainly cannot rely upon those cases to interpret the 1966 Act differently to what its clear terms require.
6. if intra-EU arbitration is contrary to EU law principles governing either primacy of the CJEU or EU principles generally, then this must (and can only) arise from the EU Treaties themselves.
7. that conflict does not mean that the latter EU law principles as enunciated by the CJEU remove Spain from the ambit and scope of the ECT, or from the ICSID Convention.

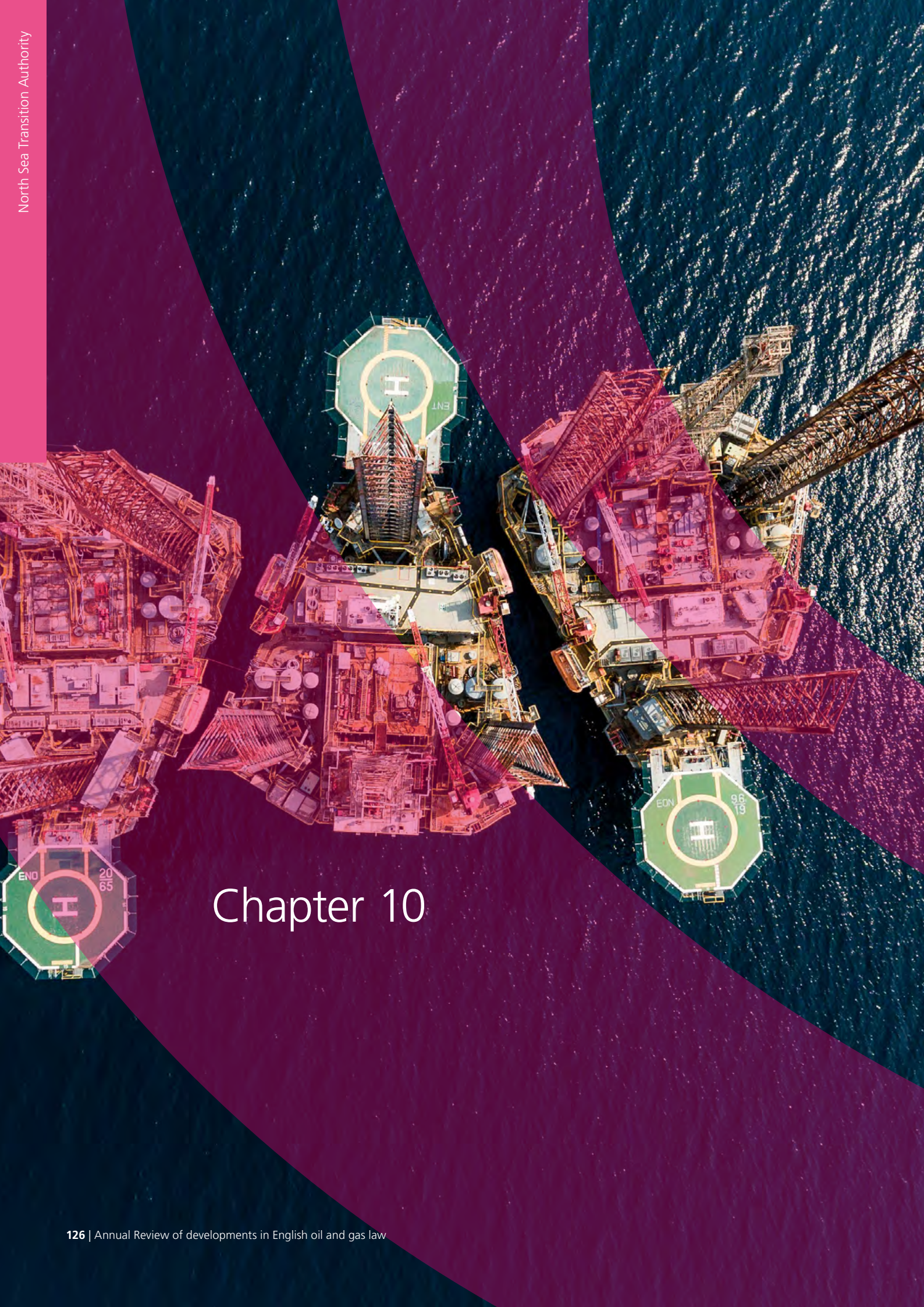
Comment

The words '*benefit of Brexit*' will doubtless result in a divergence of views. However, this case appears to be a clear example of a benefit of the United Kingdom leaving the European Union (at least as far as energy investors are concerned).

Unencumbered by *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1991] 1 AC 603, the courts of the United Kingdom are no longer required to follow decisions of the CJEU. As a result, the relevant test for the enforcement of an arbitral award concerning an intra-EU investment treaty dispute will differ between the courts of an EU Member State and the courts of the United Kingdom. The courts of the United Kingdom will give primacy to primary domestic legislation. Here, the 1966 Act. That will result in the United Kingdom being an attractive destination for the enforcement of investor protections that rely upon the ICSID Convention.

The decision will no doubt be welcomed by investors, demonstrating the United Kingdom courts' commitment to investor-state arbitration and pre-existing international law obligations, including under the ICSID Convention.

Judge: Fraser J.



Chapter 10

North Sea Transition Authority

It has been two years since the NSTA introduced a *'net zero'* obligation requiring the UKCS oil and gas industry to support the Government's climate change ambitions and targets. In the last year, it has become apparent that the NSTA's focus has consequently broadened to encompass energy transition more generally and the NSTA's work over the last year has reflected that shift in priorities. For example:

— The NSTA has awarded its first carbon storage licences.

— A recent Government consultation on future regulatory requirements for offshore hydrogen and proposals to extend the NSTA's regulatory remit to become the licensing and consenting authority for offshore hydrogen storage and pipelines transport.

— The NSTA has set a new cost efficiency target for redundant oil and gas infrastructure, which aims to allow more money to be invested in energy security and the transition to net zero.

— The NSTA has challenged the industry to lower the total estimate for decommissioning redundant platforms, wells and pipelines by an additional 10% – from GBP 37bn to GBP 33.3bn – between 2023 and the end of 2028.

— The NSTA published a report on the industry's progress on Environmental, Social and Governance ('**ESG**') disclosure, which builds on the previous recommendations of the NSTA and the ESG Taskforce. The report states that the previous recommendations have largely been followed, and '*Environmental*' reporting appears to be easier to quantify than '*Social*' and '*Governance*' reporting.

The NSTA has highlighted for a number of years its view that retaining the oil and gas industry's '*social licence to operate*' is crucial, and that emphasis has continued following the change of CEO from Andy Samuel CBE to Stuart Payne at the start of 2023. To try to ensure the industry keeps its '*house in order*', there has been a notable uptick in its use of enforcement powers, targeting breaches of licence terms and permits and continuing to advocate the NSTA's *'right assets, right hands'* message. More widely, the NSTA has had to defend its decision making in various court challenges, perhaps most notably in respect of the challenge by Greenpeace and Uplift, who have been granted permission to proceed with judicial review against the NSTA's latest (33rd) offshore oil and gas licensing round.

Licensing

Carbon storage licences offered for award

The NSTA launched the UK's first carbon storage licensing round in June 2022, offering awards for 21 carbon storage licences at offshore sites, including some near Aberdeen, Teesside, Liverpool and Lincolnshire. The licensing round attracted 26 bids across 13 areas, from a total of 19 companies.

The NSTA also announced the creation of a dedicated development team to oversee the delivery of carbon storage developments, following successful exploration and appraisal.

33rd Offshore Oil and Gas Licensing Round

In October 2022, the NSTA launched its 33rd oil offshore oil and gas licensing round. Applications were initially invited for over 100 potential licences to explore and potentially develop 898 blocks and part-blocks in the North Sea; this number increased following a further announcement from the NSTA adding an additional 34 blocks.

The application period ran until 12 January 2023 and, on 17 January 2023, the NSTA announced that the 33rd licensing round attracted 115 bids across 258 blocks/part-block, from a total of 76 companies.

Greenpeace and Uplift granted permission to proceed with judicial review against 33rd offshore oil and gas licensing round

Environmental campaign groups such as Greenpeace and Uplift are increasingly using court proceedings to advance their arguments, often by means of judicial review applications challenging the approach taken by Government or regulators in considering environmental issues in licensing or approval processes.

Following the launch of the 33rd licensing round, a coalition of campaign groups threatened legal challenges in a bid to stop the award of new North Sea oil and gas licences, initially writing to the Business Secretary setting out why they considered the launch

of the offshore licensing round to be unlawful and seeking to reverse the decision.

Subsequently Greenpeace and Uplift each filed an application at the High Court for judicial review against the Government's decision to launch the new oil and gas licensing round. The claims by Greenpeace and Uplift were heard together before Mr Justice Waksman on 25 April 2023 and permission was granted to proceed with the judicial review applications.

The claimants seek to challenge the 33rd licensing round on the basis that the Government:

— did not take into account the environmental effects of consuming the oil and gas to be extracted in the new licensing round, and wrongly failed to take into account the advice of the Climate Change Committee; and

— failed to provide any explanation as to why the licensing round was considered to meet the climate compatibility checkpoint. The climate compatibility checkpoint was introduced prior to the 33rd licensing round and is intended to ensure that any new licensing round is offered only where it is compatible with the UK Government's climate change objectives, including to achieve net zero emissions by 2050.

Additionally, the decision to adopt the climate compatibility checkpoint itself is challenged on the basis that it wrongly excluded two tests which the claimants argued ought to have been included: (i) a requirement to consider downstream emissions; and (ii) consideration of the '*global production gap*'.

The claim will now proceed to a full hearing. If the claim is successful, the usual result is that the NSTA's decision is '*quashed*' and must be taken again – this time following the correct procedure and applying the appropriate criteria.

Consultation on proposal to issue guidance on the conduct of licence assignments

On 28 March 2023, the NSTA launched a consultation inviting views on proposed guidance on the conduct of licence assignments in the UKCS.

The NSTA's stated aim is to uphold '*a stable and predictable system of regulation which encourages investment in oil, gas, carbon storage operations and in energy transition projects*'. While recognising that there can be good reasons why a party may withhold consent to a transfer, the NSTA's consultation document expressed a concern that, notwithstanding previous publications and guidance, the time taken to obtain consent for licence assignments continued to cause delays, threaten transactions, and undermine investor confidence in the UKCS. To try to '*minimise the number of transactions which proceed slowly or reach an impasse*' the proposed guidance seeks to *'support and provide confidence to current licensees and potential future investors during transactions'* and to strike the balance between *'the benefits achieved by a liquid market for the ownership of licence interests and protecting the rights and interests of existing participants in the UKCS who wish to maintain their current holdings*'.

The proposed guidance sets out the NSTA's expectations for:

— buyers and sellers (who are expected to run an efficient, well organised consents process); and

— consenting parties (who are expected to behave properly in considering consent requests).

The consultation closed on 23 May 2023 and new guidance is expected to be published later in the year.

Cessation of Production Process

In line with its continued *'net zero'* agenda, the NSTA withdrew its Cessation of Production ('**COP**') Guidance and process on 1 November 2022.

Historically, it was necessary to seek the NSTA's agreement on the point at which all hydrocarbon economic and development opportunities in respect of a particular licence had been pursued so that activity in that licence area could cease. The regulator's agreement, that production may permanently cease, was an important milestone and allowed the industry to work towards a *'no earlier than'* date for COP. However, as the industry moves away from older, higher emitting assets, to newer, lower emission production, the NSTA has decided to depart from the COP process and hopes this will allow more attention to be focussed on workstreams which help deliver the UK net zero strategy.

Licensees are therefore no longer required to complete and submit a COP report. Once production has ceased permanently and all wells have been shut in, licensees should now email the relevant Area Manager with the date on which this occurred and provide the licensees' written consent to the NSTA sharing this information with HMRC if they request to see it to process a claim for transferable tax history.

With regards to any existing COP dates, the NSTA plans to set up stewardship meetings to discuss any queries.

Powers, Disputes and Sanctions

NSTA Updates its Statutory Notice on Meetings

As it has done regularly since its inception, in October 2022, the NSTA again updated its Statutory Notice on Meetings ('**Meetings Notice**'), amending the list of meetings that fall within the advance notification requirements in the Energy Act 2016 (the '**2016 Act**'). The 2016 Act gives the NSTA the power to attend and participate in many industry meetings and obliges industry to inform the NSTA in advance of these meetings, provide the NSTA with any relevant documentation, and if the NSTA does not attend the meeting, provide it with a summary of the meeting. Failure to comply with these obligations is sanctionable in accordance with Chapter 5 of the 2016 Act

The Meetings Notice provides a broad exemption from those requirements for all industry meetings except those which fall within the scope of the current Meetings Notice, which must comply with the 2016 Act requirements. The full notice details the meetings that fall within the scope of the requirements and tends to reflect the NSTA's current priorities and areas of focus or concern.

Refreshed guidance on Sanctions, Dispute Resolution, Disputes over Third Party Access to Infrastructure and Financial Penalties

In November 2022, the NSTA refreshed its guidance on: (i) Sanctions; (ii) Financial Penalties; (iii) Dispute Resolution; and (iv) Disputes over Third Party Access to Infrastructure. The changes made are largely process changes to try to remove duplication from the NSTA's decision-making process. In summary:

Sanctions Procedure

Under Chapter 5 of the 2016 Act, the NSTA has a series of powers in relation to dispute resolution, amongst which is the power to give sanction notices for failure to comply with a petroleum-related requirement. Shortly after the NSTA was established, it introduced guidance outlining its process for considering whether to impose sanctions on a regulated party, and if so what type of sanction.

As initially introduced, the NSTA's process comprised escalation of a matter through various stages: (i) stewardship, facilitation and enhanced facilitation, typically dealt with by the Operations Directorate; followed by (ii) Enquiry and Investigation stages, typically dealt with by the Regulation Directorate, before any recommendation was made as to whether a sanction should be imposed (and, if so, of what type). The main change that the NSTA has made in updating its Sanctions Procedure is the removal of the Enquiry stage. With experience, the NSTA has discovered that there was a considerable overlap between the work conducted in the Enquiry stage and the Investigation stage. Consequently, the process has been somewhat simplified, so that the process is now as follows:

— the first three stages of measured escalation remain the same. These are (i) stewardship; (ii) facilitation; and (iii) enhanced facilitation, dealt with by the Operations Directorate.

— where an issue is not satisfactorily resolved by the measured escalation process, the NSTA's Disputes and Sanctions team will carry out an initial assessment (which in large part reflects the considerations that were previously applied at Enquiry stage) to examine whether there is sufficient initial evidence that there has been a failure to comply with a petroleum-related requirement to merit a full Investigation. If so, an Investigation will be opened and will follow the process set out in the Sanctions Guidance. In the Sanctions Guidance, the NSTA notes that the evidential threshold for commencing an Investigation is low.

Ultimately that process may lead to one of a number of outcomes, for example:

— the Investigation may be closed, the NSTA having determined there has been no failure; or

— the NSTA may issue a Sanction Warning Notice and, having considered representations in response, a Sanction Notice.

Financial Penalty Guidance

The Financial Penalty Guidance provides details of the factors which the NSTA will consider when determining the amount of the financial penalty to be imposed by a financial penalty notice, pursuant to the 2016 Act. The current maximum amount of a financial penalty is GBP 1m.

The NSTA has reported that the substance of the Financial Penalty Guidance has not changed, and the reason for updating the guidance is to reflect its name change from the '*OGA*' to the '*NSTA*'. There are,

however, some other changes between the previous and latest versions, including that, when determining the amount of the financial penalty, the NSTA will (amongst other things) take into account the severity of the failure to comply with the NSTA's Strategy which is in force at the time the financial penalty is issued; and confirmation that where a financial penalty is envisaged as the sanction (or part of the sanction), the amount considered as appropriate will be included in the sanction warning notice.

Dispute Resolution Guidance

Sections 19 to 26 of the 2016 Act set out the NSTA's duties and powers in considering qualifying disputes. The NSTA's Dispute Resolution Guidance sets out how the NSTA will likely handle such disputes and the process that it will follow.

The NSTA's Dispute Resolution Guidance was updated to largely reflect the organisation's name change (from OGA to NSTA) and to align with the changes to the Sanction Procedure and the Financial Penalty Guidance, described above.

Guidance on Disputes over Third Party Access to Upstream Oil and Gas Infrastructure

The NSTA inherited the powers held by its predecessor regulators to determine the terms of access to upstream petroleum infrastructure, in terms of the Energy Act 2011 Sections 82 to 91. The updated guidance explains how to formally raise disputes over third party access to upstream petroleum infrastructure ('**TPA Disputes**') with the NSTA, along with the likely approach that the NSTA will take in these instances. It also sets out where the NSTA may choose to intervene in any TPA Disputes. The main differences between the updated version and the previous version (in May 2019) are the updating of reference from the '*OGA*' to the '*NSTA*'; updating of references to EU legislation; reflecting that the NSTA no longer has an Enquiry stage in its Disputes and Sanctions process; and adding clarification to certain non-material points.

Enforcement

The NSTA has rarely exercised its sanction powers, having only issued one sanction notice prior to 2020. However, the NSTA has now exercised various of its sanctions powers on a number of other occasions. It announced in December 2022, that three Operators had been fined a total of GBP 265,000 for failures to comply with petroleum-related requirements:

— The NSTA fined two Operators for exceeding flaring permits over the course of 2020/2021 – between them they were issued with financial penalties totalling GBP 215,000. The NSTA's flaring and venting guidance aims to eliminate wasteful or unnecessary flaring and venting of gas, in line with meeting the net zero target of nil routine flaring and venting by 2030. The NSTA has reported that it has seen recent improvements on emissions but will continue to take action against any companies who fail to meet their obligations.

— The third Operator received a financial penalty of GBP 50,000 as it was held to have exceeded the maximum allowed production volumes from two of its fields over the course three years, thus breaching its production consent. The NSTA considered that producing too much oil and gas can reduce the overall long-term production from a reservoir which can be detrimental to the UK's security of supply, so that it is vital that Operators who want to raise production levels apply for new consents that it can be assessed by the NSTA.

The NSTA confirmed that all three Operators co-operated fully with their investigations and have taken steps to avoid any future repeated breaches.

NSTA exercises revocation powers in relation to offshore licences

Since its inception the NSTA has highlighted the importance of 'right assets, right hands' i.e., of ensuring that offshore petroleum licences are held by the right companies to ensure their development, production and management in compliance with good practice and the Maximising Economic Recovery ('**MER UK**') regime. In the last year, we have seen the NSTA increase its focus on the corporate governance of the companies it regulates, and on ensuring compliance with licence terms and timeframes. That focus has now been reinforced by a recent and significant decision by the NSTA to exercise its power to partially revoke a licence.

Although the NSTA does not have a pre-approval right in respect of a change of control of a licensee, the model clauses which form part of the licence terms and conditions include a provision which permits the NSTA to require a further change of control of a licensee and to revoke the licence where that is not effected within the stipulated period. Although this has been a power available to the industry's regulators throughout most of the history of the UKCS, the right to require a further change of control has been very rarely used in practice.

For the first time, in exercise of that power, the NSTA has partially revoked three offshore petroleum licences for reason of a failure to comply with a notice requiring a further change of control. The licenses in question have been revoked insofar as they relate to Fujairah Oil and Gas UK 12 Limited ('**FOGUK12**'). The NSTA has explained that the action was taken because FOGUK12 did not meet regulatory requirements (although it has not explained in any detail what that failure comprised).

However, as a result of the failure to meet regulatory requirements, notices requiring a further change of control were served by the NSTA on FOGUK12 in January 2023, requiring a change of control within three months. No further change of control was implemented, so the NSTA used its powers to partially revoke the licences.

The NSTA's decision means that FOGUK12 has been removed from the licences. However, the licences concerned remain in force insofar as they relate to the other licensees.

This is a significant example demonstrating that the NSTA is advancing its regulatory approach and taking increasingly proactive measures to ensure that those active in the industry are able to meet their commitments and obligations and comply properly with the regulatory regime in which they are expected to operate.

Collaboration with the Supply Chain

Supply Chain Action Plan Guidance

The NSTA recognised early in its existence that the oil and gas industry's supply chain has a key role to play in supporting delivery of its MER UK ambitions, not least in terms of cost reduction and timely project delivery. Although the supply chain is not regulated by the NSTA, the NSTA has sought to influence that part of the sector by encouraging the companies that it does regulate to engage constructively and collaboratively with the supply chain to support MER UK. In particular, operators are required to prepare Supply Chain Action Plans ('**SCAPs**') to support key project activity and decision-making. SCAPs were initially introduced in 2018, following consultation with the industry, so that operators and licensees could demonstrate effective working relationships across their supply chain and to assist operators in demonstrating that their contract strategies were well positioned to deliver the 'best value' pursuant to their Field Development Plans ('**DP**'), Field Development Plan Addendum ('**FDPA**') or Decommissioning Plans ('**DP**').

The NSTA has now introduced new guidance on SCAPs, replacing and updating the guidance it originally issued in 2018 (the '**SCAPs Guidance**').

The SCAPs Guidance provides that the purpose of SCAPs is to '*facilitate and evidence that relevant persons are deriving maximum value from UKCS projects activity whilst maintaining fair and equitable relationships with their chosen supply chain.*'

SCAPs will also assist the NSTA to (amongst other things) monitor trends and potential gaps in the capability of the supply chain; identify lessons learned; and promote collaboration. The NSTA will use SCAPs to monitor the progress of the industry in complying with the targets outlined in the recently agreed North Sea Transition Deal. This includes a provision for a voluntary industry target of 50% local UK content across all new energy technology projects by 2030, in addition to oil and gas decommissioning.

The NSTA expects operators with any project requiring an FDP, FDPA or DP to submit a SCAP for review and approval. This includes, but is not limited to, new developments, greenhouse gas reduction projects and electrification of existing oil and gas assets (including floating offshore wind). The NSTA has stated that it expects SCAPs to be project specific and clearly relevant to an operator's overall contracting strategy.

The timing for submission of a SCAP will vary project to project, however the NSTA expects SCAPs to be developed as early as possible in a project, prior to contract award, and probably during the '*concept select*' stage. They are intended to be an informed part of the NSTA's FDP consent process and DP consultation process and the NSTA expects that operators will share a first draft of their SCAP document with the NSTA before it is formally submitted in order to encourage early discussion.

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