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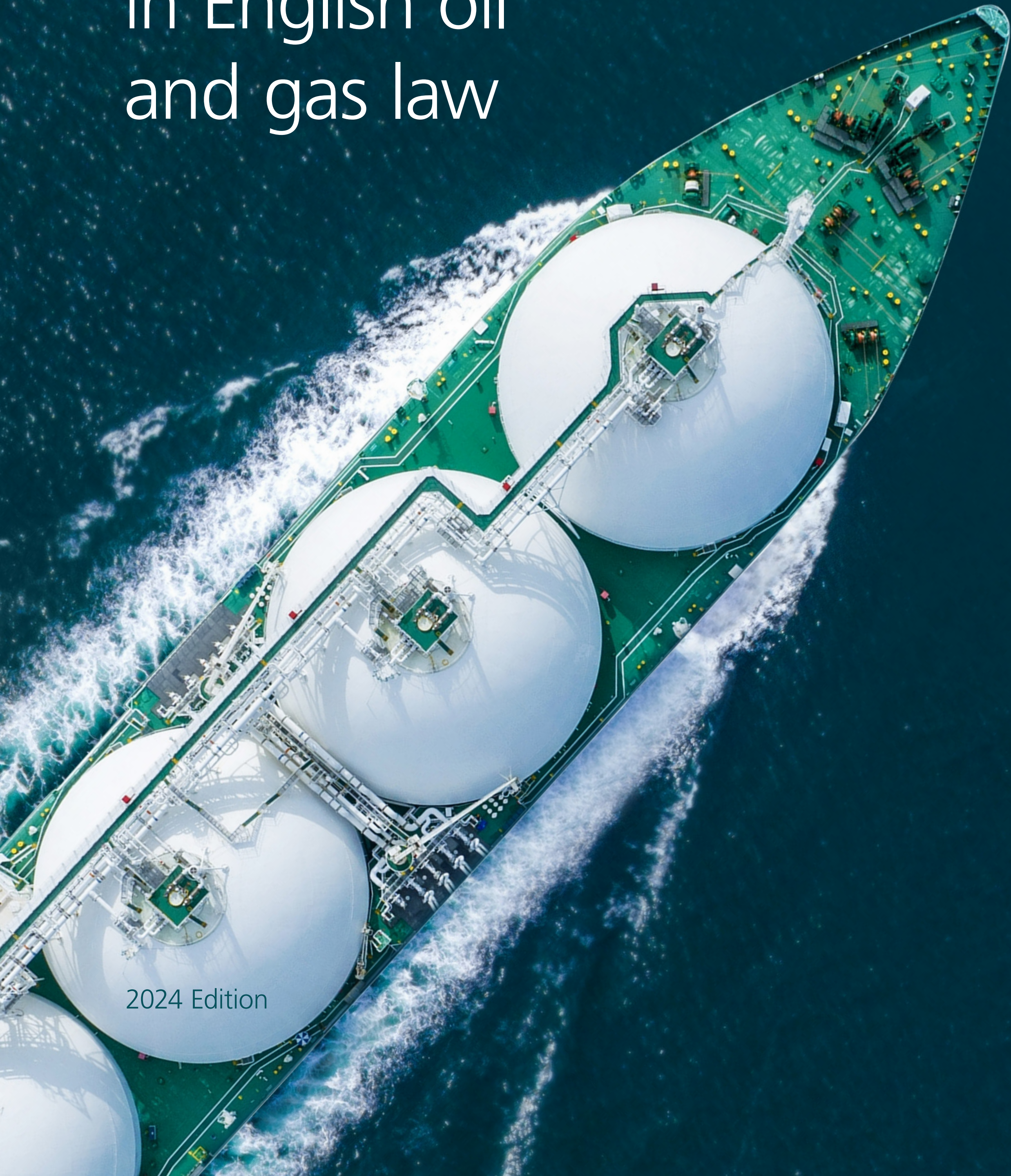
# Annual Review of developments in English oil and gas law



2024 Edition

# Contents



## Previous editions

Previous editions of the CMS Annual Review of developments in English oil and gas law are available at **cms.law**.

# Welcome to the 2024 edition of the CMS Annual Review of developments in English oil and gas law.

It has been a significant year for energy lawyers practicing English law. The range of cases in which judgments and/or arbitral awards have been delivered is significant, ranging across issues such as expert determination, the role of hedging in calculating damages, the relationship between unitisation and stabilisation clauses in production sharing contracts and whether annual contract quantities in gas sales agreements apply during times of hardship.

In addition, there have been Supreme Court decisions in *Sharp Corp Ltd v Viterra BV (previously known as Glencore Agriculture BV)* [2024] UKSC 14 and *RTI Ltd v MUR Shipping BV* [2024] UKSC 18 which, whilst not oil and gas cases, will have a significant impact on the industry as one relates to the calculation of damages where goods have not been accepted by the buyer and the other relates to whether an inability to pay in a contract currency amounts to a force majeure.

That notwithstanding, the most significant cases continue to arise in relation to the 'energy trilemma', i.e. seeking to strike a balance between energy security, affordability and sustainability.

Two cases of note are the Supreme Court decision in *R (on the application of Finch on behalf of Weald Action Group) v Surrey County Council and others* [2024] UKSC 20 and the European Court of Human Rights decision in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (application no. 53600/20).

The Supreme Court's decision, by a bare majority, in *Finch* decided that the council's decision to grant planning permission for an onshore oil and gas development was unlawful because the emissions that will occur when the oil produced is burnt as fuel come within the scope of the environmental impact assessment required by law, and the council had failed to consider them in making its decision. The decision is controversial and has the potential to significantly impact the oil and gas licencing process in the United Kingdom.

The European Court of Human Rights decision in *Verein KlimaSeniorinnen Schweiz* is arguably the most impactful and far-reaching ruling by any European court since the Second World War. In deciding that Article 8 of the European Convention on Human Rights '*must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life*', the European Court has cast law courts, rather than governments, as the ultimate bodies responsible for deciding whether public authority action and inaction on climate change are appropriate.

Whilst section 2 of the Human Rights Act 1998 states that domestic courts and tribunals are only required to '*take into account*' European Court of Human Rights decisions when determining a question that has arisen in connection with a Convention right, the Supreme Court has decided that '*a national court subject to … section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law.*' (per Lord Bingham in *R (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323, at paragraph 20). As a result, it is unclear how English law will proceed.

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

I would like to thank the many contributors across CMS for their articles, comments and assistance. 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 Sofia Sotgia, Jake Todd, Manuel Pena, William Crossley and Anna Rose for their considerable efforts in assisting with the collation of this year's Annual Review. I would also like to thank Valerie Allan and the team in Aberdeen for their considerable contribution and Phil Reid for his contribution on tax law.

This Oil and Gas Annual Review has been collated 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 useful in navigating the legal challenges and opportunities faced by 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

# Oil and Commodity Sales

The past twelve months have seen a large number of cases concerning oil, gas and commodity sale contracts, which are either oil/gas cases or directly relevant to the industry:

- In *Rhine Shipping DMCC v Vitol SA* [2024] EWCA Civ 580, the Court of Appeal considered whether the 'internal hedging system' of the charterer in question could reduce the damages it could claim.
- In *Sharp Corp Ltd v Viterra BV* [2024] UKSC 14, the Supreme Court redefined how damages should be assessed when a buyer fails to take delivery.
- In *Premier Oil UK Ltd v Shell International Trading and Shipping Company Ltd* [2023] EWHC 3269 (Comm), the Commercial Court considered when it is appropriate for the court to express a view as to the ambit of a contractual expert's decision-making powers.
- In *RTI Ltd v MUR Shipping BV* [2024] UKSC 18, the Supreme Court unanimously overturned the Court of Appeal's decision that a 'reasonable endeavours' obligation in a force majeure clause could require a party to accept alternative, or non-contractual, performance.
- In *Litasco SA v Der Mond Oil and Gas Africa SA and Locafrique Holdings SA* [2023] EWHC 2866 (Comm), the Commercial Court clarified the application of sanctions and force majeure clauses in contracts involving Russian entities.
- In *Gasum OY v Gazprom Export LLC* (PCA), an arbitration tribunal addressed take-or-pay challenges faced by a natural gas importer due to market liberalisation and issues of force majeure.

# Internal hedging system not relevant to damages

In *Rhine Shipping DMCC v Vitol SA* [2024] EWCA Civ 580, the Court of Appeal considered whether the 'internal hedging system' of the charterer could lead to a reduction in the damages it could claim following a loss caused by a shipowner's delay in delivery. As 'internal hedging' to identify net trading positions plays a significant part of many oil traders' strategies, the result of this case is of importance to many oil companies and traders.

## Facts

Vitol SA ('**Vitol**') is a trader in oil and petroleum products. Rhine Shipping DMCC ('**Rhine**') was the disponent owner of the vessel MT DIJILAH (the '**Vessel**').

Vitol entered into a charterparty contract (the '**Charterparty**') with Rhine to charter the Vessel. The Charterparty was for carriage of a minimum of 260,000 m.t. of crude oil from 1/2 port(s) West Africa (Ghana-Angola range) to 1/3 port(s) Far East Singapore-Japan range. It contained the following terms:

*'Owners represent and warrant*

*that at the time of and immediately prior to fixing the charter, the vessel, owners, managers and disponent owners are free of any encumbrances and legal issues that may affect vessel's approvals or the performance of the charter.'*

(the '**warranty**').

*'13. Third Party Arrest*

*In the event of arrest/detention or other sanction levied against the vessel through no fault of Charterer, Owner shall indemnify Charterer for any damages, penalties, costs and consequences and any time vessel is under arrest/detained and/or limited in her performance is fully for Owner's account and/or such time shall not count as laytime or if on demurrage, as time on demurrage.'*

(the '**indemnity**')

The Charterparty was entered into in order to fulfil a purchase and sale contract between Vitol and its associated group company, Vitol Asia Pre Ltd ('**Vitol Asia**'), for the sale of 920,000 bbl to Vitol Asia CIF Qingdao China with an estimated arrival period of 20-31 May 2020 (the '**Sale Contract**'). Under the Sale Contract, the sale price was agreed as the average of the settlement quotations for July-20 ICE Brent, for quotations between 27 – 28 May 2020, plus USD 2.60 per bbl.

To fulfil the Sale Contract, Vitol also agreed to purchase 920,000 bbl from TOTSA Total Oil Trading SA ('**TOTSA**') on terms FOB Djeno (the '**TOTSA contract**'). The price payable by Vitol under the TOTSA contract was determined by reference to the bill of lading date for the Djeno cargo and was to be calculated as the average of the prices published in the Platts Crude Oil Marketwise index under the heading Brent Dated, on the five publication dates following the bill of lading date, minus a discount of USD 4 per bbl.

The Vessel was to complete two loading stops: the first being at the Offshore Cape Three Points in Ghana, and the second being at a port in Djeno, Congo, where TOTSA contract crude oil (the '**Cargo**') was to be loaded onboard.

Upon arrival in Ghana, the Vessel was detained at the loadport and its bunkers and stores were arrested due to a separate claim against the bareboat charterer of the Vessel. Due to a 7-day detention, the Vessel was delayed in arriving at Djeno port.

The Cargo was loaded onto the Vessel along with three corresponding bills of lading dated 12 May 2020. In addition to the bills of lading being 6 days later than expected, the Vessel also failed to arrive in Djeno within the specific '*vessel presentation range*' that was agreed upon in the contract with TOTSA. As a result of this, the purchase price of oil was USD 3,674,834 higher. Vitol claimed this difference in damages.

## Commercial Court Decision

The Commercial Court considered whether the Vessel's detention in Ghana was directly attributable to its delay, and the subsequent increased purchase price of the oil barrels. The Commercial Court deemed that it was sufficiently likely that the Vessel would have made its desired arrival date in Djeno if the detention had not occurred. Taking this into account and having considered the wording on detention, the Commercial Court found that there had been a breach of warranty in the Charterparty and that Rhine's indemnity was also applicable.

The second element to the decision was whether Vitol's internal risk management system (the '**Hedging System**') could reduce its damages in the same way an external hedging contract could have. Vitol's Hedging System involved brokers recording the details of corresponding purchase and sale contracts into a database that would track the progress of each contract. The purpose was to identify Vitol's net position, so that Vitol could manage and hedge its net risk across the business. The transactions relevant in the Hedging System were not contractual 'hedges' as usually understood. In simple terms, the Hedging System 'matched' buy/sell contracts so as to ascertain (i) whether Vitol was already 'hedged' internally and (ii) its remaining 'net' exposure that it may wish to hedge with a third party.

Rhine's argument in terms of the Hedging System was twofold: (1) that the loss suffered by Vitol had been significantly reduced by its internal Hedging System, and as such the damages payable should only be for the net loss of USD 802,863; and (2) Vitol's Hedging System had the same effect of an external hedging system. Rhine relied on the findings in *Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 for its external hedging argument, where the Court decided that such hedging could be considered as a mitigation of loss which could be taken into account when calculating damages.

The Commercial Court rejected Rhine's argument. Had the hedge been an external one, with a third party, the benefit would have had to be taken into account (see the judgments of *Christopher Clarke J in Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm) at [161] and *Blair J in Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 (Comm) [2010] 1 CLC 284 at [78]). An external rolling of external swaps would have been a step taken in mitigation of the delay caused by Rhine's breach, and the resultant benefit from a third party would have fallen to be taken into account as a benefit received as a result of such reasonable mitigation.

However, the Commercial Court found that the 'swaps' that were made were internal and not even 'hedges' as usually understood in the industry. The Hedging System simply matched transactions to ascertain a net risk. It was clear, in light of the above, that the rolling of the internal swaps by which the pricing risk on the TOTSA contract arising from the delay was transferred, in Vitol's Hedging System, merely transferred the risk between Vitol portfolios, and did not make good any loss to Vitol.

What the likely factual position demonstrated was that a trader the size of Vitol may well not have to hedge externally, or have to adopt a speculative position, in relation to such price risks, because its book of business is sufficiently large and diverse that there can usually be found within it sufficient other transactions that carry opposite risks. But those other transactions are not entered into for the purpose of hedging the transaction in question, and Vitol's decision to enter into them is in no way caused by the price risks to which Vitol is exposed on the transaction in question, still less by a breach of contract that causes loss in relation to the transaction in question.

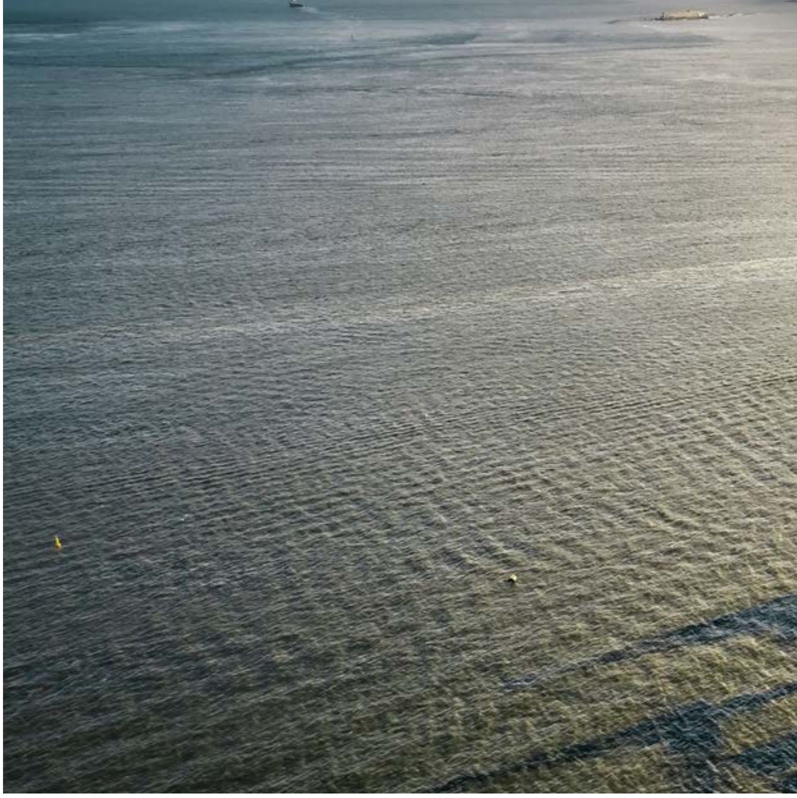
As such, the position is not equivalent to that found in the *Glencore* or *Choil* cases referred to above, where external hedges had been entered into or closed out as a result of the breach of contract. Moreover, those other physical transactions with which the Sale Contract was matched in Vitol's Hedging System, to the extent they gave rise to a benefit to Vitol, did so independently of the circumstances giving rise to the loss on the Djeno cargo transaction. Any such benefit had nothing to do with the charter, with the delay to the Vessel or the reason why it had been delayed. It was not derived from steps taken by Vitol in consequence of the breach of charter. Nor did it derive from a contract made for the benefit of Rhine.

As such, the transactions in the Vitol Hedging System were not steps taken to mitigate Vitol's loss, and did not fall to be taken into account in assessing damages.

Rhine subsequently appealed the decision of the Commercial Court.

## Court of Appeal Decision

The Court of Appeal had no hesitation in dismissing any appeal based on the case advanced by Rhine before the Commercial Court. The Court of Appeal found the reasoning of the Commercial Court compelling. Indeed, Rhine did not seek to argue the points which had been advanced before the Commercial Court, but confined itself to a new argument.



Rhine raised a novel argument for the Court of Appeal's consideration that brought new factual and legal issues into the discussion on damages. Rhine contested that the subsequent benefit received by Vitol in other transactions within Vitol's Hedging System would not have occurred were it not for their breach. As such, those other transactions and the specific benefit derived from them due to Rhine's breach (and subsequent internal swaps made by Vitol) should be taken into account when calculating their damages. The Court of Appeal dismissed this, stating that a new argument based on the counterfactual requiring additional evidence could not be considered on appeal.

Accordingly, the appeal was dismissed.

In the context of the new argument being dismissed, the Court of Appeal preferred not to comment on Vitol's argument that the new point would be bound to fail for the additional reason that an avoided book hedge loss would be *res inter alios acta*. In this respect, *Globalia Business Travel SAU v Fulton Shipping Inc (The New Flamenco)* [2017] UKSC 43 was an example of a case in which a gain made as a direct result of what an arbitrator had found was a step taken in mitigation of loss caused by the breach was held to be a benefit which did not fall to be taken into account, because there was insufficient causation in law for these purposes, notwithstanding that it would have satisfied a causation in fact analysis in other contexts. This illustrates that questions of causation in this area raise difficult issues involving taking into account a wide variety of circumstances, being matters of fact and degree which are highly sensitive to the particular circumstances of individual cases. For that reason, and although the Court of Appeal considered that the collateral benefit principles would place formidable difficulties in the way of Rhine's new argument succeeding even if the avoided loss were made out on the facts, it preferred not to express a final concluded view.

## Comment

This decision provides a slightly different outlook on the current case law in relation to the mitigation of loss under oil related contracts.

It is clear law that a party is under a duty to take reasonable steps to mitigate their loss. Further, where losses are reduced by hedging arrangements that are made for the purposes of seeking to mitigate a loss, English law will take that into account in calculating damages.

The issue in this case arises because many oil traders, like Vitol, will not hedge individual transactions. They will seek to ascertain their net position, and consider whether that net position requires an external hedge. In seeking to ascertain that net position, oil trading companies will often 'match' trades internally (which will ascertain where it already has an 'internal hedge'). If needed, the trader may 'swap' those internal matches (or 'hedges') as the position evolves. None of this internal activity is 'hedging', as generally understood. On the facts in this case, the Commercial Court and Court of Appeal decided that the activity was not of the type that falls to be considered as 'mitigation' under an assessment of damages. As such, it did not fall to be taken into account in damages assessments.

That said, in dismissing the 'new point' on procedural grounds, the Court of Appeal left open the question as to whether subsequent benefit received by an injured party in internal 'transactions' that would not have occurred were it not for their breach should be considered a collateral benefit for which an injured party must give credit. As a result, the role that an internal risk management system plays in ascertaining damages remains open for further debate.

**High Court Judge:** Simon Birt KC

**Court of Appeal Judges:** Underhill LJ, Aplin LJ and Popplewell LJ.



# Compensatory Principle and the Mitigation Principle: Supreme Court clarifies law on assessment of damages

In *Sharp Corp Ltd v Viterra BV* [2024] UKSC 14, the Supreme Court provided guidance on the assessment of damages for a breach of contract where the buyer failed to take delivery. In doing so, it departed from an approach long accepted by lawyers. This decision will have a significant impact on those involved in oil, gas and commodity sales.

## Facts

Viterra BV (the '**Sellers**' or '**Viterra**') (formerly known as Glencore Agriculture BV) and Sharp Corporation Ltd (the '**Buyers**' or '**Sharp**') entered into two contracts dated 20 January 2017 for the sale of 21,000 tonnes of lentils and 47,250 tonnes of yellow peas by the Sellers to the Buyers. The contracts were in identical terms save as to commodity, quantity and price: C&FFO Mundra

Each contract provided that all terms and conditions not conflicting with the express terms of the contracts should be as per GAFTA Contract No 24. GAFTA Contract No 24 has a default clause at Clause 25 (the '**Default Clause**') which is common to many of the GAFTA standard contract forms. Under Clause 25(c) the damages payable are based on the difference between the contract price and '*the actual or estimated value of the goods, on the date of default*'.

Both contracts were governed by English law and contained a Grain and Feed Trade Association ('**GAFTA**') arbitration clause.

Payment was due 5 days before the vessel carrying the goods arrived in Mundra, India. However, following the Buyer's failure to pay on time, to avoid demurrage, it was agreed that the lentils and peas clear customs and were to be stored in a warehouse pending transfer of funds.

While the goods were being stored, the Indian Government introduced 50% / 30.9% import tariffs on peas and lentils with immediate effect. This increased the value of the warehoused goods considerably, as the price in the Indian market increased to reflect the import tariffs.

With payment still outstanding, Viterra declared Sharp to be in default, terminated both contracts, and resold the goods to one of its affiliated companies.

Viterra subsequently raised arbitration proceedings against Sharp, seeking to be compensated for its losses under the Default Clause.

## Arbitration Award

The Appeal Board found that the Buyers were in default by their failure to pay for the goods in accordance with the terms and conditions of the contracts, and liable to pay damages for default in accordance with the Default Clause.

The Appeal Board found that the damages should be assessed '*on the market value of the goods on or about 2 February 2018 C&FFO Mundra in bulk*'. They rejected the Buyers' case that the relevant market value was that of the higher domestic market (as a result of the import tariffs).

## Commercial Court Decision

The Commercial Court rejected the Buyers' appeal and found that the Appeal Board had made no error of law in assessing damages.

## Court of Appeal Decision

The Court of Appeal overturned the decisions of the Appeal Board and Commercial Court on damages.

The Court of Appeal concluded that the damages payable under the Default Clause were to be assessed on the basis of a notional substitute contract for the goods on the same terms as the parties' contract, save as to price, at the date of default. This, however, was not a C&FFO Mundra contract because by the date of default the contracts had been varied so as to become contracts for the sale of the goods ex warehouse.

## Supreme Court Decision

The key issue in the cross-appeal was Clause 25 of the contract, which dealt with the sum on which damages would be payable. In this respect, the Supreme Court overturned the decision of the Court of Appeal (and disapproved the outcome reached by the Commercial Court and Appeal Board).

The damages were to be based on the difference between the contract price and the '*actual or estimated value of the goods on the date of default*'. The parties agreed that the actual sale price obtained from Viterra's associated company should not be used as the '*default price*' under the Clause as it was not an arms-length transaction. The question was therefore: what should the '*default price*' be?

In an attempt to limit the damages payable, Sharp contended that this should be benchmarked on the higher price of the goods in the warehouse, after the imposition of the tariffs. Viterra argued that the value of the goods should be calculated by reference to the original C&FFO Mundra contract terms between the parties and using the hypothetical cost of purchase and sale of new goods at the time without taking into account the financial benefit gained by the Sellers due to the goods already having cleared customs; and the increased value of the goods due to the imposition of the tariffs.

In *Bunge SA v Nidera BV* [2015] UKSC 43, the Supreme Court summarised the workings of the Default Clause. In essence, the Default Clause provides for two alternative bases of assessment by the arbitrators. The first, which applies if a default price has been established but not accepted, is the difference between the default price and the contract price. In other words, if the injured party has gone into the market and bought or sold against the defaulter, the arbitrators may accept that the default price should be used to calculate damages, notwithstanding the objections of one or other party or even both of them. The second basis of assessment is the difference between the contract price and the '*actual or estimated value*' of the contract goods at the 'date of default'.

The Supreme Court applied two key principles of damages law when considering the facts: the compensatory principle and the mitigation principle, which are fundamental to calculating the losses recoverable under a claim for breach of contract, and particularly relevant where the seller retains the goods following the breach.

***Compensatory Principle***
The compensatory principle is the well-known doctrine that a party should be restored to the position they would be in but for the breach of contract. The compensatory principle of damages has been described as '*the overriding rule*' of damages and '*the bedrock of every assessment of damages.*'

***Mitigation Principle***
The mitigation principle, on the other hand, imposes a duty on the injured party to act reasonably and to try to avoid or reduce the consequences of a breach. In the case of non-acceptance of goods, mitigation refers to the steps taken by the seller to sell on the goods which remain in their possession in order to minimise the losses suffered.

***Application***
The Supreme Court considered it clear that both the compensatory principle and the principle of mitigation are reflected in the Default Clause. The starting point for damages is sub-clause (a) which addresses the situation

where the injured party goes into the market and makes a substitute sale or purchase, as the case may be. As is well established, and as recognised in sections 50(3) and 51(3) of the Sale of Goods Act 1979, this is what the injured party would be expected to do in reasonable mitigation of its loss where there is an available market for the goods. If neither party is dissatisfied with the default price under the substitute transaction (see sub-clause (b)) then that will fix the default price and, under sub-clause (c), the damages payable will be the difference between the contract price and the default price. The damages will thereby be established by reasonable steps taken by the injured party in mitigation of its loss. As Lord Sumption stated in Bunge v Nidera [32]: '*sub-clauses (a) and (b) cover the territory occupied by the common law principles concerning the mitigation of losses arising from price movements.*'

The Supreme Court went on to reason that sub-clause (c) '*covers the same territory*' as sections 50(3) and 51(3), and the common law, stating that where there is an available market, the normal or prima facie means of establishing the '*actual or estimated value of the goods*' under sub-clause (c) is by reference to the price of a substitute sale or purchase in that market.

This means that, if there is an available market for a substitute transaction on the same terms as the contract, then that will be the appropriate market price to take. In some cases there will be no substitute transaction on identical terms available. If the difference in terms is of no economic significance then that will not matter; if it is of some economic significance then that can often be addressed by making an appropriate adjustment so as to ensure that the contract price and the default price are comparing like with like.

In the present case there was no evidence before the Appeal Board of an available market for a substitute transaction on C&FFO Mundra terms and the issue which then arises is by reference to what market is the estimated value of the goods to be established.

Given the importance of the principle of mitigation to Clauses 25(a) to (c) in general, and to sub-clause (c) in particular, the proper approach is to be guided by that principle and to consider the market in which it would be reasonable for the Sellers to sell the goods. In the present case, on the default date the Sellers were left with goods which had been landed, customs cleared and stored and were situated in a warehouse in Mundra. Moreover, the goods so situated had significantly increased in value because of the imposition of customs tariffs. In such circumstances the obvious market in which to sell the goods, and in which it would clearly be reasonable to do so, is the ex warehouse Mundra market. Indeed, this was the market into which the Sellers did sell the goods, albeit to a related company. Conversely, it is difficult to see how it could be reasonable to sell those goods in the international market involving, as it would, the costs of re-exporting the goods and losing the increase in value resulting from the goods being customs cleared before the significant increase in tariffs.

## Comment

Although the Supreme Court decision relates to an express term of the GAFTA terms, it is clearly expressed in terms that are intended to have a wider application to damages claims under the Sale of Goods Act 1979 (and generally) in English law.

The Supreme Court decision departs from an approach to calculating damages that was widely accepted by many lawyers. Until this decision of the Supreme Court, it was widely accepted that damages should be calculated on the basis of the difference between the contract price and market price at the date of the breach – assuming the goods were sold on the same terms. As a result, a breach of a C&FFO contract would assume that the market price of the goods was measured by reference to C&FFO terms.

The decision of the Supreme Court clarifies that this is not the law. The interplay of the compensatory principle and the mitigation principle mean that the proper approach is to consider the market in which it would be reasonable for the sellers to sell the goods.

The decision makes clear that the same analysis would apply in a Sale of Goods Act 1979 contract as in the GAFTA contract considered. Both damages clauses were held to be applications of the combined compensatory and mitigation principles. The decision is therefore applicable across different types of contracts, including those for oil, oil products, gas, and other commodities.

In the context of the above, careful thought should be given by innocent sellers as to the market in which it would be reasonable to sell goods where the buyer has failed to accept or take delivery.

**Commercial Court Judge:** Cockerill J

**Court of Appeal Judges:** Asplin LJ, Popplewell LJ and Phillips LJ

**Supreme Court Judges:** Lord Reed, Lord Hodge, Lord Briggs, Lord Hamblen and Lord Leggatt

# Defining an expert determiner's decision-making powers

In *Premier Oil UK Limited v Shell International Trading and Shipping Company Limited (for and on behalf of Shell Trading International Ltd)* [2023] EWHC 3269 (Comm), the Commercial Court considered whether it is appropriate for the court to express a view as to the ambit of a contractual referee's (or expert's) decision-making powers before the referee has exercised them and if so, what guidance, if any, should be given to the referee in relation to performing his function under the contractual referee procedure.

## Facts

Premier Oil UK Limited ('**Premier**') owns and operates a number of North Sea oil and gas fields. Shell International Trading and Shipping Company Limited and Shell Trading International Ltd (together '**Shell**') trade oil and gas.

Premier and Shell were parties to two contracts for the sale of crude oil by Premier to Shell (together, the '**Contracts**'), each of which incorporated the Shell General Terms and Conditions ('**GT&Cs**').

The Contracts contained detailed pricing structures fixing the price to be paid under the Contracts for the duration of the contract. The price to be paid under the Contracts was calculated, among other things, by reference to '*the average of the high and low daily quotations for Urals Rotterdam versus Med Dated Brent Strip as published in Platts (AAGXJ00)*' (the '**Urals Assessment**').

In the event of a material change by Platts to the heading or contents of its reports relevant to the calculation used within the pricing structures (such as the Urals Assessment), the Contracts provide a mechanism by which a 'referee' is to determine an alternative source of price information. (The concept of a 'referee' determining matters under an agreement is part of Shell's GT&Cs (Section 44). However, Shell's GT&Cs do not specifically refer pricing matters to a referee).

It was common ground between the parties that there had been a material change regarding the pricing structure under the Contracts and further that the Contracts provided a mechanism by which a referee is to determine an alternative source of price information. However, Premier and Shell were unable to agree on an alternative source of price information within the 10-day period stipulated by the Contracts. Accordingly, both parties accepted that the appropriate next course of action, pursuant to the Contracts, was for the matter to be referred to a referee for determination.

To resolve the dispute, the parties identified and appointed a referee in accordance with the dispute resolution provisions in the Contracts. In broad terms, each of the parties subsequently raised concerns that the other was looking to unduly influence the referee in exercising his powers under the Contracts. Premier was concerned that Shell wished to give guidance to the referee which would lead him to adopt a more restricted approach to the exercise of his contractual powers than the parties originally intended. In contrast, Shell was concerned that Premier was seeking to persuade the referee to undertake a more wide-ranging pricing review than the parties originally intended. Consequently, Premier brought a Part 8 claim concerning the instructions to be given to the referee for the purpose of enabling him to exercise his decision-making powers.

## Decision

The parties agreed as to the principles to be applied generally to the process of construing the Contracts. In doing so, the parties referred the Commercial Court to a number of authorities concerning (i) the approach the courts should take to construing expert determination clauses and (ii) the extent to which the courts should, or can supervise a process of expert determination even if the relevant clause provides for the determination to be final and binding (noting that the principles that should be applied in construing the provisions for the appointment of a referee are the same as would apply in relation to the appointment of an expert). The Commercial Court helpfully summarised the following principles:

- The court will apply the ordinary principles of contractual construction to determine the effect of the words used by the parties to express the terms of their agreement that relevant disputes should be referred to expert determination.
- If the issue for determination is within the matters remitted to the expert, then the court should not interfere with the determination unless the determination is tainted by fraud or collusion.
- If the parties have agreed on the principles or procedures pursuant to which an expert is to make their determination, the court does have jurisdiction to decide whether the expert has correctly applied those principles or procedures and can and will set aside a determination made contrary to the agreed principles or procedures, because the expert has acted outside the scope of their authority.
- The fact that the issue which the expert is required to determine requires the expert to reach conclusions on the proper construction of the contract does not prevent the expert from reaching those conclusions but, subject to the wording of the

contract, the expert's conclusions are open to review by the court even if the contract otherwise provides that the expert's decision is to be final and binding on the parties.

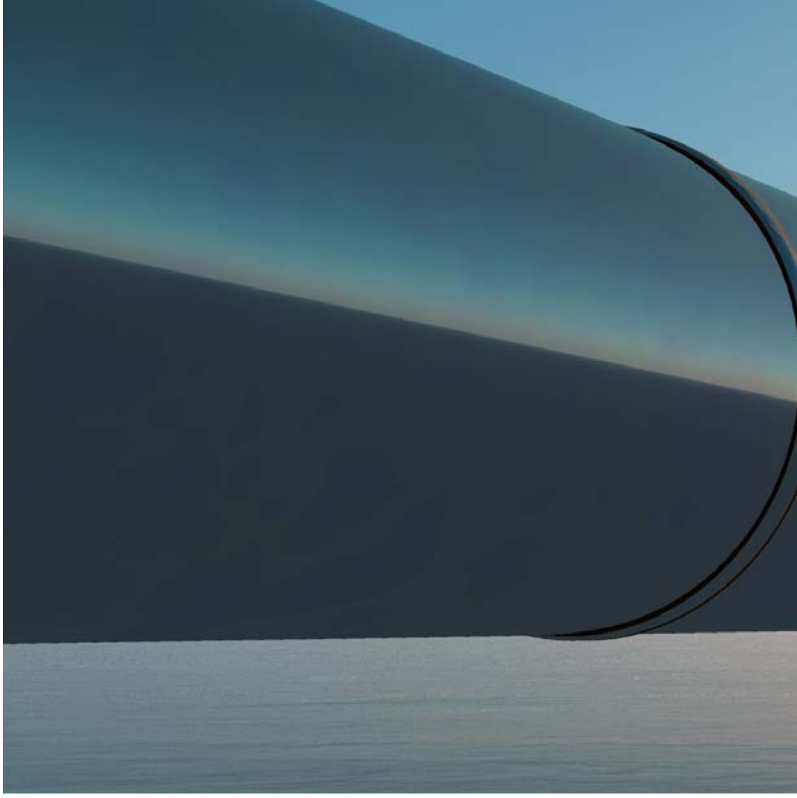
- The court will not usually intervene before an expert has completed their task even if one- or other-party fears that the expert may go wrong because, unless there are strong grounds for thinking that the expert is likely to go wrong, the court's intervention is likely to result in a waste of time and the incurring of unnecessary costs.
- The decision as to whether to intervene before the expert has made their determination is ordinarily one for the discretion of the court. There do not need to be exceptional circumstances to justify the court reaching its conclusions on the issues of construction first and the court may well do so if the issue in dispute is real, rather than hypothetical, and if it is in the interests of justice and convenience for the court to do so.
- The fact that one party may face evidential difficulties in establishing that an expert has gone outside their authority is not usually a legitimate reason for the court to give a pre-emptive ruling. The parties have agreed to submit to a particular form of decision-making with whatever evidential difficulties that might entail.
- The court should be careful not to re-write the terms of the dispute resolution mechanism even if one party may no longer regard that regime to be satisfactory.

Having considered the authorities, the Commercial Court was satisfied that there was no dispute between the parties regarding the court's jurisdiction to construe the relevant provisions of the Contracts, nor any dispute that in appropriate cases the court can exercise that jurisdiction in advance of the referee's determination. In that regard, the Commercial Court focused on whether this was an 'appropriate case' and concluded that this was not a case where it would be just and convenient for the court to decide the scope of the referee's jurisdiction before the referee reaches his determination. The Commercial Court's reasons were as follows:

- The parties are both experienced and sophisticated commercial operators.
- The parties had contracted on the basis that the determination of an alternative source of price information should be made by a referee rather than by the courts, at least in the first instance.
- At the time of contracting, the parties were satisfied that the relevant clauses of the Contracts were sufficiently clear to provide the referee with the information he needed as to the tasks he was required to undertake.
- There was no evidence to suggest that the referee would not be able to properly apply the relevant clauses of the Contracts for the purposes of making his determination or that the referee would seek to construe his task too widely or too narrowly.
- This was particularly the case where there is an agreement between the parties that (i) the task for the referee is to determine an alternative source of price information for the relevant contractual provisions and (ii) this information will be provided to the referee is in his instructions.
- The parties could have chosen at the time of contracting to provide the referee with more detailed guidance as to the scope of his powers and the procedure to be followed but chose not to (contrasting with the detailed provisions for expert determination provided under both Contracts).
- The court would be in a better position to answer questions of construction having the benefit of the referee's determination and an understanding of why the referee has reached their determination. This is because the court will then have the benefit of the referee's knowledge and experience and the court will be able to test the referee's determination against the wording of the Contracts in order to understand on what basis the referee has concluded that his determination falls within the scope of his powers.
- There is a danger in the present case that if the court gave guidance now as to the effect of the relevant clauses of the Contracts, it may inadvertently restrict the referee's determination in a way which is not intended by the Contracts.
- Although the authorities referred by the parties to the Commercial Court recognise that there are circumstances where the court can answer questions of construction in advance of a referee carrying out their role, they also make clear that ordinarily a court should be reluctant to make a pre-emptive decision.

The Commercial Court further held that despite there being force to Shell's additional arguments that:

- Premier has invoked the Court's power to make declaratory relief by issuing its Part 8 claim form and seeking declaratory relief itself; and



— The parties had come to the Commercial Court prepared to answer the questions of construction raised by the differences between the parties as to the information to be provided to the referee and therefore it would be a waste of time and costs for the parties to have to return to court after the referee's determination for the court to interpret the same contractual provisions,

these are not sufficient reasons to make declarations where the Court considers it is not otherwise just and convenient to do so nor to go behind the parties' original agreement that their dispute as to an alternative source of pricing information should be resolved (at least in the first instance) by a referee.

## Comment

Oil and gas industry contracts regularly provide for specified disputes to be referred to a referee or an expert for determination. Such provisions regularly appear in a wide range of contracts, including commodity sales, share sale agreements and joint operating agreements.

For example, the Association of International Petroleum Negotiators (AIPN) model contracts for gas sales and gas transportation include optional dispute resolution clauses that provide for the appointment of an expert to resolve technical disputes. Examples of matters the AIPN model contracts refer to expert determination include failure to agree commissioning procedures, failure to agree the DCQs for the decline period to be included in the annual forecast, value for indexation, revisions in base price and disputed amounts. Similarly, the OEUK standard joint operating agreement contains provisions for expert determination (for example, the 2009 agreement (updated in 2021) includes provisions where disputes regarding technical or accounting matters may be referred to an expert for a binding decision, rather than resorting to litigation or arbitration). However, this is not universal – the BP Oil General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products do not provide for expert determination. Rather, disputes will be referred to the Commercial Court or an arbitrator under the London Maritime Arbitrators' Association.

The decision from the Commercial Court provides some helpful commentary regarding referrals to both a referee and an expert. For drafters in the industry, it is important that when including provisions for a referee or expert determination that the scope and dispute resolution process are clear to ensure there is little room for ambiguity as to when a referee or an expert has jurisdiction to act. It may be a more complex question to decide whether, once their jurisdiction is engaged, the contract should be drafted to give the expert specific instructions as to how to go about their role.

In any event, insofar as the foregoing requires the expert or referee to construe the contract, the courts (or arbitrator) will, absent words to the contrary in the contract, maintain a supervising jurisdiction to remedy any error of legal construction and interpretation by the expert/referee. However, this Commercial Court decision confirms that such supervisory jurisdiction will usually only be invoked, in practice, after a determination has been rendered. That timing does not occur due to any legal doctrine, but because the court will usually consider it just and convenient for it to be so.

As a result, in circumstances where a matter is referred to a referee or expert to determine, it is usually only once that determination has been made that the court will give its views on construction and interpretation that are relevant to the determination. The foregoing will be familiar to practitioners given the recent decision 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) where it was held (amongst other things) that an expert should be able to proceed with their determination even if there are disputed issues of construction (i.e., only after their determination has been made may their interpretation be challenged on the basis of an error in law). See further details on pages 39 to 43 of the CMS Annual Review of developments in English oil and gas law (2023 edition).

**Judge:** Nigel Cooper KC



# Supreme Court overturns Court of Appeal on force majeure

In *RTI Ltd v MUR Shipping BV* [2024] UKSC 18, the Supreme Court unanimously overturned the Court of Appeal's decision that a 'reasonable endeavours' obligation in a force majeure clause could require a party to accept alternative, or non-contractual, performance.

The Supreme Court clarified the law on force majeure clauses by relying on well-established English law principles and found that an obligation to use reasonable endeavours in the context of a force majeure clause would not require a party who wishes to rely on the clause to accept the other party's offer of non-contractual performance.

## Facts

CMS has published an article on the Commercial Court's judgment in its 2022 Annual Review (see CMS Annual Review of developments in English oil and gas law (2022 edition), page 78) which sets out the facts of the underlying dispute in greater detail. An abridged summary of the facts is reproduced in the 2023 Annual Review about the Court of Appeal judgment (see CMS Annual Review of developments in English oil and gas law (2023 edition), page 80).

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 bauxite from Guinea to Ukraine.

The force majeure was defined in the COA 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 endeavours from the Party affected'.*

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 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).

RTI commenced arbitral proceedings against MUR.

The arbitral tribunal considered that making payment in Euros was a '*completely realistic alternative*', and so MUR should have accepted this proposal rather than claiming force majeure.

MUR appealed 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 was not required to sacrifice its contractual right to payment in US Dollars.

As such, the Commercial Court confirmed that *'reasonable endeavours*' on a party to overcome a force majeure event does 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.

## Court of Appeal Decision

CMS has published an article on the Court of Appeal's judgment, appealed in this case, in its 2023 Annual Review (see CMS Annual Review of developments in English oil and gas law (2023 edition), page 80).

Males LJ considered that the appeal concerned the specific terms of Clause 36 and that the *'real question'* was whether acceptance of the proposal to pay freight in Euros and to bear the cost of converting those Euros into US Dollars would '*overcome*' the state of affairs caused by the imposition of sanctions. Newey LJ, agreeing with Males LJ, held that it was sufficient that the force majeure event could be '*overcome*' in a '*practical sense, such that all its adverse consequences would be avoided*'.

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 MUR 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 number 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.

## Supreme Court Decision

The Supreme Court unanimously overturned the Court of Appeal judgment.

The judgment presented by Lord Hamblen and Lord Burrows disagreed with the Court of Appeal's analysis that the case was dealing with a narrow issue of interpretation of the specific terms of Clause 36. Since force majeure clauses are generally interpreted as applicable only if the party invoking it can show that the state of affairs was beyond its reasonable control and could not be avoided by taking reasonable steps, they were dealing with a very common feature of force majeure clauses and any decision an appellate court takes would be applicable to force majeure clauses generally.

After reviewing a large number of authorities, the Supreme Court explained why it disagreed with the Court of Appeal's decision under several well-established principles of English law:

— ***Object of reasonable endeavours provisos:*** The Supreme Court noted that force majeure clauses are generally interpretated as implicitly including reasonable endeavours provisos because of causation (i.e. if the party could have prevented the state of affairs by taking reasonable steps, then the force majeure event could not have caused the failure to perform). Lord Hamblen and Lord Burrows reiterated that contractual performance under a force majeure clause means performance of the contract according to its terms (which, in this case, meant payment in US Dollars) and failure to perform means failing to perform according to those terms. The Supreme Court strongly disagreed with the Court of Appeal's analysis of this issue and stated:

  *'This means that the relevant question is whether reasonable endeavours could have secured the continuation or resumption of contractual performance. (...) It is not concerned with the steps that could or should have been taken to secure some different, non-contractual, performance. The object of the reasonable endeavours proviso is to maintain contractual performance, not to substitute a different performance. (...) Put another way, it would be absurd to say that MUR caused the non-performance of the contract by failing to accept an offer of non-contractual performance.'*

— ***Freedom of contract:*** The Supreme Court reiterated that the principle of freedom of contract is fundamental to English law and stated that freedom of contract includes '*the freedom not to accept the offer of a non-contractual performance of the contract*'.

— ***Clear words are needed to forego contractual rights:*** A party should not be required to forego valuable rights unless the contract makes it clear. On the facts, MUR had the contractual right to refuse payment in any other currency than US Dollars and did not expressly forego this right.

— ***Importance of certainty in commercial contracts:*** Counsel for RTI had suggested that non-contractual performance may be accepted if: (i) it involves no detriment to the party seeking to invoke force majeure; and (ii) it achieves the same result as performance of the contractual obligation in question. Lord Hamblen and Lord Burrows examined RTI's arguments in the context of legal and commercial certainty and RTI's claim that this approach would be favoured by reasonable business people. The Supreme Court rejected this argument, stating that RTI's proposed approach gives rise to considerable uncertainty, especially in the context of a clause which requires immediate judgments to be made, which would be contrary to the expectations of reasonable business people.

## Comment

As the Supreme Court itself noted, this is the first case that has decided whether or not reasonable endeavours in a force majeure clause requires the affected party to accept an offer of non-contractual performance from the other party.

The closest cases were: *Bulman & Dickson v Fenwick & Co* [1894] 1 QB 179 and the *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691 ('the Vancouver Strikes case'), which provided strong implicit support for MUR's case. In contrast, any support in the authorities for RTI's case was weak.

The potential problem with the Court of Appeal's analysis is that it was not what the contract required. The contract required payment in US Dollars. If payment could not be made in US Dollars, the contract could not be performed on its terms. The approach taken by the Court of Appeal had the potential to create confusion in the operation of force majeure clauses and was (perhaps) an example of hard facts creating bad law.

The Supreme Court's decision accepted that at first sight, RTI's submissions appear to favour reasonableness (and justice) over certainty, but this should not '*be allowed to ride rough-shod over the required contractual performance*', holding that reasonable endeavours provisos in force majeure clauses should not be extended to offers of non-contractual performance unless the parties expressly agreed.

The Supreme Court has confirmed that '*it is not unmeritorious or unjust to insist on contractual performance*'.

Accordingly, the decision brings welcome clarity to any uncertainty the Court of Appeal judgment may have created and bases its judgment on fundamental principles of English commercial law, especially certainty and predictability.

For lawyers drafting force majeure clauses the key 'take away' points are:

— In English law, force majeure clauses will be construed on their own terms such that the drafter is in control of the category of events that may constitute force majeure and their contractual consequences.

— Even where a force majeure provision does not contain an express obligation to use reasonable endeavours to mitigate the effect of the event that might cause force majeure, the law will usually imply that a party invoking force majeure must show that the event or state of affairs was beyond its reasonable control and could not have been avoided by taking reasonable steps.

— The requirement to take reasonable steps (or reasonable endeavours) will not generally be construed as compelling non-contractual performance. That said, the Supreme Court made clear that it is open to the parties to agree otherwise in their contract.

**Commercial Court Judges:** Mr Jacobs J

**Court of Appeal Judges:** Newey LJ, Males LJ, Arnold LJ

**Supreme Court Judges:** Lord Hodge Deputy President, Lord Lloyd-Jones, Lord Hamblen, Lord Burrows, Lord Richards

# Russian Companies and Force Majeure/Sanctions revisited

In *Litasco SA v Der Mond Oil and Gas Africa SA and Locafrique Holdings SA* [2023] EWHC 2866 (Comm), the Commercial Court confirmed its approach to applying sanctions to oil and gas entities with Russian connections and the application of force majeure and sanctions clauses in that context. The decision highlights that the application of sanctions law is likely to be fact-specific. Further, a force majeure clause is unlikely to come to the rescue where the obligation to perform has already passed by the time that the force majeure event occurs.

## Facts

Litasco SA ('**Litasco**') is a Swiss oil marketing and trading company that is wholly owned by Lukoil PJSC, a Russian oil company. Der Mond Oil and Gas Africa SA ('**Der Mond**') is a Senegalese company involved in oil trading, particularly in the West African market.

On 29 April 2021, Litasco entered into a contract to sell Der Mond 950,000 barrels of ERHA (Nigerian) crude oil (the '**Contract**'). Clause 14 of the Contract contained a force majeure clause that provided as follows:

*'14.1 If by reason of 'force majeure', which for the purpose of this Agreement shall mean any cause beyond the reasonable control of the affected Party including, but not limited to, any act of God, war, terrorism, riots, acts of a public enemy, fires, strikes, labour disputes, accidents, or any act in consequence of compliance with any order of any government or governmental or executive authority, either Party is delayed or hindered or prevented from complying with its obligations under this Agreement, the affected Party will immediately give notice to the other Party stating:*

*14.1.1 the nature of the force majeure event;*

*14.1.2 its effect on the obligations under this Agreement of the Party giving the notice; and*

*14.1.3 the estimated date the contingency is expected to be removed.*

*14.2 To the extent that the affected Party is or has been delayed or hindered or prevented by a 'force majeure' event from complying with its obligations under this Agreement, the affected Party may suspend the performance of its obligations until the contingency is removed.*

*14.3 If:*

*14.3.1 the force majeure event cannot be permanently removed; or*

*14.3.2 a force majeure event results in a delay extending beyond ten (10) days;*

*14.3.3 either Party may terminate the Agreement upon notice and both the Parties will be relieved of their further contractual obligations, except for their accrued rights and obligations which shall survive the termination of the Agreement in accordance with this provision.*

*14.4 Neither Party shall be responsible for any loss or damage caused by any failure or delay in the fulfilment of its obligations under the Agreement if such failure or delay arises'.*

In relation to sanctions, Clause 15.1 of the Contract provided as follows:

'*15.1 Each Party acknowledges and understands that the performance of the Parties' respective obligations arising out of the Agreement shall be in compliance with any United Nations Resolutions or any Regulations which have the force of law in Switzerland, the EU, the United States of America, the United Kingdom and/or the country or countries in which the Oil may be loaded, delivered, discharged stored or transit during the performance of the Agreement and/or the counter of origin of the Oil, and which:*

*15.1.1 are directly or indirectly applicable to one or both of the Parties or to the transaction contemplated under this Agreement;*

*15.1.2 relate to foreign trade controls, export controls, embargoes or internal boycotts of any type (applying, without limitation, to the financing, payment, insurance, transportation, delivery or storage of the Oil); and*

*15.1.3 are imposed against:*

a. *(a) any natural or legal persons, entities or bodies from a particular designated country; or*

b. *(b) any natural or legal persons, entities or bodies controlled by such persons, entities or bodies, any other natural or legal persons, entities or bodies that are, in any way, subject to such controls, embargoes or boycotts,*

*hereinafter referred to as the 'Trade Sanctions'.*'

The cargo was delivered and Der Mond made partial payments in respect of the contractual purchase price in November 2021 and January 2022, before defaulting on a further scheduled payment.

Following negotiations, the parties entered into a deed of payment which provided for a further five monthly payments (the '**Deed of Payment**'). The Deed of Payment also permitted Litasco to accelerate the entire debt in the event of default. When payment was not forthcoming, Litasco accelerated the debt and demanded the outstanding balance, which at that point stood at €44,445,987.51 (excluding interest).

Proceedings were commenced to enforce these claims but were later stayed whilst negotiations between the parties took place, during which Litasco and Der Mond entered into an addendum to the Contract dated 5 November 2022 (the '**Addendum**'). The Addendum set out a new repayment schedule, under which two further payments were made by Der Mond. When Der Mond defaulted on the third payment Litasco again accelerated the entire debt, and the stay on proceedings was lifted on 10 March 2023.

Litasco applied for summary judgment on 5 June 2023. Der Mond argued that the force majeure clause had been engaged because payment to Litasco had to be made through the international banking system, which was not possible.

### Decision

The alleged refusal of the banks to make payments to Litasco was argued to be an event '*beyond the reasonable control*' of the defendants, which had '*delayed, hindered, or prevented*' them from complying with their obligation to pay.

Litasco adduced evidence of payments it had received from a variety of international banks throughout 2022 and 2023 (such as Credit EuropeBank and Deutsche Bank), proving instead that Der Mond was unable to make the outstanding payments due to a lack of foreign currency in its account. This was further compounded by the fact that Der Mond itself was able to make payments to Litasco in both November and December 2022 via the international banking system.

The Commercial Court sought to distinguish between circumstances that prevent or hinder a party in complying with their obligations due to a force majeure event and where a party simply lacks the financial resources to meet their obligations.

In addition, Foxton J held that Der Mond was not entitled to engage the force majeure clause to suspend payment as the Contract had been fully fulfilled on Litasco's part before any alleged force majeure event had occurred. As a result, Der Mond's payment obligations under the Contract had become due, and were initially payable, even before that time.

The Contract also supports the conclusion that Litasco was entitled to receive payment for the following reasons:

— Clause 14.3.3 allowed Litasco to terminate the Contract if a force majeure event continued for more than 10 days.

— Clause 14.8 would have been engaged even if the force majeure defence had succeeded. The clause stated that '*Notwithstanding this [Force Majeure] clause, neither Party shall be relieved of making payment...of any sums that have accrued due under this Agreement prior to its suspension or termination...*'.

In either eventuality, the accrued payment obligations of Der Mond would have remained post suspension or termination of the Contract.

***Trade Sanctions***

Der Mond's sanctions defence was advanced both under Clause 15 of the Contract and as a matter of general law, relying in both instances on the Russia (Sanctions) (EU Exit) (Amendment) Regulations 2019 (the '**2019 Regulations**').

In arguing that the 2019 Regulations had been imposed against Litasco, Der Mond sought to rely on Regulations 12 and 7.

Regulation 12 provides that funds must not be made indirectly available to a '*designated person*', which includes making them available to an entity that is owned or controlled by a designated person (under the meaning of Regulation 7). Regulation 7 then deals with the concepts of ownership and control, stating that an entity ('C') is owned or controlled by another person ('P') if:

***Regulation 7(1)***

*'P— (a) holds directly or indirectly more than 50% of the shares in C, (b) holds directly or indirectly more than 50% of the voting rights in C, or (c) holds the right directly or indirectly to appoint or remove a majority of the board of directors of C' or*

***Regulation 7(4):***

*'...it is reasonable, having regard to all the circumstances, to expect that P would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of C are conducted in accordance with P's wishes.'*

Litasco successfully proved that neither it nor its parent company, Lukoil PJSC, had been named as an entity sanctioned by the 2019 Regulations. In addition, Litasco demonstrated that whilst its former founder, president and CEO was sanctioned under the 2019 Regulations on 13 April 2022, he had stepped down from the board at the time with his shareholding in Lukoil PJSC standing at 8.5%, which did not meet the threshold to amount to a controlling stake in Litasco.

Der Mond also advanced the argument that Litasco was controlled by President Putin, who has been sanctioned by the 2019 Regulations. In reaching his conclusion on the issue of control, Foxton J reviewed the High Court and Court of Appeal's decisions in *Mints v National Bank Trust and Bank Okritie* [2023] EWCA Civ 1132 ('***Mints***'), which Der Mond sought to rely upon. In *Mints*, the Court of Appeal held that President Putin did exercise control over the claimant bank, given that it was 97.9% owned by the Central Bank of Russia and was classified as '*an organ of the Russian state*'. In the present case however, Lukoil PJSC is not a state-owned body and Foxton J therefore determined that there was no evidence to contend that funds received by Litasco would be used in accordance with President Putin's wishes.

In addition, Foxton J went on to address obiter comments made by the Court of Appeal in *Mints,* which stated that the '*control*' test should be interpreted broadly so as to deem any entity as being controlled by a designated person where that designated person already does or could at any time decide to '*call the shots*' of the entity in question. Whilst Foxton J conceded that it is arguable that President Putin has the means of placing Litasco, or indeed any Russian company, under his *de facto* control should he decide to do so, he stated that the correct interpretation of Regulation 7(4) is that it is concerned with an '*existing influence*' of a designated person rather than a state of affairs which a designated person is in a position to bring about. The implication of the latter viewpoint is that President Putin is arguably in control of all companies in Russia, even the ones of whose existence he is '*wholly ignorant*' of and of whose affairs are conducted on a routine basis without him.

## Comment

The decision highlights:

— The need for careful drafting of force majeure and sanctions clauses. The existence of sanctions against a state or state entities does not always translate to giving a party a legitimate reason, under a force majeure/sanctions clause or at law, for refusing to perform contractual obligations with entities domiciled in that jurisdiction not clearly falling within the scope of sanctions. Most of the time, they will not.

— Whilst events such as the Russian-Ukraine war and imposed sanctions may mean that a party no longer wishes to perform a contract with a Russian entity, it does not follow that this will be permissible under the relevant contract.

— In respect of force majeure and sanctions clauses, much will turn on the specific words of the clause and whether they discharge the obligation to perform and/or relieve a party from sanction for failing to do so. In this respect, where a payment obligation arises prior to a force majeure event commencing, purely relying on force majeure may be insufficient (although sanctions remedies may come to the rescue).

— Perhaps more importantly, the decision offers further clarity on how the English courts are likely to interpret the application of the 2019 Regulations, particularly with regards to the approach to establishing 'control' of an entity by a 'nominated person' under Regulation 7. Foxton J's introduction of the 'existing influence' element to the 'control' test demonstrates that courts will look to establish de-facto control on a case-by-case basis and will not simply allow parties to use the sanctions regimes as an excuse for defaulting on contractual obligations with Russian companies solely due to their (or their parent's) incorporation in Russia.

**Judge:** Foxton J

# Force Majeure and hardship in long-term gas supply contracts

In *Gasum OY v Gazprom Export LLC* (PCA), an arbitral award was recently published following a hearing in 2022 relating to an arbitration between Finnish natural gas importer, Gasum OY ('**Gasum**'), and Russian natural gas exporter, Gazprom Export LLC ('**GPE**'). This award illustrates a Tribunal's approach to the impact of decisions taken by the Russian Government requiring payment in Russian rubles, and the impact of liberalisation on minimum quantity / take-or-pay provisions.

## Facts

On 12 March 1994, Gasum and GPE entered into a 'Contract for the Sale and Purchase of Natural Gas', with subsequent amendments, under which GPE agreed to supply Gasum with a certain quantity of natural gas at a specified price, and Gasum agreed to take or pay for a minimum annual quantity ('**MinAQ**') and, after an amendment in 2021, a minimum daily quantity ('**MinDQ**') of gas (the '**Contract**').

The Contract contained a Hardship Clause and a Force Majeure Clause (the text of which are redacted in the award). The Contract was governed by Swedish law and provided for arbitration seated in Stockholm. For the first 16-years of the Contract, the natural gas market in Finland remained isolated from other EU Member States. Gasum had the monopoly of natural gas: it acted as sole importer, as sole system operator and as the only wholesale supplier. GPE, for its part, operated as the single supplier of natural gas, through Imatra, which was the only entry point for the import of gas into Finland.

The Finnish gas market diversified on 1 January 2020 with the opening of the Balticconector, resulting in increased competition and reduced demand for Gasum's gas, which affected its ability to resell gas and meet its obligations under the Contract. Due to the liberalisations of the Finnish gas market, the parties entered negotiations in relation to the Contract terms (the specific contract terms have been redacted in the award) with Gasum submitting various hardship claims on the basis that:

- Gasum had lost nearly half of its market share after the Finnish gas market liberalisation and the opening of the Balticconnector;
- the flow of natural gas from the Baltic countries through the Balticconnector to Finnish customers, sold at prices significantly lower than what Gasum could offer on the basis of the Contract Price, was affecting Gasum's ability to sell gas; and
- the volume commitments under the Contract were based on the total demand of natural gas in Finland (pursuant to Article 2.1 of the Contract), but this was no longer in line with reality, since alternative natural gas suppliers had taken up a considerable share of the diversified Finnish market.

On 31 March 2022, the President of the Russian Federation issued Decree No. 172, which imposed a new payment procedure for foreign buyers of Russian gas, requiring them to pay in advance and in Russian rubles, effective 1 April 2022. The Decree provides that failure to comply with this procedure would result in the Russian customs authorities prohibiting delivery of gas.

On 1 April 2022, GPE requested Gasum to amend the Contract's payment provisions, in compliance with the Decree. GPE informed that, otherwise, it would be prohibited from delivering natural gas under the Contract.

On 3 May 2022, Gasum insisted on the continued and aggravated hardship that it was suffering and submitted a new hardship claim due to the following events:

- The competitive situation in the Finnish natural gas market, which resulted in Gasum losing nearly 50% of its market share to other natural gas importers;
- the soaring gas prices in the European gas markets during the second half of 2021; and
- the Russian military actions in Ukraine, which, combined with the high gas prices, had completely destroyed the demand for Russian gas on the Finnish market – in fact, the majority of Gasum's customers refused to buy Russian gas.

GPE's position was that the events relied on by Gasum did not constitute hardship/force majeure as the events were foreseeable and could have been avoided/overcome, and that it was Gasum's commercial decisions, not external events, which caused its difficulties in meeting its contractual obligations. Gasum refused to amend the payment terms of the Contract to comply with the Russian decree and stated that it would continue to pay for gas as it had always done, in euros. Following a payment for gas, GPE informed Gasum that its attempt to pay for the April 2022 deliveries in GPE's Euro bank account was a direct violation of the payment procedure set out in Decree No. 172. It returned the money and suspended the delivery of gas. Gas deliveries under the Contract were suspended as of 21 May 2022.

## Decision

The Tribunal decided that:

- Decree No. 172 and the subsequent order by the Russian Central Energy Customs constituted a force majeure event under the Contract, which suspended the performance of the parties' obligations as of 21 May 2022, until the force majeure event ceases or the Contract is terminated.
- Gasum had assumed the risk of market changes when it entered into the Contract and that the MinAQ Obligation for 2020 and 2021 was not unreasonable or oppressive in light of the parties' expectations and the industry practice.
- The MinAQ Obligation for 2022 was unconscionable due to the unforeseeable and drastic impact of Decree No. 172 on Gasum's ability to perform the Contract and the disproportionate burden it imposed on Gasum.
- The MinDQ Obligation, which was introduced by an amendment in 2021, was unconscionable, as it was imposed by GPE without Gasum's genuine consent and under the threat of termination, and as it aggravated Gasum's contractual liability and exposed it to excessive penalties. The Tribunal adjusted the MinDQ Obligation to 8.5% of the average Contract Price of the not off-taken gas, which it considered to be a reasonable and fair compensation for GPE's loss of opportunity.

The Tribunal's decision acknowledges that the diversification of the Finnish gas market was not a sufficient ground to modify or terminate the Contract, as it was a foreseeable and manageable risk that Gasum had assumed when it entered into the Contract. However, the Tribunal's decision to uphold the force majeure event and to suspend the Contract reflects its recognition of the extraordinary and unforeseeable nature of Decree No. 172, which rendered the performance of the Contract impossible or impracticable for both parties.

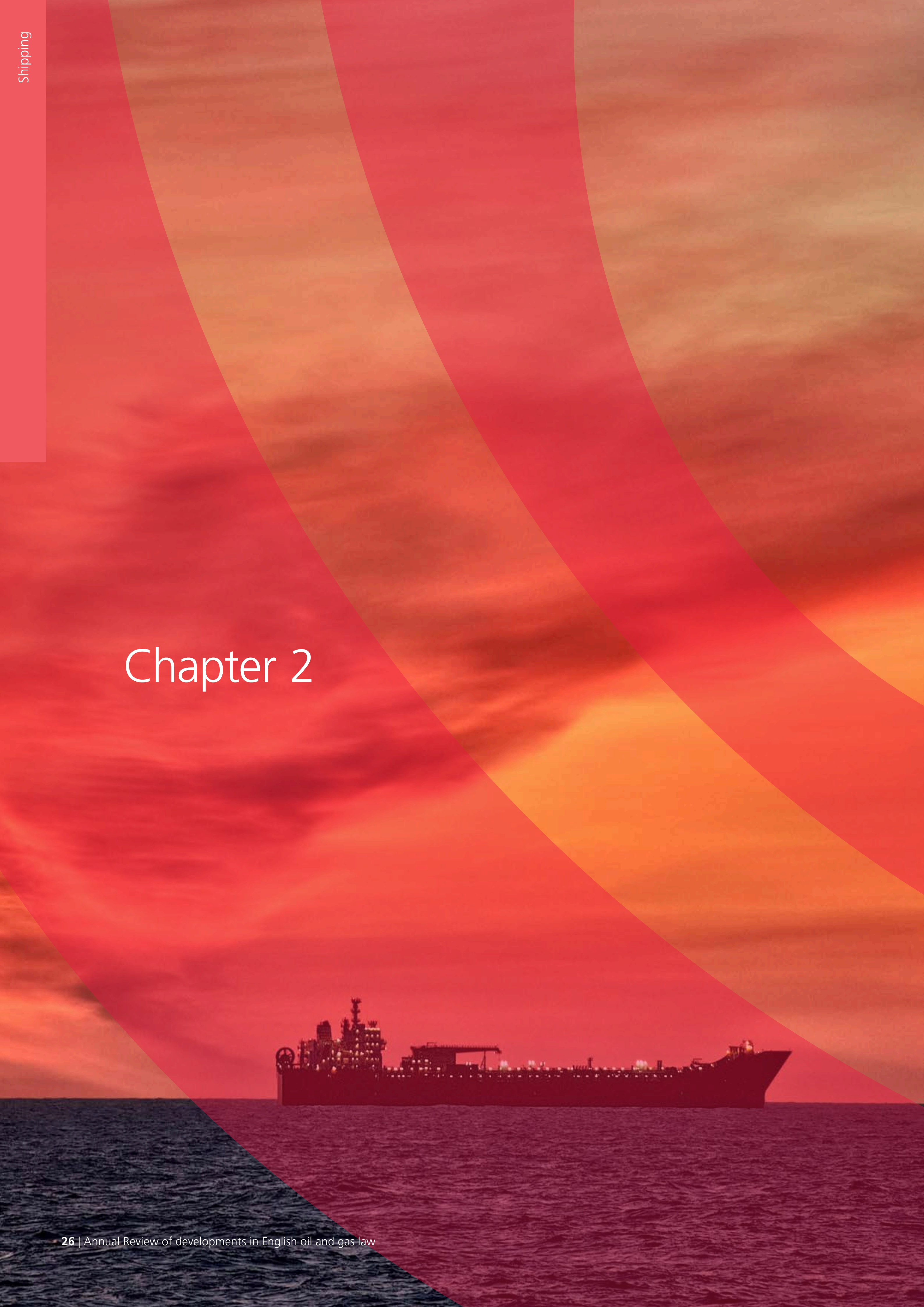
## Comment

This award is particularly interesting for lawyers in the oil and gas industry dealing with natural gas sales agreements, specifically when considering and negotiating: (i) minimum quantity (annual, monthly, and daily) provisions; (ii) take-or-pay/take-and-pay clauses; and (iii) force majeure clauses.

In an interesting parallel with the UK Supreme Court decision recently given in *RTI Ltd v MUR Shipping BV* [2024] UKSC 18, the Tribunal decided that an inability to pay in the currency stipulated in the Contract constituted a force majeure. Although much will turn on the exact words used in the force majeure clause, the cases (taken together) are an indicator that inability to pay in the contract currency is, in principle, capable of being a force majeure event. If parties wish there to be scope to pay in a different currency, careful thought should be given to this at the contract drafting stage.

The Tribunal's approach to the issue of annual contract quantities will also be of interest. Although much is redacted, it is a fair 'take away' for drafters that a Tribunal will likely be cognisant that a gas sales agreement will seek to allocate risks between buyers and sellers. Many gas sales agreements will be structured so as to place a significant 'quantity risk' on the buyer (hence the mantra, 'the buyer takes the quantity risk, and the seller takes the price risk' – which like many maxims has an element of truth). In turn, any shift in price or quantity risk that results in a change in the risk allocation might be managed (in the long term) through the inclusion in the contract of hardship and/or price review provisions in the gas sales agreement. Any Tribunal will likely have to grapple with the relationship between the original contractual allocation of risk (including quantity risks arising from liberalisation), subsequent changes in the market and any hardship/price review provisions.

**Tribunal:** Prof. Dr. Juan Fernández-Armesto (President), Yves Derains, and Prof. Dr. Klaus Peter Berger.

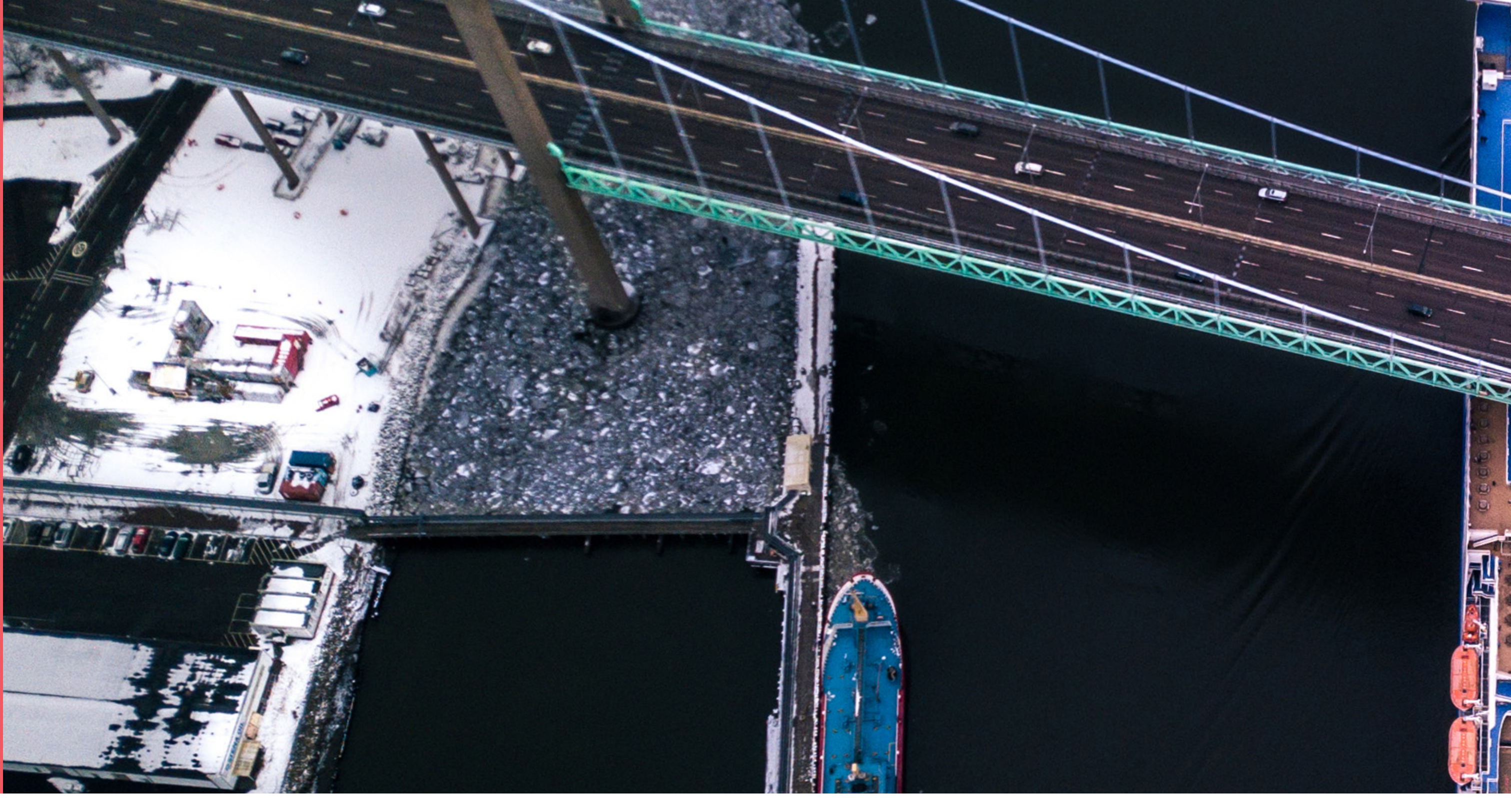


# Chapter 2

# Shipping


This year the Commercial Court and Supreme Court have delivered notable rulings on shipping which are likely to impact the oil and gas sector, including the consequence of 'subjects' in a 'recap':

- In *Southeaster Maritime Ltd v Trafigura Maritime Logistics Pte Ltd ('The Aquafreedom')* [2024] EWHC 255 (Comm), the Commercial Court determined that a 'recap' of negotiations for chartering an oil tanker did not result in an enforceable contract, thus highlighting the importance of the use of 'subjects' clauses in charterparty negotiations, as where a contract is 'subject to' a condition, it will not come into existence until that condition is fulfilled.
- In *Argentum Exploration Ltd v Republic of South Africa* [2024] UKSC 16, the Supreme Court unanimously overturned the Court of Appeal's decision, ruling that the cargo of silver recovered by Argentum in 2017 from the SS TILAWA was not in commercial use at the time the cause of action arose in 1942. Therefore, South Africa was entitled to a state immunity defence under section 10.4(a) of the State Immunity Act 1978, which meant that Argentum's in rem claim for a salvage reward against South Africa was not permissible.
- In *Herculito Maritime Ltd v. Gunvor International BV ('The Polar')* [2024] UKSC 2, the Supreme Court considered whether the owners of a cargo of oil carried on a vessel had to contribute in general average to a ransom payment paid by the owner of the vessel to Somali pirates for the release of the vessel. In ordering the owner of the cargo (who held the bills of lading and had chartered the vessel) to contribute to the general average of the ransom payment, the Supreme Court held that that there was no insurance fund in the charterparty and that the bills of lading did not exclude the cargo owners' liability.



# Uncertain Terms and Unfulfilled Subjects

In *Southeaster Maritime Ltd v Trafigura Maritime Logistics Pte Ltd ('The Aquafreedom')* [2024] EWHC 255 (Comm), the Commercial Court was asked to decide whether a recap for chartering an oil tanker gave rise to an enforceable contract. In deciding it did not, the Commercial Court highlighted the importance of 'subs' or 'subjects' in a recap. It also reinforced the approach in English law that where a contract is 'subject to' a condition, it will not come into existence until that condition is fulfilled.

## Facts

Southeaster Maritime Ltd ('**Southeaster**') is the owner of the vessel Aquafreedom. The defendant, Trafigura Maritime Logistics Pte Ltd ('**Trafigura**'), contended that it was the charterer of that vessel as a result of negotiations between the parties occurring in early 2023. The Aquafreedom was a Suezmax oil tanker of 157,747 DWT.

The evidence consisted principally of communications in the form of written emails and Whatsapp messages between two individual brokers at Arrow Tankers P/S ('**Arrow**'), who each acted as broker for one of the parties. There was no dispute as to the content of the communications.

The negotiations fell broadly into three phases:

1. Initial negotiations which culminated in a 'recap' circulated by Trafigura's broker on 30 January 2023 (the '**Recap**') from Southeaster to Trafigura on 26 January 2023, which included a firm emailed offer for a 48-month charter with two one-year extensions at charterer's option.

   The Commercial Court noted that it was apparent from the Recap that there were further terms which needed to be discussed and agreed between the parties following such offer. The email referred to two 'subjects', being firstly Southeaster's board approval, and secondly Trafigura's management approval, although subsequently Southeaster accepted the deletion of the 'subject' in its favour. For the contractual terms of the charterparty, Trafigura proposed terms that had been used previously on a failed fixture. The Recap however indicated that these terms were subject to review by both sides, and reiterated the 'subject' of Trafigura's management approval within two working days of all terms being agreed.

   A sequence of exchanges followed, through which the parties sought to agree these terms. Trafigura put forward updated environmental and energy reporting clauses as required partly by new rules in relation to the EU Emissions Trading System (the '**ETS Clauses**'), and suggested changes to the trading range, cargo and sales clauses. Southeaster put forward an updated drydocking clause which in evidence was shown to be incomplete, omitting a required timeframe.

On 1 February 2023, Southeaster emailed its last substantive email on the terms (referred to as '**Owners' Last**'), containing various comments on the terms, except for one of the ETS Clauses, on which it noted it was reverting.

2. A hiatus of four days followed during which Southeaster failed to respond to Trafigura's further comments and proposals, despite being chased. The Commercial Court acknowledged that the '*ball was obviously in* [Southeaster's] *court*'. Evidence submitted to the Commercial Court suggested that, in the background, Southeaster was beginning to have concerns about dealing with Trafigura in relation to Trafigura's conduct with another vessel.

   A Teams call invitation was sent to all relevant parties by Southeaster's broker on 6 February 2023.

3. Southeaster cancelled the Teams call scheduled for that morning. At this point, Trafigura hastily purported to accept Owners' Last, subject to its management's approval and thereby bring the negotiations on terms to a conclusion. At this stage, evidence shows that the relevant individual at Southeaster thought it was '*going as bad as it could*'.

   On the same day, 6 February 2023, Trafigura swiftly obtained management approval and purported to '*lift all subs and fully fix the deal*'. At this point confusion prevailed. Trafigura asserted a contract and Southeaster contended the opposite. Trafigura's broker made attempts to summarise the agreed terms of the charterparty, understandably without much success.

## Decision

The main question facing the Commercial Court was whether a charterparty was concluded.

In this respect, the Commercial Court needed to decide:

— Whether the Recap was a binding agreement (the 'review' and 'management approval' being conditions subsequent, and therefore that any dispute as to whether the parties reached agreement subsequent to the Recap is a matter for arbitrators in accordance with the arbitration clause agreed by the parties).

— Alternatively, whether an agreement came into existence on 6 February 2023 by exchange of WhatsApps after which Trafigura sought to '*lift all subs and fully fix the deal*'.

In respect to the Recap, the Commercial Court decided that it did not result in a contract coming into existence. It is now very clearly established that, in the context of contracts for the employment of a ship, the making of an agreement on 'subs' or 'subjects' signals that there are pre-conditions to a contract which remain outstanding. The conclusion of a binding contract is dependent upon the agreement of the relevant party or parties to 'lift' (i.e. remove) the subjects. This was explained by Foxton J in *Nautica Marine Ltd v Trafigura Trading LLC: The Leonidas* [2020] EWHC 1986. There is also authority that a 'subject' requiring board/management approval operates the same way, even outside the shipping context (see *Goodwood Investments v Thyssenkrupp Industrial Solutions* [2018] EWHC 1056 (Comm) paras [32] – [33]). It was clear beyond any serious argument that the relevant subject in the Recap ('*Charterers management approval latest*

*2 working day after all terms agreed*') is to be interpreted in accordance with the above authorities. It meant that there was no contract between the parties until the subject had been lifted.

On a proper construction of the Recap, the '*Terms*' and '*Subs*' provisions work in tandem, and their effect was that the parties agreed upon a sequence of events: (a) review of the previous terms by both sides followed by (b) agreement on '*all terms*' (c) which would trigger the start of 2 working days for Trafigura to lift the '*subject*'. Since it is clear that there was no contract during the period of 2 days triggered by agreement on all terms, there can have been no agreement at any prior stage.

In relation to the argument that an agreement came into existence on 6 February 2023, it was held that the parties did not reach agreement on all terms on 6 February or at all. The effect of the Recap was that agreement on '*all terms*' was a precondition to the existence of a binding contract, and it follows that there was never a binding contract between the parties. On any basis, there remained outstanding issues to be resolved.

## Comment

The case illustrates the importance the use of 'subjects' clauses in charterparty (and other) negotiations. As a general proposition, where an agreement is made 'subject to' other matters it is a question of interpretation whether the parties intended to be bound at all. It may be that the words 'subject to' mean that no agreement comes into existence, alternatively the words may mean that the agreement has come into exitance – but performance is 'subject to' the mater in question.

As the Commercial Court decided, in the context of contracts for the employment of a ship, making of an agreement on 'subs' or 'subjects' signals that there are pre-conditions to a contract which remain outstanding. As such it will not come into existence until those pre-conditions are satisfied. Similar considerations apply to other types of contract that contain requirements for board or management approval.

Although it might be possible for a party to seek to waive a 'subject', it will not be permitted to do so where there are pre-existing conditions that need to be satisfied before the 'subject to' may be completed. Here, there was a three-stage process: (a) review of the previous terms (b) agreement on '*all terms*' (c) which would trigger the start of two working days for Trafigura to lift the '*subject*'. Trafigura could not skip steps (a) and/or (b), and then seek to waive (c).

**Judge:** Jacobs J

# Salvage and the State Immunity Act 1978: A Silver Lining for States in *in Rem* Claims

In *Argentum Exploration Ltd v Republic of South Africa* [2024] UKSC 16, the Supreme Court considered the question of whether salvors of a cargo of silver bars could make a claim *in rem* for payment for recovery of the cargo against a sovereign state, or whether the sovereign state in question was entitled to state immunity from suit. This is the first case in which the application of section 10.4(a) of the State Immunity Act (the '**SIA**') has been considered by the courts.

## Facts

In 1942, the vessel SS TILAWA was carrying a cargo of 2,364 silver bars (valued at GBP 32m in today's money) from Bombay to Durban, when it was torpedoed and sunk in the Indian Ocean by a Japanese submarine. The silver bars belonged to the Republic (at that time the Union) of South Africa, which had purchased them in order to mint currency.

In 2017, Argentum Expoloration Ltd ('**Argentum**') recovered the silver from a depth of 2.5 kilometres in the contiguous zone off the coast of South Africa. Argentum had not made any arrangement with the South African government to salvage the silver. The silver was transported to the UK where it was declared to the Receiver of Wreck (the official responsible for cases involving voluntary salvage wreck material in the UK). Salvors can usually make a claim for payment for recovery of cargo, whether or not the owner of the cargo has asked them to try to recover it. Claims can be made *in rem*, meaning that the claim is made against the property itself. *In rem* proceedings can be raised without notice to the owner of the property and give the salvor significant rights, creating a maritime lien allowing the salvor to 'arrest' the property as security for the value of his reward from the owner. Argentum therefore claimed to be the salvor of the silver and raised a claim *in rem*.

The South African Government challenged the jurisdiction of the court to hear the claim on the basis that it was entitled to immunity from suit for an *in rem* claim under section 1(1) of the SIA and/or Article 25 of the International Convention on Salvage 1989 ('**Salvage Convention**'), which was given effect to in UK legislation by section 224(1) of the Merchant Shipping Act 1995.

Argentum argued that its claim was subject to the exception at section 10.4(a) of the SIA, which provides that a State is not immune in respect of:

d. *an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or*

e. *an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.*

## High Court (Admiralty Court) Decision

Argentum was successful in the High Court, where it was held by that the cargo was in commercial use because it was being carried on a merchant ship, further to a contract of sale with the Government of India and a contract of carriage with the shipowner. A state contracting for its goods to be carried by sea was a classic example of a commercial contract, and so there was no reason, in accordance with the restrictive theory of state immunity, for it not to have the same liability in salvage as a private owner of goods.

## Court of Appeal Decision

The Court of Appeal upheld the decision of the High Court by majority. The Court adopted, but expanded upon, the reasoning of Sir Nigel Teare. The main judgment was given by Popplewell LJ. In his judgment, the relevant use was the South African Government making arrangements for the silver to be put on board the vessel and transported by sea, as it was this use that gave the silver the status of 'cargo' for the purpose of a salvage claim. The intended use of the silver after the voyage was legally and logically irrelevant, because the existence of the claim was contingent on the silver being 'cargo' when on board the vessel. The nature of the activity being undertaken, and not its ultimate purpose, was the focus of the test at section 10.4(a) of the SIA, consistent with customary international law.

In a separate judgment, Andrew LJ concurred but gave different reasons. She considered that the reference to 'commercial purposes' in section 10.4(a) could be interpreted by substituting the definition of 'commercial purposes' in section 17 of the SIA: 'was the cargo in use for the purpose of any transaction or activity mentioned in section 3(3)?'. Section 3(3) provides that a state is not immune from proceedings concerning commercial transactions, which are defined as including 'any transaction or activity entered into by a state other than in exercise of sovereign authority'. She held that at all material times the silver was being used to perform obligations under transactions other than in the exercise of sovereign authority. Therefore, it was being used for a commercial purpose and did not attract state immunity.

Laing LJ dissented. In her judgment, whether something is or is not a cargo is a factual question, not one of legal interpretation. The silver was a cargo because it was being carried on a ship. Whether a cargo has an intended use is also a question of fact, to be answered by reference to any evidence of the intended use of the cargo at the time the wreck occurred. In her judgment, the silver was not in use at all at the relevant time – it was simply being carried – and its intended use, for minting into coin, was a governmental purpose, not a commercial one. Therefore, in her opinion, South Africa was immune from suit in *in rem* proceedings.

## Supreme Court Decision

The Supreme Court overturned the majority decision of the Court of Appeal. It unanimously found that the silver was not in use for commercial purposes at the relevant time. Therefore, state immunity applied.

It was held that for an *in rem* claim to be subject to the exception at section 10.4(a) of the SIA, both the ship and the silver had to be in use or intended for use for commercial purposes at the time the cause of action arose. This is in contrast to an action *in personam* (against the person) which, under section 10.4(b), only requires the ship carrying the cargo to be in use for a commercial purpose.

It was common ground between the parties by the time the case reached the Supreme Court that the time the cause of action arose was in 1942, when the vessel was carrying the cargo. There was also agreement that the ship carrying the silver had been in use for a commercial purpose at that time. However, the Supreme Court held that the silver itself was not in use at all at the relevant time – it was simply being transported from Bombay to Durban. The court considered that if it were right to say that when cargo is carried on a commercial vessel it is 'in use for commercial purposes', the additional test for *in rem* claims at paragraph (a) would be satisfied by any cargo, which cannot have been the intention of the legislation, as it would deprive the test of meaningful effect. Further, the intended use of the silver was by the South African state to mint coins. It was held that this was not a commercial purpose but a state purpose. Therefore, South Africa was immune from being sued in an action *in rem* for salvage.

The Supreme Court considered that its interpretation of the test at section 10.4(a) of the SIA was in line with the Brussels Convention, which the SIA had been enacted in part for the purposes of allowing the UK to become a party to. Article 3(3) of the Convention provides that state-owned cargos carried on board merchant ships for government and non-commercial purposes shall not be subject to any proceedings *in rem*. While Article 3(3) goes on to allow claims to be brought in respect of salvage, the Supreme Court held that this provision must be confined to *in personam* claims.

## Comment

The Supreme Court's judgement is a useful read for its review of state immunity in international and UK law, and detailed consideration of the relevant legislation. It also provides a useful review of the differences between *in rem* and *in personam* claims, and how these will be treated for the purposes of state immunity, emphasising that the requirements for the exception to apply to an *in rem* claim are intentionally more onerous than for an *in personam* claim, since an *in rem* claim constitutes a potentially significant interference with the property rights of the owner over the cargo. In contrast, an *in personam* claim does not confer any rights over the cargo itself.

The significance of the case is that it will now be more difficult, where wrecks are targeted by salvage companies, to claim payment where the cargo salvaged is being transported for sovereign or other non-commercial purposes. It will also potentially frustrate attempts by salvors to assert rights associated with *in rem* claims, including the right of lien over the cargo pending payment. However, where precisely the line is to be drawn between a 'state purpose' and a 'commercial purpose' in respect of cargo remains unclear. On the basis that a cargo in transportation will never be 'in use', it is the intended onward purpose of the cargo which will be determinative. On the basis of this decision, it would seem that a state-owned cargo of oil destined for use for a state-related activity will attract state immunity from suit *in rem*, even if that state activity may ultimately serve other, commercial purposes (as is the case with the minting of coins). However, if a cargo is to be used for a transaction entered into by a state, or an activity by a state other than in exercise of sovereign authority, the state will not be immune from proceedings.

**High Court Judge:** Sir Nigel Teare

**Court of Appeal Judges:** Popplewell LJ, Andrews LJ, Elisabeth Laing LJ

**Supreme Court Judges:** Lord Lloyd-Jones JSC, Lord Briggs JSC, Lord Hamblen JSC, Lord Leggatt JSC and Lord Richards

# Does insurance get you off the hook?

In *Herculito Maritime Ltd v Gunvor International BV* [2024] UKSC 2, the Supreme Court considered whether the owners of a cargo of fuel oil carried on a vessel had to contribute in general average to a ransom payment paid by the owner of the vessel to Somali pirates for the release of the vessel. The case will be of interest to traders, shipowners, charterers, bill of lading holders and insurers as it has significant implications as to the effect of insurance and premium payment clauses on subsequent rights of recourse in the event of an insured event arising.

## Facts

The dispute arose between Herculito Maritime Ltd (the '**Owner**'), the owner of MT Polar (the '**Vessel**') which had been chartered by Clearlake Shipping Ltd (the '**Charterer**'), and Gunvor International BV (the '**Cargo Interests**'), who was the owner of the cargo of fuel oil transported from St. Petersburg to Singapore and lawful holder of the bills of lading.

The charterparty governing the voyage of the Vessel incorporated the BPVOY 4 form, including clause 39 'War Risks' ('**clause 39**') as amended in the fixture recap and various additional clauses, including the 'War Risk' clause (the '**War Risk**' clause) and the 'Gulf of Aden' clause (the '**Gulf of Aden**' clause) (together referred to as the '**War Risk Clauses**').

The War Risk Clauses provided that any additional insurance premia payable in respect of war risks, including piracy, incurred by reason of the Vessel transiting through excluded areas not covered by the Owner's basic war risk insurance were to be for the charterer's account subject to a USD 40,000 limit. Further, six of the bills of lading held by the Cargo Interests had on their face the following words of incorporation: '*…pursuant and subject to all terms and conditions, liberties and exceptions as per TANKER VOYAGE CHARTER PARTY indicated hereunder, including provisions overleaf.*'

In addition, bill of lading no. 084VI provided on the reverse side: '*(1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herein incorporated.*'

None of the bills of lading specifically identified the charterparty intended to be incorporated but it was common ground between the parties that the charter entered into by the Owner and Charterer was the relevant charterparty.

Each of the bills of lading contained on their reverse side general average clauses providing for general average to be settled in accordance with the York-Antwerp Rules 1974 (or the 1994 Rules in the case of bill of lading no. 084VI).

On 30 October 2010, the Vessel was seized by Somali pirates in the Gulf of Aden during a voyage from St Petersburg to Singapore. The Vessel was kept captive for 10 months before being released following a ransom payment of USD 7.7m by the Owner.

The Owner declared general average and before delivering the cargo to Singapore, the cargo underwriters provided the Owner with a general average guarantee dated 16 September 2011 (the '**GA Guarantee**'), while the Cargo Interests provided a general average bond dated 28 September 2011 (the '**GA Bond**'). Both the GA Guarantee and the GA Bond were governed by English law and provided that any disputes should be referred to arbitration in London in accordance with the Arbitration Act 1996 and the London Maritime Arbitrators Association Terms.

In due course the Owner issued a general average adjustment which consisted (in large part) of the ransom payment. The adjustment concluded that USD 5.91m was due to the Owner from the Cargo Interests.

The Cargo Interests contested the Owner's adjustment, arguing that they had no liability in general average in respect of the ransom payment. The Cargo Interests argued that the Owner's only remedy with respect to the ransom payment was recovery under additional insurance purchased to cover risks of kidnapping pursuant to the terms of the charterparty governing the voyage, which was paid for by the Charterer. The additional insurances covering these risks were:

— A kidnap and ransom insurance.
— An annual Hull & Machinery and War Risk insurance.

The Cargo Interests argued that the insurance clauses in the charterparty were incorporated into the contracts of carriage of the cargo evidenced by bills of lading and constituted an 'insurance code' pursuant to which the parties had agreed that in the event of loss as a result of the insured risks, the Owner would seek recovery from the insurers only.

## Arbitral Award

The Owner commenced arbitrations under the GA Bond and the GA Guarantee. The same tribunal was appointed in both arbitrations. The Tribunal found in favour of the Cargo Interests' ruling that they did not need to contribute to the general average.

## Commercial Court Decision

On appeal to the Commercial Court, Sir Nigel Teare disagreed with the Tribunal's ruling and allowed the appeal. It was held that the terms of the charterparty were incorporated into the contracts of carriage of the cargo evidenced by bills of lading, but that the charterparty clause requiring the additional war risks premiums to be paid by the charterers could not be interpreted so as to place the obligation of payment on the holders of the bill of lading and so they could not take advantage of the insurance code incorporated into the bills of lading. As a result, the Cargo Interests did have to contribute to the general average.

## Court of Appeal Decision

On appeal to the Court of Appeal, Peter Jackson LJ, Males LJ and Sir Patrick Elias dismissed the appeal and upheld Sir Nigel Teare's decision that the Cargo Interests did have to contribute to the general average.

***Issues on appeal***
The issues to be decided on appeal were:

— Whether on the proper interpretation of the voyage charter, and in particular the War Risk Clauses and the additional Gulf of Aden clause, and/or by implication, the Owner was precluded from claiming against the Charterer in respect of losses arising out of risks for which additional insurance had been obtained pursuant to those clauses.

— Whether all material parts of those clauses were incorporated into the bills of lading.

— Whether on the proper interpretation of those clauses in the bills of lading and/or by implication the Owner was similarly precluded from claiming for such losses against the bill of lading holders (the Cargo Interests).

— If necessary, whether the wording of those clauses should be manipulated so as to substitute the words '*the Charterers*' with '*the holders of the bill of lading*' in the parts of those clauses allocating responsibility for the payment of the additional insurance premia.

## Supreme Court Decision

The Supreme Court dismissed the appeal, upholding the Court of Appeal decision.

In relation to the first issue, the Supreme Court noted that contractual counterparties may agree that specified loss or damage is to be covered by insurance and that in the event of the insured risks arising, the parties will seek recourse against insurers rather than each other. Such an agreement is referred to as an 'insurance code'. The charterparty in this case did include clauses providing for additional insurance in relation to specified risks which included kidnapping in the Gulf of Aden.

In order to show that the parties had agreed an insurance code it had to be shown that this was the necessary consequence of the agreement. The Supreme Court found this to be akin to a necessarily implied term which involved a similarly high threshold which the Cargo Interests could not satisfy. Most cases where insurance codes have been found involved insurances in joint names of the parties. The Supreme Court said that where parties agree to insurance arrangements which have the legal consequence that they cannot claim against each other in respect of an insured loss, it is well understandable that that may have the necessary consequence that there is an insurance code under their contract. However, this was not the case here.

The Cargo Interests sought to argue that there was a *prima facie* position set out obiter dictum by Longmore LJ in the Court of Appeal in *The Ocean Victory* [2015] EWCA Civ 16, [2015] 2 ALL ER (Comm) 894 and endorsed by the Supreme Court in that same case (*The Ocean Victory* [2017] UKSC 35) that where a contract requires a party to that contract to insure, the *prima facie* position should be that the parties have agreed to look to the insurers for indemnification rather than to each other. The Supreme Court in this case did not find that the Supreme Court in *The Ocean Victory* endorsed Longmore LJ's *obiter dictum* and the judgment did not suggest that there was any prima facie position. Instead, the Supreme Court stated that the position always depends upon the construction of the contract terms as a whole and the necessary consequences of what has been agreed in relation to insurance.

In reviewing various cases in which arguments of insurance code were raised, the Supreme Court noted that case law to date is clear that the mere fact that charterers pay an extra insurance premium is not enough to create an insurance code. As explained by Mustill J in *St Vincent Shipping Co Ltd v Bock, Godeffroy & Co (The Helen Miller)* [1980] 2 Lloyd's Rep 95, by paying the premium the charterer obtains a benefit of being able to send the ship on a voyage which the owner would not otherwise allow her to perform. That does not mean that the charterer then obtains the right to send the vessel on

such a voyage risk free. An analogous situation took place here, where the Charterer was getting a real benefit from agreeing to the terms of the Gulf of Aden clause and paying additional insurance premia in being able to transit through the Gulf of Aden despite the known piracy risks.

In finding that there was no insurance code in the charter prohibiting the Owner from claiming from the Cargo Interests, the Supreme Court also referred to the 'Gilbert-Ash' principle. The Supreme Court found that the Owner's entitlement to general average is a common law right which can only be excluded by clear words in the contract *(Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 717). In order for the Owner to give up their right to general average in relation to kidnap and ransom risks would require a clear agreement in the contract, of which there was no evidence.

In relation to the second issue, the Supreme Court found that all material parts of the War Risks Clauses in the charter were incorporated into the bills of lading. They related to the route to be taken by the Vessel and therefore were directly relevant to the carriage of the goods.

In relation to the third issue, the Cargo Interests argued that the Charterer paid the premiums for the additional insurance on behalf of the Cargo Interests, since it was the Cargo Interests who would be most affected in the event of the Vessel being kidnapped. The Supreme Court disagreed with that analysis, noting that there was no evidence in the contract of an agreement to this effect, that the obligation to pay the insurance premiums was that of the Charterer who had its own interest in ensuring the charter is performed properly and that the bargain struck between the Owner and the Charterer pursuant to the insurance premiums was bilateral in nature and did not extend to the Cargo Interests who were not a party to the relevant agreement.

Finally, in relation to the fourth issue, even if an insurance code had been incorporated into the bills of lading, it could not be interpreted so as to substitute the words 'the Charterers' with 'the holders of the bill of lading' in the parts of those clauses allocating responsibility for the payment of the additional insurance premia. The allocation of responsibility for payment of the insurance premia made sense in the context of the bills of lading as a record of the terms upon which the shipowner has agreed to transit the Gulf of Aden. Further, such manipulation of the wording would lead to an implausible conclusion of the bill of lading holders accepting a potential liability to pay unknown and unpredictable amounts of insurance premia.

## Comment

The decision of the Supreme Court will be important for those in the industry who trade along high-risk routes such as the Red Sea, where over the last year we have seen increased Houthi attacks on commercial vessels. The decision also has wider implications in relation to the role that insurance plays on the liability of parties.

When a heightened risk is identified concerning the performance of a contract, it is common for parties to agree that insurance should be taken (as a term of their agreement) to mitigate that risk. However, it does not follow that the existence of insurance will discharge a liability that arises under the contract (or related transaction document) when an insured event occurs. Whether it does so will depend on the proper construction and interpretation of the contract. In this respect, in applying the principle in 'Gilbert-Ash', the Supreme Court has indicated that the usual position is that a liability will not be discharged. Insurance is usually for the benefit of the insured.

In this case, a party with an interest in the cargo (as neither the insured vessel owner, nor the charterer who was liable for the premium) could rely upon the need to take insurance under the terms of the charterparty to discharge their share of a liability to contribute towards an extraordinary voluntarily expenditure incurred for the purpose of preserving the property imperilled in a common adventure (i.e. a general average).

As a consequence of the above case, oil traders will wish to play close attention when entering into agreements to whether insurance that the vessel owner is required to take out under a charterparty has the effect of discharging their liability to pay a general average in the event of an extraordinary voluntarily expenditure incurred for the purpose of preserving the property imperilled in a common adventure (e.g. a ransom).

In addition, there is a broader point relevant to many other contracts, which is that the existence of insurance will not usually discharge the liability of a party under a contract.

**Commercial Court Judge:** Sir Nigel Teare

**Court of Appeal Judges:** Peter Jackson LJ, Males LJ and Sir Patrick Elia

**Supreme Court Judges:** Lord Hodge DPSC, Lord Hamblen JSC, Lord Leggatt JSC, Lady Rose JSC and Lord Richards JSC

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# 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.

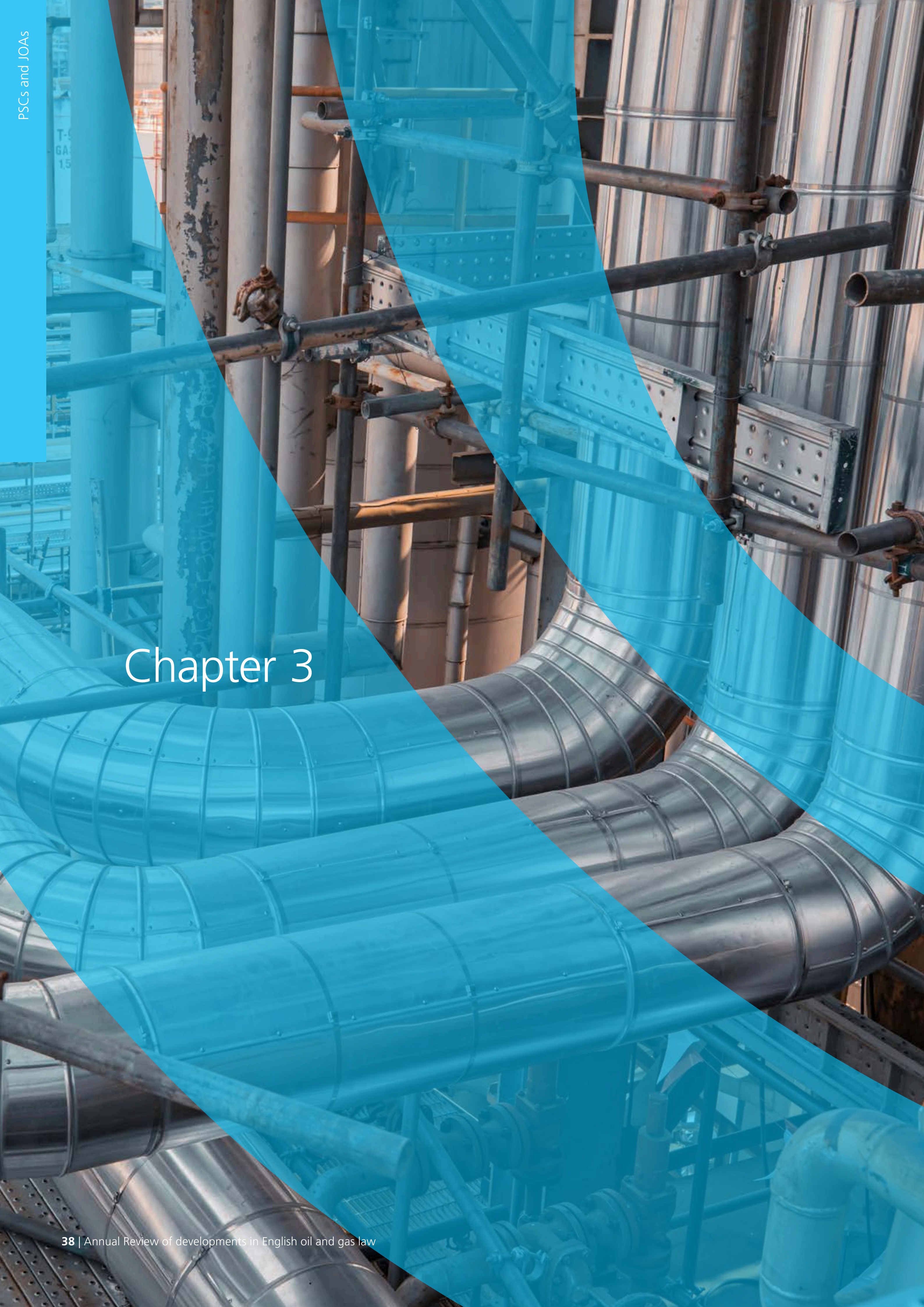
To assist practitioners in this sector, the CMS Expert Guide to Consequential Loss provides a summary of the approach to consequential loss in 39 jurisdictions and outlines key trends in this area. The guide answers questions such as:

— 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 3

# PSCs and JOAs

The past twelve months have seen several decisions related to production sharing contracts ('**PSC**') and joint operating agreements ('**JOA**'). Such contracts remain the backbone of the upstream industry, so will be of particular interest:

- In *RSM Production Corporation v Gaz du Cameroun SA* [2023] EWHC 2820 (Comm), the Commercial Court considered the role of dispute resolution provisions in drafting interrelated upstream contracts, specifically PSCs (or participation agreements), JOAs and settlement agreements.
- In *The Shell Petroleum Development Company of Nigeria Limited v Sunlink Energies and Resources Limited* [2023] EWHC 3135 (Comm), the Commercial Court demonstrated its willingness to ensure that a JOA's arbitration provisions were preserved and backed by real action by the Court for a party seeking to circumvent them.
- In *ENI Ghana Exploration and Production Limited and Vitol Upstream Ghana Limited v the Republic of Ghana, and Ghana National Petroleum Corporation* [2024] SCC Case No. U2021/114, an arbitral tribunal declared that the Republic of Ghana breached a Petroleum Agreement by issuing unitisation directives that were unlawful.

# Drafting for parallel disputes under a PSC, JOA and settlement agreement

In *RSM Production Corporation v Gaz du Cameroun SA* [2023] EWHC 2820 (Comm), the English High Court considered the relationship between arbitration clauses in a production sharing contract ('**PSC**') (or participation agreement), joint operating agreement and settlement agreement. The outcome illustrates the benefit of giving careful consideration to the interplay between dispute resolution provisions in drafting interrelated upstream contracts.

## Facts

On 6 December 2005, RSM Production Corporation ('**RSM**'), an independent oil and gas exploration company, and Gaz du Cameroun SA ('**GdC**'), a Cameroonian company, entered into a Joint Operating Agreement (the '**JOA**') regarding the Logbaba hydrocarbons block, under which GdC was designated as operator. The JOA was governed by Texas law and contained an arbitration agreement providing for ICC arbitration seated in Houston, Texas.

Subsequently, on 12 June 2017, the parties entered into a Participation Agreement ('**PA**') with the national oil and gas company of Cameroon, Société Nationale des Hydrocarbures. The PA was subject to the laws of Cameroon and provided, at Article 16, that any dispute arising out of it should be settled by arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('**ICSID**'), failing which for whatever reason, the UNCITRAL Arbitration Rules would apply.

On 10 October 2018, RSM commenced an ICC arbitration under the JOA, claiming expenditure due from GdC for the wells being drilled in the Logbaba hydrocarbons block. These claims then became the subject of a separate arbitration commenced by RSM in February 2020 pursuant to the PA, under UNCITRAL Arbitration Rules. A settlement agreement was concluded on 27 September 2021 (the '**SA**'), where the parties agreed to dismiss the claims in the UNCITRAL arbitration, under the PA, provided that the dismissal would have no effect on the ongoing ICC arbitration.

The SA was governed by the laws of England and Wales and provided that '*the dispute resolution provisions of Article 16 of the [PA] shall apply to all disputes arising out of the [SA], provided, however, that the parties agree that disputes shall be submitted under the UNCITRAL Arbitration Rules and provided further that the parties agree that any dispute under this [SA] may be consolidated with any dispute that arises under the JOA and/or the [PA] in a single arbitration under the UNCITRAL Arbitration Rules (or, where applicable, the ICSID)*'.

On 7 August 2023, GdC's lawyers sent a letter to RSM claiming USD 48,855,450 under the JOA, contending that since RSM did not consent to the remedial works (which were the subject of the UNCITRAL arbitration), pursuant to an express clause in the JOA, RSM was liable to pay 700% of RSM's Participating Interest share in the operation. Upon RSM's refusal to pay this amount, GdC commenced substantive proceedings in the Cameroon courts.

RSM contended that the Cameroonian proceedings were in breach of the arbitration agreement in the SA and applied to the High Court of England and Wales for an anti-suit injunction which was granted at a hearing without notice on 4 October 2023 before Pelling HHJ. The return date for the anti-suit injunction was 2 November 2023, during which hearing the Court decided to continue the anti-suit injunction.

## Issues

At the hearing, GdC resisted the continuation of the anti-suit injunction on four grounds:

- The dispute RSM sought to enjoin was not a dispute governed by an English-seated arbitration agreement, or at least RSM could not show a high degree of probability that it was;
- there was no breach of any arbitration agreement because GdC had merely sought and obtained interim relief in Cameroon in support of anticipated arbitration proceedings, and that it is established that seeking such interim relief does not breach an agreement to arbitrate;
- the English Court had no jurisdiction over GdC; and
- there was a failure to make a fair presentation at the without notice hearing.

## Decision

In his judgment, Butler J focused on each of GdC's grounds of resistance in turn.

As to the first ground, Butler J considered the wording of the arbitration agreement. The judge held that the provision from the SA's dispute resolution clause was not simply one which provides that arbitrations commenced under the JOA and under the SA can be consolidated. The clause stated that it is the disputes which may be consolidated in a single arbitration. Furthermore, if there were an arbitration under the JOA (ICC Rules) and also under the SA (UNCITRAL or ICSID Rules), consolidation of the arbitrations could not reliably be assured. Instead, the proper construction of the clause allows a party to refer to arbitration any dispute which arises under the JOA, where a dispute also arises under the SA. In effect a 'one stop shop'.

Further, the language of the provision is that the dispute under the JOA or the PA '*may*' be consolidated with a dispute under the SA in a single arbitration. This provides for an option to invoke the clause and have a consolidated dispute in a single arbitration. Such option could be exercised by the commencement of such an arbitration, or by requiring the other party to submit the dispute to such an arbitration by making an unequivocal request to that effect and/or by applying for a corresponding stay of any relevant proceedings.

Therefore, the arbitration provision in the SA was binding on GdC and applicable to its substantive claims made before the Cameroonian courts.

In relation to the second ground, Butler J also disagreed with GdC's claim that the Cameroonian proceedings were not a breach of any arbitration proceedings since they were intended solely to provide security for a claim to be pursued in ICC arbitration. Notably, GdC had not initiated any arbitration proceedings, and there was no evidence to suggest it was seeking security for a claim intended for arbitration.

The issue with GdC's jurisdictional argument (the third ground) was whether GdC had been properly served such as to invoke the jurisdiction of the English courts. In the SA the parties had agreed that '*any claim form, notice or other document upon GdC for the purpose of any proceedings or disputes begun in England and/or Wales shall be duly served upon it if delivered to its*' parent company's stated address. As such, in dismissing GdC's arguments, Butler J found that this was a contractually agreed method of service within CPR r. 6.11. The Arbitration Claim Form was served in accordance with that agreement on the parent company's address in England. In any event, and although it is unnecessary to consider in detail because of the applicability of CPR r. 6.11, RSM was entitled to serve GdC out of the jurisdiction without permission, by reason of CPR r. 62.5(2A), as the seat of the arbitration pursuant to the SA '*is or will be in England*'.

Finally, with respect to the fourth ground, Butler J held there was no merit in GdC's argument concerning lack of full and frank presentation. It was not incumbent on RSM at the hearing without notice to inform the judge that, under one interpretation, the order could prevent GdC from commencing an ICC arbitration. The judge was of the view that this argument was put forward as an afterthought and that GdC should have promptly sought clarification in the first hearing, which it did not.

As such, Butler J ordered the continuation of the anti-suit injunction and the discontinuance of the substantive Cameroonian proceedings.

## Comment

This case highlights a few interesting points:

— The English courts remain committed to enforcing arbitration agreements and restraining parties from pursuing parallel litigation in breach of such agreements.

— Whilst it may remain open (depending upon the exact wording of the dispute resolution clause and arbitration rules chosen) for a party to seek interim relief from a national court, (i) it must be a genuine attempt to seek interim relief rather than a substantive final remedy and (ii) the nature of interim relief is that a party should follow up with commencing arbitral proceedings.

— In oil and gas transactions it is common for the underlying PSC granted by the government (or national oil company) to the relevant oil companies to be governed by local law. It may also be subject to ICSID arbitration (or an alternative).

— As between the oil companies in a joint venture to explore for, develop and produce hydrocarbons under a PSC, such joint venture relationship (as between each other) will usually be structured as an unincorporated joint venture through a joint operating agreement (or '**JOA**'). These usually follow industry specific model forms, which are published by the Association of International Energy Negotiators, Offshore Energies UK and other industry bodies.

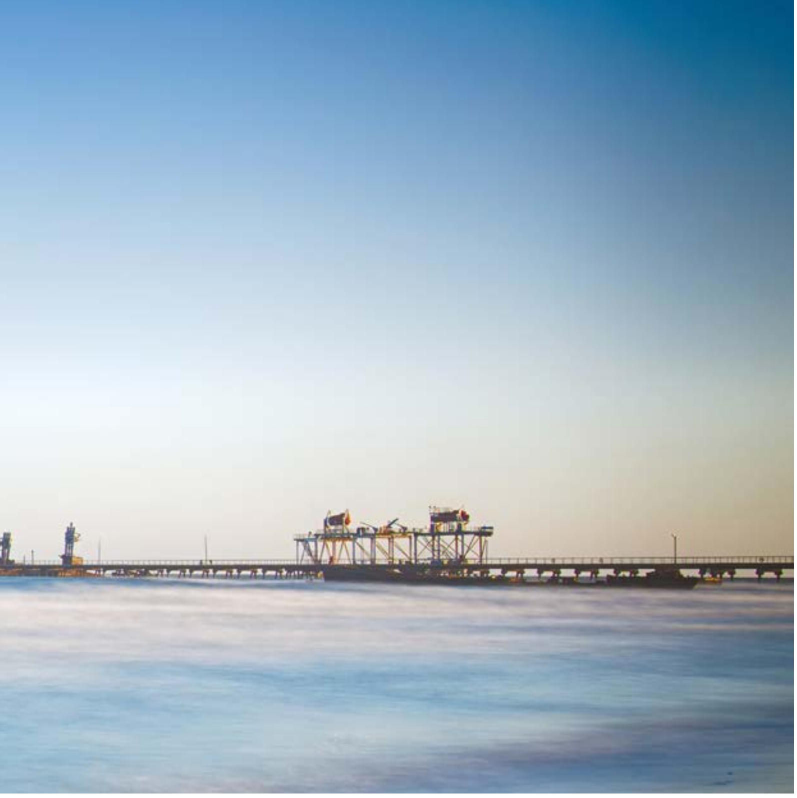
— JOAs are usually governed by English law, Singapore law, or the laws of one of the United States' jurisdictions. In turn, in respect of JOAs for operations outside the US or UK, it is also more usual to incorporate a dispute resolution clause that provides for ICC, LCIA or SIAC arbitration, seated in one of the main arbitral seats.

— Where a dispute arises under a PSC, on one hand, and a JOA, on the other, there is a potential for parallel proceedings. That said, this will usually be rare due to the different obligations under the respective documents.

— As a result, if any document has the potential to create a dispute that 'straddles' both a JOA and PSC, careful consideration should be given as to the appropriate consolidation provisions. That is particularly the case with a settlement agreement. In this case, the 'optional' consolidation provision was found to have fulfilled its commercial purpose.

Parties engaged in international transactions should be aware of and consider jurisdictional issues that may arise from inconsistent arbitration agreements, and how that inconsistency is best managed. Additionally, this case demonstrates the power of anti-suit injunctions to protect a party's rights under an arbitration agreement – and along with it the value of those arbitration agreements.

**Judge:** Butcher J



# English Court restrains foreign JOA proceedings in breach of arbitration provision

In *The Shell Petroleum Development Company of Nigeria Limited v Sunlink Energies and Resources Limited* [2023] EWHC 3135 (Comm), the English Commercial Court demonstrated its willingness to ensure that a joint operating agreement's arbitration provisions were preserved and backed by real action by the Court for a party seeking to circumvent them.

## Facts

The claimant, Shell Petroleum Development Company of Nigeria Limited ('**SPDC**'), and the defendant, Sunlink Energies and Resources Limited ('**Sunlink**'), were parties to a 2005 Joint Operating Agreement (the '**JOA**') concerning oil operations to be conducted under a Nigerian Oil Prospecting Licence.

The JOA contains an arbitration agreement (the '**Arbitration Agreement**') stipulating as follows:

*'25.2 Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, which cannot be amicably resolved between the Parties (whether in its capacity as a Party to this Agreement or as a Technical Partner) shall be referred to and finally resolved by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce effective at the time notice of arbitration is served, which Rules are deemed to be incorporated by reference into this Clause.'*

*'25.3 The arbitration will be conducted in English in London by three (3) arbitrators. The arbitrators shall be retired judicial figures of standing, or Queen's Counsel practising at the commercial Bar, or similar qualified Solicitors. Where appropriate, the arbitrator's decision shall state a time for compliance with the decision. Each party shall bear its own arbitration costs and expenses, including the costs of its witnesses.'*

Clause 25.1 of the JOA provided that the JOA is governed by the laws of the Federal Republic of Nigeria.

In September 2023, Sunlink commenced proceedings in Abuja, Nigeria, against SPDC seeking over USD 1bn in damages for alleged breaches of the JOA, with a claim for interest on those damages at a rate of 21%, and importantly, asserting that the Arbitration Agreement was ineffective and inoperable.

As a result, SPDC sought and successfully obtained an interim *ex parte* anti-suit injunction ('**ASI**') from the English Commercial Court, in September 2023, in relation to those proceedings.

Shortly before the return date for the interim ASI, Sunlink withdrew its challenge to the English Court's jurisdiction, simultaneously indicating that it would take no further part in the English proceedings and noting that it made no concession regarding whether or not the English Court had jurisdiction, or an ASI had been appropriately granted.

### *Issues*

At the ASI return hearing, Sunlink resisted the continuation of the ASI by asserting that the Arbitration Agreement was ineffective for the following reasons:

- The current iteration of the ICC Rules is titled differently to the set of ICC rules referred to in Clause 25 of the JOA;
- the requirement for arbitrators to be retired judicial figures of standing, or current (then) Queen's Counsel practising at the Commercial Bar (or solicitor of equivalent standing) is incapable of application and void due to these categories of arbitrators not having been practising Nigerian lawyers; and
- the JOA raised issues of Nigerian public and economic policy, thereby precluding arbitration.

## Decision

As Clause 25.1 of the JOA provides that the JOA is governed by the laws of the Federal Republic of Nigeria, it was accepted by the Commercial Court that Nigerian law was the governing law of the Arbitration Agreement in accordance with the approach taken in the Supreme Court's decision in *Enka v Chubb* [2021] WLR 4117. The Commercial Court also accepted the expert evidence in respect of Nigerian law that supported the seat of the arbitration being London, failing which the seat would fall to be stipulated by the parties' chosen arbitrators, or arbitral institution (in which regard the ICC Court had stipulated London as the seat).

In this context, the Commercial Court decided that there was no merit in any of Sunlink's arguments in respect of the invalidity and ineffectiveness of the Arbitration Agreement:

— First, it was held to be irrelevant that the title of the current iteration of the ICC Rules differed from the version referred to in the JOA, as it was plain that the JOA contemplated the use of the ICC Rules in force from time to time.

— Second, the Commercial Court was not convinced that there was any merit in Sunlink's argument that the Arbitration Agreement was a pathological agreement incapable of being performed because it called for arbitrators to be retired judicial figures, or current (then) Queen's Counsel practising at the Commercial Bar or similarly qualified solicitors and such lawyers would not have been practising Nigerian lawyers.

— Finally, the Commercial Court dismissed the public policy argument as there was no evidence that the dispute was anything other than a high-value commercial dispute stemming from a business contract. It was also observed that the Nigerian Court had approved the claimant's plea for a suspension of the Court proceedings based on the Arbitration Agreement, albeit the decision was being appealed by the defendant.

The Commercial Court made reference to the fact that Sunlink, as well as bringing claims in breach of the Arbitration Agreement, had also sought to interfere with the due process of the arbitration by issuing and seeking to have the Nigerian Court deal with an application by way of contempt against the claimant and seven of its directors or officers for any part they may have or may play in seeking to have the obligation to arbitrate enforced by the English Court.

The Commercial Court granted a final ASI restraining Sunlink from continuing the Nigerian proceedings or taking any further steps in breach of its obligation to arbitrate disputes under the JOA. The injunction included mandatory orders requiring Sunlink to withdraw the Nigerian proceedings.

The Commercial Court's decision to grant mandatory orders requiring Sunlink to take positive steps to withdraw the Nigerian proceedings follows recent practice adopted in the English Commercial Court. In doing so, the Commercial Court cited the case of *RSM Production Corp v Gaz du Cameroun SA* [2023] EWHC 2820 (Comm) as an example of the Court now being willing to grant anti-suit injunctions in mandatory form.

## Comment

The decision is the latest in a series of decisions concerning dispute resolution provisions in JOAs, and related documents. We have dealt with some of these issues in the article '*Drafting for parallel disputes under a PSC, JOA and settlement agreement*' at page 40 of this Annual Review:

— In oil and gas transactions it is common for the underlying production sharing contract, licence or concession ('**PSC**') granted by the government (or national oil company) to the relevant oil companies to be governed by local law. It may also be subject to ICSID arbitration (or an alternative).

— As between the oil companies in a joint venture to explore for, develop and produce hydrocarbons under a PSC, such joint venture relationship (as between each other) will usually be structured as an unincorporated joint venture through a JOA. These usually follow industry specific model forms, which are published by the Association of International Energy Negotiators, Offshore Energies UK and other industry bodies.

— JOAs are usually governed by English law, Singapore law, or the laws of one of the United States' jurisdictions. In turn, in respect of JOAs for operations outside the US or UK, it is also more usual to incorporate a dispute resolution clause that provides for ICC, LCIA or SIAC arbitration, seated in one of the main arbitral seats.

This case is a good example of a JOA which does not follow the structure of the usual model forms and is also subject to local law. However, the key aspect is that, notwithstanding that the JOA was governed by local law, (i) the seat of arbitration was in a neutral, arbitration friendly, jurisdiction (London, England) and (ii) the choice of law of the Arbitration Agreement (Nigerian law) was a law that recognised that choice of seat.

As a result:

— The parties could rely on the courts in their choice of seat to protect their choice of arbitration as their dispute resolution forum and exclude the jurisdiction of the local courts.

— As the seat was London, England, the Courts of England and Wales were willing to grant anti-suit relief to restrain foreign court proceedings brought in breach of an arbitration agreement.

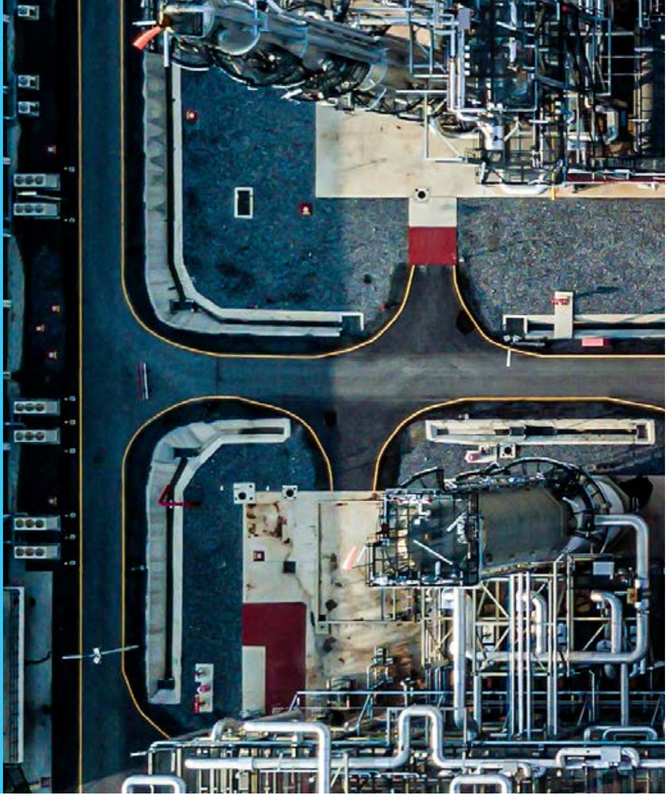
— The approach of the English courts to anti-suit injunctions is not limited to prohibiting the continuation of foreign proceedings, it can also compel positive action to undo steps already taken in breach of an agreement to arbitrate.

In this respect:

— For drafters, the case demonstrates the importance of the law or the seat of arbitration and the law of the arbitration agreement in any JOA. Careful thought should be given to their relationship, and the extent to which (working together) they will protect the parties' chosen dispute forum and exclude forums the parties have sought to exclude.

— The reach of injunctive relief by the English Courts is a strong one. Injunctions, including anti-suit injunctions, can be backed by the power of criminal sanction. Although that might seem far-fetched, the English courts have repeatedly shown themselves willing to back-up including with penal actions – which, as London is a major financial centre and transit route, will have major implications for many international parties and their directors.

**Judge:** Baker J



# Tribunal Declares Ghana Breached Petroleum Agreement with ENI and Vitol following Unlawful Unitisation Directives

In *ENI Ghana Exploration and Production Limited and Vitol Upstream Ghana Limited v the Republic of Ghana, and Ghana National Petroleum Corporation* [2024] SCC Case No. U2021/114, an arbitral tribunal declared that the Republic of Ghana breached a Petroleum Agreement by issuing unitisation directives that were unlawful.

## Facts

ENI Ghana Exploration and Production Limited ('**ENI**') and Vitol Upstream Ghana Limited ('**Vitol**') are oil companies operating in Ghana, and are subsidiaries of international oil companies.

The Ghana National Petroleum Corporation ('**GNPC**') is Ghana's national oil company ('**NOC**'), established in 1983, to support the government's objective of providing adequate and reliable supply of petroleum products and reducing the country's dependence on crude oil imports, through the development of the country's own petroleum resources. Ghanaian law grants GNPC the right of entry into any open acreage to undertake exploration activities.

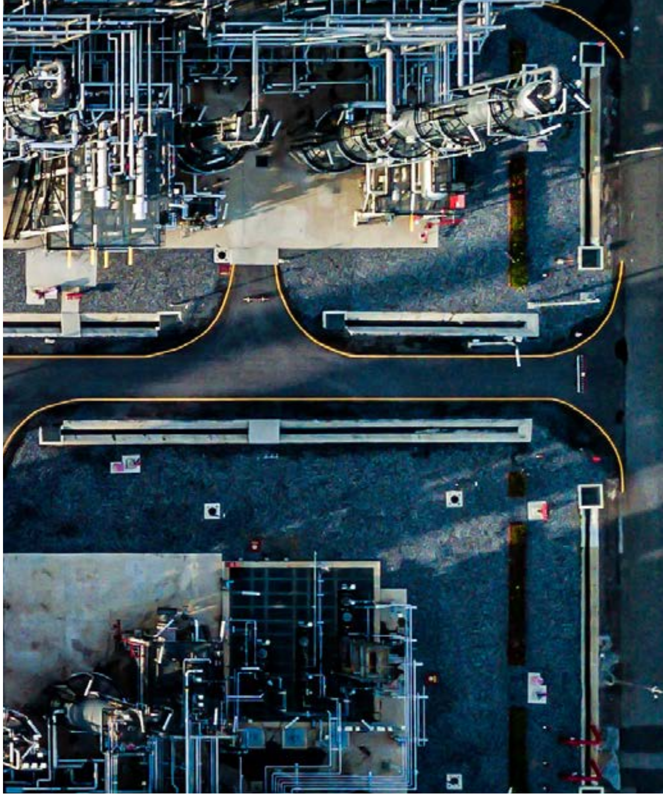
On 2 March 2006, Vitol, GNPC and the Republic of Ghana ('**Ghana**'), represented by its Ministry of Energy of Ghana ('**MoE**'), entered into a Petroleum Agreement in Respect of Blocks Offshore Cape Three Points (being oil fields 50 km off the coast of Ghana). ENI later joined the Petroleum Agreement as a majority interest holder and operator (the '**Petroleum Agreement**').

Article 26.2 of the Petroleum Agreement contained a stabilisation clause that stated:

*'26.2 The State, its departments and agencies, shall support this Agreement and shall take no action which prevents or impedes the due exercise and performance of rights and obligations of the Parties hereunder. As of the Effective Date of this Agreement and throughout its term, the State guarantees Contractor the stability of the 'terms' and conditions of this Agreement as well as the fiscal and contractual framework hereof specifically including those terms and conditions and that framework that are based upon or subject to the provisions of the laws and regulations of Ghana (and any interpretations thereof) including, without limitation, the Petroleum Income Tax Law, the Petroleum Law, the GNPC Law and those other laws, regulations and decrees that are applicable hereto. This Agreement and the rights and obligations specified herein may not be modified, amended, altered or supplemented except upon the execution and delivery of a written agreement executed by the Parties. Any legislative or administrative act of the State or any of its agencies or subdivisions which purports to vary any such right or obligation shall, to the extent sought to be applied to this Agreement, constitute a breach of this Agreement by the State.'*

By virtue of Ghanaian law, two main provisions govern the implementation of unitisation. First, Section 34 (Co-ordination of petroleum activities and unitisation) of the Petroleum (Exploration and Production) Act, 2016 (the '**Petroleum Act**') provides the principles for the operation of unitisation by virtue of Ghanaian law. Specifically, Section 34(1) states:

*'Where an accumulation of petroleum extends beyond the boundaries of one contract area into one or more other contract areas, the Minister in consultation with the Commission may, for the purpose of ensuring optimum recovery of petroleum from the accumulation of petroleum, direct the relevant contractors, to enter into an agreement to develop and produce the accumulation of petroleum as a single unit.'*



Second, Regulation 50 (Co-ordination of petroleum activities and unitisation) of Ghana's Petroleum (Exploration and Production) (General) Regulations, 2018 (the '**Petroleum Regulations**') aims to give effect to Section 34 of the Petroleum Act, which deals with unitisation.

At the point of dispute, the claimants, ENI and Vitol, operated the Offshore Cape Three Points ('**OCTP**') block, while a Ghanian company, Springfield Exploration & Production Limited ('**Springfield**'), operated the West Cape Three Points ('**WCTP**') block, which was subject to a separate petroleum agreement. Springfield was not a party to the dispute.

In short, Springfield asserted that a discovery in the WCTP block extended into the OCTP block and sought unitisation pursuant to the above unitisation laws of Ghana. ENI and Vitol took the view that there was insufficient evidence that accumulations straddle the boundary between the respective contract areas. After various communications between Springfield, ENI/Vitol and Ghana/GNPC:

— On 9 April 2020, the MoE directed Springfield and ENI to begin the process for '*the unitisation or otherwise of the Afina and Sankofa fields*' within 30 days, and to provide the MoE a draft unitisation and unit operating agreement (the '**Draft UUOA**') within 120 days (the '**April Directive**').

— On 14 October 2020, the MoE delivered a letter to ENI and Springfield (the '**October Directive**') in which it observed that the parties had not submitted a joint report as agreed in the 19 August 2020 meeting, and that their actions demonstrated that they did not intend to comply with the MoE's directives. Consequently, the MoE had engaged GNPC to update its 2018 GNPC Report, resulting in the 2020 GNPC Report which confirmed that the hydrocarbon accumulation straddled the two blocks.

On 28 October 2020, the claimants delivered a letter to the MoE expressing their concerns regarding the October Directive and asserting that the relevant procedure for the establishment of the unitisation regime had not been followed. In particular, the claimants underscored that the appraisal of the Springfield was still pending and that they had not received any data showing that the two relevant areas were indeed ripe for unitisation. According to the claimants, a comprehensive assessment of the petroleum accumulation was necessary to warrant unitisation, and could not be carried out without appraising the Springfield discovery.

On 6 November 2020, the MoE rejected ENI's requests and stated that '*compliance with the terms and conditions imposed by [the October Directive] is non-negotiable*', adding that it would soon share with ENI and Springfield a Draft UUOA (the '**November Directive**' and, together with the April Directive and the October Directive, the '**Unitisation Directives**') The dispute centred on Unitisation Directives. The claimants argued that the unitisation was unlawful as it did not satisfy substantive and procedural requirements under Ghanaian laws, regulations, and the stabilisation regime contained in the Petroleum Agreement.

Ghana and GNPC contended that the unitisation was substantively and procedurally justified, and that the Tribunal should defer to the policy decisions of the MoE and the judicial determinations of the Ghanaian courts. In addition, Ghana and GNPC contended the claimants failed to prove that the measures caused any actual harm.

On 16 August 2021, the claimants initiated arbitration proceedings, claiming that the unitisation measures violated the Petroleum Agreement and sought damages for loss of future income suffered. Ghana and GNPC counterclaimed arguing that the claimants breached the Petroleum Agreement by refusing to comply with the Unitisation Directives.

## Decision

The Tribunal explained its jurisdiction to resolve disputes under the Petroleum Agreement and hence to rule on potential breach of contract obligations, including those embedded in the stabilisation clause in Article 26(2) preventing Ghana from impairing and unilaterally altering any of the rights and obligations under the Petroleum Agreement. This implied that the Tribunal had the mandate to scrutinise whether Ghana complied with Ghanaian laws and regulations when carrying out the unitisation. As a result, the issue of whether the MoE acted lawfully in imposing the unitisation is a preliminary question that the Tribunal need to answer to discharge its duty to assess whether a potential violation of the stabilisation clause of Article 26(2) of the Petroleum Agreement occurred.

The claimants requested a declaration that GNPC, the second respondent, breached the Petroleum Agreement by assisting the first respondent with wrongful unitisation. However, The Tribunal held that Article 26(2) of the Petroleum Agreement only imposes stabilisation obligations on the '*State*'. Without a proper legal basis to scrutinise GNPC's alleged assistance, the Tribunal dismissed the claim against GNPC, therefore focusing its analysis on the conduct of Ghana.

***Compliance with applicable regulations under Ghanaian law***

While the Parties made arguments on multiple procedural and substantive aspects of the unitisation measures, the Tribunal concentrated its analysis on the relevant shortcomings, acknowledging that it owes a degree of deference to the competent organs of Ghana and must not sit in judgment of each and every administrative irregularity.

The Tribunal found that the Unitisation Directives' unitisation measures taken by the MoE were not implemented in a manner that is consistent with the applicable legal framework, with multiple substantive and procedural flaws. The Tribunal identified three main issues: (i) the statutory unitisation trigger was not established; (ii) the imposition of unitisation terms was unlawful; and (iii) the determination of tract participation was arbitrary. For these reasons, the Tribunal decided that, by altering the key terms of the Petroleum Agreement through wrongful Unitisation Directives, Ghana violated the stabilisation clause in Article 26(2) of the Petroleum Agreement which the Tribunal viewed as prohibiting administrative acts that alter contractual rights in violation of Ghanaian laws and regulations, as well as any relevant international legal principles.

Importantly, the record showed that the MoE had not made any of the sources that it cited as the basis for its decision available to the claimants prior to issuing the April Directive. In fact, it refused ENI's repeated requests for the underlying documents even after the April Directive. In contrast, Springfield had access to the relevant report by GNPC at least as early as 14 August 2018, as it referred to that report in its unitisation request. As a result, the claimants did not have a meaningful opportunity to consider and contest the MoE's assertion that the available data demonstrated a straddling accumulation.

The term '*accumulation*' used in Section 34(1) of the Petroleum Act, concerning unitisation, denotes a movable volume of petroleum contained in a host rock. For petroleum volumes to be considered part of a single accumulation, they must therefore be movable within a single reservoir, which implies dynamic, rather than static communication.

On the facts, none of these sources invoked by the MoE established the existence of a straddling accumulation, which could have served as a trigger for the invocation of the MoE's unitisation powers under Section 34 of the Petroleum Act, let alone for the direction to provide a Draft UUOA under Regulation 50(6) of the Petroleum Regulations. As such, Ghana's unitisation powers were not triggered.

However, the Tribunal also concluded that the claimants did not sufficiently prove that the failure to withdraw these Unitisation Directives or preventing third parties from relying on them constituted a separate violation. Therefore, the Tribunal did not grant the additional requests for relief sought by the claimants.

***Preclusive effect of Ghanian Judicial Decisions***

The Tribunal found that two sets of Ghanaian judicial decisions that that the Unitisation Directives gave rise to did not have preclusive effect in the arbitration. Applying the principle of *res judicta*, which exists in Swedish law (as the arbitration was seated in Sweden and governed by Swedish arbitration law), the Tribunal held that the subject matter of both sets of proceedings were distinct from the arbitration in question, and therefore the previous judgments had no preclusive effect on the arbitration.

The Tribunal also noted that the fact that the Ghanian Court of Appeal held that the MoE had not breached Section 34(1) of the Petroleum Act could not invoke estoppel as this does not form part of Swedish law, which is a civil law jurisdiction.

***Damages***

The Tribunal dismissed the claimants' damages claim. The Tribunal noted that the Unitisation Directives had not been enforced and that any future enforcement could lead to a redetermination of tract participations. The claimants' process losses claim was also dismissed due to insufficient evidence. Additionally, the Tribunal rejected the claimants' requests for Ghana to notify Ghanaian courts and Springfield about the breach of the Petroleum Agreement, citing a lack of legal basis for such claims. However, the Tribunal left open the possibility for the claimants to claim damages if the wrongful Unitisation Directives are enforced in the future.

## Comment

This award highlights a number of important points:

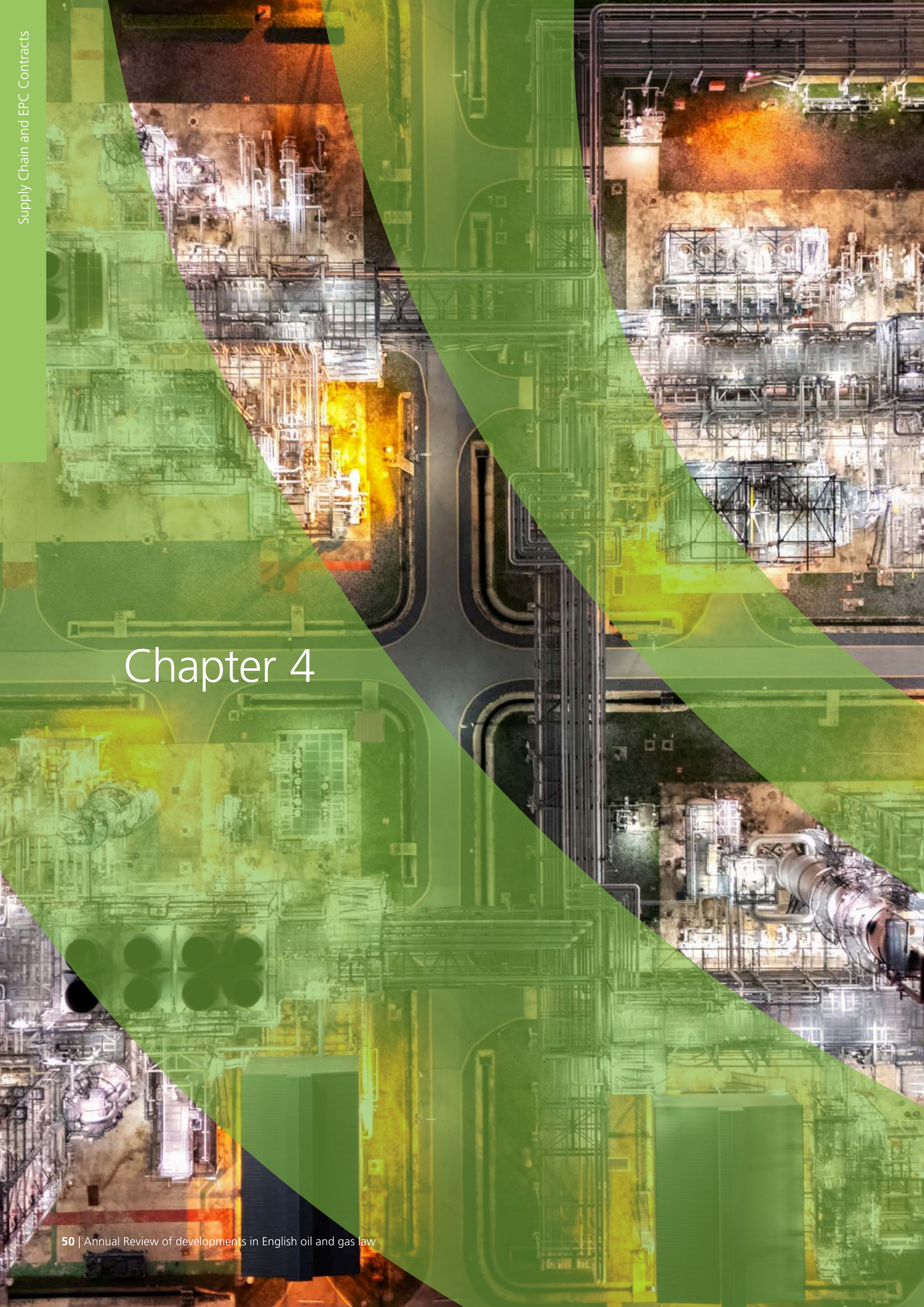
— First, stabilisation clauses can have a significant role to play in ensuring that a host state does not act outside its legal powers. The Tribunal preferred a construction of the Petroleum Agreement that, when construed as a whole, did permit Ghana to undertake acts that had the effect of amending the Petroleum Agreement – but only so far as the law (at the date of the Petroleum Agreement) allowed. The foregoing illustrates that the drafting of stabilisaiton clauses, in the context of a contract read as a whole, remains an important element of production sharing agreements (and similar), so as to afford parties protection from state action that may seek to underline or amend its rights.

— Second, and linked to the above, it is important to carry out due diligence as to the relevant local laws at the timing of executing a production sharing agreement – as stabilisaiton clauses will not always (and often will not) protect a party from implementation of existing laws that have the impact of altering contractual rights.

— Third, tribunals may grant relevant government authorities a 'margin of appreciation' in judging the lawfulness of acts undertaken allegedly pursuant to existing laws relating to petroleum operations. That said, this will unlikely extend to allowing a government to act outside its lawful authority (properly construed by a tribunal). In this respect, most legal regimes draw a distinction between an obligation to act within lawful authority (which will be construed strictly in accordance with the law) and exercising a discretion conferred by the law upon the government (for which a margin of appreciation will usually be granted).

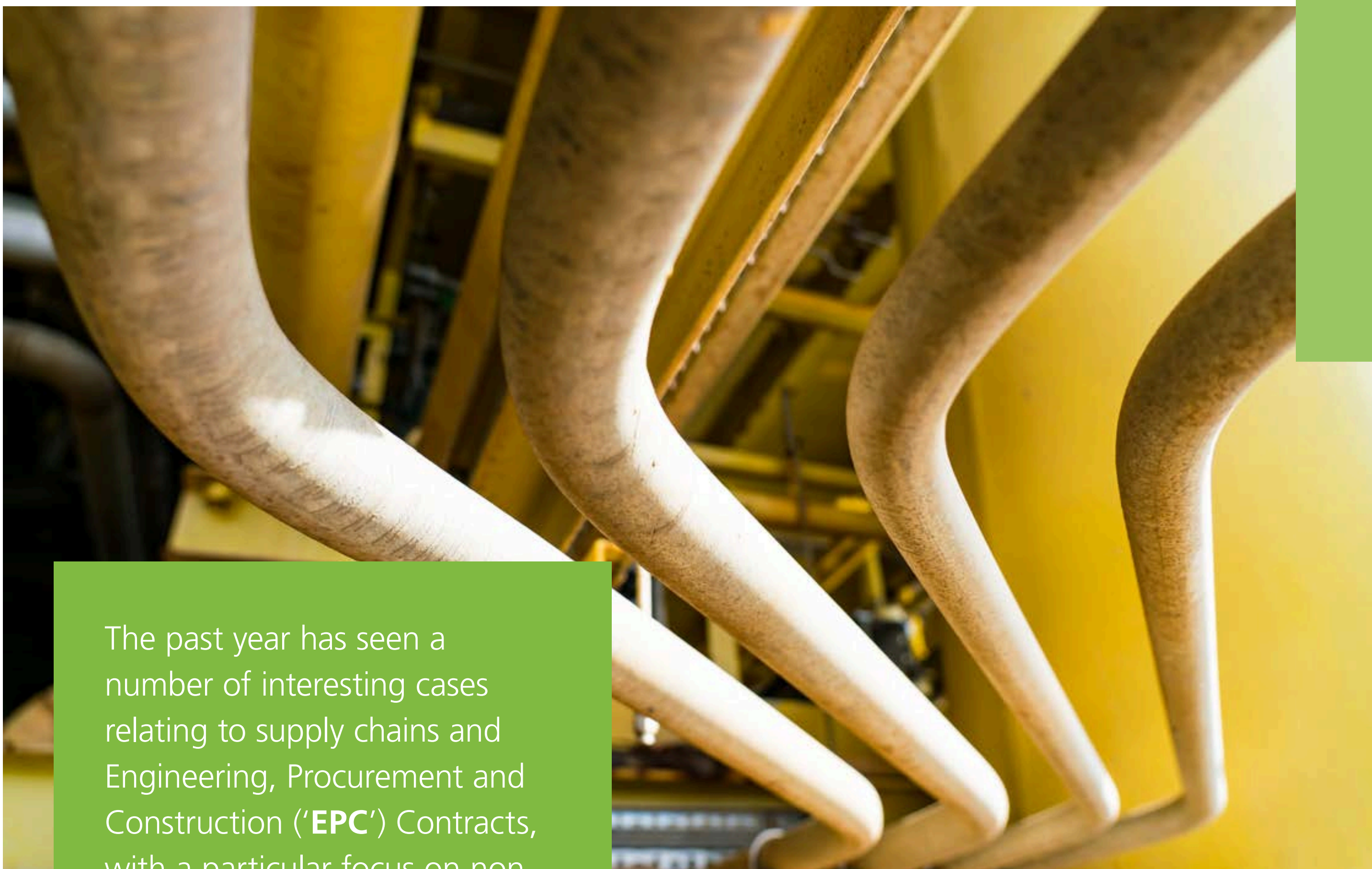
— Fourth, unitisation remains a complex area and prone to disputes. The finding by the Tribunal that unitisation required a '*movable volume of petroleum contained in a host rock*' (i.e. connectivity of flow and pressure), was the result of interpreting the relevant legislation. Each country will have its own regime, which will require individual consideration.

**Arbitrators:** Prof. Gabrielle Kaufmann-Kohler (President), Ms. Judith Gill KC, Prof. Dr. Mohamed Abdel Wahab



# Chapter 4

# Supply Chain and EPC Contracts



The past year has seen a number of interesting cases relating to supply chains and Engineering, Procurement and Construction ('**EPC**') Contracts, with a particular focus on non-assignment clauses and WELCAR policies.

— In *Technip Saudi Arabia Ltd v The Mediterranean & Gulf Insurance and Reinsurance Co.* [2024] EWCA Civ 481, the Court of Appeal upheld the Commercial Court's interpretation that an exclusion was contained within an endorsement (i.e. an amendment) to a WELCAR 2001 Offshore Construction Project policy.

— In *MW High Tech Projects UK Ltd v Outotec (USA) Inc* [2023] EWHC 2885 (TCC), the Technology and Construction Court provided a critical insight into the ability of parties to re-assign contracts when a 'non-assignment clause' exists. Although not an oil and gas case, the issues raised are important to note.

— In *King Crude Carriers SA & Ors v Ridgebury November LLC & Or* [2024] EWCA Civ 719 the Court of Appeal confirmed the '*Mackay v Dick Principle*' and concluded that if a party's obligation to pay a debt is subject to a condition and the debtor wrongfully prevents that condition from being fulfilled, the condition is treated as either dispensed with or fulfilled, with the result that the debt accrues.

# Exclusions in WELCAR 2001 Offshore Construction Project policies

In *Technip Saudi Arabia Ltd v The Mediterranean & Gulf Insurance and Reinsurance Co.* [2024] EWCA Civ 481, the Court of Appeal considered the scope of an exclusion in an endorsement to a WELCAR 2001 Offshore Construction Project policy. As WELCAR is the dominant form of offshore insurance in the oil and gas sector, the decision of the Court will act as a cautionary tale to parties agreement endorsement to WELCAR policies.

## Facts

Technip Saudi Arabia Ltd ('**Technip**'), an offshore construction company, contracted with Al-Khafji Joint Operation ('**KJO**') to work on offshore assets in Saudi Arabia. During this work, a vessel chartered by Technip collided with a well-head platform owned by KJO, resulting in significant damage. Technip paid nearly USD 25m to KJO for the damages.

Technip was one of the insureds under a composite offshore construction insurance policy underwritten by an insurer on an amended WELCAR 2001 Offshore Construction Project Policy wording (the '**policy**'). The policy contained an endorsement that excluded the insurer's liability for damage to existing property which was owned by any of the Principal Assureds ('**endorsement 2**'). '*Principal Insureds*' (not '*Principal Assured*') was a defined term under the policy. It included Technip, the joint venturers in KJO and their affiliated companies and others.

The critical words in endorsement 2 were the exclusion for '*any claim for damage to … any property for which the Principal Assured: 1) owns that is not otherwise provided for in this policy*'.

Technip sought indemnity under a WELCAR 2001 Offshore Construction Project policy. The insurers denied liability on several grounds, but the Commercial Court upheld their denial of liability on the ground that endorsement 2 excluded liability for damage to existing property which was owned by any of the '*Principal Assureds*'.

Technip appealed on the basis that '*the Principal Assured*' refers only to the entity making the claim, implying coverage should be excluded only for their property.

## Decision

The Court of Appeal reiterated the principles of contractual construction and interpretation summarised in *Arnold v Britton* [2015] UKSC 36 by Lord Neuberger) (see 2016 CMS Annual Review, page 54).

It was accepted that the endorsement's language was '*not a model of clear drafting*'. It ambiguously references '*Principal Assureds*', '*Principal Insureds*', and fluctuates between singular and plural forms and opens the door to two distinct interpretations. Under the first interpretation, '*The Principal Insureds*' encompasses Technip and its associated entities, implying that the policy excludes coverage for claims related to any property these entities own, utilize, or are otherwise liable for, unless such property is expressly listed in the policy's provisions. Given that the platform was not explicitly enumerated in endorsement 2, this reading of the clause would bar Technip from receiving indemnification for the damages compensated to KJO.

The second interpretation, adopted by Technip, results in '*the Principal Assured*' referring only to the entity making the claim, implying coverage should be excluded only for their property.

The Court of Appeal dismissed the appeal, adopting the first interpretation. It offered five main reasons for this:

- **Natural Meaning:** The Court of Appeal found that Technip's interpretation involves reading endorsement 2 as if it included the highlighted words as follows: *'any claim for damage to … any property [for] which the Principal Assured [**which is making the particular claim concerned**]: 1) owns that is not otherwise provided for in this policy*'. (**emphasis** added)
- **Language Consistency:** It was held that contrary to Technip's argument, adopting interpretation one did not deviate from the natural meaning of the endorsement; it merely read in the thrice-repeated meaning of the '*Principal Insureds*' in place of '*the Principal Assured*'.
- **Other Insureds:** Technip's interpretation did not account for the claims made by the '*Other Insureds*' who were not '*Principal Insureds*'. In fact, in relation to claims by '*Other Insureds*', it would render the exclusion invalid because the words 'the Principal Assured' cannot mean the '*the Principal Assured which is making the particular claim concerned*', because no Principal Insured is making the claim at all. This suggested no commercial rationale behind the second interpretation and it suggests that the intention was for the first interpretation to be adopted.
- **Policy Clauses:** Contrary to Technip's submission, construing the contract as a whole, there was no consistent usage of either terms that pointed one way or another. The fact that the Principal Assured is principally referring to the party making the claim in relation to a different limb of the endorsement, does not mean that the words '*the Principal Assured*' cannot still mean '*Technip and/or KJO and/or associated companies*'.
- **Contra Proferentem:** The suggestion that the endorsement should be construed against the party seeking to reply upon it (*contra preferentem*) did not assist. The insurer's interpretation aligned with the purpose of an '*existing property*' endorsement, which is to exclude coverage unless it is bought back for specific properties. Technip's interpretation, on the other hand, gave inadequate importance to the fact that endorsement 2 was an existing property exclusion and to the buy-back that was an integral part of the coverage.

## Comment

Oil and gas projects caried out offshore have special, if not unique, risks. It is in this context that WELCAR was developed as a model form policy to be used for contractors' all risks ('**CAR**') in the offshore oil and gas industry. Today, WELCAR is the dominant basis upon which policies are agreed for CAR insurance in industry. That said, endorsements (amendments) are commonly agreed.

This case emphasises:

- First, the importance of endorsements and the critical impact they may have on the scope of coverage;
- second, the process that English law will use to seek to establish the true meaning and effect of any ambiguous endorsement.

Endorsements might be agreed in short periods of time, and may not be subject to the same drafting scrutiny as the words used in model for insurance policies. As such, they have a heightened risk of ambiguity that might result in disputes (and a disappointing outcome for one of the parties).

In this instance, although each entity that was insured under the policy was considered to have a separate insurance, the meaning of the term '*Principal Assured*' was read the same in each such separate insurance between each insured and the insurer. As a result, the scope of the cover was narrower than some of the insured entities might have understood. For insured entities, this case serves as a cautionary tale to thoroughly, and carefully, review and understand policy schedules and exclusions to avoid unexpected uninsured events.

**Judges:** Sir Geoffrey Vos MR, Lewison LJ and Arnold LJ

# Non-assignment clause defeats claim

In *MW High Tech Projects UK Ltd v Outotec (USA) Inc* [2023] EWHC 2885 (TCC), the Technology and Construction Court ('**TCC**') provided a critical insight into the ability of parties to re-assign contracts when a 'non-assignment clause' exists and the scope of parent company guarantees when it comes to misrepresentation. Although this is not an oil industry case, as non-assignment clauses and parent company guarantees are widely used in the oil and gas industry, there are some key take aways for transactional lawyers dealing with 'non-assignment clauses' and parent company guarantees.

## Facts

MW High Tech Projects UK Ltd ('**MW**'), entered into an EPC contract in 2015 worth c.GBP 154m with Energy Works Hull Ltd ('**EWH**') to build a new waste-to-energy plant in Hull. MW subcontracted with the First Defendant, Outotec (USA) Inc. ('**Outotec**'), for the supply of plant and equipment (the '**Subcontract**'). The Subcontract was an amended version of the IChemE Yellow Book standard form. The Second Defendant, Outotec's parent company, Metso Oyj ('**Metso**'), provided a parent company guarantee for Outotec's performance.

Clause 2.1 of the parent company guarantee provided as follows:

*'The Guarantor [Metso] hereby guarantees the due and proper performance by the Subcontractor [Outotec] of the Subcontractor's duties and obligations arising under* ***or in connection with*** *the Subcontract so that if the Subcontractor shall in any respect fail to perform any of its duties or obligations arising under or in connection with the Subcontract or shall commit any breach of any provision, or fail to fulfil any warranty or indemnity, set out in the Subcontract, then, upon the Contractor's [MW's] written demand, the Guarantor shall forthwith perform and fulfil in the place of the Subcontractor each and every duty, obligation, provision, warranty or indemnity in respect of which the Subcontractor has committed a breach or which the Subcontractor has otherwise failed to fulfil'* (**emphasis** added).

Clause 3.1 provided:

*'If the Subcontractor in any respect fails to observe or perform any of its duties or obligations to the Contractor under* ***or in connection with*** *the Subcontract […] then the Guarantor shall indemnify the Contractor against all direct losses, damages, costs and expenses incurred by the Contractor by reason of such failure or non-payment or termination (including costs and expenses incurred by the Contractor in connection with the enforcement of or preservation of its rights under this Agreement) […] However, subject to the other provisions of this Guarantee, this shall not be construed as imposing greater obligations or liabilities on the Guarantor than are imposed on the Subcontractor under the Subcontract'* (**emphasis** added).

Clause 8.1 provided:

*'The Contractor shall be entitled to recover no more under this Agreement in respect of any matter than the Contractor would be entitled to recover from the Subcontractor in respect of that matter, and, without prejudice to the foregoing, as between the Guarantor and the Contractor,* ***all the limitations and defences available to the Subcontractor in respect of its obligations and liabilities under the Subcontract or otherwise available to the Subcontractor*** *at law shall be available to the Guarantor in respect of its liabilities under this Agreement[…]'* (**emphasis** added).

The Hull waste-to-energy project encountered numerous difficulties and EWH terminated the main contract in March 2019, suing MW for GBP 131m in damages. MW brought contribution proceedings against Outotec in September 2019 for liability for liquidated damages for delay under the subcontract, certain defects arising out of breaches of contract by Outotec and for exposing MW to liability for liquidated damages and termination for default. EWH had exercised its right under the main contract to demand MW assign the Subcontract to EWH, and MW duly complied. However, following settlement between MW and EWH in late 2022, EWH reassigned the Subcontract back to MW.

MW subsequently brought the instant proceedings against Outotec and Metso, claiming misrepresentation and breaches of the Subcontract. Outotec and Metso submitted that the re-assignment of the Subcontract to MW was invalid and therefore MW had no basis to bring its claims against Outotec or Metso.

## Decision

The TCC decided that the breach of contract claims should be summarily dismissed because the re-assignment, being made without consent, was ineffective.

The TCC outlined that the validity of the initial assignment of the contract by MW to EWH was not in issue. Clause 9.1 of the Subcontract clearly envisaged that MW could assign to EWH without Outotec's consent. Clause 9.1 of the Subcontract provides:

*'Neither the Contractor nor the Subcontractor shall without the previous consent of the other transfer any benefit or obligation under the Subcontract to any other person in whole or in part,* ***except that***

*[…]*

*if so required by the Purchaser under the Main Contract the Contractor may assign the Subcontract to the Purchaser'* (**emphasis** added).

The issue at hand was whether the settlement agreement between MW and EWH operated as a valid and effective re-assignment of the contract between MW and Outotec in the absence of consent. The TCC concluded that as a matter of straight-forward contractual construction, EWH had no right to re-assign the Subcontract to MW without the previous consent of Outotec. The TCC held that the clause must be construed as meaning that the restriction on assignment without consent applies as much to the assignees as to the original contracting parties, to hold otherwise would confer a wider right to assign to EWH as the assignee than was previously enjoyed by MW.

In addition, the TCC also decided that MW was no longer able to pursue breach of contract claims against Metso under the parent company guarantee on the basis that after the first assignment of the contract, any such claims fell outside the wording of Clauses 2.1 and 3.1 of the parent company guarantee. Further, Clause 8.1 specifically entitles Metso to the same defences as Outotec, therefore, where the TCC has held that Outotec is able to rely on its defence of lack of consent to the re-assignment, so too can Metso.

The TCC then considered whether MW's misrepresentation claim against Metso could fall within the scope of the parent company guarantee. The TCC cited *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488, where the Court of Appeal considered whether claims for damages allegedly sustained by the claimant as a result of an innocent misrepresentation made to them by the defendant's representatives fell within the scope of the arbitration clause in that contract which extended to claims '*in connection with*' the contract. In that case, the Court of Appeal held that they did, and considering this case, the TCC determined that MW's misrepresentation claims against Metso fell within the scope of Clauses 2.1 and 3.1 of the parent company guarantee.

## Comment

This decision reinforces the principle that if you seek to assign a contract where there is a contractual condition to that assignment, such as consent or assurances to be given, then any assignment (or re-assignment) that does not satisfy those conditions will be ineffective.

This is of particular importance to the oil and gas industry as many standard industry contracts require consent (usually not to be unreasonably withheld) or reasonable assurances to be given for assignment to be effective. For example, a common oil and gas assignment provision may provide: '*No assignment of an interest […] shall become effective until the Participants have received such reasonable assurances as they may require to ensure that the assignor's obligations under this Heads of Agreement, including but not limited to abandonment, will be performed*' (for further analysis on this see *Apache Beryl Limited v Marathon Oil UK LCC and Others* [2017] EWHC 2258 (Comm)).

As highlighted by the TCC in this decision, the situation becomes more complex in the context of re-assignment, where a party originally assigns the contract complying with all relevant consents and conditions, but the contract is then re-assigned. In those circumstances, parties will have to carefully consider any restrictions on assignment and whose consent or assurances may be required for that re-assignment to be effective.

In the context of a dispute and a settlement being reached, any re-assignment of the contract as part of that settlement should be considered particularly high-risk and parties should ensure that they follow all underlying contractual conditions for assignment to ensure any such re-assignment is effective.

Outotec and Metso appealed to the Court of Appeal against elements of the judgment relating to whether the claim should be struck out as an abuse of process. The judgment was handed down on 24 July 2024 dismissing their appeal. The dispute will now proceed to an 8-week trial scheduled for February 2026.

**Judge:** Davies J

# Preventing a condition from being fulfilled will not assist a debtor

In *King Crude Carriers SA & Ors v Ridgebury November LLC & Ors* [2024] EWCA Civ 719, the Court of Appeal confirmed the *Mackay v Dick Principle* – if a party's obligation to pay a debt is subject to a condition and the debtor wrongfully prevents that condition from being fulfilled, the condition is treated as either dispensed with or fulfilled, with the result that the debt accrues. Although this is not an oil and gas case, it will be of relevance to practitioners.

## Facts

The case concerned contracts for the sale of four vessels under the 2012 Norwegian Saleform. The sales were governed by four separate contracts, but the material terms of the underlying contracts were identical. The buyers were obliged to put down a deposit of 10% of the purchase price with escrow holders. It was a condition precedent to this payment obligation that the parties would provide all documentation necessary to open and maintain the escrow accounts to the escrow holders without delay.

In breach of this obligation, the buyers did not provide all necessary documentation, meaning that the escrow holders could not open the escrow accounts to receive the deposits.

The contracts gave the sellers the right to cancel the contracts if the deposits were not lodged. They therefore gave notice to terminate, relying on the contractual right of cancellation and on repudiatory breach at common law.

## The Arbitration

The sellers then commenced arbitration proceedings against the buyers for the amount of the deposits, contending that because the buyers had breached a condition precedent to the obligation to lodge the deposits, the condition should be treated as if it had been fulfilled or waived, and the buyers were, therefore, indebted to them in the amount of the deposits. In the alternative, the sellers claimed for damages for breach of contract in the amount of the deposits.

The majority of the arbitrators found that the sellers were entitled to recover the amount of the deposits in debt because the buyers could not rely on their own breach of contract to prevent the fulfilment of a condition precedent to payment. The buyers appealed to the Commercial Court, pursuant to section 69 of the Arbitration Act 1996 (appeal on a question of law).

## The Commercial Court decision

The Commercial Court found in favour of the buyers and concluded that the deposits were only recoverable in damages. This decision was based on the contention that the *Mackay v Dick Principle* was inconsistent with well-established principles of contract law. The Commercial Court also found that although there was a principle in English law that one could not derive a benefit from their own wrongdoing (such as failure to fulfil a condition precedent in breach of contract), it was necessary for there to be a mechanism which could give effect to this principle. The Commercial Court found that a condition precedent could be dispensed with if a debt had already accrued but not, as in this case, where the condition was as to the accrual of the debt.

## The Court of Appeal decision

The Court of Appeal was unanimous in their findings in favour of the sellers that the *Mackay v Dick Principle* should apply where there is:

*'(1) an agreement capable of giving rise to a debt rather than damages;*

*an agreement that the debt will accrue and/or be payable subject to fulfilment of a condition precedent; and (crucially)*

*an agreement that the obligor will not do the thing which prevents the condition precedent being fulfilled so as to prevent the debt accruing and/or becoming payable, whether that agreement takes the form of the implied term of cooperation identified by Lord Blackburn in Mackay v Dick, or an express term, as in this case.'*

Notably, it was also found that:

— First, although the *Mackay v Dick Principle* was formulated in a Scottish appeal and was based on Scottish law, which is founded on Roman civil law, there exists a general principle at English common law that one should not be entitled to take advantage of their own wrongdoing.

— Second, there has previously been clear adoption and application of the *Mackay v Dick Principle* in English law, notably in the Court of Appeal decisions in *Wm Cory & Son Ltd v London Residuary Body & Western Riverside Waste Authority (unreported 5 November 1990) and Panamena Europea Navigacion (Cia Lda) v Frederick Leyland & Co Ltd* [1947] AC 428.

— Third, the *Mackay v Dick Principle* applies to conditions precedent to the accrual of debts and not merely to the payment of accrued debts. Accordingly, non-fulfilment of a condition precedent to a debt cannot be used as a defence to the obligation to pay a debt.

— Fourth, the *Mackay v Dick Principle* is not inconsistent with established rules of contract law and does not interfere with the parties' freedom of contract, since it is open to the parties to contract out of it should they choose to do so.

## Comment

The Court of Appeal expressed its conclusion as: '*I would therefore formulate the principle as being that an obligor is not permitted to rely upon the non-fulfilment of a condition precedent to its debt obligation where it has caused such non-fulfilment by its own breach of contract, at least where such condition is not the performance of a principal obligation by the obligee, nor one which it is necessary for the obligee to plead and prove as an ingredient of its cause of action, and save insofar as a contrary intention is sufficiently clearly expressed, or is implicit because the nature of the condition or the circumstances of the case make it inappropriate*'.

That is arguably slightly different to Lewison on *The Interpretation of Contracts* (8th Ed) which states that '*The parties are under an implied obligation not to prevent the fulfilment of a condition upon which a contract depends. In addition, one or both of them may be under an implied obligation to take steps to procure that the condition is fulfilled*'.

Although they may appear synonymous, the former might be taken to be an expression of a principle of law (relating only to conditional debt obligations), whereas Lewison's formulation takes the guise of a wider implied term. The potential importance of the distinction is that an implied term, although widely recognised, will need (in each individual circumstance) to pass the test for an implied term confirmed by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72. That said, the above might be a distinction without a difference. Where conditionality exists, the key elements needed for an implied term will usually be met. Importantly, however, the Court of Appeal was clear that the principle/implied term would only bite insofar as it was consistent with the express words of the contract. In practice, that means that where a conditionality exists, the parties remain free to determine by way of an express term the level of performance needed to seek to fulfil that conditionality. Any principle/implied term will only appear to fill a gap if no express performance obligation is provided.

Conditionality will appear in a variety of places throughout oil and gas contracts. For example, to completion obligations in M&A deals. Conditionality as to payment might appear less often, but will also appear in a variety of oil and gas contracts. For example, in various EPC and supply chain contracts. The 'take away' is that silence in the drafting will not allow a party to frustrate the purpose of the contract. That said, where a standard of performance is required ('reasonable endeavors', 'best endeavors' etc), there are advantages of setting out the standard of performance in the contract.

**Commercial Court Judge:** The Honourable Mrs Justice Dias DBE

**Court of Appeal Judges:** Popplelwell LJ, Nugee LJ and Falk LJ

# Chapter 5

# M&A, Company Law and Tax

This year saw significant decisions which brought clarity to notice requirements concerning warranty/indemnity claims, the interpretation of the Corporation Tax Act 2010 and remedies against oil companies seeking to put assets beyond the reach of creditors.

- In *R (on the application of ClientEarth) v Financial Conduct Authority v Ithaca Energy plc* [2023] EWHC 33001 (Admin), the High Court rejected ClientEarth's renewed application for permission to apply for judicial review of the decision of the FCA to approve the prospectus of Ithaca Energy plc.
- In *Crescent Gas Corporation Ltd v National Iranian Oil Company & Anor* [2024] EWHC 835 (Comm), the Commercial Court highlighted the remedies available against oil and gas companies where assets have been put beyond the reach of creditors.
- In *Commissioners for His Majesty's Revenue and Customs v Dolphin Drilling Ltd* [2024] EWCA Civ 1, the Court of Appeal provided welcome clarity as to the interpretation of the term '*incidental*' within the context of the Corporation Tax Act 2010 and whether an oil contractor's tender support vessel should be treated as a '*relevant asset*' under the act due to its use as accommodation for oilfield workers, thereby making it subject to higher levels of corporation tax.
- In *Drax Smart Generation Holdco Ltd v Scottish Power Retail Holdings Ltd* [2024] EWCA Civ 477, the Court of Appeal gave a useful insight as to the meaning of '*stated in reasonable detail the nature of the claim*' in the context of notice requirements concerning a warranty and/or indemnity claim under a share sale agreement. Although not an oil and gas case, it will be of relevance to many oil and gas M&A deals.

# The impact of climate change on listing procedures

In *R (on the application of ClientEarth) v Financial Conduct Authority v Ithaca Energy plc* [2023] EWHC 33001 (Admin), the High Court refused ClientEarth's renewed application for permission to apply for judicial review of the decision of the Financial Conduct Authority (the '**FCA**') to approve the prospectus of Ithaca Energy plc ('**Ithaca**'). The high-level approach taken by the High Court to evaluating the risk factors in Ithaca's prospectus and the High Court's emphasis on the expertise of the FCA as regulator in this area, combined with the decision to refuse ClientEarth the cost protection afforded by the Aarhus Convention, may serve to deter similar claims being brought in the future.

## Facts

The background to this claim concerns events leading up to Ithaca's listing on the London Stock Exchange, hailed as the largest Initial Public Offering of 2022.

On 18 October 2022, Ithaca's registration document was initially approved and published by the FCA. After receiving correspondence from ClientEarth, the FCA, no doubt mindful of the European Security and Markets Authority guidelines that set out when regulators should consider challenging issuers, wrote to Ithaca. Ithaca subsequently expanded the section of its proposed prospectus that dealt with climate change risk factors. The final version of Ithaca's 461-page prospectus titled '*The Strength of the North Sea*', published on 9 November 2022 (the '**Prospectus**'), made extensive reference to the risk factors associated with climate change and climate change activism on page 18, including a reference to ClientEarth's High Court derivative claim against Shell.

### *The grounds for ClientEarth's judicial review application*

On 8 February 2023, ClientEarth commenced judicial review proceedings against the FCA, alleging that the FCA's decision to approve the Prospectus was unlawful. ClientEarth's judicial review grounds were that:

- The FCA erred in law by approving the Prospectus in circumstances where the Prospectus failed to disclose, or describe adequately, Ithaca's assessment of the materiality of its climate-related financial risks, in breach of Article 16 of the Prospectus Regulation ('**Ground 1**').
- The FCA erred in law by approving the Prospectus in circumstances where the Prospectus failed adequately to disclose or describe the specificity of the climate-related risks associated with Ithaca's securities, in breach of Article 16 of the Prospectus Regulation ('**Ground 2**').
- The FCA's conclusion that the Prospectus contained the necessary information which is material to an investor for making an informed assessment of Ithaca's financial position and prospects, as required by Article 6 of the Prospectus Regulation, was rationally unsustainable ('**Ground 3**').

## Decision

The High Court rejected ClientEarth's renewed application for judicial review on all three of the above grounds; each ground was held to be unarguable and with no realistic prospect of success.

On Grounds 1 and 2, the High Court held that Parliament had conferred upon the FCA responsibility for approving the Prospectus and, therefore, any challenge to the FCA's decision could only be made on public law grounds. The High Court described the FCA as an expert regulator, and the Court would not substitute its views, or ClientEarth's views, for the considered judgment of the FCA.

On Ground 3, the judgment notes that the Paris Agreement was identified as a material risk for the business in the Prospectus in line with the Prospectus Regulations. Although ClientEarth and Ithaca presented competing arguments as to its compatibility with the Paris Agreement, the difference of views was referenced in the Prospectus.

For the purposes of determining which party was responsible for the legal costs of the case, the High Court held that this claim was not covered by the Aarhus Convention for the purpose of CPR 46.24(2)(a), which affords costs protection to a claimant and limits its liability to the other party to GBP 10,000. An Aarhus Convention claim is defined by CPR 46.24(2)(a) as '*a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions*' which is within the scope of Article 9(3) of the Convention and other provisions. The High Court found that there was not a sufficiently close connection to the environmental factors regulated by the Aarhus Convention, and even if ClientEarth's claim succeeded, it would not have significant environmental benefits.

## Comment

The Prospectus omitted to include any references to the International Energy Agency's (the '**IEA**') key milestones in its Net Zero by 2050 Roadmap Report, which includes the milestone of no new oil and gas projects beyond 2021. This omission likely motivated ClientEarth to commence judicial review proceedings against the FCA. The IEA is an intergovernmental organisation made up of 31 member countries accounting for 80% of global energy consumption and 62% of global energy consumption.

The Prospectus makes over a hundred references to the IEA, including stating that the trends identified by the IEA are '*emblematic of a shift in the energy landscape since the Paris Agreement*' (page 126 of the Prospectus). However, prior to the COP 26 held in Glasgow in 2021, one of the key milestones identified by the IEA, in its Net Zero by 2050 Roadmap Report published in May 2021, was that there was no need for investment in new fossil fuel supply and that '*beyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our pathway, and no new coal mines or mine extensions are required*' (page 20 of the Net Zero by 2050 Roadmap Report). This key milestone in the IEA's Net Zero Roadmap Report is not mentioned in the Prospectus and ClientEarth's position was that Ithaca's planned business operations failed to adequately describe the climate risks associated with Ithaca's activities, including the development of the Cambo and Rosebank oil and gas fields in the North Sea.

The High Court judgment which refused ClientEarth the permission to proceed with its claim against the FCA does not address this aspect in any detail, in light of the High Court's emphasis on the regulator's expertise in its area. Whether or not the high-level approach taken in this decision will deter future claims of a similar nature is uncertain. Climate activists are unlikely to compromise on what they consider to be the science of climate change demands. Indeed, the Prospectus acknowledges that climate-related litigation is likely to continue and that there may be an increase in climate-related litigation and challenges (page 18 of the Prospectus). Future reporting requirements, based on the Task Force on Climate-related Financial Disclosure (now monitored by the IFRS since the Task Force was disbanded in November 2023), may also impose more specific quantitative climate reporting obligations on energy companies attempting to raise funds to finance their operations for new oil and gas production and development activities in the North Sea.

Determining that the cost protection afforded by the Aarhus Convention does not apply to this kind of claim may also serve as a deterrent to future judicial review applications of this nature against the FCA. That decision is consistent with the High Court's view that whilst the FCA is an expert regulator in financial matters, it is not an expert in environmental matters, including assessing the materiality of the risks associated with energy and climate change.

**Judge:** Lang JDBE

# Oil & Gas Insolvency: Clawing back assets dissipated by insolvent counterparties

In *Crescent Gas Corporation Ltd v National Iranian Oil Company & Anor* [2024] EWCH 835 (Comm), the Commercial Court ordered the transfer of a GBP 100m property, after a judgment debtor transferred ownership of a London property to a closely related pension fund, shortly after a high-value oil and gas arbitration award was made against it. In reaching its decision, the Commercial Court highlighted remedies available to oil and gas companies where assets have been removed from counterparties with a purpose of putting them beyond the reach of creditors.

## Facts

The claimant, Crescent Gas Corporation ('**CGC**'), is a wholly owned subsidiary of Crescent Petroleum Company International Ltd ('**CPCIL**'). CPCIL is a privately owned exploration and production company in the Middle East.

The first defendant, National Iranian Oil Company ('**NIOC**') is responsible for Iran's crude oil and gas exploration, development and marketing operations. CGC and NIOC were parties to a 25-year term Gas Sales and Purchase Contract (the '**GSPC**'). Under the GSPC, NIOC would supply natural gas to CGC. Following a dispute in relation to the GSPC, NIOC was unsuccessful in an arbitration between the parties, and subsequently failed to pay the damages due under the award or the interest that was accruing, resulting in it owing CGC over USD 2bn.

CGC sought a charging order over a property based in London, known as NIOC House. NIOC House was prime commercial real estate in central London, with an estimated value between GBP 80 – GBP 104m.
On 15 August 2022, the date permission was given to enforce the Remedies Award as a Judgment, NIOC was the registered sole owner of NIOC House (and had been, since its purchase in 1975).

However, when CGC sought to enforce the award against the property, it found it had been transferred to the second defendant, a pension fund for employees in the Iranian oil and gas industry (the '**Pension Fund**').

CGC therefore applied for relief under section 423 of the Insolvency Act 1986 ('**IA 1986**'). In addition, or in the alternative, it also sought relief under section 1-2 of the Charging Orders Act 1979.

## Decision

Section 423 of the IA 1986 deals with '*transactions entered into at an undervalue*', and permits the Court to restore the position prior to the transaction and protect the interests of victims. It 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 summarised the burden in bringing a claim under section 423 of the IA 1986 as: '*…if a creditor seeks an order under sub-section (2), he must show that there is a transaction at an undervalue within sub-section (1) which was entered into with the purpose of putting assets beyond the reach of a creditor within sub-section (3).*'

In relation to CGC's claim under section 423 of the IA 1986, the Court decided that NIOC did own NIOC House, and its transfer to the Pension Fund had been at an undervalue, in an attempt to avoid enforcement of the award against the property.

NIOC put forward two alternative defences:

— Firstly, it argued that under Iranian law, the Pension Fund owned NIOC House as an absolute owner under an amanat arrangement from 1975 which the English Court is bound to recognise by reason of Article 11 of the Convention on the law applicable to Trusts and their Recognition (which is part of English law pursuant to the Recognition of Trust Act 1987).[1]

— Secondly, under English law the Pension Fund was the beneficial owner of NIOC House.

It was NIOC's case that, on either basis set out above, the transfer of NIOC House to the Pension Fund for nil value was justified and so, an order under section 423 of the IA 1986 was not available.

***Ownership***

The Commercial Court therefore had to determine who had been the beneficial owner of the NIOC House at the time of the transfer, and as a result, whether the transfer had been justifiable.

In relation to NIOC's first argument, the Commercial Court considered the factual history of the property, and found that the purchase of NIOC House in 1975 was funded by monies borrowed by NIOC from the Pension Fund, with 9% interest. As a consequence of the property being purchased through a loan agreement could not fall within the amanat. The experts agreed:

*'If NIOC purchased NIOC House in 1975 with its own monies, NIOC was the owner of NIOC House as a matter of Iranian law. We also agree that, given the ownership-transferring nature of loans, if a loan was given to NIOC from the funds, the loaned money and whatever it purchased with the loaned money would belong to NIOC, subject to a in personam debt obligation'*

In relation to NIOC's English law argument, the Commercial Court found that there had been no declaration of trust: NIOC was both legal and beneficial owner of NIOC House at the time of the transfer, and it did not hold NIOC House as trustee for the fund.

***Purpose***

As the transfer had not been for any form of monetary value, the Commercial Court had to consider the purpose of the transfer of the property, in the context of section 423 of the IA 1986.

When considering the purpose, it is sufficient to establish that a purpose of the transaction was to put the asset beyond the reach of a person who is making a claim; there is no need for it to be the main or dominant or substantial purpose. In this respect the Commercial Court referred to the judgment of *Leggatt LJ in JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176:

*'It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within s.423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that.'*

On this basis, the Commercial Court found:

*'…a cogent case for concluding or inferring that the only credible explanation for such urgency is that NIOC and NTT were acting as quickly as they could to effect the transfer before CGC was able to enforce the judgment against NIOC House'.*

As a result, the Commercial Court found in favour of CGC. It was established that the transfer was a transaction at an undervalue. It was not '*for money or anything which has a monetary value*' and NIOC and the Pension Fund could not justify that undervalue by the requisite proof that NIOC was subject to a trust in favour of the Pension Fund. CGC has also established that NIOC entered into the transfer for the purpose of putting NIOC House beyond the reach of CGC.

In terms of remedy, the Commercial Court had the power to make such order as it thinks fit for the purpose of restoring CGC to the position that it would have been, if the transaction had not been entered into and to protect the interest of persons who were victims of the transaction. It therefore concluded that the appropriate order was that the Pension Fund transfer the property to CGC.

[1] An amanat and an anim exists where the owner entrusts an asset to the amin but retains ownership of the asset. The amin has no ownership of the asset and has no right to deal with the asset or to enjoy the fruits of ownership other than in accordance with the terms of the amanat. An amin cannot be equated to an English law trustee since a trustee has the legal proprietary interest in the asset which is the subject of the trust. In Iranian law, there is one concept of absolute ownership and no division between legal and beneficial ownership. The expert evidence in the case therefore determined that a trustee and an amin *'are not the same thing'*.



## Comment

This is not the first time the Commercial Court has shown itself willing to invoke section 423 of the IA 1986 in an oil and gas context. Last year's CMS Annual Review dealt with *Integral Petroleum S.A. v Petrogat FZE & others* [2023] EWHC 44 (Comm) in which 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 (see 2023 CMS Annual Review, page 32).

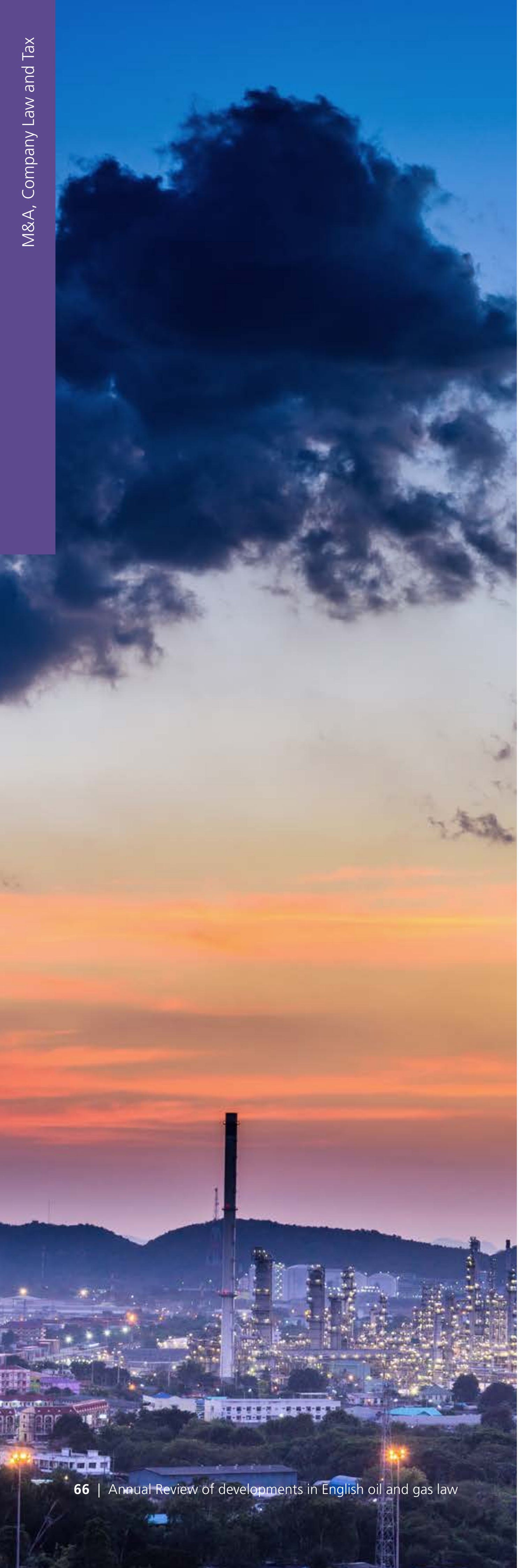
Whilst English law recognises the veil of incorporation and will not (usually) allow enforcement of contractual remedies or damages against group companies (absent guarantees or security from those group companies), nor will it permit creditors to be frustrated by the removal of assets from a debtor company at an undervalue with the purpose of putting those assets beyond the reach of creditors.

As explained in last year's CMS Annual Review, 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 or seeking to avoid judgment/arbitration debts by the dissipation of assets. It is notable also, that section 423 of the IA 1986 is available without an insolvency process (as in this case).

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 highlights the liability of companies to whom assets have been transferred, and the type of order (for transfer of property) that may be made against them.

It is notable that the IA 1986 offers creditors wider protection too. Whilst in this case, the IA 1986 was used to protect against assets being put beyond the reach of a creditor, section 423(3)(b) provides a more general protection, in circumstances where a transaction may otherwise prejudice '*the interests of such a person in relation to the claim which he is making or may make*'. Further, whilst in this case, the transferee was directly party to the transaction, section 425 also offers protection against third parties, as it provides the Court discretion to make a wide range of orders against persons who are not directly party to the transaction in certain circumstances.

**Judge:** Sir Nigel Teare



# Corporation Tax and Oilfield Activities: Drilling deep on the meaning of '*incidental*' use under the Corporation Tax Act 2010

In *Commissioners for His Majesty's Revenue and Customs v Dolphin Drilling Ltd* [2024] EWCA Civ 1, the Court of Appeal provided welcome clarity as to the interpretation of the term '*incidental*' within the context of the Corporation Tax Act 2010 (the '**CTA 2010**') and whether an oil contractor's tender support vessel ('**TSV**') should be treated as a '*relevant asset*' under the act due to its use as accommodation for oilfield workers.

## Facts

In June 2011, Total E&P UK Ltd ('**Total**') invited Dolphin Drilling Ltd ('**Dolphin**') to tender for a contract to provide tender assisted drilling ('**TAD**') services in association with its operation of the Dunbar oil platform (the '**Dunbar**'), which was located off the coast of the Shetland Islands in the UK sector of the North Sea. As the Dunbar lacked significant facilities deemed to be essential for carrying out drilling operations, part of this contract included for the provision of a TSV.

Dolphin explained in its tender that it proposed to lease an asset known as the Borgsten Dolphin (the '**Borgsten**') from Borgsten Dolphin Pte Ltd ('**BDPL**'), an associated company of Dolphin in Singapore, for a charter fee of over USD 100,000 per day. After some negotiations between Total and Dolphin, Dolphin was awarded a contract to supply TAD services to the Dunbar and a contract for the provision of TSV Drilling Services.

The Borgsten moved into position alongside the Dunbar in February 2013 and the pre-drilling phase of the contract lasted until April 2015. Among other services (such as running all systems needed to provide TAD services and functioning as a floating warehouse for the Dunbar), the Borgsten was used to provide living accommodation for crew members who worked on the Dunbar.

The dispute in this case arose out of Dolphin's filings of its tax returns for the years ending 31 December 2014 and 31 December 2015, as Dolphin did not consider that the Borgsten was a '*relevant asset*' under the CTA 2010.

***Corporation Tax and Oil Contractors***

Part 8ZA CTA 2010 came into force on 1 April 2014 and concerns the corporation tax treatment of oil contractor activities. Under these provisions, profits from oil contractor activities are 'ring-fenced' and must be treated separately from other income or gains, with the amount allowable as a deduction under lease of a '*relevant asset*' restricted by a hire cap.

The hire cap is provided for by s.356N CTA 2010 as follows:

*'356N Restriction on hire etc of relevant assets to be brought into account*

*(1) This section applies if the contractor makes, or is to make, one or more payments under a lease of–*

*(a) a relevant asset, or*

*(b) part of a relevant asset.*

*(2) The total amount that may be brought into account in respect of the payments for the purposes of calculating the contractor's ring fence profits in an accounting period is limited to the hire cap.*

*…'*

The question as to whether the hire cap applied to Dolphin's payments to BDPL therefore depended on whether the Borgsten was deemed to be a '*relevant asset*' under s.356N CTA 2010.

*'Relevant asset' is defined by s.356LA, with the relevant parts of this section providing as follows:*

*'(1) In this Part 'relevant asset' means an asset within subsection (2) in respect of which conditions A and B are met.*

*(2) An asset is within this subsection if it is a structure that–*

*(a) can be moved from place to place (whether or not under its own power) without major dismantling or modification, and*

*(b) can be used to–*

*(i) drill for the purposes of searching for, or extracting, oil, or*

*(ii) provide accommodation for individuals who work on or from another structure used in a relevant offshore area for, or in connection with, exploration or exploitation activities ('offshore workers').*

*(3) But an asset is not within subsection (2)(b)(ii) if it is reasonable to suppose that its use to provide accommodation for offshore workers is unlikely to be more than incidental to another use, or other uses, to which the asset is likely to be put.'*

When submitting its tax returns, Dolphin determined that the Borgsten did not constitute a '*relevant asset*' under the CTA 2010. Dolphin therefore ignored the hire cap and brought the entire hire that it had paid to BDPL into the calculation of its profits. However, HMRC took the view that the Borgsten was a '*relevant asset*' and amended Dolphin's tax returns accordingly. The additional corporation tax payable was calculated to be more than GBP 6.7m across the two years in question.

Dolphin appealed this decision to the First-tier Tribunal (the '**FTT**').

## FTT and Upper Tribunal (Tax and Chancery Chamber) Decisions

It was common ground between Dolphin and HMRC that the Borgsten was movable and capable of accommodating offshore workers, but the parties disagreed as to whether the accommodation function was likely to have been more than '*incidental*' to the primary TAD services.

On a balance of probabilities and consideration of all uses of the Borgsten, the FTT found in favour of Dolphin. The FTT concluded that '*incidental*' meant '*secondary*' or '*subordinate*' and held that the provision of accommodation for offshore workers, although important, was no more than incidental to the other uses of the Borgsten, as it was subordinate to those uses and of a secondary function. Accordingly, the FTT concluded that the terms of the exception in s.356LA(3) CTA 2010 were satisfied such that the Borgsten was not caught within s.356LA(2)(b)(ii). It was therefore not to be treated as a '*relevant asset*' for the accounting periods in issue.

HMRC appealed to the Upper Tribunal (Tax and Chancery Chamber) (the '**UT**'), which upheld the findings of the FTT.

HMRC thereafter appealed to the Court of Appeal on the basis that the FTT had erred in its decision and that the UT should have therefore allowed HMRC's appeal.

## Court of Appeal Decision and the meaning of '*incidental*'

The Court of Appeal allowed HMRC's appeal and overturned the decisions of the FTT and UT, coming to a different conclusion on what it means for one use of an asset to be incidental to another. The Court of Appeal disagreed with how the FTT had decided the question i.e. by assessing whether the use of the Borgsten to accommodate those working on the Dunbar was in some way lesser than the other uses of the Borgsten. Instead, LJ Nugee held that a use can only be considered incidental to another use if there is '*some link between them*' or if a particular use is tied into another use.

In coming to his conclusion, LJ Nugee considered the judgment of *Pennycuick V-C in Robson v Dixon* [1972] 1 WLR 1493, which considered the residence of an airline pilot for UK income tax purposes. The Court of Appeal agreed with this prior judgment, holding that a use cannot be said to be '*no more than incidental*' to another use '*if it serves an independent purpose of its own*' and '*is of some significance and not trivial or causal*'.

On the facts, the Court of the Appeal determined that the Borgsten's use as accommodation was not incidental to its use as a TSV supplying TAD services to Total. Although its use as accommodation was less important than these other uses, it was an independent end in itself and still of some significance to Total and the Dunbar. Put simply, the Borgsten was used to provide TAD services to the Dunbar and was also used as an accommodation vessel for the Dunbar. Although the Court of Appeal accepted that both of these uses enabled the drilling operations on the Dunbar to take place, LJ Nugee held that this did not mean that one use was incidental to the other.

The case therefore turned entirely on the statutory construction of the word '*incidental*'. By concluding that a use is only incidental to another use if it has some link or connection to, or arises out of that other use, the Court of Appeal determined that it was not reasonable to suppose that using the Borgsten as accommodation was likely to be no more than incidental to its other uses. Therefore, the exception in s.356LA(3) did not apply, and the Borgsten was held to be a '*relevant asset*' under the CTA 2010. The hire cap therefore applied to the accounting periods in question and HMRC's appeal was allowed.

## Comment

The Court of Appeal's decision set a new precedent with wide implications on what deduction claims can be made in the sector under corporation tax law.

By determining how certain expenses and activities should be treated under the CTA 2010, this decision will likely affect the financial and operational strategies of companies within this sector. Oil and gas contractors should take particular care when providing TAD services via a TSV to oil platforms without the capacity to carry out its own operations, as it is now clear following the Court of Appeal's ruling that such vessels will be captured under the meaning of a '*relevant asset*' for corporation tax purposes. This reflects the original intention behind the enactment of Part 8ZA in the CTA 2010, as it was originally designed to combat the '*practice of moving profits in fact derived from the UK offshore oil sector outside the UK tax net*'. With this decision, both drilling rigs and accommodation vessels will be subject to the hire cap.

It remains to be seen however if the findings of the Court of Appeal will continue to stick, as Dolphin received permission to proceed with an appeal to the UK Supreme Court on 13 May 2024. The hearing is yet to be scheduled but is anticipated for 2025, and the British Shipping Chamber has already commented that the case will have '*serious consequences*' for hundreds of rigs and vessels operating in the UK offshore sector.

**First-tier Tribunal:** Judge Zaman and Duncan McBride

**Upper Tribunal (Tax and Chancery Chamber) Judges:** Falk J and Judge Scott

**Court of Appeal Judges:** Nugee LJ, Jackson LJ and Newey LJ

# M&A warranty and indemnity claims: Getting the notice right

In *Drax Smart Generation Holdco Ltd v Scottish Power Retail Holdings Ltd* [2024] EWCA Civ 477, the Court of Appeal gave a useful insight as to the meaning of '*stated in reasonable detail the nature of the claim*' in the context of notice requirements concerning a warranty and/or indemnity claim under a share sale agreement.

## Facts

In 2018 Drax Smart Generation Holdco Ltd ('**Drax**') acquired the shares in Scottish Power Generation Limited, now VPI Power Ltd ('**the Company**'), via a share purchase agreement ('**SPA**') with Scottish Power Retail Holdings Ltd ('**SPRHL**').

The Company owned a potential site for a gas power station which required an easement over adjacent land owned by a third party. Another SPRHL group company held an Options Agreement ('**OA**') for this purpose. The OA and associated benefits were to be assigned to the Company as part of the SPA (deemed '**the Reorganisation**'). Under the SPA, SPRHL indemnified Drax in respect of all losses suffered in relation to a failure to implement the Reorganisation properly.

The SPA required: '*In the case of the types of claim detailed below, the Seller shall not be liable for a claim unless the Buyer has notified the Seller of the claim, stating in reasonable detail the nature of the [claim] and the amount claimed (detailing the [buyer's] calculation of the Loss thereby alleged to have been suffered) …*'

Subsequently the SPA was varied twice which introduced a new type of claim and time limits for making the same, in respect of the OA (an '**OA Claim**'). The OA was not effectively assigned which was not discovered until after it had expired. This prevented the Company from exercising the easement. Drax sold the Company in December 2020 but remained liable for losses suffered by the Company in respect of the failure to effect the Reorganisation properly.

## The Notice of Claim ('the Notice')

On 30 June 2021, Drax issued the Notice based on the Company not having the benefit of the OA as it ought to have done. The Notice was said to be notice of (1) an OA Claim and (2) '*to the extent necessary*' a Reorganisation Claim. The Notice claimed that the Company was entitled to payment based on:

— Breach of warranty from the failure to effectively assign the OA rights to the Company ('**the Warranty Claim**').

— Breach of contract arising from the failure to effectively assign the OA.

— Indemnity for losses incurred in relation to the failure to properly effect the Reorganisation (the '**Indemnity Claim**').

The Notice set out that Drax claimed for losses occasioned by the Company namely:

— Future losses in that the Company could only replace the rights under the OA by purchasing them or via compulsory purchase.

— Past losses being legal costs and management time involved in negotiating those rights.

— Further losses suffered by the Company, albeit these had not yet crystallised. In respect of this aspect, the Notice set out likely heads of loss and requested indemnity for future losses.

## The Commercial Court Decision

During the Commercial Court proceedings, Drax sought to re-state its particulars of claim to allege that it (rather than the Company) had suffered a loss based on a diminution of the value of its shares in the Company. SPRHL sought summary judgement, claiming that the Notice was invalid as:

— It did not set out either details nor a calculation of what was being claimed.

— As Drax had changed the basis of its claims from losses to diminution in value of the shares, the Notice did not meet the content requirements.

The Commercial Court agreed with SPRHL. It held the Notice did not state in reasonable detail the nature of the loss, nor properly demonstrate the calculation of the loss suffered. They reached this conclusion on the basis that:

— The Notice did not mention diminution in the value of shares.

— The Notice referred to losses suffered by the Company (and not Drax).

— The Notice referred to losses likely to arise in the future which were not related to or consistent with a claim for diminution in value of the shares.

The Commercial Court considered that the hypothetical reasonable recipient would understand that the loss being claimed was loss that the Company would suffer and for which Drax would be liable. To be effective, the Notice should have identified that the Warranty Claim was based on the diminution of value of the shares in the Company at the point of discovery of SPRHL's breaches. By only raising this in the particulars of claim, Drax had failed to comply with the SPA's notification requirements. Finally, describing losses as 'likely' or 'potential' was held to be a recognition that there was no certainty as to the loss, if any, that the Company would incur.

Accordingly, the Commercial Court held that Drax had not provided an effective notice of claim. It therefore refused to allow Drax to amend its claim and granted summary judgement in favour of SPRHL in respect of the Warranty Claim.

The Commercial Court did not, however, dismiss the Indemnity Claim. It held that Drax did not need to identify a specific sum in its notice of claim, and it would be uncommercial to require an indemnity claim to be precisely ascertained within the relevant timeframe.

## The Court of Appeal's Decision

Both parties appealed; Drax in relation to the summary judgment and SPRHL in relation to allowing the Indemnity Claim to proceed. The Court of Appeal allowed Drax's appeal and dismissed SPRHL's appeal.

The Court of Appeal held that the Commercial Court had erred in determining that the Notice had not '*stated in reasonable detail the nature of the claim*'. The amended notice satisfied the requirements of the relevant clause within the agreement in respect of both the Warranty Claim and the Indemnity Claim.

In reaching this decision, the Court of Appeal considered:

— First, clauses which bar a claim unless notice is given within a specified time limit are a common feature of share purchase agreements. Such clauses sometimes require the notice to state 'the nature of the claim' and sometimes require this to be done 'in reasonable detail'.

— Second, in general terms, the purpose of a notice of claim clause was described by Lord Justice Popplewell in *Dodika Ltd v United Luck Group Holdings Ltd* [2021] EWCA Civ 638 at [46]. The clause in that case required the notice to state '*in reasonable detail the matter which gives rise to such Claim, the nature of such Claim and (so far as reasonably practical) the amount claimed in respect thereof*'. It was accepted that the notice in question had provided reasonable detail of the nature of the claim, the issue being whether it provided reasonable detail of the amount claimed. Lord Justice Popplewell said:

*'46. … The purpose of a notice clause such as that in schedule 4 para 2(b) of the SPA is to enable the recipient to make such inquiries as it is able, and would wish, to make into the factual circumstances giving rise to the claim, with a view to gathering or preserving evidence; to assess so far as possible the merits of the claim; to participate in the tax investigation to the extent desirable or possible with a view to influencing the outcome; and to take into account the nature and scope of the claim in its future business dealings, whether by way of formal reserving or a more general assessment of the potential liability. … the additional detail available, if included in the 24 June letter, would not have advanced any of these purposes. I balk at a conclusion that the level of detail provided in a notice of this sort fell short of what was required as reasonable, that is to say was unreasonably deficient, when the additional level of detail said to have been required would not have furthered any of the commercial purposes for giving such a notice. What is reasonable takes its colour from the commercial purpose of the clause, and what businessmen in the position of the parties would treat as reasonable. Businessmen would not expect or require further detail which served no commercial purpose. That would be the antithesis of what was reasonable.'*

- Third, taking a step back, the initial purpose of such clauses is to provide a contractual limitation period. If no notice is given by the specified deadline, the parties can close their books on the transaction. That promotes finality and certainty in commercial dealings. It is only if some kind of notice is given that the purposes identified in *Dodika* come into play. In that event, it will be obvious that the buyer is seeking to make a claim, so that the achievement of finality and certainty must be postponed.
- Fourth, whether a notice is sufficient to satisfy the requirements of any given clause must depend primarily on the language of the clause. Commercial parties are free to impose whatever requirements they wish.
- Fifth, where they use broad and general terms such as 'the nature of the claim' and 'in reasonable detail', those requirements should be interpreted in the light of the commercial purposes of such clauses, including those identified in *Dodika.* In this respect, it is important that notice of claim clauses should not become a technical minefield to be navigated, divorced from the underlying merits of a buyer's claim.
- Sixth, courts should not interpret such clauses as imposing requirements which serve no real commercial purpose unless compelled to do so by the language of the clause.
- Finally, such clauses are essentially exclusion clauses. If necessary to resolve ambiguity, exclusion clauses should be construed narrowly.

The Commercial Court rejected SPRHL's contention that the buyer had to specify that the claim was based on the difference in value of the shares in the Company because of not having the benefit of the OA. It considered that this was not part of the 'nature of the claim' and did not have to be identified to serve any commercial purpose.

The Commercial Court went on to state that: *'…so long as what is put forward in the Notice of Claim is a genuine estimate, it is as a matter of fact 'the Buyer's calculation of the Loss thereby alleged to have been suffered', which is all that the clause requires. There is nothing in the clause to set in stone the calculation of the loss which is stated in the Notice of Claim.'* In this case, the notice was clear that Drax would have liability to the party to whom it had sold the Company. The Commercial Court also considered it relevant that the parties had been corresponding regarding the dispute for over a year prior to service of the Notice.

Finally, the Commercial Court observed that the Indemnity Claim was not an OA Claim as defined by the amendments to the SPA, but rather fell under a different section of the SPA, which had different requirements and limitation periods.

## Comment

The decision makes several key points which are relevant to parties at drafting and making claims under warranties and indemnities pursuant to share sale and purchase agreements.

First, the drafters will be in control of (i) the extent and form to which a contractual notice must be given and (ii) the consequences of failing to give that notice. Ultimately, the parties are free to agree what they may in relation to notices concerning warranty and indemnity claims.

Second, the Commercial Court recognises the benefits of contractual provisions that require notice to be given in a specified time and/or manner. In providing for a contractual limitation period, the parties can close their books on the transaction at the end of that period (absent notice). That promotes finality and certainty in commercial dealings.

Third, that said, the Commercial Court will not give a notice clause an interpretation that gives an uncommercial outcome (absent clear words used by the parties).

In addition, in the event of ambiguity, the exclusionary effect of the clause will likely be construed narrowly. As such, clear words will be needed to ensure that claims are excluded by failure to follow the notice requirements.

Taken together, it reiterates the necessity of drafting clear and precise notice clauses. If an outcome is intended that might (to some) seem uncommercial, clear words should be used to achieve that effect.

When it comes to drafting notices, it is important to closely follow (and have regard to) the provisions of the contract (including the relevant clause under which the sum is claimed and the notice clause). A 'notice' that does not fulfil the contractual requirements will be invalid, which may result in an otherwise valid claim being lost in its entirely.

**Judges:** Sir Geoffrey Vos MR, Males LJ and Birss LJ

# Chapter 6

# Dispute Resolution

The English Courts have recently handed down a number of cases relevant to resolving disputes that will be of importance to oil and gas companies that are engaged in contentious proceedings, particularly in the context of arbitration, the enforcement of costs in emerging oil and gas producer states and the conduct of the parties both in their commercial relationships and during ongoing litigation proceedings.

— In *Unicredit Bank GmbH v Ruschemalliance LLC [2024] EWCA Civ 64*, the Court of Appeal granted an anti-suit injunction to prevent the pursuit of proceedings in Russia.

— In *Societe Africaine De Raffinage v Savannah SA* [2024] EWHC 590 (Comm), the Commercial Court provided comfort to those seeking to enforce costs orders in states which are new to the production of oil and gas and has provided clarification on when security for costs could be granted.

— In *The Federal Republic of Nigeria v Process & Industrial Developments Ltd.* [2023] EWHC 2638 (Comm), the Commercial Court found that an arbitral award had been obtained through fraud bringing into question the ability of arbitration to deal with disputes where fraud is a risk.

— In *ABFA Commodities Trading Ltd v Petraco Oil Company SA* [2024] EWHC 147 (Comm), the Commercial Court allowed a third party to enforce a cross-undertaking in damages after it suffered loss arising from a worldwide freezing order, highlighting the value of such cross-undertakings which are often sought in the context of international oil and gas transactions.

— In *ABFA Commodities Trading Ltd v Petraco Oil Company SA (Re Consequential Matters)* [2024] EWHC 706 (Comm), the Commercial Court considered the consequences of Part 36 offers where the successful party of the proceedings is found to have engaged in bad conduct.

# Court of Appeal upholds jurisdiction to enforce arbitration agreement with anti-suit injunction

In *Unicredit Bank GmbH v Ruschemalliance LLC* [2024] EWCA Civ 64, the Court of Appeal overturned a Commercial Court decision and found that the English Courts had jurisdiction and granted an anti-suit injunction to prevent the pursuit of proceedings in Russia. This decision provides further guidance on the issue of the governing law of arbitration agreements.

## Facts

Ruschemalliance LLC ('**RCA**') entered into two EPC contracts for the construction of liquefied natural gas and gas processing plant facilities in Russia. Its contractual counterparties were German companies, Linde GmbH and Renaissance Heavy Industries LLC (together the '**Contractors**').

Under the EPC contracts, RCA was obliged to pay, in stages, a total of approximately EUR 10bn. The Contractors were entitled to advance payments of approximately 20% of that sum, i.e. EUR 2bn. The contracts also provided for the Contractors to provide on demand bonds guaranteeing the performance of their obligations. It arranged for some of those bonds to be provided by Unicredit Bank GmbH ('**UniCredit**').

UniCredit issued seven bonds, four of which were to guarantee the performance of the Contractors' obligations under the contract and three of which were to secure the repayment of the advance payments.

Each bond contained a clause stating that '*all non-contractual or other obligations arising out of or in connection with it shall be construed under and governed by English law*'. The bonds went on to specify that all disputes arising between the parties about the validity, interpretation or performance of the bond would be settled under the rules of arbitration the International Chamber of Commerce (the '**ICC**') in Paris.

Following Russia's invasion of Ukraine in February 2022, the Contractors sought guidance from the German Federal Office for Economic Affairs and Export Control on whether they could continue fulfilling their obligations under the EPC contracts due to the sanctions imposed on Russia by the European Union. The Contractors were instructed to cease operations.

On 23 September 2022, RCA terminated, or attempted to terminate, the first contract, accusing the Contractors of a significant breach of obligations. On 7 April 2023, RCA terminated the second contract on similar grounds, requesting the return of advance payments and seeking compensation for damages caused by the alleged breach.

After terminating the contracts, RCA demanded payment from UniCredit under the on-demand bonds. However, UniCredit rejected the payments, arguing they were prohibited by EU sanctions, specifically Articles 3b(2)(b) and 11(1) of Regulation (EU) 833/2014. RCA disputed that these sanctions provided a valid reason for non-payment, and both parties agreed to resolve the issue through an ICC arbitration in Paris, under English law.

However, instead of initiating arbitration proceedings, RCA filed a lawsuit against UniCredit in the Arbitrazh Court of St Petersburg and the Leningrad Region on 5 August 2023, seeking over EUR 443m under the bonds. RCA argued that the EU sanctions cited by UniCredit violated Russian public policy and that the arbitration clause in the bonds was unenforceable under Russian law.

In response, UniCredit filed a claim in the English Courts on 22 August 2023, along with an urgent application for an interim anti-suit injunction to halt the Russian proceedings, which was subsequently granted.

The final anti-suit relief claim and RCA's challenge to the English Court's jurisdiction was heard by the Commercial Court on 22 September 2023. The Commercial Court found that the English Courts lacked jurisdiction for two reasons: (i) the arbitration agreement is governed by French law, not English law; and (ii) the English Court was not the appropriate forum, as substantial justice could be achieved through arbitration in France.

Given the judge's decision on jurisdiction, he was not required to consider whether a final injunction should be granted. UniCredit subsequently appealed the decision to the Court of Appeal.

## Court of Appeal Decision

The Court of Appeal was tasked with determining whether the English Courts should grant an anti-suit injunction against RCA to prevent proceedings in Russia despite an existing arbitration agreement specifying Paris as the seat of arbitration.

The Court of Appeal established that there was a binding arbitration agreement between the parties. The pursuit of proceedings in the Russian court by RCA was found to be a breach of this agreement. The Court of Appeal reiterated that the English Courts have the authority to grant anti-suit injunctions to enforce arbitration agreements, even when the seat of arbitration is abroad, which was aligned with the principles set out in *Nori Holding Ltd v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm).

In determining the proper forum for resolving the dispute, the Court of Appeal cited the requirements as set out in *Altimo Holdings & Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, namely that:

— there is a serious issue to be tried on the merits;

— there is a good arguable case that the claim falls within one of the relevant gateways; and

— England and Wales is '*the proper place in which to bring the claim*'.

The Court of Appeal stated that there was no difficulty concerning the first requirement and turned to the second and third requirements for determination.

The gateway on which the bank relied was that the claim was in respect of a contract governed by English law and due to the principle of separability, the arbitration agreement should be treated as a separate agreement within the bonds (as set out in paragraph 3.1(6)(c) of Practice Direction 6B of the CPR). In their determination the Court of Appeal cited the Supreme Court Decision in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 in deciding that due to the express choice of law contained within the arbitration agreement, the bonds were governed by English Law.

The next question was whether England and Wales was '*the proper place in which to bring the claim*'. It was held that England was the proper forum for this case in order to ensure substantial justice. The inability to obtain substantial justice in Russia or through arbitration in Paris played a crucial role in this decision. The Court of Appeal considered RCA's '*abusive*' actions in pursuing litigation in Russia while simultaneously contesting the arbitration agreement.

Following the determination that the English Court should have exercised jurisdiction over this claim, the Court of Appeal then turned to whether the final injunction should be granted. RCA presented three reasons as to why a final injunction should not be granted in this case:

— The French Courts would not recognise or enforce an English order. The Court of Appeal regarded this as irrelevant as it was unlikely that UniCredit would ever seek recognition or enforcement of an English anti-suit injunction in France.

— As a matter of English law, Article 11 of EU Regulation 833/2014 imposing sanctions on Russian entities provides UniCredit with no defence to RCA's claim on the bonds. The Court of Appeal held that this in itself did not amount to a reason justifying RCA's breach of its agreement to arbitrate.

— The English Court had no sufficient interest in or connection to the matter to justify the indirect interference with a foreign court which an anti-suit injunction entails. The Court of Appeal disagreed with this suggestion and stated that the fact that the contract, including the agreement to arbitrate, is governed by English law provided sufficient interest or connection.

The Court of Appeal therefore granted an anti-suit injunction ordering RCA to terminate the Russian proceedings. RCA appealed to the Supreme Court and, whilst a full judgment is yet to be published, the Supreme Court has released its decision in the interim due to the parallel proceedings in the Arbitrazh Court of St Petersburg and the Leningrad Region which had been adjourned while the appeal was considered. The appeal was dismissed, therefore the injunctive relief and declarations granted by the Court of Appeal remain in force.

## Comment

The Court of Appeal's decision to grant the anti-suit injunction was rooted in the enforcement of the arbitration agreement, ensuring the proper forum for dispute resolution, and preventing abusive litigation practices. The decision reinforces the English courts' role in supporting arbitration agreements and maintaining the integrity of contractual obligations.

This decision underscores the importance of clear jurisdiction and governing law clauses in international contracts, providing assurance to lenders about the enforceability of agreements under English law. This will provide some comfort to parties who engage in substantial cross-border transactions which usually include financing from international lenders.
It also serves as a reminder of the need for meticulous contract drafting and the potential legal recourse available in the event of a breach, offering a layer of security for international financial transactions within the sector especially when conflicts arise with entities from sanctioned jurisdictions.

**Judges:** Bean LJ, Males LJ, Lewis LJ

# Security for costs in international oil and gas transaction disputes

In *Societe Africaine De Raffinage v Savannah SA* [2024] EWHC 590 (Comm), the Commercial Court clarified when security for costs should be ordered in respect of an oil and gas transaction. In this case, a party was domiciled in Senegal where it was suggested that an English costs order would be unenforceable or that enforcing an order there would create any material costs or cause delay.

## Facts

Savannah SA ('**Savannah**') and Societe Africaine De Raffinage ('**SAR**') were in a dispute, in which Savannah claimed it had a contract with SAR by which Savannah would sell and deliver petrol and diesel to SAR in 2022.

Savannah asserted that SAR wrongfully repudiated this contract and claimed USD 16m in unliquidated damages. SAR disputed the existence of such a contract as well as liability for any repudiation of such a contract. Savannah was subject to a cost order to provide SAR with security for costs up to and including the case management conference, the first of which took place in November 2023. Such payment was to be made in two tranches, totalling approximately GBP 600,000.

A second claim then arose, in which SAR claimed EUR 7m in respect of two contracts entered into in 2022 under which SAR supplied light naptha and naptha to Savannah. Savannah did not dispute that this contractual debt arose, however, the Commercial Court noted that Savannah intended to plead that it had the right to an equitable set-off in respect of the first claim. Savannah then sought a costs order for security for costs against SAR up to and including the first case management conference, in relation to the second claim.

## Decision

The Commercial Court first turned to the issue of jurisdiction in awarding security for costs. It was noted that the formal satisfaction of the threshold was met; SAR, as claimant, is a resident outside of the UK (specifically, Senegal) and Senegal is not bound by the 2005 Hague Convention. It was also noted that the Commercial Court has discretion as to whether to make such an order and that to make such an order purely because the formal threshold is met is discriminatory. In deciding whether it was just to award such an order, the Commercial Court turned to the decisions in *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099 and *Danilina v Chernukin* [2018] EWCA Civ 1802. From *Bestfort Developments LLP v Ras Al Khaimah Investment Authority*, the Commercial Court drew out the test for whether a real risk existed in the enforceability of an English costs order: '*A test of real risk of enforceability provides rational and objective justification for discrimination against non-Convention state residents*'.

From *Danilina v Chernukin* the Commercial Court drew upon the following considerations:

*'(4) This requires 'objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned' – see Nasser at [61] and Besfort at [51].*

*(5) Such grounds exist where there is a real risk of 'substantial obstacles to enforcement' or of an additional burden in terms of cost or delay – see Bestfort at [77].'*

In advancing this argument, Savannah produced the following evidence:

- An anecdotal example of an instance in which a Senegalese court declared itself not competent to enforce a damages claim in an ICC arbitration;
- an anecdotal example of a declaration of enforceability not being given by the President of the Tribunal de Grande Instance and therefore an arbitral award not being enforceable;
- the fact that Savannah, a foreign plaintiff, would have to provide a personal bond to pay costs and damages under Article 110 of the Senegalese Civil Procedural Code when seeking to enforce or execute an English costs order; and
- a supposition that SAR's position as being 46% state owned may make the Senegalese judicial system disinclined to enforce a foreign award against it.

It was decided by the Commercial Court that Savannah was unable to present sufficient evidence that there was any real risk that a costs order would not be enforced or that any obstacles existed to such enforcement.

The Commercial Court stated that the '*evidence is thin almost to the point of non-existence*' in proving that there may be material obstacles or risk in enforcing the award or that the award would be unenforceable.

## Comment

Given Senegal has very recently become an oil and gas producer with first oil announced in June 2024, oil and gas companies may take comfort in the Commercial Court's ruling that there is no real risk when it comes to enforcing English costs orders in Senegal and that English courts can be elected to deal with any disputes under their contracts.

For those with proceedings before the English courts, as the White Book explains, the purpose of an order for security for costs is to protect the awarded party against the risk of being unable to enforce any costs order they may later obtain. The order, if complied with, will provide that party with a fund against which they can enforce any such award of costs.

CPR 25 grants the Court power to make an order for security for costs where one or more conditions are satisfied. One of those conditions is that the claimant is '*not resident in a State bound by the 2005 Hauge Convention*'. The importance of this provision is that the Hague Convention provides for the enforcement of judgments of the English courts in signatory states. The condition in question has an obvious relevance to many oil and gas related cases, which tend to be international in nature.

That said, the Commercial Court is clear that the above condition is a 'threshold requirement' that provides the court with discretion to order security for costs if it is satisfied, but the Court cannot properly be satisfied that it is just to make such an order solely on the ground that the threshold requirement has been satisfied. In that respect, the Court will wish to be satisfied that (i) there are objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country and (ii) such grounds exist where there is a real risk of substantial obstacles to enforcement.

Oil and gas contracts typically include arbitration clauses and there is not a strong tradition of awarding security for costs in an arbitral context. Notwithstanding, for arbitrations seated in England, section 38(3) of the Arbitration Act 1996 empowers arbitrators to grant security for costs. Additionally, Article 25.2 of the LCIA Rules provides the power to order security for costs and the powers in the ICC Rules given to a tribunal to order '*any interim or conservatory measure it deems appropriate*' have exercised to grant security for costs.

In this context, it is becoming increasingly prevalent for arbitral parties to seek security for costs. Guidance on the topic has been published by the Chartered Institute of Arbitrators (*International Arbitration Practice Guideline: Applications for Security for Costs*).
The guidance sets out the following considerations:

*'2. When deciding whether to make an order for security for costs, arbitrators should take into account the following matters:*

*i) the prospects of success of the claim(s) and defence(s) (Article 2);*

*ii) the claimant's ability to satisfy an adverse costs award and the availability of the claimant's assets for enforcement of an adverse costs award (Article 3); and*

*iii) whether it is fair in all of the circumstances to require one party to provide security for the other party's costs (Article 4).'*

However, the guidance expressly draws a distinction between the domicile of a claimant and the location of their assets when it comes to enforcement risk. It states that arbitrators should not order security for costs solely on the ground that the claiming party has a foreign residence, i.e. different from the country to the place of the arbitration.

Notwithstanding, the location of the assets of a party may be a legitimate consideration if the arbitrators are satisfied that an order for security is justified because enforcing a costs award would be more difficult or uncertain than would normally be expected. This is a permissible consideration because it is based on the risk of unenforceability of a costs award in the foreign location of the assets, rather than the foreign residence of the party.

The guidance goes on to make the important point that '*if the risk associated with the jurisdiction in which a party organises its affairs (and holds its assets) was known at the inception of the relationship and there is no reason to conclude that this was to defeat creditors, then the arbitrators may conclude that it was part of the accepted risk of doing business with that party*'. In that context, parties should consider at the stage of the transaction whether any special measures or security is needed in respect of risks arising from the location of the counterparty's assets.

**Judge:** Baker J

# Overturning a USD 11bn award for fraud

In *The Federal Republic of Nigeria v Process & Industrial Developments Ltd.* [2023] EWHC 2638 (Comm), the Commercial Court found that an arbitration award for USD 11bn had been '*obtained by fraud*' and thus was '*contrary to public policy.*' The Commercial Court's decision invites discussion on several issues central to the rule of law and the conduct of arbitration, including professional conduct standards, the ability of the arbitral process to root out corruption and the role of transparency in arbitrations involving states.

## Facts

In 2010, Process & Industrial Developments Ltd ('**P&ID**') entered into a 20-year contract with the Federal Government of Nigeria ('**Nigeria**'). Under this contract, Nigeria was to supply a certain amount of 'wet' gas that P&ID would then strip into 'lean' gas and deliver back to Nigeria for power generation. P&ID would retain the remaining materials for onward sale.

Neither party performed all of its obligations under the contract. A few years after it was signed, P&ID launched an arbitration where the tribunal ultimately found Nigeria liable for repudiatory breach of contract, and then, in a separate decision, awarded P&ID USD 6.6bn with 7% interest per annum.

Nigeria challenged both the award on liability and the award on quantum in the Commercial Court under section 68 of the Arbitration Act 1996. It did so on the grounds that the awards were procured by fraud and/or conduct contrary to public policy, and that the arbitral tribunal lacked jurisdiction due to corruption and fraud. In support of its legal arguments, Nigeria alleged widespread corruption, fraud, and misconduct by P&ID and its lawyers before, during, and after the conclusion of the contract at issue. This included allegations of misconduct during the arbitration and Nigeria's initial challenges before the arbitral tribunal. P&ID denied all such allegations.

## Decision

While the Commercial Court did not agree with all of Nigeria's allegations, it did agree with Nigeria on several instances of corruption and misconduct, including several actions by P&ID and its legal team that raised serious questions about the validity of the arbitral awards.

***Fraud and Misconduct Hidden from the Tribunal***

The Commercial Court agreed with Nigeria that a series of payments from people and companies affiliated with P&ID to a then-Nigerian government employee were bribes '*in connection with the entry into*' the original contract. These payments also continued throughout the arbitration and after the final award, in the Commercial Court's view because P&ID wanted to ensure its corruption remained hidden.

The Commercial Court also found that throughout the arbitration, P&ID and its lawyers misused material that was protected by Nigeria's legal professional privilege. After noting that the contingency arrangements with P&ID's legal team would result in '*life-changing sums of money*', the Commercial Court found that P&ID's legal team had been provided with documents that they knew were privileged and were not entitled to see, but made the '*indefensible*' choice '*not to put a stop to it*' and instead opted to retain the documents, read them, and '*take the benefit of the information they conveyed.*' This '*improper retention*' of privileged material allowed P&ID to track Nigeria's strategy throughout the arbitration and adjust its strategy accordingly, including during settlement discussions that occurred in the midst of the arbitration.

Finally, the Commercial Court found that P&ID provided false witness evidence. Nigeria challenged several assertions in a witness statement about the creation of the contract, P&ID's performance of its obligations, and P&ID's ability to continue to perform. While the Commercial Court was not satisfied that all of the statements were '*knowingly false*' at the time they were made, it agreed that some of the statements were false. The most troubling issue for the Commercial Court was the omission of any mention of payments made to the government official at the contract's inception. While P&ID claimed that it had no duty to disclose pre-contractual payments, the Commercial Court found that omission to be '*dishonest by the standards of ordinary decent people.*'

Despite this finding, the Commercial Court was careful to note that, given the status of the action as a set-aside proceeding, its inquiry was limited to corruption in the creation of the (separable) arbitration agreement, rather than its other operative provisions. However, the Commercial Court concluded that if the arbitral tribunal had known about the bribes, the misuse of privileged information or the witness' incorrect testimony, '*the entire picture would have had a different complexion.*'

***Nigeria's Lawyers' Conduct***

Nigeria also raised allegations relating to the conduct of its own lawyers and experts during the proceedings.

The Commercial Court agreed that some of them were concerning, particularly in relation to what the Commercial Court appeared to view as an inadequate defence of Nigeria's position on quantum. While the Commercial Court did not find any evidence of bribery, it acknowledged that this was a case where lawyers, experts, and the politicians and civil servants overseeing the arbitration '*failed to do their work*' to '*ensure that Nigeria as a state participated properly*' with the result that '*the Tribunal did not have the assistance that it was entitled to expect, and which makes the arbitration process work.*'

***The Court's Invitation for Further Discussion***

The Commercial Court also addressed the broader arbitration community in the hope that its findings would spark a wider discussion about '*whether the arbitration process . . . needs further attention where the value involved is so large and where a state is involved.*' The Court invited discussion on four key issues:

- First, the importance of professional standards of ethics when drafting contracts involving developing states, including the potential assistance *pro bono* of leading law firms.
- Second, the importance of the disclosure process and a court's ability to enforce disclosure, including third-party disclosure orders. It was only through court-ordered disclosure from banks and other third parties in England and other jurisdictions that much of P&ID's misconduct came to light - '*in all the recent debates about where disclosure or discovery matters, this case stands a strong example for the answer that it does.*'
- Third, the ability of arbitration to address issues of fraud as, in the Commercial Court's view, the fact that even with an eminent tribunal '*of the greatest experience and expertise*', these issues went undetected meant that the arbitral process was '*vulnerable to fraud.*'
- And finally, whether '*greater visibility in arbitrations involving a state or state owned entities is part of the answer.*' As the Commercial Court noted, despite the serious issues at stake for the Nigerian public given the sum of damages awarded, the public and press had no '*opportunity to call out what is not right.*'

The Commercial Court concluded by opining that this case is a sad example of '*what some individuals will do for money*' when '*driven by greed and prepared to use corruption; giving no thought to what their enrichment would mean in terms of harm for others.*'

## Comment

While the Commercial Court found that Nigeria was successful on some of its claims of fraud and allowed the challenge of the Award under Section 68(2)(g) of the Arbitration Act, it asked the parties for further submissions in light of the judgment. In a later ruling in December 2023, the Commercial Court denied P&ID's application for leave to appeal, refused to remit the award to the arbitral tribunal for reconsideration and set aside the arbitral awards in whole.

Sir Michael Tugendhat argued, in '*Liberty intact: Human Rights in English Law*', that '*… in part to persuade the public that the decisions the judges have made are the right decisions. They have to be unelected to be independent, but they account to the public by administering justice in public. One purpose of open justice (as Shakespeare put into the mouth of the King in the Winter's Tale) is to put judges on trial. Criticisms of those decisions by the public and in the media would be even more helpful to the public, if the critics reported (or gave hyperlinks to) the reasons that judges give for their decisions…*'.

Although international commercial arbitration, partly by design, is styled to resolve (potentially confidential and commercially sensitive) international commercial disputes in a private forum, this comes with significant downsides and risks. Two key risks are (i) the lack of public and press oversight of the type that compels transparency and flushes out corruption and (ii) whether it is appropriate for state (or state owned) parties to ever take part in a process whereby the public (as direct or indirect stakeholders) are excluded from being entitled to view and comment on proceedings.

In addition, any perception that international arbitration is the domain of a small, and informal, 'club' of insiders that are known to each other through mutual bonds of friendship and cross-referrals has the potential to create distrust and heighten concerns related to the above key risks. Whether those perceptions have any merit is beside the point – when it comes to trust in the judicial/determinative system it is the perception that counts rather than the merits.

As international arbitration reaches its maturity, it must grapple with issues concerning transparency in the administration of justice. How it deals with resolving the issues identified by the Commercial Court, and related issues of transparency, may well define its future.

**Judge:** Robin Knowles J CBE

# Enforcing cross-undertakings in damages

In *ABFA Commodities Trading Ltd v Petraco Oil Company SA* [2024] EWHC 147 (Comm), the Commercial Court allowed a third party to enforce a cross-undertaking in damages after it suffered loss arising from a worldwide freezing order ('**WFO**'). In doing so the Commercial Court shed light on the value of cross-undertakings (when fortified with security) and gave guidance as to the role that the conduct of the parties plays in the court exercising its discretion as to whether the cross-undertaking should be enforced.

## Facts

The claimant, ABFA Commodities Trading Limited (formerly VTB Commodities Trading Limited) ('**ABFA**') was a subsidiary of PJSC VTB Bank between 2017 and 2019. PJSC VTB Bank was a major Russian bank with a significant oil trading business.

Petraco Oil Company SA ('**Petraco**') is a long-established oil trader.

JSC Antipinsky Refinery ('**Antipinsky**') owned and operated Russia's largest stand-alone oil refinery, and was ABFA's original contractual counterparty.

JSC VO MachinoImport ('**MachinoImport**') was a Russian company which worked closely with Antipinksy to sell its oil products and was Petraco's contractual counterparty.

ABFA entered into a series of contracts with Antipinksy in 2018 and 2019 for the purchase of High Sulphur Vacuum gasoil ('**VGO**') - a petroleum product obtained by refining crude oil, from which gasoline and diesel could then be produced.

In 2019, Petraco and MachinoImport entered into a contract for the sale of VGO, in quantities that would be agreed by way of separate addenda. Addendum No 4 was entered into on 16 April 2019, under which MachinoImport agreed to obtain from Antipinsky, and deliver to Petraco, two cargos of c. 30,000 mt VGO in May/June 2019 ('**Addendum No 4**').

It was ABFA's view that the VGO being delivered to Petraco pursuant to Addendum No 4 was rightfully due to them under their contract with Antipinsky, and that by providing it to Petraco, it was being double sold. ABFA therefore commenced arbitral proceedings under LCIA Rules in April 2019, and in parallel sought an injunction against Antipinsky, to prevent Antipinsky from supplying Petraco with the VGO (the '**Disputed VGO**').

ABFA alleged that instead of delivering the pre-paid shipments of VGO, Antipinsky double sold them to Petraco. On 29 April 2019, the Commercial Court granted a WFO and a mandatory injunction requiring Antipinsky to deliver the Disputed VGO to ABFA ('**Cargo Injunction**'). See further discussion of this decision by the Commercial Court in CMS' Annual Review of developments in English oil and gas law (2020 edition), page 69.

As part of the WFO, ABFA provided a cross-undertaking in damages as a condition for obtaining the relevant relief. ABFA were also required by the Commercial Court to fortify the cross-undertaking by paying a sum equivalent to the value of the Disputed VGO, plus a sum for costs, into the Court (the '**Undertaking**').

In May 2019, Petraco applied to intervene in the proceedings, arguing that it was entitled to the delivery of the Disputed VGO. Petraco then brought proceedings to enforce the cross-undertaking in damages given by ABFA, on the basis that the injunctions should not have been granted and had caused Petraco loss.

ABFA in turn, brought a Part 20 claim against Petraco's claim in relation to the Undertaking. ABFA sought damages under Russian law in relation to the Disputed VGO and other cargoes. ABFA argued that under Russian law, Petraco would not have acquired title to the cargo and/or that Petraco was liable to ABFA for its conduct in relation to this and two other cargoes.

ABFA further claimed that Petraco's behaviour at the time of entering into the contracts with MachinoImport and the manner in which it had pursued the litigation amounted to '*unclean hands*', such that the Court should refuse to enforce the undertaking.

In December 2019, Antipinsky was declared insolvent and was not actively involved in the proceedings. Sanctions imposed on ABFA following the Russian invasion of Ukraine also resulted in an earlier adjournment of the trial.

Following the initial decision to grant the injunctions in 2019, there have been various other decisions taken by both the arbitral tribunal and the Commercial Court. In 2020, the injunction against Antipinsky was set aside and the WFO was varied to allow Antipinksy to deliver VGO to third parties.

## Decision

On the substance of the dispute, which was governed by Russian law, the Commercial Court found mostly in favour of Petraco. In those circumstances, the issue arose as to whether Petraco was entitled to enforce the Undertaking.

AFBA argued that the Undertaking should not be enforced due to Petraco's bad faith in commercial dealings and untruthful statements when entering into the relevant contracts and during the conduct of the litigation.

The Commercial Court stated that case law offers the following guidance as to the exercise of the Court's discretion whether or not to enforce an undertaking in damages:

— Where it is determined that the injunction should not have been granted, the Court is 'likely' to enforce the undertaking (*Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545, 1551 (Neill LJ), and the undertaking will be ordinarily be enforced, '*save for special circumstances*' (ibid, 1556 (Peter Gibson LJ)). That last expression appears to have originated in the judgment of James LJ in *Graham v Campbell* (1878) 7 Ch D 490, 494. There are stronger formulations – for example in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [42], Neuberger LJ observed that if the injunction should not have been granted, the undertaking will be enforced '*virtually as of right*'.

— It has been suggested that where the respondent's conduct is relied upon as a reason not to enforce the undertaking, '*[t]here must be … a link between the defendant's conduct and the obtaining or continuing of the injunction or the enforcement of the undertaking. Outrageous or dishonest conduct in itself and not so linked will not suffice*' (*Eliades v Lewis* (No 9) [2005] EWHC 2966 (QB), [29]). In that case (in which a freezing order had been wrongly obtained), it was held that the defendant's dishonest behaviour during foreign proceedings which led to the judgment the claimant was seeking to enforce, and in the injunction proceedings themselves, satisfied this test, '*in that it was designed to assist in the discharge of the injunction and to put forward a false level of loss to arise out of it*' ([124]).

— In *Universal Thermo Sensors Limited v Hibben* [1992] 1 WLR 840, 857, a case in which an injunction had been granted to protect the claimant's confidential information which had been stolen by departing employees to set up a rival business, but the injunction had been granted in over-wide terms which had the effect of destroying the defendants' business, the Court enforced the undertaking even though the defendants' conduct was '*outrageous and dishonest*' and their evidence to the Court had not been frank, holding that it was not part of the Court's function when determining whether or not to enforce the undertaking to punish the respondent.

— In *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [50], the Court of Appeal held that it was open to the judge to refuse to enforce the undertaking where the injunction had prevented the respondents doing what they were not entitled to do, the respondents had brought the interlocutory injunction on themselves by their unreasonable and high-handed conduct, and the respondents' position in relation to their rights was very different at the time the interlocutory injunction was obtained when compared with the time that the Court came to consider whether to grant a perpetual injunction at trial.

— At least as to the measure of recovery, that '*the Court should act as nearly as may be on fixed rules, or by analogy with fixed rules*' (*Smith v Day* (1882) 2 Ch D 421, 427-28, Brett LJ).

Finally, the Commercial Court noted that if the enforcement of an undertaking in damages is regarded as a form of discretionary equitable relief, it is a form which arises in a context in which there is no right to damages at law to fall back on where that relief is refused. As the editors of Snell's Equity (34th), observe at [5-011] of the 'clean hands' maxim:

'*In considering the question of whether denying a remedy would be disproportionate, it may be important in the equitable context to distinguish between cases where denying the requested remedy would leave B with no protection and may give another party a windfall (as may be the case where B is attempting to assert a beneficial interest under a trust) and cases where B may instead turn to a different remedy for protection if the equitable remedy is denied (as may be the case where, for example, specific performance is denied but a money claim may still be available)*'

Further, the Commercial Court noted that '*(t)he enjoyment of legal proprietary or contractual rights is not generally denied merely because a party has acted in a way deserving of moral censure in relation to those rights*' and distinguished general moral culpability from acting unconscionably.

The Commercial Court accept that the manner in which Petraco presented their case, and the evidence the key individuals gave on its behalf had a sufficient connection with the application to enforce the Undertaking that the court was entitled to have regard to it when determining whether or not to enforce the Undertaking. In that context, the Commercial Court decided that Petraco should be entitled to enforce the undertaking in damages in respect of part of its case – but not other elements.

In deciding that the Undertaking should be enforced, in respect of the Disputed VGO, the Commercial Court considered that the effect of its findings is that, but for the Cargo Injunction, Petraco would have acquired title to the Disputed VGO. Were the Court to refuse to enforce the Undertaking at all, the effect would be as follows:

— Petraco would realise none of the value of the Disputed VGO to which it was contractually entitled, and of which it would, but for the Court's order, have become the owner.

— ABFA would (at least on its case) be entitled to the sum in court which represents the Disputed VGO, and thereby be placed in the same position as if it had obtained delivery of the Disputed VGO, even though the Cargo Injunction was discharged because it was held to amount to an order of specific performance, to which ABFA was not entitled.

The first of those consequences comes very close to the '*very strong thing*' Lord Hope referred to in *Fisher v Brooker* [2009] 1 WLR 1764 ([224]), because it is only the granting of an injunction which it has been held should not have been granted which means that Petraco does not have a proprietary claim to the proceeds of the Disputed VGO. The second would have the effect of ABFA securing a substantial windfall.

While the Commercial Court admits that there might be circumstances which are sufficiently extreme to justify those outcomes, they were not present in this case. The Commercial Court would therefore enforce the Undertaking so far as concerns:

— The sum of USD 25,050,600 (the value of the Disputed VGO less the outstanding amount of the price).

— The profit which Petraco would have made on the Disputed VGO.

However, no such issues arose in relation to Petraco's claims for demurrage or the amounts paid in settlement of its liability for failure to load. In those circumstances, the Commercial Court concluded that it should exercise its discretion not to enforce the Undertaking in respect of these claims.

## Comment

In the context of international oil and gas transactions, where injunctions are often sought (and cross-undertakings given in damages), the approach of the Commercial Court highlights the value of such cross-undertakings. In practice, this means that whilst the injunction may have a temporal benefit to the applicant, should the applicant lose at trial, English law will usually ensure that the applicant (in receipt of the injunctions benefits) is not placed in an advantageous position by virtue of an injunction protecting a state of affairs that the Court later decides was legally incorrect. This means that if it has gained possession of property (such as oil), when it is not entitled to that property, the cross-undertaking will be enforced against it. In turn, if the cross-undertaking has been fortified with security – it will give the successful respondent access to that security to satisfy the damage that it has suffered.

That being said, the Commercial Court's discretion in enforcing an undertaking is not limited by an '*all or nothing*' approach and even though '*the enjoyment of legal proprietary or contractual rights is not generally denied merely because a party has acted in a way deserving of moral censure*', the Commercial Court has the discretion to reject certain heads of loss due to the conduct of a party.

**Judge:** Foxton J

# Sometimes Winning Does Not Pay (Fully): Part 36 Cost Consequences of Bad Conduct

In *ABFA Commodities Trading Ltd v Petraco Oil Company SA (Re Consequential Matters)* [2024] EWHC 706 (Comm), a consequential hearing forming part of a series of hearings regarding this dispute, the Commercial Court considered the consequences of Part 36 offers where the successful party of the proceedings is found to have been engaging in bad conduct prior to, and during, the litigation.

## Facts

The claimant, ABFA Commodities Trading Limited (formerly VTB Commodities Trading Limited) ('**ABFA**') was a subsidiary of PJSC VTB Bank between 2017 and 2019. PJSC VTB Bank was a major Russian bank with a significant oil trading business.

The third-party intervener, Petraco Oil Company SA ('**Petraco**') is a long-established oil trader.

JSC Antipinsky Refinery ('**Antipinsky**'), owned and operated Russia's largest stand-alone oil refinery, and was ABFA's original contractual counterparty.

As explained in more detail in the previous case in this Annual Review (*ABFA Commodities Trading Ltd v Petraco Oil Company SA* [2024] EWHC 147 (Comm)), ABFA entered into a series of contracts with Antipinksy for the purchase of High Sulphur Vacuum gasoil ('**VGO**') - a petroleum product obtained by refining crude oil, from which gasoline and diesel could then be produced.

However, it was ABFA's view that the VGO which was due to them was being double sold to Petraco (the '**Disputed VGO**'). Therefore, in 2019, ABFA commenced arbitral proceedings against Antipinsky and in parallel sought an injunction to prevent Antipinsky from supplying Petraco with the Disputed VGO (which was granted, subject to a cross-undertaking in damages (the '**Undertaking**'). Petraco successfully intervened in the injunction proceedings and brought its own proceedings against ABFA to enforce the Undertaking.

After protracted proceedings in the arbitral tribunal and the Commercial Court, in January 2024, the Commercial Court enforced the Undertaking in relation to the Disputed VGO in Petraco's favour. However, the Commercial Court found that it had the discretion to limit the equitable relief to the value of the Disputed VGO and the loss of profit thereof and nothing more. This was due to Petraco's conduct in the proceedings.

At the subsequent consequential hearing, the issue of costs arose. Specifically concerning the impact of Petraco beating a Part 36 Offer to settle.

## Decision

Having obtained a judgment in its favour of USD 27,034,184, Petraco had beaten a Part 36 Offer it had made to ABFA for USD 24m.

The law was common ground:

— CPR Part 36.17 allows for the court to make enhanced awards of costs where a party beats a Part 36 offer to settle that it has made '*unless it considers it unjust to do so.*'



- In considering whether it would be unjust, the court must take into account all the circumstances of the case including:
  - the terms of any Part 36 offer;
  - the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
  - the information available to the parties at the time when the Part 36 offer was made;
  - the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
  - whether the offer was a genuine attempt to settle the proceedings.
- The effect of CPR 36 is that the court does not have an unfettered discretion to depart from the stipulated consequences of failing to beat the Part 36 offer, and the burden on a party who has failed to beat the Part 36 offer to show that it would be unjust for the stipulated consequences to follow is a '*formidable obstacle*' to the obtaining of a different order.
- The factors identified by Part 36 that the court must take into account are not exhaustive, and the court can have regard to all of the circumstances of the case (*Adrian Smith v Trafford Housing Trust* [2012] EWHC 3320, [13] and *Lilleyman v Lilleyman* (No 2) [2012] EWHC 1056 (Ch), [16]).

The Commercial Court considered all the circumstances in the case, and found that the discount offered by Petraco sufficiently demonstrated a genuine attempt to settle.

However, the Commercial Court determined that Petraco's conduct had prolonged the case and caused additional legal costs. The Commercial Court therefore awarded Petraco 40% of its costs on an indemnity basis to reflect the stage at which Petraco's poor conduct had started, balanced against the finding that Petraco is the successful party.

Costs prior to the Part 36 offer were also not ordered on an indemnity basis, as ABFA's conduct was not '*out of the norm*' but '*an understandable response to commercial difficulties which Petraco had played some part in creating.*'

## Comment

Part 36 offers are an important element of the litigation process in England and Wales, encouraging parties to settle and creating cost consequences of not accepting an offer that is later not bettered in a court judgment.

Although Part 36 is sometimes expressed to be a complete code, the Commercial Court clarified in this case that the factors identified by Part 36 that the court must take into account are not exhaustive. Further, those factors include broader issues of conduct – specifically if they might be said to prolong the case.

As such, parties should be aware that in considering costs to be awarded the Commercial Court will consider a wide range of factors, including the usual process under Part 36 (taking into account the conduct of the parties).

The judgment is a useful reminder that being the winning party is not a be all and end all in terms of costs if that party has engaged in bad conduct throughout the commercial relationship and during the litigation.

**Judge:** Foxton J

# Chapter 7

# Protestor Action

The risks associated with protestor action remain prevalent in the industry. In the context of high-risk working environments, where protestor action might give rise to significant dangers, it may be necessary to seek the court's assistance. The past twelve months have seen the courts hand down important guidance on when injunctions will be granted and renewed against persons unknown:

— In *Wolverhampton City Council & Ors v London Gypsies and Travellers & Ors* [2023] UKSC 47, the Supreme Court decided that the Courts do have the jurisdiction and power to grant final injunctions against 'newcomers' (as persons unknown).

— In *High Speed Two (HS2) Ltd & The Secretary of State for Transport v Persons Unknown* [2024] EWHC 1277 (KB), the High Court gave guidance on renewing existing interim injunctions.

# Newcomer Injunctions: New Supreme Court Decision

In *Wolverhampton City Council & Ors v London Gypsies and Travellers & Ors* [2023] UKSC 47, the Supreme Court considered the scope of its powers and jurisdiction to grant final injunctions against so called 'newcomers' ('persons unknown') in relation to areas as diverse as environmental protests, breaches of intellectual property rights and unlawful activities on social media. In the context of current protestor action in the energy sphere, the decision will be relevant for many energy companies.

## Facts

Between 2015 and 2020, several local authorities, in an effort to prevent unauthorised camping on their lands, secured injunctions against 'persons unknown'. These injunctions were targeted at Gypsies and Travellers who had not yet camped or indicated an intention to camp on the sites in question. The injunctions were granted proactively, without the presence or notification of the affected groups, as the individuals could not be identified in advance.

In mid-2020, as existing injunctions were nearing expiration, local authorities sought to extend or modify them. This led to a court hearing where the need to reassess all 'newcomer injunctions' was recognised.

## High Court Decision

The High Court determined that it lacked the authority to issue such broad injunctions against 'persons unknown' on a final basis. It decided that interim injunctions could be granted against persons unknown, but that final injunctions could be granted only against parties who had been identified and had an opportunity to contest the order sought.

## Court of Appeal Decision

The local authorities subsequently appealed.

The Court of Appeal decided that the High Court was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land.

## Supreme Court Decision

On appeal to the Supreme Court, a key issue was whether it was wrong in principle and/or open to the court for it to exercise its statutory power under section 37 of the Senior Courts Act 1981 so as to grant an injunction which will bind 'newcomers' (persons who were not parties to the claim when the injunction was granted) other than on an interim basis or for the protection of human rights.

Having considered the authorities at length, and noting that the Supreme Court is not bound by existing precedent, the Supreme Court decided that the court did have the jurisdiction and power to grant final injunctions against 'newcomers' (as persons unknown). In this respect, the Supreme Court decided that the

jurisdiction to grant injunctions and the principles regulating their grant lay in equity (confirmed and restated by section 37 of the Senior Courts Act 1981). It is those equitable principles that tell the court what is just and convenient in any particular case. In this respect:

— The basic general principle by reference to which equity provides a discretionary remedy is that it intervenes to put right defects or inadequacies in the common law. The deep-rooted trigger for the intervention of equity is where it perceives that available common law remedies are inadequate to protect or enforce the claimant's rights.

— The second relevant general equitable principle is that equity looks to the substance rather than the form. This was relevant in considering the relevance of a distinction between interim and final injunctions.

— The third general equitable principle is equity's essential flexibility. An injunction is always discretionary, but its precise form, and the terms and conditions which may be attached to it are also highly flexible.

— Fourthly, there is no supposed limiting rule or principle apart from justice and convenience which equity has regarded as sacrosanct over time. The Supreme Court considered this relevant in relation to debates on jurisdiction or power to make final orders against persons not served.

It should not be supposed that all relevant general equitable principles favour the granting of injunctions against 'newcomers'.

These considerations led the Supreme Court to the conclusion that, although the attempts thus far by the courts to justify them are in many respects unsatisfactory, there is no immoveable obstacle in the way of granting injunctions against 'newcomer' Travellers, on an essentially without notice basis, regardless of whether in form interim or final, either in terms of jurisdiction or principle.

However, this by no means leads straight to the conclusion that they ought to be granted, either generally or on the facts of any particular case. They are only likely to be justified as a novel exercise of an equitable discretionary power if:

— There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries.

— There is procedural protection for the rights (including Convention rights) of the affected newcomers, sufficient to overcome the strong prima facie objection of subjecting them to a without notice injunction otherwise than as an emergency measure to hold the ring. This will need to include an obligation to take all reasonable steps to draw the application and any order made to the attention of all those likely to be affected by and the most generous provision for liberty (i.e. permission) to apply to have the injunction varied or set aside, and on terms that the grant of the injunction in the meantime does not foreclose any objection of law, practice, justice or convenience which the newcomer so applying might wish to raise.

— Applicant local authorities can be seen and trusted to comply with the most stringent form of disclosure duty on making an application, so as both to research for and then present to the court everything that might have been said by the targeted newcomers against the grant of injunctive relief.

— The injunctions are constrained by both territorial and temporal limitations so as to ensure, as far as practicable, that they neither outflank nor outlast the compelling circumstances relied upon.

— It is, on the particular facts, just and convenient that such an injunction be granted. It might well not, for example, be just to grant an injunction restraining Travellers from using some sites as short-term transit camps if the applicant local authority has failed to exercise its power or, as the case may be, discharge its duty to provide authorised sites for that purpose within its boundaries.

## Comment

While this case is not directly related to the energy or oil and gas sectors, the Supreme Court expressly recognised that the issues raised have a wider significance. The availability of injunctions against newcomers has become an increasingly important issue in many contexts, including environmental and other protests. The issue is liable to arise whenever there is a potential conflict between the maintenance of private or public rights and the future behaviour of individuals who cannot be identified in advance. Recent years have seen a marked increase in the incidence of applications for injunctions of this kind, especially in the energy sector.

The decision of the Supreme Court will clarify the landscape for seeking injunctions against 'persons unknown' in respect of issues such as trespass. Prior to the Supreme Court decision, it was accepted law and practice that the courts would grant interim injunctions. The issue then arose as to whether there should be a 'trial' and a final injunction sought and granted. In turn, that raised the issue of whether the court had the power to grant final injunctions against 'persons unknown' (potentially resulting in years of proceedings updating and renewing interim injunctions, with no final trial being set down or occurring).

The Supreme Court decision makes clear that the courts do have the power and the jurisdiction to grant final injunctions against 'persons unknown' – dispensing with the 'necessary fiction' of updating and renewing interim injunctions with no real prospect of a trial.

However, the Supreme Court has also laid down guidelines that should inform the court in relation to whether to grant, and the scope, of any interim or final injunction. These include (amongst other things) the need for:

— territorial and temporal limits on such injunctions; and

— the applicant to ensure all relevant facts are disclosed to the court.

The decision of the Supreme Court will doubtless be of assistance in dealing with applications for injunctions against 'persons unknown' more efficiently. In that respect, they will be welcomed by property owners (in the industry and beyond). However, the Supreme Court has stressed the need to ensure that it is just and convenient to grant any such injunctions – and laid down safeguards to protect those that may be impacted by such injunctions.

**High Court Judge:** Nicklin J

**Court of Appeal Judges:** Nicklin J
High Court Judges: Nicklin J

**Supreme Court Judges:** Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Briggs, Lord Kitchin

# Court scales back protest injunction

In *High Speed Two (HS2) Ltd & The Secretary of State for Transport v Persons Unknown* [2024] EWHC 1277 (KB), the High Court has extended, in time if not in geographical spread, an injunction order to protect the HS2 project from unlawful interference by anti-HS2 activists and other trespassers. The decision is significant in two respects: (i) it addresses the question of how claims of this type ought to address changing circumstances; and (ii) it considers the question of whether these kinds of proceedings ought to continue on an interim basis, or ought to be brought to a final determination. Although this is not an oil and gas case, it will be relevant to companies that are subject to potential protestor action.

## Facts

The order, which covers all HS2 land for phase 1 of the project, was first granted in 2018 and has been renewed several times since then. The claimants, HS2 Ltd and the Secretary of State for Transport, argued that the order should be renewed again on the same interim basis as before, claiming it was necessary and effective in reducing the costs and delays caused by the defendants' actions.

The defendants included any persons unknown who entered or remained on HS2 land without consent, obstructed access to HS2 land, or damaged HS2 land perimeter security, as well as 61 named individuals who were involved in anti-HS2 campaigns. Only one of the named defendants opposed the claimants' application for an extension of the order. He contended that the claimants should proceed to a final hearing, that the claimants had failed to make the High Court aware (as they were obliged to) of the change in circumstances caused by the Government cancelling phase 2 of the HS2 project, and that he wished to be released from the claim.

## Decision

In light of the arguments made by the named defendant and having reviewed the guidance set down by the Supreme Court in *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47 (which clarified the law on injunctions against newcomer travellers), the High Court significantly reduced the geographical scope of the injunction to reflect the revised (reduced) scope of the HS2 project. The High Court was of the view that the government announcement that the phase 2 section would not be built removed protesters' incentive to target it. New criminal offences also existed to deter disruption by protest of any nature in relation to nationally significant infrastructure such as this.

However, the injunction was renewed for a further year for the London-Birmingham route, where construction continues. The High Court found that a real continued risk of protest activity, and evidence to support the belief that the injunction and associated criminal sanctions presented a significant deterrent, justified continuation of the precautionary relief there.

## Comment

The ruling highlights how changed circumstances can lead courts to reassess the justification for injunctions against persons unknown in these instances and again reiterates the importance of taking steps, in a timely manner, to comply with the duty of full and frank disclosure by updating the court where such changes occur.

The judgment provides useful guidance on adapting persons unknown orders to project changes. The claimants' four-month delay in notifying the High Court of the phase 2 cancellation was criticised, although not enough to discharge the entire injunction which was otherwise working as intended.

The ruling also resists calls to force claimants to pursue a final order imminently, noting protest injunctions operate differently than typical interim relief 'holding the ring' pending trial. Most activists did not actively defend and the real mischief was the ongoing need to guard against persons unknown, not resolve disputes with a handful of named defendants where the proceedings are in fact '*more a form of enforcement of undisputed rights than a form of dispute resolution*'.

The decision shows the High Court's pragmatism in balancing these two opposing rights (the right to protest and the right to carry out a lawful development) by carefully crafting injunctions sufficiently flexibly to protect active infrastructure works from disruption, while keeping orders under regular review.

**High Court Judge:** Ritchie J

# Chapter 8

# Climate Change and Judicial Review

In the past twelve months, there have been numerous high-profile claims brought by groups campaigning against the continued production and use of fossil fuels. Some of these were rejected in recognition of the role of expert regulators and ministerial assessments. However, unlike past years, there were significant challenges which were successful, with the ECtHR recognising an obligation on States to protect individuals from the harmful effects of climate change and the UK government once again being ordered to review its carbon budget plans.

- In *R (on the application of Finch on behalf of Weald Action Group) (Appellant) v Surrey County Council and others* [2024] UKSC 20, the Supreme Court handed down its much-awaited decision, ruling that scope 3 emissions do need to be included in an Environmental Impact Assessment.
- In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (application no. 53600/20), the European Court of Human Rights decided that Article 8 required States to protect individuals from harmful effects of climate change.
- In *R (on the application of Greenpeace Limited) v Secretary of State for Energy Security and Net Zero, Oil and Gas Authority* [2023] EWHC 2608 (Admin), the High Court dismissed Greenpeace and Uplift's judicial review challenge against the North Sea Transition Authority's 33rd Offshore Oil and Gas Licensing Round, as it was held that the Government had not failed to take into account the environmental effects of consuming the oil and gas to be extracted in the licensing round.
- In *Friends of the Earth & Ors v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin) (03 May 2024), the High Court has once again rejected the UK Government's plan to achieve the carbon budgets for the periods between 2023 and 2037 as unlawful.

# Supreme Court decision on 'scope 3' emissions

The UK Supreme Court has handed down its much-awaited decision in *R (on the application of Finch on behalf of Weald Action Group) (Appellant) v Surrey County Council and others (Respondent)* ('**Finch**'). The case concerned a challenge to a development consent for an onshore oil and gas development on the basis that the relevant environmental impact assessment ('**EIA**') did not consider indirect (commonly referred to as 'scope 3' or 'downstream') emissions from the combustion of eventually refined hydrocarbons produced by the development. The Supreme Court's majority decision – that an assessment of those 'scope 3' or 'downstream' emissions does need to be included in an EIA – will likely have a significant impact on the approval of offshore as well as onshore oil and gas projects, and potentially far wider implications for many major development projects.

## Facts

In December 2018, Horse Hill Developments Ltd ('**HHDL**') sought planning permission from Surrey County Council (the '**Council**') to retain and expand an existing onshore oil well site and to drill for new wells – which would enable the production of hydrocarbons from six wells over 25 years. The total amount of crude oil expected to be extracted in that 25-year period was assessed at approximately 3.3 million tonnes, together with a quantity of natural gas which was intended to provide power to the development. The crude oil would be taken to refineries for processing, and once refined could be used by consumers, as, for example, fuel for motor vehicles.

The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 571) (the '**EIA Regulations**') (which implemented the European Union Directive 92/11/EU, as amended by Directive 2014/52/EU (together, the '**EIA Directive**')) required that an EIA be carried out before planning permission could be given. This includes a requirement to prepare an environmental statement ('**ES**') regarding the likely significant effects of the development. The ES produced by HHDL considered the environmental impacts of emissions from the construction, production, and decommissioning of the well site itself, but did not consider the 'downstream' emissions arising from the end use of the oil to be produced from the site.

Following the EIA process, the Council granted planning permission for the development in September 2019.

Sarah Finch, who lives six miles from the development site and has objected to drilling at the site since 2013, applied for judicial review of the Council's decision (for herself and on behalf of Weald Action Group).

The core issue raised in the judicial review was whether a developer's obligation under the EIA Regulations to prepare an ES describing the likely significant effects of a development (both direct and indirect), extended to including an assessment of the 'scope 3' or 'downstream' greenhouse gas emissions resulting from the use of the end product originating from the development i.e. in this case, the ultimate end use of the oil produced by the development.

The claimant argued that, on a proper interpretation of the EIA Regulations, an ES should include quantification of the greenhouse gas emissions arising from the combustion of the refined oil and not merely emissions arising from the project site itself.

The Council, meanwhile, argued that this was too wide an interpretation of the EIA Regulations, which could not have been intended to include the difficult and uncertain exercise of assessing such end emissions – which may occur outside the UK, far removed from the project site in respect of which planning permission was sought.

The appellant's claim was unsuccessful before both the High Court and the Court of Appeal, albeit for different reasons.

## High Court Decision

Holgate J's starting-point was the wording of the EIA Regulations, noting that applying a broad purposive approach to interpretation does not permit the clearly expressed wording of the legislation to be disregarded. As a matter of law, the High Court determined that 'downstream' emissions were incapable of falling within the scope of the EIA. The '*environmental effects of consumers using (in locations which are unknown and unrelated to the development site) an end product which will be made in a separate facility from materials to be supplied from the development being assessed*' were not '*environmental effects of the project*' within the meaning of the EIA Regulations.

## Court of Appeal Decision

On appeal, the Court of Appeal departed from the approach adopted by the High Court. The Court of Appeal decided that the appeal '*turned not on a hard-edged question of law*' (i.e. whether the EIA Regulations required 'downstream' emissions to be included or not) but on the lawfulness or otherwise of the Council's decision (i.e. whether, as a matter of fact and judgement, the Council's decision that 'downstream' emissions need not be included was irrational). The Court of Appeal considered that the Council's decision had not been irrational, such that its decision to grant planning permission based on the ES was lawful.

## Supreme Court Decision

The main issue for the Supreme Court to determine was whether, under the EIA Directive and EIA Regulations, it was unlawful for the Council not to require the ES for the development to include an assessment of the impacts of 'scope 3' or 'downstream' greenhouse gas emissions resulting from the end use of the refined crude oil as '*effects of the project*' on climate which the Council needed to assess as part of the EIA.

The claimant's position was that, on the proper interpretation of the legislation, the '*effects of the project*' included such emissions. Two of the defendants – the Council and the Secretary of State – supported the Court of Appeal's approach, that the Council was entitled to decide, as a matter of judgement, that the emissions were not '*effects of the project*' such that they did not need to be concluded. HHDL, meanwhile, supported the original analysis of Holgate J in the High Court, that such emissions were not '*effects of the project*' as a matter of law.

The Supreme Court heard the appeal in June 2023, which was called before five Supreme Court justices: Lord Kitchin, Lord Sales, Lord Leggatt, Lady Rose, and Lord Richards.

The Supreme Court decided, by a majority of 3-2 (Lord Sales and Lord Richards dissenting), to allow the appeal. This means the Council's decision was unlawful and must be quashed.

The Supreme Court was unanimous in deciding that the proper question to be answered was a matter of law. What amounted to '*effects of the project*' was a question of proper interpretation of the EIA Regulations, and was not a matter of judgement to be left to individual authorities. The effect of the Court of Appeal's reasoning was that different authorities could reach different views as to whether 'downstream' emissions were required to be included or not.

Where the Supreme Court disagreed was as to the answer to that question of law. The majority considered '*the effects of the project*' as a matter of causation: was there a causal connection between the extraction of oil and its eventual combustion, such that this would be considered to be an '*effect of the project*'? The answer to that question was 'yes'. The dissenting judges, meanwhile, agreed with the original reasoning of Holgate J.

***Majority View***

To consider the '*effects of a project*', the majority considered it '*obvious*' that the question was one of causation: this is because '*an effect is the obverse of a cause*'.

In this regard, it was significant that the parties all agreed that it was not merely likely, but inevitable, that the oil produced at the site would be refined, combusted, and result in greenhouse gas emissions. The Supreme Court considered that this brought about '*the strongest form of causal connection*', such that downstream emissions were plainly '*effects of a project*' to extract oil.

The majority also addressed an argument made before the lower courts concerning the impacts of this analysis on other raw materials, for example steel, which may be transformed into other products, for example motor vehicles but also many other uses. If all 'downstream' emissions were considered '*effects of a project*', Holgate J had been concerned that this would render the ES process unworkably difficult because a developer would be required to calculate emissions resulting from all possible 'end uses'. However, the majority considered oil to be a very different type of commodity, which did not fundamentally change (as steel does to a car component) in the process of refinement, and which would always be used for the same end purpose (combustion). Again, it was significant here that the parties had effectively agreed that all oil produced would result in combustion (and not be put to other uses).

Geographic considerations when assessing emissions were also questioned. The Supreme Court held that the Council was incorrect to confine the assessment of emissions to those that occur at the project site. The Supreme Court analysis was that the EIA Directive itself does not impose any geographical limits, and the impact of greenhouse gas emissions that are causally connected to a development does not depend on where the emissions take place – such emissions will still contribute to global warming, and therefore have an environmental effect which requires an assessment.

The argument that national planning policy encourages domestic energy production and so is relevant to the scope of the EIA Directive was also rejected. This consideration would only be towards the decision of the planning authority to grant permission, and not to justify limiting the scope of the environmental assessment prior to the decision to grant permission.

***Dissenting View***

The dissenting opinion of Lord Sales (with which Lord Richards agreed) made the observation that the granting of planning permission for these projects is taken at a local or regional level, whereas the issues surrounding downstream greenhouse gas emissions are taken at a national level. Therefore, Lord Sales argued that it would be constitutionally inappropriate for local authorities to make decisions based on their own views on downstream emissions.

The EIA Directive itself also makes clear that the entirety of downstream emissions does not count as indirect effects of a project and that the effects still need to be those '*of the project*' – which does not immediately read as including downstream emissions.

## Comment

This is a significant case, particularly for the oil and gas industry, but also more widely given the focus on the proper interpretation of the EIA Directive. It is notable that the Supreme Court's concern appears to have been directed in large part towards ensuring that

the appropriate process was followed, and that full information was available to the public and decision makers in assessing whether any particular project should be permitted to proceed, commenting that '*You can only care about what you know about.*' However, the Supreme Court acknowledges at the start of its written decision that '*The legislation does not prevent the competent authority from giving development consent for projects which will cause significant harm to the environment. But it aims to ensure that, if such consent is given, it is given with full knowledge of the environmental cost.*'

The EIA Regulations do not prevent a relevant authority from granting permission for a development that is likely to cause significant harm to the environment. The EIA Regulations do however require the authority to reach a reasoned conclusion on the environmental impact and to take this into account in making its decision.

The judgment highlights that the consideration of downstream greenhouse gas emissions is to form part of the assessment in the EIA process and will need to be carefully considered by companies who are or will be applying for planning permission in relation to developments and projects for hydrocarbon extraction. It is likely to have a wider impact, notwithstanding the distinction drawn by the Supreme Court between oil and gas extraction on the one hand and manufacturing processes such as steel on the other.

Finally, it will be interesting to see the Government's response. The Government consulted last year on proposals to replace environmental impact assessments with a more streamlined system which, once adopted, will require environmental outcomes reports ('**EOR**') to be produced. We will have to wait to see to what extent the principles in this case are adopted within the new EOR system if introduced.

**High Court Judge:** Holgate J

**Court of Appeal Judges:** Lewison LJ, Sir Keith Lindbolm and Moylan LJ

**Supreme Court Judges:** Lord Kitchen, Lord Sales, Lord Leggatt, Lady Rose and Lord Richards

# Energy and climate change: The most significant climate change litigation decision yet?

In *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (application no. 53600/20), the European Court of Human Rights (the '**ECtHR**') issued arguably the most impactful and far-reaching ruling on climate change by any European court. The decision has the potential to impact individuals, businesses, and governments in a radical way by casting the law (and courts) rather than governments (and parliaments) as the ultimate body responsible for deciding whether public authority action and inaction are appropriate in the context of climate change. Furthermore, if NGOs determine that a public authority has not acted appropriately, they now have a basis to intervene.

## Facts

Verein KlimaSeniorinnen Schweiz (i.e. '**the applicant association**') and four of its members (i.e. '**the individual applicants**') applied to the ECtHR alleging that their human rights were being violated by Switzerland's failure to take sufficient action against climate change. The individual applicants consisted of female senior citizens who suffer from health issues exacerbated during heatwaves – one of whom died during the proceedings. The applicant association was a Swiss non-profit organisation, which advocates for climate controls and represents over 2,500 women with an average age of 73.

On 25 November 2016, the applicants requested the Federal Council, the Federal Department of the Environment, Transport, Energy and Communications, Federal Office for the Environment and the Federal Office for Energy in Switzerland to provide legal remedies regarding omissions by the Swiss Confederation vis-à-vis climate protection. The application was dismissed, as were appeals on 25 April 2017, 27 November 2018, and 5 May 2020.

The applicants turned to the ECtHR, lodging their application on 26 November 2020.

The application accused the Swiss Confederation of failing to enact and implement adequate climate change legislation to effectively protect life (Article 2), ensure respect for private and family life (Article 8), and provide proper access to courts (Article 6).

The Chamber to which the application was originally allocated relinquished jurisdiction in favour of the Grand Chamber. The President of the ECtHR decided that '*in the interests of the proper administration of justice*' the case should be assigned to the same composition of the Grand Chamber as the cases *Carême v France* and *Duarte Agostingo and Others v Portugal and 32 Others*, which also concerned the failure of States to take sufficient actions to tackle climate change. The ECtHR handed down judgments in all three cases on 9 April 2024. The cases against France and Portugal were found to be inadmissible.

## Decision

In its decision, the ECtHR enunciated that the task of the judiciary is to ensure the necessary oversight of compliance with legal requirements and nothing more. The ECtHR made a distinction with earlier environmental case-law to take into account the particularities of climate change and various European Convention on Human Rights ('**ECHR**') issues, which may arise in the context of climate change.

***Article 34 - Victim Status***

Each applicant contended that they were a victim within the remit of Article 34.

The ECtHR considered that to be a victim in the context of climate change, an individual must suffer a high intensity of exposure to the adverse effects of climate change or there must be a pressing need to ensure the individual protection of the applicant. It held that the individual applicants failed to fulfil this particularly high criteria.

However, the ECtHR allowed the applicant association to bring the claim, given the shared human concern and need for '*intergenerational burden-sharing*' precipitated by climate change. It was also noted that associations are more able to bear the challenge and cost of climate change litigation than individuals who suffer personally. The ECtHR (drawing on the Aarhus Convention) clarified the test it used to evaluate an association's standing:

*502. The association in question must be:*

— lawfully established in the jurisdiction concerned or have standing to act there;

— able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and

— able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.

The ECtHR also noted that in the context of climate change, an association will not be subject to the requirement to show that the members on behalf of whom it brings the case meet the victim-status requirements as individuals.

***Article 2 - Failing to Protect Life Effectively***
The ECtHR chose not to examine the application in relation to Article 2, noting that the relevant principles are similar to those under Article 8.

***Article 8 - Respect For Private and Family Life***
The ECtHR found that there was a violation of the right for respect for private and family life under Article 8.

It held that '*Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life*'.

As a result, the ECtHR ruled that Switzerland owed positive obligations concerning climate change under Article 8: '*the State's obligation under Article 8 is to do its part to ensure such protection. In this context, the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention rights*'.

The ECtHR held that Switzerland failed to comply with this newly stated positive obligation, as '*critical gaps*' existed in its climate change legislation. Such failures included not quantifying a carbon budget or limitations on greenhouse gas ('**GHG**') emissions and failing to meet its own past GHG emission budgets.

The ECtHR acknowledged that States have a wide discretion to adopt their own legislation and mitigation principles. Switzerland, however, had gone beyond this discretion and failed to implement plans to reach net neutrality in a timely manner. According to the ECtHR, Switzerland had failed '*to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework*'.

***Article 6 - Proper Access to Court***
The applicants further alleged that their right to a fair trial had been breached. Although the Swiss courts had proffered reasoning for dismissing the individual applicants' application (their action was considered an *actio popularis* not appropriate for legal remedy), no such logic was presented for the applicant association.

In not giving a rationale for the dismissal, the ECtHR considered that the Swiss courts had fettered the applicants' right to access a court and Article 6 was violated.

***Articles 41 and 46 – Just Satisfaction and Binding Force and Execution of Judgments***
The applicant association did not submit a claim for damages. Instead, it requested the ECtHR to indicate that '*the State would need to take all suitable measures to allow it to achieve a level of annual emissions compatible with its target of attaining a minimum reduction of 40% in GHG emissions by 2030, and carbon neutrality by 2050*.'

Given the complexity and the nature of the issues raised in the application, the ECtHR found that it could not prescribe specific measures to be implemented by a State to effectively comply with its judgment and that a State would be better placed to assess the specific measures to be taken to comply with the ECHR requirements.

***Dissent***
Judge Tim Eicke of the UK issued a partial dissent, stating that the ECtHR was wrong to extend the meaning of Article 8 in this way and arguing that the adoption of a far narrower approach in line with the ECtHR's previous jurisprudence was a more appropriate remedy.

Judge Eicke highlighted the ECtHR's subsidiary role to the States in relation to questions of social and economic policy, which required the careful weighing up of competing rights and interests. According to Judge Eicke, the new right '*to effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change*', as well as the new corresponding '*primary duty*' imposed on the contracting parties had no basis in Article 8 or any other provision of or protocol to the ECHR.

## Comment

While it remains to be seen how this decision will be implemented, it has the potential to be the most far reaching and controversial climate change decision of any European court. In summary:

- Article 8 has been interpreted to create a new 'right' to '*effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change*'. This could create a positive obligation on States who need to freshly consider whether their legislation and mitigation plans reach this requirement and are compliant with the new standard.
- In this respect, the 46 States that are party to the ECHR must '*adopt, and … effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change*'. Considering the ECtHR's findings, States may consider implementing more rigorous legislation relating to regulation of GHG emissions, along with stricter enforcement mechanisms to ensure compliance.
- Pivotally, the above obligations are relevant not just to emissions created within a State's territory, but also to embedded emissions (i.e. emissions generated by imports into the State). As such, the obligations have the potential to impact a State's foreign policy and laws concerning trade and tariffs. These regulatory changes could lead to potential claims against States by foreign investors if they are implemented in a manner that breaches the State's obligations under relevant bilateral or multilateral investment treaties.
- The concept of a victim under Article 34 has been expanded to include associations, even where that association represents members who would not be able to invoke victim status as individuals. This is the case despite the fact that Article 34 stipulates that an association should be a victim itself. This definition has the potential to vastly increase the pool of possible climate litigants. Furthermore, in granting associations standing in this manner, the ECtHR has created a potential path for *actio popularis* claims, which it professes to seek to curb.
- The decision will impact the 46 member States who are parties to the ECHR, including the EU, the UK, Azerbaijan, Türkiye and Georgia.
- For those in the UK, section 6 of the Human Rights Act 1998 ('**HRA 1998**') means that all public authorities (including the courts) have an obligation to act in a way that is compatible with Article 8. In addition, in considering what Article 8 means, the HRA 1998 requires that a court or tribunal must consider any judgment, decision, declaration or advisory opinion of the ECtHR. Although there is a debate about what this means, the starting point is that domestic courts should follow a clear and constant line of decisions, especially if the decisions emanate from the Grand Chamber. The Climate Change Act 2008 and associated law set out a mechanism for UK carbon budgets to 2050. The devolved nations have additional legislation. The Scottish Government recently announced eliminating its national 2030 GHG reduction target and is considering changing annual targets to five yearly budgets. As a result of the above decision, there will be more scrutiny of whether existing approaches accord with the decision and whether existing approaches are effectively applied.
- The ECtHR's decision garnered mixed reviews. For some, this has the potential to create a radical change in domestic law that may have a serious and wide-ranging impact on all areas of government (including creating positive obligations to act). For others, this is a clear elaboration and application of ECHR principles given the known and increasing risk associated with the present and long-term issues raised by climate change, which are unlikely to lead to any significant changes in the States' policy.
- This decision will doubtless be welcomed by many and criticised by others but could have serious implications for complex polycentric decisions where it may elevate climate change above factors that do not benefit from protection. For example, it may require a government to reduce the import of goods from outside its territory due to carbon footprint (even where those imports assist to alleviate poverty in developing countries with a view to materially enhancing standards of living and fair trade).
- The ECtHR decision may also impact upon other climate change litigation pending before international courts and tribunals. On 29 March 2023, the United Nations General Assembly adopted a resolution requesting an advisory opinion from the International Court of Justice (the "**ICJ**") on the obligations of States regarding climate change. The ICJ was asked to clarify '*what are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations*' and '*what are the legal consequences under these obligations for States?*' Similar requests for advisory opinions in relation to States' climate change obligations are also pending at the International Tribunal for the Law of the Sea and the Inter-American Court of Human Rights. While the ICJ and other tribunals are not bound by the ECtHR decision, it may have a persuasive effect.

As a result of this decision, NGOs and courts will have an enhanced role in reviewing all aspects of government conduct concerning climate change objectives. This is likely to be leveraged strategically by NGOs and create near term opportunities and risks for the private sector as well as significant challenges for governments in requiring consideration of climate change impact across a much wider range of policies than before.

# High Court dismisses judicial review claim against 33rd Offshore Oil and Gas Licensing Round

In *Greenpeace Ltd, R (On the Application Of) v Secretary of State for Energy Security and Net Zero & Anor* [2023] EWHC 2608 (Admin), the High Court dismissed Greenpeace and Uplift's judicial review challenge against the North Sea Transition Authority's (the '**NSTA**') 33rd Offshore Oil and Gas Licensing Round (the '**Licensing Round**').

## Facts

Following the NSTA's launch of the Licensing Round in October 2022, it was reported that several climate campaign groups had each written to the Business Secretary, Grant Shapps, contesting that the Licensing Round was unlawful, and were calling for the decision (taken by his predecessor Jacob Rees-Mogg) to be reversed.

Following this, the claimants (Greenpeace and Uplift) raised separate legal challenges and filed an application at the High Court for judicial review against the decision.

On 25 April 2023, the High Court granted the claimants permission to apply for judicial review based on certain specific grounds, with both claims being heard together so as to avoid repetition.

Last year's Annual Review detailed the initial permission stage (see CMS Annual Review of developments in English oil and gas law (2023 Edition), page 128).

The main issues raised were that the Government:

— failed to take into account the environmental effects of consuming the oil and gas to be extracted in the 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 decision to adopt the climate compatibility checkpoint was also challenged on the basis that it wrongly excluded two tests which it was claimed required to be included: (i) a requirement to consider downstream emissions; and (ii) consideration of the '*global production gap*'.

## High Court Decision

The substantive hearing took place before Mr Justice Holgate on 25 and 26 July 2023. The decision was handed down on 19 October 2023. The challenge was unsuccessful on all aspects.

In particular, the High Court held that:

— The Secretary of State's reasoning in its Offshore Energy Plan (the '**Plan**') and Strategic Environmental Assessment to not assess end use greenhouse gas emissions from other oil and gas licensing rounds was not irrational or in breach of the Environmental Assessment of Plans and Programmes Regulations 2004 (the '**2004 Regulations**'). The Court considered that the Plan sets a framework for licensing oil and gas exploration and production in its specified geographical location. It does not set a framework for decisions on development consents for downstream development or for the use of petroleum products in vehicles, for example. Therefore, the determination that end use greenhouse gas emissions are not '*likely significant effects* ' of the Plan is adequate and that reasoning cannot be deemed to be irrational.

— The Secretary of State did comply with the obligation under the 2004 Regulations to assess the likely significant effects on the environment of reasonable alternatives and compare them with the Plan.

— The High Court considered that several of the assumptions that the Secretary of State had made (which were challenged by the claimants) could be made as a matter of his judgement. The High Court found that the Secretary of State was not irrational in his assessment.

— As to the challenge on the climate compatibility checkpoint, this is a non-statutory agreement, which is non-binding. The High Court was not persuaded from the claimants' arguments that the Secretary of State was under an obligation to provide reasons on the application of the climate compatibility checkpoint. Furthermore, the High Court considered that the Secretary of State had provided adequate reasoning for the exclusion of the tests (referred to above) and that reasoning could not be viewed as unlawful or irrational.

As a result of failing on these issues, the other issues that had been raised also fell away. Greenpeace has indicated that it will appeal the decision.

## Comment

This case follows a number of high-profile judicial review challenges in recent years brought by groups campaigning against the continued production and use of fossil fuels. By and large, these challenges have been unsuccessful.

In its judgment, the High Court relied quite heavily on the Court of Appeal case of *R(Finch) v Surrey County Council* [2022] EWCA Civ 187, which found that there is no general legal principle that the environmental effects of the consumption of an end product resulting from a development must be treated as an indirect effect of that development. The High Court concluded in the present case that it was therefore lawful for the government to exclude the 'scope 3' emissions from the environmental assessment process. However, the Court of Appeal decision in *Finch* was recently overturned by the Supreme Court, which handed down its judgment on 20 June 2024. As discussed further in our article on *Finch* in this year's Annual Review, the Supreme Court decided that an assessment of the 'scope 3' or 'downstream' emissions does need to be included in an environmental impact assessment. This decision will likely have significant implications for the oil and gas industry more generally but might also provoke a reconsideration of past cases which relied on the lower court decisions of *Finch*, such as the present case. It is yet to be seen what the wider impact of the Supreme Court's decision will be.

**Judge:** Holgate J

# Third time lucky? UK Government's emissions reduction plan ruled unlawful again

In *Friends of the Earth & Ors v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin), the High Court once again struck down the UK Government's plan to achieve the carbon budgets for the periods between 2023 and 2037 as unlawful. This marks the second time in less than 2 years that the High Court has determined the plans for achieving legally binding emissions reduction targets to be critically flawed and not in accordance with the Climate Change Act 2008 ('**CCA**').

## Facts

***The CCA and Carbon Budgets***

In 2008, the CCA established (with cross-party support) (i) an independent expert advisor to the government, the Climate Change Committee, (ii) a 2050 reduction target (the net UK carbon account) and (iii) a framework for 5-yearly carbon budgets to 2050. Carbon budgets are required to be set by the Parliament for successive five-year periods, each setting the level of reduction in emissions required during the relevant five-year period to ensure that the UK continues '*on track*' to achieve '*net zero*' in terms of reducing net UK emissions of carbon dioxide and certain other greenhouse gas emissions. The intention behind setting these future looking budgets was that they would be based on the best available scientific evidence, be politically agnostic given the ramifications of climate change and facilitate holistic strategies to achieve the 2050 target. In 2019, the 2050 target was changed from a requirement to achieve an 80 per cent reduction on 1990 levels by 2050 to at least 100 per cent by 2050 on 1990 levels (i.e. '*net zero*'). With the carbon budgets having been set, the Secretary of State is obliged under the CCA to prepare such proposals and policies that they consider will enable these carbon budgets to be met with a view to meeting the 2050 target.

***The First Case***

Friends of the Earth, ClientEarth and the Good Law Project, the campaigning groups which brought the recent action, had previously brought a challenge against the government in 2022 following the unveiling of the government's Net Zero Strategy ('**NZS**').

The High Court ruled that the government had failed to comply with its duties under Sections 13 and 14 of the CCA when it implemented the NZS, in particular regarding the potential shortfall identified in meeting the sixth carbon budget, as the NZS was based on a lack of sufficient information as to its achievability, which meant the public and the Parliament were uninformed and unable to scrutinise its contents.

As a result, the NZS was quashed and the government was ordered to publish a revised, lawful climate strategy. After considerable analysis and information gathering, the revised plan was published in the form of the Carbon Budget Delivery Plan ('**CBDP**').

***The Second (Recent) Case***
When the CBDP was published in March 2023, covering plans to achieve carbon budgets 4, 5 and 6 (i.e. the period until 2037), campaigners quickly raised new legal challenges arguing that the CBDP still failed to meet the necessary requirements. Various challenges were raised and the cases were heard together in the High Court in February 2024.

The campaigners claimed the CBDP remained unrealistic, and downplayed significant risks such as the possibility of many of the emissions-cutting policies it contained underperforming and missing their projected reductions. Without properly analysing and quantifying these delivery risks, the campaigners argued the government had again failed to comply with its legal duties as set out in the CCA.

## Decision

In considering the challenges brought, the High Court considered carefully and in detail the process that had been followed by the relevant officials in the Department for Energy, Security and Net Zero ('**DESNZ**') in gathering the information and evidence and then preparing and advising the Secretary of State on the proposed CBDP. In that process, the High Court recognised that DESNZ had sought to take into account the criticisms that had led to the quashing of the NZS. There was no suggestion that the information presented to the Secretary of State was inaccurate, but rather the focus was on the question of whether a sufficient level of detail was provided to the Secretary of State to enable him to make the proper and appropriate evaluation as to whether the proposed CBDP met the CCA requirements.

***Failure to Consider Sufficient (or Sufficiently Detailed) Information***
The High Court ruled in the claimants' favour on four of the five grounds of challenge. The High Court concluded that the Secretary of State had acted irrationally and unlawfully, because he had proceeded on the mistaken understanding that every single policy proposal in the CBDP would be delivered in full so as to meet the sixth carbon budget. However, that was contradictory to the evidence that there were risks of under-delivery, which the High Court considered were not sufficiently brought to the Secretary of State's attention at the point he made his decision. The High Court also rejected the suggestion that the Secretary of State would have been highly likely to have made the same decision even if he were not proceeding on that mistaken assumption – the High Court could not see how that threshold could be met on the evidence before it.

The High Court considered that even if that were not the case, the information provided to the Secretary of State was also incomplete, resulting in the Secretary of State not being able to properly evaluate which specific proposals were at risk of not being fully delivered and to what extent. Without this information, the Secretary of State could not assess whether under-delivery on some policies would be offset by over-delivery on others. While not necessarily requiring a specific illustrative rating system, the Secretary of State needed to have more granular information about the delivery risks for individual policies than was before him when he made his decision, rather than just the more general narrative about risks and mitigations that was presented to him when he was asked to consider and approve the CBDP.

***Requirement to Consider Contribution to Sustainable Development***

The High Court also considered arguments concerning the requirement under Section 13(3) of the CCA which states: '*The proposals and policies, taken as a whole, must be such as to contribute to sustainable development.*' In particular, the High Court considered whether, in light of the precise terms of this part of the CCA, the contribution to sustainable development should form any part of the Secretary of State's assessment, or whether the Court was required to consider, as a matter of fact, whether the CBDP met this requirement. The High Court concluded that this assessment does form part of the Secretary of State's evaluation process, requiring the Secretary of State to assess with a sufficient degree of certainty that the proposals and policies being considered (i.e. the CBDP) would contribute towards meeting the carbon budgets. While the threshold for that assessment may be different (i.e. to '*contribute*' to achieving the carbon budget, rather than to '*achieve*' the carbon budget, as is required by other parts of the CCA), the use of the term '*must*' in Section 13(3) meant that the Secretary of State had to consider there to be much more than a '*better than evens chance*' of the contribution being met. The Secretary of State had, however, only indicated that this outcome was '*likely*' - that was insufficient so the Secretary of State had also failed to comply with the necessary requirements in this regard.

Ultimately, the High Court determined that the Secretary of State did not have adequate risk information to credibly evaluate if the CBDP could achieve 97% of the stated emissions savings goal for the sixth carbon budget period.

## Comment

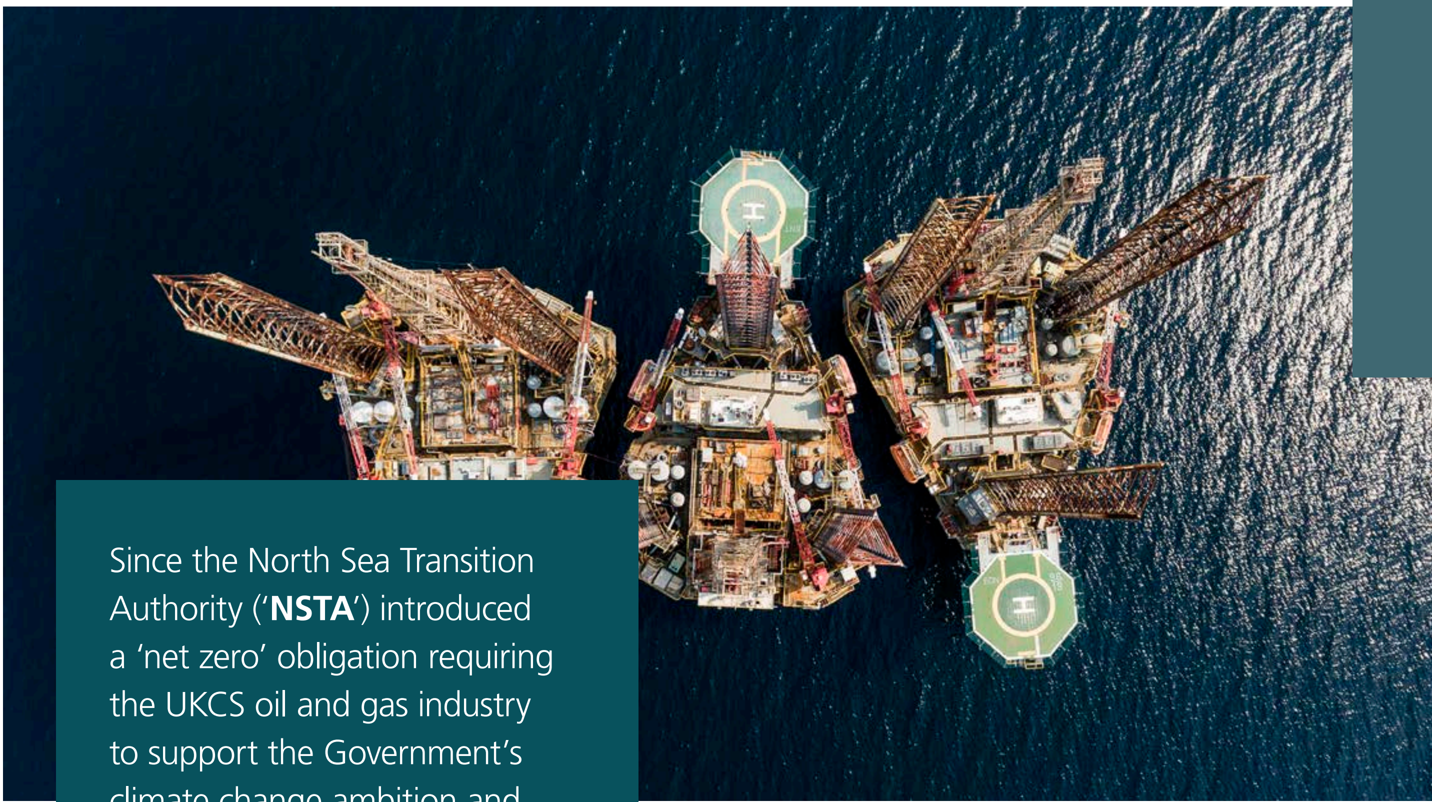
The new Labour government must now develop a third plan that addresses the issues identified by the High Court, ensuring that sufficient and detailed information is provided to the Secretary of State including, importantly, identifying any risks to or potential shortfalls in policy delivery, so as to enable the Secretary of State to take an informed evaluation of whether the proposals meet the requirements of the CCA by setting out the emissions savings up to the sixth carbon budget period that are necessary to meet the 2050 net zero target.

The judgment indicates that the assumptions underlying the previous plans were overly optimistic about full policy implementation. This decision challenges policy makers to ensure robust and realistic analysis is embedded in their emissions reduction planning and implementation. Their efforts to do so as a third attempt at compliance with the CCA will undoubtedly face the same intense scrutiny from campaigners as the first two attempts have met.

**Judge:** Sheldon J

# Chapter 9

# North Sea Transition Authority



Since the North Sea Transition Authority (‘**NSTA**’) introduced a ‘net zero’ obligation requiring the UKCS oil and gas industry to support the Government’s climate change ambition and targets, it has been actively focusing on industry efforts to reduce production emissions while seeking to ensure continued development and production. Over the last twelve months, the NSTA has:

- Implemented regulatory changes and initiatives across the offshore oil and gas sector and in regard to carbon capture and storage (‘**CCS**’) and hydrogen projects;
- launched the first binding Oil and Gas Authority plan (‘**OGA Plan**’), focused on emissions reductions, emphasizing investment, electrification, and reducing flaring and venting by 2030;
- emphasised the need to: improve Environmental, Social, and Governance (‘**ESG**’) reporting standards, and manage decommissioning timelines and costs;
- approved new oil and gas projects to reduce reliance on imported energy, while awarding carbon storage licences and supporting the development of hydrogen infrastructure and introducing licence conditions recognising areas of overlap with windfarms; and
- continued to exercise its sanction powers by imposing fines on oil and gas companies for regulatory breaches to encourage high levels of compliance and to deter future violations.

The North Sea Transition Authority's ('**NSTA**') publication of the Oil and Gas Authority ('**OGA**') Strategy ('**OGA Strategy**') focused the United Kingdom Continental Shelf ('**UKCS**') offshore oil and gas industry's attention on its supporting role in working towards net zero. Since then, that role has been emphasised with new guidance and requirements as the NSTA has continued to seek to use its regulatory approach to accelerate decarbonisation efforts while ensuring domestic energy security and maximising economic production. The NSTA's regulatory role has also begun to expand to include aspects of the developing hydrogen and carbon capture and storage industries. As regards their role in regulating the oil and gas industry, in the last twelve months we have seen:[1]

- The first binding OGA plan setting out the NSTA's expectations on how the industry should work to reduce emissions ('**OGA Plan**').
- A focus on improving environmental, social and governance ('**ESG**') reporting standards and transparency.
- Further oil and gas licences under the 33rd licensing round, in some cases incorporating a 'windfarm clause' to recognise competing interests in some areas.
- New change of control powers for the NSTA in the Energy Act 2023.

## The NSTA's Approach to Energy Transition

***NSTA Overview 2024***

The NSTA's overview for 2024 focussed on its efforts to support the move to net zero such as offshore wind, carbon storage options and the potential of hydrogen, including:

- Work to support delivery of the North Sea Transition deal (the agreement between the oil and gas industry and government to deliver an orderly energy transition).
- Approval of eight oil and gas projects since the start of 2023 to contribute to the UK's domestic energy production. The report considers that this supports energy transition on the basis that producing gas domestically has a quarter of the carbon footprint of imported gas and newer assets have a lower carbon intensity on average than older assets.
- The award of 27 carbon storage licences to support the UK's long-term carbon reduction goals, in respect of which Carbon Capture and Storage ('**CCS**') is seen as an essential component. The NSTA reported that it is collaborating with several other key external bodies and working on various other projects to build a portfolio of carbon storage opportunities.
- Support for hydrogen projects, seen as a key enabler in the energy transition, with the government aiming to produce 10GW of hydrogen by 2030. The NSTA is also responsible for the licensing and consenting of offshore hydrogen pipelines and offshore hydrogen storage.

[1] Information current as of 18 July 2024.



***ESG Reporting Requirements and Best Practices: NSTA Issues Open Letter to Licensees***

The NSTA's emphasis on ESG reporting and disclosure best practice was first reflected in the NSTA's open letter to the industry in March 2022. In a further open letter in February 2024, the NSTA has urged all licensees to improve their ESG reporting to promote trust and demonstrate the UKCS as an attractive investment proposition. The NSTA expects collaboration and transparency in ESG reporting between joint venture partners to ensure that ESG data is shared in a coherent and timely manner (where practicable), in line with the NSTA strategy and the stewardship expectations requirements regarding collaboration.

Feedback from the industry and the NSTA's ESG taskforce had identified various challenges, such as:

- the absence of a clear contractual requirement to report and disclose ESG data;
- poor communication and understanding of the ESG data sharing requirements;
- poor quality and completeness of shared data; and
- inconsistent and non-standard processes for sharing and presenting data.

To address these concerns and drive consistency and transparency, the NSTA believes joint venture partners should:

- consider creating action plans;
- hold regular ESG data focused meetings;
- consider a standardised approach to sharing data; and
- develop a data methodology describing how data is measured and reported.

Although the NSTA has acknowledged that not all data can be standardised, it appears to expect the industry to take steps to address the issues identified, and will be actively monitoring progress, so as to '*drive the right outcomes for the sector as a whole*'.

***The OGA Plan – Emissions Reductions***

The NSTA's OGA Plan focuses on steps to support achieving the Government's net zero target (i.e. the second limb of the Central Obligation) by setting out the steps the NSTA considers necessary to continue reducing greenhouse gas emissions from oil and gas production. The OGA Plan is significant because paragraphs 18 to 20 of the OGA Strategy require regulated companies to comply with an OGA Plan or satisfy the NSTA that an alternative approach nonetheless meets the obligations under the OGA Strategy.

The OGA Plan sets out specific requirements that relevant persons must comply with (or satisfy the NSTA as to their proposed alternative approach), focusing on investment and efficiency; electrification and low carbon power; inventory; and flaring and venting.

*1. Investment and efficiency*

Relevant persons were already required (by paragraph 13 of the OGA Strategy) to deploy, develop and invest in emission reducing technologies and procedures where appropriate. The OGA Plan now requires them to produce and promptly implement (over a reasonable timescale) an Emissions Reduction Action Plan ('**ERAP**') for each asset that summarises areas where emissions can be monitored and reduced, and identifies technologies and other opportunities that may assist with this. Relevant persons are expected to achieve substantial emission reductions, which are to be reported into the government's Environmental and Emissions Monitoring System Future investment proposals to recover new resources and should also be accompanied by a commitment to reduce emissions in the asset's ERAP.

*2. Electrification and low carbon power*

The NSTA considers that power generation is the largest contributor of emissions from UKCS oil and gas production, so that increasing electrification and low carbon power options is crucial. The OGA Plan sets out different requirements, depending on a development's first oil date:

— All new developments with a first oil or gas date after 1 January 2030 are to be fully electrified or run on alternative low carbon power with near equivalent emission reductions.

— New developments, excluding tie-back developments, with a first oil or gas date that falls before 1 January 2030 should, at a minimum, be electrification ready.

— All assets (whether current or new developments) that will continue to produce beyond 1 January 2030 must include in their ERAP a comprehensive technical and economic assessment of full and partial electrification.

Before submitting their Field Development Plans ('**FDPs**') or FDP Addendums ('**FDPAs**'), relevant parties are required to provide a technical and economic assessment which identifies all feasible electrification schemes and the associated emissions reductions alongside these – the NSTA expects to prefer the lower emissions option.

The OGA Plan also requires relevant persons to make financial investments to electrify all assets where reasonable to do so, assessed by comparing a risked value of remaining reserves and the expected reduction in emissions from electrification against the cost of electrification. If the NSTA considers that it is reasonable to electrify an existing asset (or implement a low-carbon method with near equivalent reduction in emissions), but a relevant person fails to do so, the NSTA will likely not approve FDPs or FDPAs, or issue any future decisions that give access to additional hydrocarbon resource on that asset.

*3. Inventory*

The OGA Plan makes clear that the NSTA will take active steps to '*manage out*' older, high emitting assets with low production in favour of permitting new developments with lower emissions. Broadly, if the emission intensity of an asset that is due to produce beyond 1 January 2030 is 50% over the average UK offshore emissions intensity, this may result in relevant



persons having to agree to an earlier Cessation of Production ('**CoP**') date, subject to other considerations including the significance of a particular asset in the context of the region where it is located.

Relevant persons are now required, via the annual UKCS Stewardship Survey, to declare CoP dates and report against delivery. Going forward, these will be considered to be 'fixed' dates rather than 'no earlier than' dates, as has previously been the case.

*4. Flaring and venting*

The NSTA's Flaring and Venting Guidance already indicated that there should be zero routine flaring and venting for all developments by 2030. The OGA Plan underpins this guidance and requires all new developments to be designed on the basis of no routine flaring and venting. From 1 June 2025, relevant persons are also required, within their ERAPs, to have plans and associated budgets to deliver continuous improvements in flaring and venting leading to emissions reductions.

***NSTA data from the National Hydrocarbons Data Archive files now accessible through the National Data Repository***

The NSTA has moved around 4,000 files from the National Hydrocarbons Data Archive to the National Data Repository, containing information about wellbores and seismic surveys. The move aimed to consolidate information into one place to ensure better accessibility for those in the industry and academia.

## Decommissioning

***UKCS Decommissioning Cost and Performance Report 2023***

The NSTA published its 2023 UKCS Decommissioning Cost and Performance Report in August 2023, reporting that unit operating costs have been increasing in the past few years. In 2022, the average unit operating cost went up by GBP 0.64/boe following a GBP 4.03/boe rise in 2021. The NSTA expects the average unit operating cost to rise even further in 2023, with a predicted level of GBP 19/boe. This is due to the rise in operating expenditure, inflation and a slower production rate, which is forecast to decrease in 2023. However, it seems that production efficiency had increased significantly from 73% in 2021 to 78% in 2022, albeit remaining below the NSTA target of 80%.

***NSTA letter to licensees outlining expectations for well decommissioning***

The NSTA wrote to licensees in November 2023 as a reminder of their responsibility to decommission wells in a timely manner, highlighting the Well Consents Guidance which outlines the NSTA's approach to applications for suspension of inactive wells – it will usually consent to an initial suspension period of up to two years, and up to five years in special circumstances. This reminder was given in the face of an increasing number of applications for deferral of well decommissioning. The NSTA acknowledged there have been challenges which may affect decommissioning decisions, such as high inflation, however it considers this is not an excuse to disregard the obligation to decommission. The NSTA does not expect licensees to request to extend suspension consents except in special circumstances, when applications should be made in good time.

***North Sea sector spent GBP 1.6bn on decommissioning in 2022***

The most recent Decommissioning Cost and Performance Report by the NSTA, dated 16 July 2024, indicates that the North Sea oil and gas industry spent close to GBP 2bn on decommissioning in 2023. This figure does not reflect the industry's planned attainment target, with these levels only reflecting 70% of the industry's planned well decommissioning activities.

The increase in cost for decommissioning is stated to be attributable to growth in underlying cost basis and increases in scope associated with licensees' decisions to bring forward CoP dates for a number of fields.

The NSTA also raised its concerns about the growing backlog of decommissioning work and the impact of this on suppliers being forced to source work overseas. The NSTA has confirmed that it will continue to use its powers to hold operators to account and ensure visibility of upcoming decommissioning work to allow surety of work along the supply chain.

## Licensing

***33rd Oil and Gas Licensing Round***

The 33rd Licensing Round opened in October 2022, with 931 blocks and part-blocks made available for application. This round saw the highest participation since 2016/17, with 115 applications being submitted by 76 companies.

The NSTA had initially offered 27 new licences for oil and gas exploration, focusing on areas that are potentially able to start producing faster. The NSTA then offered 24 further licences as part of the second tranche of this licencing round in January 2024.

A third tranche of licences was offered in May 2024, of which some were stated by the NSTA to include a new licence condition – a 'relationships with windfarms' clause. This clause prohibits the relevant licensee from undertaking activities or operations under the licence in any area that overlaps with, or is within 500 metres of the boundary of, an area leased from the Crown Estate through a wind farm agreement, unless a co-operation agreement is in place between the licensee and the windfarm. This recognises the relationship between the licensee and proximate windfarms, and the reality of the potential overlap in location between oil and gas production and renewable energy production.

These licences are part of the NSTA's efforts to support the UK's energy security by reducing the need for foreign energy imports and giving the UK a range of options in its own supply.

## Enforcement

The NSTA has continued to exercise its sanction powers over the last year, imposing significant fines on oil and gas companies for various breaches of flaring and venting regulations, underscoring the emphasis that the NSTA places on the industry's efforts to adhere to environmental standards and the drive towards net-zero emissions. In particular:

- One company faced a GBP 160,000 penalty for emitting over 73 tonnes of greenhouse gases without consent.
- Another company was fined GBP 100,000 for exceeding its venting consent limit by 1,200 tonnes due to misallocated cold flare volumes, a breach that persisted undetected for seven months.
- The NSTA's largest fine of GBP 225,000 was levied against a company for venting 59 tonnes of gas without consent, surpassing its annual limit in November and failing to engage promptly with the regulator.

Despite industry-wide progress in emission reduction, such as a near 50% decrease in North Sea flaring since 2018, these incidents highlight ongoing challenges. These fines reflect the NSTA's approach of using its sanctions powers to seek to encourage a very high level of compliance, deter future violations, and ensure companies are held accountable for their environmental impact, while also recognising the industry's efforts to reduce emissions consistently. The NSTA is driving the industry to eliminate unnecessary flaring and venting to assist the transition to net zero emissions. While praising recent emission reductions, the NSTA is pushing companies to adopt decarbonization measures like ending routine flaring and venting by 2030.

The NSTA has also recently indicated that it is now turning its attention to decommissioning, opening its first investigations into delays in work to plug and abandon. This builds on the NSTA's November 2023 letter to licensees and its withdrawal in 2022 of its CoP Guidance.

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