Annual Review of developments in English oil and gas law

2025 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 2025 edition of the CMS Annual Review of developments in English oil and gas law.

This edition marks 10 years since the first CMS Annual Review of developments in English Oil and Gas Law ('**Oil and Gas Annual Review**') was published in 2015. It hardly seems ten years ago that, during a quiet August week, in what can only be described as a surge of summer activity, I decided that I should write and collate summaries of recent English court cases relevant to oil and gas practitioners and publish them in a review. How this could have been said to be a good use of otherwise lazy summer days remains a mystery to many.

The chapter headings in 2015 suggest some continuity of issues with which the English courts are asked to grapple (JOAs and third party access, natural gas and LNG price reviews and competition, supply chain, oil and gas insolvency, termination for breach, consequential loss, mergers & acquisitions, force majeure and international arbitration clauses). However, a closer look at some of the cases gives an indication of changes across the industry. Some of the companies mentioned have ceased to exist, and the industry looks very different today than it did 10 years ago.

On other issues it feels like we may be close to completing a circular movement. Ten years ago natural gas was seen as a major contributor, as a transition fuel, to the energy transition. A few years ago that strategy seemed outdated, and renewables to be the only game in town. However, we now appear to be completing the circle and many countries and market participants again see natural gas as an important element in the energy transition. With global coal consumption estimated at 8.77 billion tonnes in 2024, a record, it seems difficult to ignore the role of natural gas in moving towards a cleaner, greener, world.

Over the past 10 years, I have also been pleased to see junior associates and trainees that have assisted with this publication taking partnership at CMS: David Rutherford (Energy Transactions) and Phil Reid (Tax) being two examples of notable contributors that continue to make major contributions today.

One thing that has not changed over the 10 years is the role of this publication. At the heart of this publication remains you, our readership: in-house lawyers, academics and fellow private practitioners. As always, this publication 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 Nevine Singer, Lucy Jessop and Sofia Sotgia for their considerable efforts in assisting with the collation of this year's Oil and Gas Annual Review. I would also specifically like to thank Valerie Allan for her ongoing contribution on United Kingdom regulatory issues 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

Joint Ventures and Royalty Agreements

Joint venture relationships continue to produce interesting issues with which the English courts are asked to deal. These are particularly relevant in the oil and gas sector where such arrangements are common:

— In *Walter Oil & Gas UK LLP v Waldorf CNS (II) Limited* [2024] EWHC 3183 (Comm), the Court gave a rare insight into the proper approach to construing the terms of an oil and gas royalty agreement.

— In *Matiere SAS v ABM Precast Solutions Ltd* [2025] EWHC 1434 (TCC) the Technology and Construction Court considered the interpretation of express good faith obligations in a joint venture context.

'Deductible Costs' under a Deed of Grant of Overriding Royalty Interest

In *Walter Oil & Gas UK LLP v Waldorf CNS (II) Limited* [2024] EWHC 3183 (Comm), the Commercial Court gave a rare insight into the proper approach to construing the terms of an oil and gas royalty agreement. The Commercial Court was asked to determine what costs a producer was entitled to deduct from the proceeds of sale of petroleum before paying the holder its royalty interest share. Royalty agreements are widely used around the globe, in the oil and gas and mining industries. However, it is rare for these types of agreements to come before the courts. This judgment will be of interest to parties to such agreements, providing insight into potential areas of disagreement and how these might be resolved through clearer drafting.

Facts

The producers, Waldorf CNS (II) Limited ('**Waldorf**') and EnQuest Heather Limited ('**EnQuest**'), granted the holder of the royalty interest, Walter Oil & Gas UK LLP ('**Walter**'), a right to 3% of all petroleum produced from certain blocks in the North Sea (the '**Royalty Interest Petroleum**') under a Deed of Grant of Overriding Royalty Interest dated 19 September 2005 (the '**Deed**'). Walter assigned part of its entitlement to Eagle H C Limited making it the Second Claimant in this claim. References to Walter in the judgment includes the Second Claimant's derivative entitlement. There was no dispute between Waldorf and EnQuest and EnQuest was not a party to the proceedings.

Amounts payable in respect of the Royalty Interest Petroleum represented Walter's percentage interest of gross proceeds, less permitted deductions (the '**Deductible Costs**'). Known as a 'net profit interest' form of royalty agreement, the meaning attributed to 'deductible costs' is of significant importance, with the producer/grantor wishing to pass on as many of its costs as can be agreed, and the holder of the interest favouring a narrower position. The other form of royalty agreement is a '*gross overriding royalty' in which the royalty interest is 'calculated as a defined percentage of the gross proceeds of sale of the produced petroleum which are realised by the producer, without the deduction of any of the costs and expenses which were incurred by the producer in relation to producing that petroleum.*' See Roberts, P; Oil and Gas Contracts Principles and Practice 3rd edition [18-06].

Ultimately, only one block went into production (the '**Block**'). Petroleum from the Block was produced and transported to the UK mainland (where it was sold) in five stages, including via the Kittiwake Platform, the Kittiwake-Unity Pipeline and the Forties Pipeline System. EnQuest and/or its affiliate held an interest in the Kittiwake Platform and owned the Kittiwake-Unity Pipeline whereas Waldorf had no stake in any of the aforementioned infrastructure.

As is common in the oil and gas industry, the operation of the Block and the processes involved in producing, transporting and extracting petroleum were governed by a number of agreements. Waldorf and/or EnQuest entered into these agreements with owners of the relevant infrastructure, as well as entering into a Joint Operating Agreement between themselves, to govern production of petroleum from the Block.

As EnQuest held interests in some of the infrastructure, when entering into some of the agreements, it did so in more than one capacity (as is common in the industry): for example, under the transportation and processing agreement for the Kittiwake Platform, EnQuest and Dana Petroleum were the owners of the platform, EnQuest was the operator of the platform, EnQuest and Waldorf were shippers (being the parties purchasing the transportation, processing and operating services supplied by the platform owners) and EnQuest was also shippers operator. In respect of the costs of the relevant transportation, processing and operating services, this resulted in EnQuest invoicing itself: it issued the invoice as platform operator (on behalf of itself and Dana Petroleum) to itself as Shippers Operator (acting on behalf of itself and Waldorf as the Shippers). EnQuest then paid the invoice (as Shippers Operator) and Waldorf ultimately paid its share of the costs to EnQuest.

Waldorf and EnQuest were obligated to lift and separately dispose of, and were entitled to separately sell, their respective share of the total petroleum produced from the Block. Following the sale of the Royalty Interest Petroleum, Waldorf and EnQuest (as Grantors) were then each required to pay Walter its share of the respective proceeds, less the '*Deductible Costs*', which was defined as follows:

'(a) all Tax which may be levied now or in the future in respect of the production of all Royalty Interest petroleum produced from the Blocks, the transportation of that Petroleum and the processing and initial storage of that Petroleum at any terminal, in each such case as such tax so levied arises prior to its delivery to any purchaser thereof; and

(b) the actual amounts, if any, as may be reasonably required to be paid by the Grantors, the Agent (acting in its capacity as such) and/or the Operator for the

processing, transportation, dehydration, compression, recycling or any other similar cost or expenses incurred in making [Royalty Crude Oil, as defined in Clause 1] or [Royalty Gas, as defined in Clause 1] as the case may be ready or available for market or transporting same to the point of sale and which are charged to the Grantors, the Agent (acting in its capacity as such) or the Operator by third parties who are not Affiliates of such party for such services; and if such amounts have not been incurred in respect of [Royalty Crude Oil] or [Royalty Gas] specifically, such proportion as the quantity of [Royalty Crude Oil] or [Royalty Gas] bears to the total quantity in respect of which such amounts have been incurred'.

'*Affiliate*' was in turn defined as follows:

'in relation to a Party, a subsidiary or holding company of that Party and includes the ultimate holding company of that Party and any subsidiary of that holding company and for the purposes of this definition 'holding company' and 'subsidiary' shall have the meanings respectively given to them by section 736 of the Companies Act 1985, as amended by section 144 of the Companies Act 1989'

The parties disagreed as to whether certain categories of costs fell within the meaning of '*Deductible Costs*' in the Deed. The main categories of cost were sums paid for production / transportation of the petroleum, send or pay charges (which were payable where the quantity of petroleum required to be delivered fell below the agreed minimum quantity) and Emissions Trading Scheme tariffs.

Decision

The judgment addressed the following issues:

Third Party Issue

Walter contended that certain costs charged to Waldorf by EnQuest were not charged by '*third parties who are not Affiliates of such party for such services*', thereby falling outside of the meaning of Deductible Costs. This was on the basis of Walter arguing that the costs were charged by EnQuest (as operator of the relevant infrastructure) to EnQuest (as operator of the Block) and were therefore not charged by a third party to EnQuest. Walter also sought to rely upon the fact that EnQuest and Waldorf were jointly and severally liable for the costs (such that, in theory, EnQuest could be required to pay Waldorf's share even though, in practice, the sums in question were paid by Waldorf).

The Commercial Court did not agree with Walter's characterisation of the relevant payments; first, the Commercial Court noted that it was '*not helpful to try and reach some broad characterisation of the nature of Walter's relationship with the Grantors … and then seek to interpret the Deed in the manner which best reflects the overarching characterisation*'. Instead, having found that the Deed '*contemplate[d] that the same legal persons may pay amounts which fall to be deducted in different capacitie*s', the Commercial Court considered that it was necessary to assess whether or not a particular transaction fell within the meaning of '*Deductible Costs*' by carrying out a '*party-by-party analysis*'. This involved looking at the amount paid by the relevant person, in their relevant capacity, and asking whether such amounts had been paid to third parties (such that they were Deductible Costs) or otherwise. Having carried out that exercise, the Commercial Court found that the relevant sums in question had been paid by Waldorf to EnQuest (who was not an affiliate of Waldorf). Such sums were, therefore, Deductible Costs.

The Commercial Court also determined that such conclusion was supported by considerations of commercial purpose and consequence. Here, the Commercial Court considered that Walter's construction placed '*far too much weight on the identity of the [infrastructure] operator from time-to-time*', which (if adopted) would have led to an uncommercial outcome.

The Send or Pay Issue

The second issue concerned whether '*Send or Pay*' charges were costs of '*processing, transportation, dehydration, compression, recycling or any other similar cost or expenses*' incurred in making the petroleum ready for market or transporting it to the point of sale, and therefore '*Deductible Costs*'.

Send or pay charges, which are commonplace in such agreements, are effectively a minimum charge payable by the user of the infrastructure or service in exchange for the guaranteed reservation of capacity in the infrastructure and the guaranteed provision of the services by the owner of that infrastructure. Waldorf argued that the send or pay charges were an essential element of the overall commercial arrangement required to ensure that petroleum can be transported when required (and were therefore a '*transportation*' cost).

Although the Commercial Court considered the issue to be finely balanced, it ultimately decided that these charges were not '*Deductible Costs*' under the Deed. The Commercial Court acknowledged that this concept involved a '*blunt and to some extent crude process of identifying what is paid* '*for*' *the identified matters*' which was '*suggestive of a direct link between the charge and the service received, rather than embracing all costs incurred in achieving a desired end.*'

In considering this question, the Commercial Court was guided by Lord Hoffmann's hypothetical '*domestic example*' in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, which the Commercial Court put as follows: '*if a husband brings home new trousers, and his wife asks 'what did you pay for them?', the answer would not naturally embrace not simply the price of the trousers but the petrol consumed driving to the shops to purchase them, and the costs of parking.*' Drawing on this hypothetical scenario, the Commercial Court determined that such charges were not directly linked to the transportation of the Royalty Interest Petroleum (noting, instead, that they were incurred only to the extent the Royalty Interest Petroleum was not transported through the relevant infrastructure).

The ETS Issue

The Commercial Court was also required to consider whether tariffs under the Emissions Trading Scheme ('**ETS**') were deductible as a '*Tax*' under the Deed, where '*Tax*' was defined as follows:

'without limitation tax, levy, royalty, rate, duty, fee or other charge imposed directly or indirectly in respect of the Royalty Interest and/or the Royalty Interest Petroleum and/or the Net Proceeds thereof, or the assets, income, dividends or profits of the Grantee (without regard to the manner of collection or assessment and whether by withholding or otherwise) by any governmental, semi-governmental or other body authorised by law to impose such Tax',

Waldorf argued that the ETF tariffs were deductible as they were environmental taxes incurred in respect of the transportation of petroleum. Walter disagreed.

Whilst the Commercial Court considered that the ETS tariff was a '*Tax*' (as defined in the Deed), the Commercial Court did not consider that it fell within limb (a) of 'Deductible Costs', on the basis that this limb required a more direct link to the production or treatment of the Royalty Interest Petroleum than a tax on the operation of third party infrastructure through which the petroleum is transported (i.e. the Commercial Court adopted the same position as it did with the send or pay charges).

However, the Commercial Court considered that ETS tariffs were sufficiently directly referable to the Royalty Interest Petroleum to fall within limb (b) of '*Deductible Costs*' on the basis that they constituted amounts paid for processing of the same.

Whereas counsel for Walter submitted that these conclusions were inconsistent, the Commercial Court clarified that the application of limb (a) of the definition of Deductible Coss is concerned with the target of the Tax, whereas the second limb is concerned with the amount paid '*for*' a particular service and that the application of the two limbs, involving different enquiries, were susceptible to different outcomes.

Comment

Royalty agreements have long been used to facilitate development, financing and divestment of projects; (see Roberts, P; *Oil and Gas Contracts Principles and Practice*, 3rd edition [18-13]) however, there is no standardised wording or form for royalty agreements and it has been remarked that such agreements '*sometimes … be ill-disciplined, poorly-crafted documents which display deficiencies in how they are worded, and they can depend for their effectiveness on the application of broad concepts and detailed drafting whose intention is best known only to the original authors*' (see Roberts, P; *Oil and Gas Contracts Principles and Practice* 3rd edition [18-01]). This inevitably leads to disputes over intended meanings, as was the case in this matter.

Given that these types of agreements will require bespoke drafting (and noting their increased use), during the drafting stage, parties would therefore be well advised to consider the full range of costs incurred in relation to petroleum (or mineral) production, and how these are to be allocated. In particular, parties should ensure that key terms are clearly defined and aligned with commercial expectations. Given such agreements are usually long-term, parties should also bear in mind that circumstances may change over time and seek to allow for this during the drafting stage. Issues of complexity might include: taxes, government imposed levies (which might not be construed to be a tax), costs of transportation or sale that do not relate to a specific molecule of production (such as send-or-pay or take-or-pay costs) and decommissioning costs. Further, careful thought should be given to the use of '*third party*' costs where infrastructure may be provided on an arms-length basis by an infrastructure owner that is also a joint venture participant.

Judge: Foxton J

Joint ventures and good faith

In *Matière SAS v ABM Precast Solutions Ltd* [2025] EWHC 1434 (TCC) the Technology and Construction Court considered the interpretation of express good faith obligations in a joint venture context. Although this is not an oil and gas case, it provides a rare example of such obligations being shown to have been breached and an even rarer example of a claim for such a breach failing for the absence of any provable loss. The principles set out in this case are likely to be of relevance in other express good faith clauses and may cause some joint venture parties to seek enhancements to express good faith obligations within their joint venture agreements.

Facts

Matière and ABM formed a joint venture to bid for sub-contract work in relation to the High-Speed 2 rail project ('**HS2**'). The work was for the manufacture, supply and installation of three cut-and-cover tunnels along the HS2 route. Matière was to provide design and installation services, whilst ABM would be responsible for the manufacture of the tunnels themselves. The joint venture was unincorporated and was not financially integrated, meaning that each party would take whatever profit was made on their part of the works.

Both parties entered into a Professional Services Contract (the '**PSC**') with the main contractor to assist with the preparation of stage two proposals for submission to the employer. Just prior to this contract, ABM and Matière entered into a Consortium Agreement containing the following Clause 3.1:

'ABM and Matière shall co-operate and collaborate with one another in accordance with the terms of this Agreement and in the course of their performance of their obligations pursuant to any associated PSC each of ABM and Matière shall act in good faith toward the other and use reasonable endeavours to forward the interests of the co-operative enterprise.'

The original proposal made by the two parties involved the construction by ABM of a bespoke factory at Scunthorpe to allow it to manufacture the pre-cast concrete required for the tunnels. ABM's existing factory was not big enough to accommodate the proposed work and the construction of a new factory was part of its broader business expansion plans.

The main contractor expressed concerns to Matière over the proposal for the Scunthorpe factory, citing cost implications, but later also expressed concerns about ABM as a contracting party. The main contractor wished to maintain Matière's role on the project, however. Matière then began working with the main contractor on two strategies. The first, '*Plan B*', was to reduce the scope of ABM's work by producing the pre-cast concrete at other sites. The second, '*Plan C*', was to replace ABM entirely.

Matière worked on these two strategies without ABM's knowledge. As part of Plan B, it attempted to persuade ABM to abandon the Scunthorpe factory proposal. ABM was unwilling to compromise over the factory plans and ultimately the main contractor terminated the PSC. Matière entered into a new PSC with the main contractor on its own the following month.

ABM claimed that Matière's conduct in pursuing Plans B and C without ABM's knowledge was a breach of the good faith obligations in Clause 3.1 of the Consortium Agreement.

Decision

The Technology and Construction Court emphasised the heavily contextual nature of good faith clauses and summarised the following principles of interpretation from previous cases:

1. The core meaning of a duty of good faith is to act honestly. However, bad faith may include conduct which would be regarded as commercially unacceptable to reasonable and honest people, even if not necessarily dishonest.
2. The content of the duty is heavily conditioned by its context. When considering the interpretation of an express good faith clause in context, cases from other areas of law and commerce turning on their own particular facts may be of limited value and should be treated with considerable caution.
3. An obligation of good faith might comprehend fidelity to the bargain between the parties or adherence to the spirit of the agreement where the common purpose and aims of the parties could be objectively ascertained from the express or implied terms of the contract. In such cases, the obligation might be said to prohibit a '*cynical resort to the black letter*' or conduct which '*undermines the bargain entered or the substance of the contractual benefit bargained for*'.

The Technology and Construction Court considered that all three of the above good faith manifestations were included within Clause 3.1:

'I am satisfied that Clause 3.1 contained a requirement that each of ABM and Matière would act honestly with each other and would not conduct themselves in a manner which would be regarded as commercially unacceptable to reasonable and honest people. I am also satisfied that this is a contract in which the obligation includes keeping fidelity to the bargain. That is because the common purpose and aim of the parties is apparent from the other terms of the contract, namely the requirement to submit a joint bid to [the main contractor] that formed part of the overall Services and which complied with the terms of the PSC.'

The Technology and Construction Court also rejected a submission that merely acting in self-interest or without fidelity to the bargain would not amount to a breach of the obligation unless the effect was to undermine or substantially reduce the value of the contract. In the Technology and Construction Court's view:

'in circumstances where fidelity to the bargain, or adherence to the spirit of the agreement, falls within the ambit of the good faith obligation, a relevant consideration may be whether the action complained of might, at the time, be expected to render the contract worthless or less valuable. Consideration of the subsequent actual effect would not be material to the question of breach.'

The Technology and Construction Court accepted a separate submission by Matière that the scope of Clause 3.1 was limited to the performance of the parties' obligations under the PSC and did not extend to the entire collaboration over the project. However, this did not mean that the process of negotiation and bid preparation as between the parties and with the main contractor fell outside the Clause. Such activities were indistinguishable from the preparation of the stage two proposals required by the PSC.

Breach upheld but no loss proved

Although Plans B and C had been instigated by the main contractor, Matière was nevertheless held to be in breach of its good faith obligations in actively co-operating, without ABM's knowledge, in those strategies. The Technology and Construction Court considered that Matière's conduct was either dishonest or was of a type that would be regarded as commercially unacceptable to reasonable and honest people. The Technology and Construction Court also found that Matière did not keep fidelity to its bargain with ABM and that its actions had the potential to render that bargain worthless or significantly less valuable.

Although successful on breach, ABM's claim failed on causation. ABM had claimed for the loss of a chance that the joint venture would have secured a sub-contract with the main contractor. Whilst the joint venture had a reasonable chance of such work at the point the PSC had been entered into, those chances became non-existent in the lead up to the termination letter for reasons other than Matière's breach. In particular, the main contractor was the moving force behind Plans B and C and Matière had merely been doing its bidding in the hope of retaining a unilateral sub-contract in the event the joint venture was not awarded the work. Various other factors mentioned in the termination letter also meant that the main contractor was unlikely to have proceeded with the joint venture. ABM also appeared to have been unable to fund the construction of the Scunthorpe factory in any event.

Comment

English law does not imply obligations of good faith generally into commercial contracts, unlike many civil law systems. However, such obligations are implied into certain specific classes of contract, such as insurance contracts. There is currently a debate as to whether 'relational contracts' are another such class of contract into which good faith obligations will readily be implied. Such contracts are said to be ones which '*involve a longer term relationship between the parties [to] which they make a substantial commitment' (Yam Seng v ITC* [2013] EWHC 111). In S*heikh Tahnoon v Kent* [2018] EWHC 333 (Comm), an informal joint venture was categorised by Leggatt J (now a Justice of the Supreme Court) as '*a classic instance of a relational contract*'. Obligations of good faith were implied as a consequence.

Although other first instance decisions have supported the implication of such terms for relational contracts, doubts have also been cast as to the strength of such a rule. In the only appellate decision commenting on the issue, in *Globe Motors v TRW* [2016] EWCA Civ 396, the Court of Appeal commented that, '*even in the case of such agreements, … the position will depend on the terms of the particular contract*', and that, '*an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract*.'

In the context of joint operating agreements ('**JOAs**'), in *TAQA Bratani Limited and Others v Rockrose* [2020] EWHC 58 (Comm) the Commercial Court refused to imply a term of good faith. In that context the Commercial Court was content to treat the JOAs as being at least arguably relational contracts. However, that did not lead to the conclusion that it is necessary to imply a good faith obligation into the exercise of the power to remove the operator. That was so because: (a) on its true construction that power is an absolute and unqualified power; in consequence; (b) it is impermissible to imply a term that qualifies what the parties have agreed between them; and (c) it follows that the parties have legislated in the sense referred to by Leggatt J and it is not necessary, indeed it would be wrong, to imply such a term to qualify the power on which the claimants rely because it was not necessary in order to make the contract the parties have chosen work as it is to be presumed they intended it to work, or, to the extent there is any difference, to give effect to their presumed common intention.

However, as noted in Hewitt on Joint Ventures (8th Ed) the consequence is:

'it is likely that the number of claims involving good faith will continue to escalate. Many will simply be put forward as claims of last resort in disputes when specific provisions in the contract do not assist. Yet, good faith and fair dealing are concepts that at root seem entirely appropriate to very many joint venture relationships and their application in this area will continue to be ripe for further judicial analysis and development.'

This decision provides a helpful analysis of the approach to be taken to the interpretation of express good faith obligations and provides a rare example of a breach of such a clause being upheld. The decision illustrates the complex issues which often beset such claims. In particular:

— Whilst not an issue which arose in this case, it is arguable that the existence of express good faith obligations may not always rule out the application of implied good faith obligations. One previous case (*Sheikh Tahnoon v Kent*) has suggested that implied good faith obligations in joint venture agreements may arise 'in law' and subject to a different test in *TAQA Bratani Limited and Others v Rockrose*. That said, the direction of travel seems inconsistent with implying a term of good faith through operation of law.

— In respect of express good faith obligations, the obligations were held to be limited to a sub-set of the parties' overall commercial relationship (i.e. the performance of obligations under the PSC).

— In the context of the content of such obligations it remains debatable whether they merely require honesty or whether they also prohibit behaviour commercially unacceptable to reasonable and honest people and/or fidelity to the bargain.

— It remains important to ask whether any alleged breach will result in a loss.

Matière appears to have been faced with a difficult decision in this case. It had committed itself to a joint venture partner who became unwilling to compromise over the initial joint venture proposals despite mounting evidence that those proposals would not be accepted. Faced with pressure from the main contractor, Matière faced the choice of complying with its good faith obligations and in all likelihood losing any chance of work from the main contractor in relation to the project. Alternatively, it could act to preserve its relationship with the main contractor by breaching its good faith obligations toward its joint venture partner. Ultimately, Matière's decision to breach good faith appears to have been commercially prudent. It was able to continue working with the main contractor and successfully defended a claim from its joint venture partner.

Judge: Alexander Nissen KC (sitting as Deputy Judge of the High Court)

Chapter 2

Natural Gas and LNG

A trio of decisions have illuminated some key issues relating to natural gas and LNG contracts:

— In *Nigeria LNG Limited v Taleveras Petroleum Trading DMCC* [2025] EWCA Civ 457, the Court of Appeal gave a rare insight into an arbitral award concerning a failure to deliver multiple cargoes under an LNG master spot sales agreement.

— In *Gasum Oy v Gazprom Export LLC* (T 540-23), the Svea Court of Appeal, in Sweden, partially set aside an arbitral award on the basis that the arbitral tribunal had failed to examine a properly raised and potentially outcome-determinative legal argument under Article 101 of the Treaty on the Functioning of the European Union. Although not an English law case, it will be of interest to practitioners.

— In *URE Energy Ltd v Notting Hill Genesis* [2024] EWHC 2537 (Comm), the English Commercial Court was required to determine the meaning of the word 'value' in a termination remedies clause. As the word is widely used in LNG and natural gas price review clauses, the approach of the Court will be of interest to energy practitioners.

Damages for non-delivery of LNG

In *Nigeria LNG Limited v Taleveras Petroleum Trading DMCC* [2025] EWCA Civ 457, the Court of Appeal gave a rare insight into an arbitral award concerning a failure to deliver multiple cargoes under an LNG master spot sales agreement. Although the substance of the award is confidential, it highlights the specific challenges related to ensuring an LNG sales agreement contains a real remedy for buyers and sellers.

Facts

Nigeria LNG Limited ('**NLNG**') is an LNG producer exporting LNG from Nigeria. Taleveras Petroleum Trading DMCC ('**Taleveras**') is an energy trader domiciled in Dubai.

This case concerns a final arbitral award dated 30 January 2023 following a London arbitration (the '**Award**'), by which the arbitral tribunal (the '**Tribunal**') held NLNG liable for failing to deliver 19 FOB Cargoes of liquefied natural gas to Taleveras under a Master FOB LNG Sales Agreement and a spot confirmation notice.

The Award followed a conventional format, including a section covering the Tribunal's analysis on relevant issues, a section on the Tribunal's conclusions, and a '*dispositive section*' (beginning with '*…the Tribunal hereby DECIDES AND AWARDS as follows…*') that set out sums awarded and other remedies granted as a result of the Tribunal's conclusions. In addition to payment of damages for Taleveras's loss of profits, the dispositive section of the Award ordered NLNG to indemnify Taleveras (the '**Indemnity**') in respect of any amounts Taleveras was found liable to pay in two separate arbitrations with Vitol SA and Glencore Energy UK Limited relating to on-sale arrangements (the '**Vitol Arbitration**' and the '**Glencore Arbitration**', respectively).

Commercial Court Decision

In proceedings before the Commercial Court, NLNG disputed liability to indemnify Taleveras in respect of the Vitol Arbitration, on the basis that:

— The '*analysis*' section of the Award stated (at paragraph 607 of the Award): '*The Tribunal further orders that… any eventual enforcement of [the Indemnity] be subject to the endorsement of [the tribunals in the Vitol Arbitration and Glencore Arbitration] as to its applicability in the context of any award and, in particular, any consent award, made in either of those Proceedings.*'

— NLNG asserted that the award in the Vitol Arbitration did not comply with this requirement, and that this requirement was a condition of the Indemnity.

The Commercial Court rejected NLNG's arguments and decided that on a proper interpretation of the Award:

— The Tribunal intended that the sums awarded and other remedies granted are confined to those set out in the dispositive section; and

— the Indemnity was not subject to any declaration in the Vitol Arbitration (or the Glencore Arbitration) to the effect that the sums awarded fell within the scope of the Indemnity.

NLNG appealed.

Court of Appeal Decision

The Court of Appeal dismissed the appeal. Lord Justice Phillips (with whom the rest of the Court agreed) found '*no error in [the Commercial Court's] approach*', and confirmed as follows:

— The Commercial Court was right to take into account the nature of the arbitration, the qualifications of the arbitrators and the structure and formality of the Award when deciding that the dispositive section of the Award was intended to be a self-contained and comprehensive statement of the Tribunal's orders, akin to an order following trial in English Court proceedings.

— The Commercial Court did not place undue weight on form over substance. In fact, the Commercial Court considered the wording of paragraph 607 in the '*analysis*' section of the Award in detail and found that, in context, it did not augment the Tribunal's orders in the dispositive section. In this respect, the Court of Appeal considered it relevant that paragraph 607 addressed a subject matter that was also dealt with in the dispositive section. The need for the endorsement of the arbitral tribunal in the Vitol Arbitration (and the Glencore Arbitration) was expressly dealt with in the dispositive section, but it was limited to a situation where there was an award by consent in those arbitrations (which situation did not arise here). The Court of Appeal saw no basis for expanding the scope of the dispositive section due to the reference in paragraph 607 to '*any award and, in particular, any consent award*', and confirmed that, in light of the inconsistency, '*the dispositive section clearly prevails*'.

Comment

Damages for Non-Delivery

The decision of the Commercial Court gives a rare insight into arbitral awards concerning the sale of LNG.

It is not known whether the Master FOB LNG Sales Agreement was governed by English law, New York law or another choice of law.

In the event of a failure to deliver, in English law, the usual measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver. See the Sale of Goods Act 1979, Section 51.

In this respect, *Benjamin's Sale of Goods* 12th Ed., says:

'Where the seller fails to deliver the goods, but there is an available market, the buyer should be able, by buying substitute goods, to avoid consequential losses flowing from the seller's breach. There may, however, be some incidental expenses which the buyer incurs in buying substitute goods, such as extra expenses in transport or handling: these are recoverable as part of the buyer's damages, in addition to the measure of damages in s.51(3).

In the absence of an available market, however, the buyer may often wish to claim consequential losses such as: extra expenses incurred by him, e.g. in adapting the nearest equivalent goods which he can obtain; or the loss of profits he would have made under a contract of resale; or the loss of profits which he would have made had the goods been delivered so that he could manufacture them into different articles, as the seller knew he intended to do; ***or the damages he paid to a sub-buyer****. In some circumstances, the buyer may claim both loss of profits and the extra expenses incurred by him which are wasted as a result of the seller's breach of contract, but the courts will be careful to avoid overlapping of different heads of loss'* [**emphasis** added].

If the Master FOB LNG Sales Agreement were governed by English law, the inference seems to be that the arbitral tribunal decided that there was no available market such that the buyer was able to obtain what Benjamin's refers to as its '*consequential losses*'. It is certainly possible that where an LNG delivery does not occur, it is not practical to find available a substitute cargo for delivery at or around the same day.

In turn, that throws an interesting light onto the proper nature of a claim and measure of damages should this occur. The AIEN Model Form Master Spot Sales Agreement says:

'*Neither Party shall be liable for any Consequential Loss suffered or incurred by the other Party arising out of, in connection with or resulting from an Agreement, regardless of whether the Consequential Loss is based on tort (including negligence), strict liability, contract (including breach of or failure to perform an Agreement or the breach of any representation or warranty pursuant to an Agreement, whether express or implied), or otherwise. This limitation shall not apply to and shall not limit the liability of either Party for any remedy expressly provided pursuant to an Agreement.*'

Consequential Loss is defined as:

'Consequential Loss' means any loss, liability, damage, cost, judgment, settlement, and expense (whether or not resulting from Claims), including interest, penalties, reasonable legal costs, and attorneys' and accountants' fees and expenses, regardless of cause, which is not immediately and directly caused by the relevant act or omission. By way of illustration, and subject to the satisfaction of the standard set forth in the preceding sentence,

Consequential Loss will include the following:

(1) …

(4) loss or deferment of bargain, contract, expectation, revenue, profit, use, or opportunity; and

(5) a Claim made or brought by a Third Party for a loss which, had it been suffered by a Party, would have been a Consequential Loss.'

It is not known whether the contract in this case included a similar exclusion. However, it may be of some relevance that Consequential Loss in the AIEN Model Form Master Spot Sales Agreement is defined and specifically will not exclude losses '*immediately and directly caused by the relevant act or omission*'. As a result, it would be arguable that the AIEN Model Form Master Spot Sales Agreement would allow damages calculated on the basis the arbitral tribunal in this case permitted. That might be capable of contrast with other 'consequential loss' exclusion clauses that offer a wider exclusion, which might make it more difficult to mount claims outside the scope of the usual measure of damages. This highlights the importance of ensuring that the drafting of consequential loss exclusion clauses is fit for the purpose of the contract in which they reside.

In addition, as the Commercial Court illustrated in *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWCH 87 (Comm), properly formulating a claim under a hydrocarbons sales agreement in light of consequential loss exclusions can be critical. A claim for loss of bargain under the Sale of Goods Act 1979 is not a claim for loss of profits, which might be excluded by a consequential loss clause (see, 2015 CMS Annual review of developments in English oil and gas law, page 25).

Interpretation of Arbitral awards

This case reaffirms the Commercial Court's finding that it will not generally be appropriate to allow language used in the narrative reasoning section of an award to contradict the language in the part of the award that is intended to be its final order. This is particularly relevant in circumstances where the majority of an arbitral tribunal are English lawyers, the curial or procedural law governing the conduct of the arbitration is English law, and the arbitral award follows a structured format concluding with a dispositive section. More generally, this case demonstrates that English courts support the finality and integrity of arbitral awards, and will generally look to interpret arbitral awards in a reasonable and commercial manner to avoid ambiguity.

Commercial Court Judge: Pelling HHJ

Court of Appeal Judges: Phillips LJ, Warby LJ and Zarcaroli LJ

Take-or-pay award set aside

In *Gasum Oy v Gazprom Export LLC* (T 540-23), the Svea Court of Appeal, in Sweden, partially set aside an arbitral award on the basis that the arbitral tribunal had failed to examine a properly raised and potentially outcome-determinative legal argument under Article 101 of the Treaty on the Functioning of the European Union ('**Article 101 TFEU**'). The Court of Appeal found that this omission amounted to an excess of mandate and that the tribunal's failure likely affected the outcome.

Facts

Contractual background

The dispute arose under a long-term gas supply contract entered into between Gasum Oy ('**Gasum**'), a Finnish state-owned energy company, and Gazprom Export LLC ('**Gazprom**'), the Russian state gas exporter. The agreement included a Minimum Annual Quantity ('**MinAQ**') clause obliging Gasum to pay for a minimum volume of natural gas regardless of actual purchase, a typical 'take-or-pay' obligation.

For many years, the Finnish gas market was isolated and so Gasum had a monopoly position and was the sole importer and wholesale distributor in Finland. In 2020, the Baltic connector pipeline between Finland and Estonia became operational. This significantly changed the gas supply landscape in the region, allowing Gasum to source gas from alternative suppliers and participate in a more liberalised market. These changes had major commercial implications, Gasum was no longer reliant on Gazprom and considered the MinAQ obligation burdensome and inconsistent with competitive market principles.

As a result, Gasum failed to meet its MinAQ obligations. Gazprom initiated arbitration, seeking to enforce the clause and recover payment for unpurchased volumes. Gazprom claimed approximately EUR 330m in total, with the tribunal ultimately awarding around EUR 110m in its favour.

Gasum's arguments

In the arbitration, Gasum made two primary arguments:

— First, under Article 101 TFEU, it argued that the MinAQ clause constituted an anti-competitive agreement or restriction by object or effect, and should therefore be deemed void. Gasum submitted that the clause restricted market access and reinforced Gazprom's monopolistic position in breach of EU law.

— Second, under Article 102 TFEU, Gasum contended that Gazprom had abused a dominant position by insisting on performance of the MinAQ clause despite material changes in market conditions.

Arbitral Award

The arbitral tribunal considered and rejected the Article 102 TFEU argument. However, critically, it did not analyse or rule on the arguments made under Article 101 TFEU.

Instead, the award focused on the contractual wording of the MinAQ clause and the parties' intentions at the time of contracting. The arbitral tribunal found that the clause was valid and enforceable under Swedish contract law and ordered Gasum to pay Gazprom around EUR 110m.

The arbitration was conducted under a contractual framework that imposed an expedited timetable. According to the arbitration agreement, the entire proceeding, including the final award, was to be completed within three months from the appointment of the tribunal, with a possible extension of one additional month. The tribunal ultimately issued its final award on 14 November 2022, within the four-month period.

Following the award, Gasum applied to the Svea Court of Appeal under Section 34 of the Swedish Arbitration Act, arguing that the arbitral tribunal had exceeded its mandate by failing to rule on the Article 101 TFEU issue. Gasum contended that the competition law defence had been squarely raised and supported by factual evidence and legal submissions, and that a proper consideration would have changed the outcome.

Decision

Tribunal's Failure to Consider Article 101 TFEU

The Svea Court of Appeal ruled in favour of Gasum, holding that the arbitral tribunal had exceeded its mandate by failing to rule on a legal ground that had been properly submitted for determination.

The Court of Appeal found that:

'Gasum has requested the tribunal to review the validity of the MinAQ obligation in relation to the legal rule in Article 101 TFEU, and that Gasum in the arbitration has invoked legal facts that could be used as a basis for such a review. Furthermore, it is undisputed that the arbitral tribunal has not conducted any such review. According to the Court of Appeal, this means that the arbitral tribunal has been guilty of an excess of mandate and this has likely affected the outcome. In this assessment, there are no circumstances in the case that would lead to anything other than that Gasum's challenge shall be granted and that the arbitral award shall be set aside in the requested parts. Gasum's claim shall therefore be granted.'

The Court of Appeal emphasised that the ground was not merely raised in passing. Rather, Gasum had expressly requested that the arbitral tribunal determine whether the MinAQ clause was invalid under Article 101 TFEU, had submitted factual and legal arguments in support, and had preserved the issue throughout the arbitration. The arbitral tribunal's failure to engage with this submission therefore constituted a breach of its core adjudicative function.

Further, the Court of Appeal found that the omission was material. The issue concerned the validity of the contractual obligation that formed the basis of the award, and Gasum had argued that a proper assessment would have resulted in the clause being declared void. The Court of Appeal accepted this was a plausible counterfactual that '*likely affected the outcome*'.

Mandatory Nature of EU Competition Law

The judgment also contains a notable discussion of the mandatory nature of EU competition law. The Court of Appeal further noted that:

'An agreement, or an arbitral award based on such an agreement, that contravenes mandatory competition law cannot be upheld. This includes provisions of Article 101 TFEU, which form part of the legal order applicable in Sweden.'

Although the Court of Appeal did not itself decide whether the MinAQ clause was unlawful, it accepted that the issue was significant and that the arbitral tribunal's failure to address it compromised the integrity of the award.

Effect of the Compressed Arbitration Timeline

The final hearing in the arbitration lasted four days, which, given the complexity of the dispute, proved insufficient to address all legal issues in detail. As the Court of Appeal observed:

'The arbitration was conducted on the basis of an arbitration agreement that contained a very short time limit, and the main hearing lasted only four days. As is evident from what has been stated above, the dispute involved complex legal issues concerning competition law, as well as a high-value claim. The Court of Appeal finds that this may explain why the arbitral tribunal did not, in its reasoning, engage in an examination of the arguments that Gasum raised based on Article 101 TFEU.'

The Court of Appeal therefore recognised that the compressed schedule and short hearing may have contributed to the tribunal's failure to assess a central and potentially outcome-determinative legal issue. Ultimately, this omission was found to amount to an excess of mandate, justifying partial annulment of the award under Section 34 of the Swedish Arbitration Act.

Comment

Take-or-pay provisions are a familiar feature in natural gas and LNG sales contracts, and provide an option for the buyer to take supply of natural gas/LNG, or to pay for it anyway. Take-or-pay provisions have long been, and still are, regularly included in English law energy supply agreements. In many ways, they form part of the fabric of energy industry risk allocation. The same applies in respect of send-or-pay provisions in transportation agreements.

It has long been recognised that take-or-pay provisions have the potential to distort competition, by having the effect of foreclosing markets to competition. In regulating take-or-pay provisions, regulators have, historically, sought to balance beneficial impact on attracting energy infrastructure investment against competition law considerations. As markets evolve, the balance is bound to shift. In turn, this might raise issues over whether a take-or-pay provision that was legal at contract inception remains legal today. Much may depend upon the relevant regulatory framework.

That said, although it is unlikely that an arbitration clause will have the impact of 'ousting' the power of local regulatory authorities to deal with competition issues, it is equally likely that arbitral tribunals will need to address the contractual consequences when such issues are raised. The decision of the arbitrators may or may not be finally determinative of the issue (which will depend upon the law in the place of performance and is likely to be subject to regulatory intervention), but will likely result in issues to be determined between the parties in arbitration.

Judge: Carl-Anton Spak as Senior Judge of Appeal

The meaning of 'Value' and waiver of termination rights

In *URE Energy Ltd v Notting Hill Genesis* [2024] EWHC 2537 (Comm), the English Commercial Court was required to determine the meaning of the word '*value*' in a termination remedies clause. As the word is widely used in oil and gas contracts the approach of the Court will be of interest to energy practitioners. The decision also provides a useful insight into what events may be needed to inadvertently waive a right to terminate.

Facts

URE Energy Ltd ('**URE**') is an energy company. Notting Hill Genesis ('**NHG**') is a publicly funded charitable organisation.

On 17 July 2017, URE was purchased from Utilitgroup by Energy Logic Limited ('**ELL**'), a company owned by Mr Gary Ensor, with the specific purpose of entering into a contract to supply electricity and apply energy saving measures to the Genesis Housing Association ('**Genesis**'). Following the purchase, ELL changed its name to URE.

In September 2017, URE successfully bid for a 25-year contract with Genesis, which included installing LED lighting, constructing a 5-megawatt solar farm, and upgrading electricity meters to smart meters. However, the parties were not ready to finalise the long-term contract. Instead, on 29 September 2017, URE and Genesis signed a four-year electricity supply contract ('**Contract**') as a temporary measure, to be replaced by the long-term contract later. Since URE would charge below market rates under the Contract, the 25-year long-term Contract was crucial for URE to recover its investment.

The Contract stated:

'10.2 The Supplier may terminate this Contract at any time for all or any Supply Premises if:

…

(d) the Customer passes a resolution for its winding up which shall include amalgamation, … (other than a solvent amalgamation… approved in advance by the Supplier) …;

10.5 Where, in relation to any Supply Premises, this Contract is terminated by the Supplier pursuant to clause 10.2, the Customer shall … pay to the Supplier the 50 percent of the remaining value of this Contract to the Supplier in respect of the relevant Supply Premises ….'

On 22 March 2018, Genesis notified its existing suppliers, including URE, of a forthcoming amalgamation with Notting Hill Housing Trust ('**NHH**') to become NHG, the defendant. On 3 April 2018, the amalgamation was formally registered. URE was informed that this would not affect their ongoing Contract, and that it was merely a name change. Subsequently, various issues arose between the parties as to the performance of the Contract.

Termination notices
On 31 October 2018, URE issued a termination letter citing material breaches by NHG, specifically the failure to provide access for meter installations and readings ('**Termination Letter One**'). URE subsequently forwarded Termination Letter One to its legal advisors, who referred the matter to their litigation team. Following further legal advice, Termination Letter One was subsequently revoked by URE (on the basis that URE was required to give NHG notice to remedy the alleged breach before the termination right could be triggered) ('**Revocation Letter**'). URE confirmed in the Revocation Letter that it would continue to perform its obligations under the Contract and requested NHG to remedy the alleged breach of the Contract.

On 5 November 2018, a telephone call took place between Mr Ensor and a litigation partner from Burges Salmon, during which Mr Ensor was advised that URE could have a right to terminate without notice on the basis that NHG had not sought URE's approval for the amalgamation. Burges Salmon subsequently issued a second termination letter to NHG, this time citing the amalgamation as a ground for termination under Clause 10.2(d) of the Contract and reiterating the material breaches ('**Termination Letter Two**').

URE's case
The principal claim made by URE in the proceedings is for a contractual termination payment in the sum of approximately GBP 3.9m, alleged to be due on the termination of the Contract in November 2018. URE's primary case was that the amalgamation of NHH and Genesis in April 2018 triggered a right for URE to terminate the Contract under Clause 10.2(d) and that upon termination, it became entitled to payment of the above sum pursuant to Clause 10.5, which on its proper construction, was to be calculated by reference to URE's anticipated future income over the remaining life of the Contract ('**Amalgamation Claim**').

Decision

The Commercial Court ultimately found that URE was entitled to terminate the Contract based on the Amalgamation Claim, and as a result was entitled to a termination payment.

The Commercial Court reiterated the applicable principles derived from the case of *The Kanchenjunga* [1990] 1 Lloyd's Rep. 370 at 389 and from the decision of the Court of Appeal in *Peyman v Lanjani,* [1985] Ch. 457 at 487, 494, 500 (to which, as expected, there was little dispute between the parties) namely:

— Where a party (A) becomes entitled to terminate a contract, whether pursuant to a contractual right or a repudiatory breach by the other party or otherwise, it must elect whether to exercise that right or not;

— in order to make that election, A must be aware both of the facts giving rise to the right to terminate and of the right itself;

— A must actually make a decision. If it does not, the time may come when the law nonetheless deems an election to have been made;

— if, with the requisite knowledge set out in ii) above, A acts in a manner which is consistent only with one or other of two inconsistent courses, it will be held to have elected accordingly; and

— an election can be made by any words or conduct which communicates an intention to choose one or other course of action but, particularly where A has elected to abandon a right which it would otherwise possess, such election must be communicated in clear and unequivocal terms.

Was URE aware of its right to terminate and, if so, when? Is knowledge to be inferred from the fact that it was receiving advice from Burges Salmon?
In respect of this sub-issue, the Commercial Court confirmed that '*knowledge*' meant actual knowledge and that simply having the means of knowledge is not enough. The Commercial Court acknowledged that Mr Ensor was clearly aware that the Contract included a clause dealing with termination (which Mr Ensor regarded to be a '*boilerplate*' provision which he did not pay much attention to), but that there is a difference between knowing that a particular clause exists and understanding what it means or how it potentially applies in different circumstances.

NHG contended that, by reason of URE having received legal advice from solicitors, it could be presumed that they were appropriately advised and aware of their rights. The Commercial Court found that this presumption is rebuttable and that URE, specifically, Mr Ensor, was not aware of the right to terminate under Clause 10.2(d) of the Contract, until specifically advised by the litigation partner at Burges Salmon on 5 November 2018. The Commercial Court concluded that Mr Ensor did not understand the detailed provisions of Clause 10.2(d) of the Contract and had not been advised about its implications by Burges Salmon prior to this date. The Commercial Court rejected the argument that URE had blind-eye knowledge or Nelsonian blindness regarding this right.

Did URE waive its right by continued performance?

In light of the Commercial Court's finding that URE did not have the requisite knowledge of its right to terminate, the Commercial Court found that this question did not strictly arise. The Commercial Court noted that waiver by election requires knowledge of the right being waived, which URE did not have. The Commercial Court also considered the non-waiver clause (Clause 31.1 of the Contract) and concluded that it did not preclude the doctrine of waiver but required clear and unequivocal conduct to constitute a waiver, which was not present in this case. That said, the Commercial Court emphasised that if URE had been aware of its right to terminate, its conduct following the amalgamation would have been sufficient and, on an objective basis, sufficiently clear and unequivocal to amount to a waiver.

Is URE to be deemed to have elected to continue with the Contract through lapse of time?

The Commercial Court also rejected NHG's argument that the mere lapse of time between URE becoming aware of the amalgamation and its purported exercise of the right to terminate (some eight months) constituted an election to continue with the Contract. The Commercial Court held that a mere lapse of time, without more, is not a positive act and is therefore not caught by the non-waiver clause (Clause 13.1 of the Contract). The Commercial Court concluded that the mere lapse of time did not amount to a waiver of the right to terminate.

What is the correct meaning of 'value' under the Contract?

The parties agreed that if the Contract was validly terminated under Clause 10.2(d), which the judge held it to be, URE would be entitled to a Termination Payment under Clause 10.5. The key issue between the parties in this respect was the meaning of the words '*the remaining value of this Contract to the Supplier*'. URE argued that this meant the anticipated future income over the remaining life of the Contract, while NHG contended it represented only the net profit that URE would have realised over the remaining term.

The Commercial Court favoured URE's interpretation, concluding that the natural and ordinary meaning of the words suggests that '*value*' signifies the total amount payable to the supplier over the remaining life of the Contract.

The Court also noted that, given the inherent uncertainty in forecasting potential profits over the Contract's term, the '*value of this Contract*' is better understood as the amount payable under the Contract to the supplier.

NHG has appealed the Court's decision – the first Court of Appeal hearing is scheduled to be heard on 8 October 2025.

Comment

'Value'

For energy practitioners, the Commercial Court's approach to the meaning of the word '*value*' in an energy related contract will be of interest. The word is regularly used in energy contracts, such as price review/re-opener provisions in Gas Sales Agreements and change of law provisions in long-term Power Purchase Agreements.

The meaning attributable to the word '*value*' in any energy contract is likely to be heavily dependent upon the contractual context in which it is found. As such, the finding that '*value*' means revenue in the contract considered in this case is not necessarily directly translated to different legal circumstances. In practice, the word 'value' is often used in energy contracts as a form of compromise, without significant thought being given to how value should be assessed. The key take-away here is that, whilst that lack of clarity may assist in getting any deal over the line, it will not necessarily provide clarity in the event of a disagreement. Even in this case, there were other very credible approaches open to the Court. For example, it would be possible to assess the arms-length market value of the remaining term of the context by reference to what a willing third-party buyer would have paid to have the contract assigned to it.

Waiver of termination rights

This case underscores that a right to terminate is not necessarily waived merely by continued performance if the party exercising the right lacked knowledge of the termination grounds. Waiver requires actual knowledge. In turn, that might require legal advice.

That said, notwithstanding the findings in this case, it remains important to act quickly if a potential right to terminate arises. Otherwise, there remains a danger that a failure to do so will result in a lengthy, and costly, dispute as to whether a right to terminate has been waived.

Judge: Dias J

Chapter 3

Oil and Commodities

Oil and commodity contracts continue to give rise to the largest number of disputes. The range of issues arising continues to be broad, but gives insight into key issues for those drafting such contracts:

- In *Augusta Energy S.A. v Top Oil and Gas Development Company Limited* [2024] EWHC 2285 (Comm), the Commercial Court highlighted the importance of agreeing detailed terms (post-recap or pro-forma invoice terms) in commodity sales transactions.

- In *CE Energy DMCC v Bashar; CE Energy DMCC v Ultimate Oil and Gas DMCC* [2025] EWHC 297 (Comm) the Commercial Court decided a guarantee was a surety guarantee rather than 'on demand'. In doing so, it identified some of the key drafting differences.

- In *CAFI – Commodity & Freight Integrators DMCC v GTCS Trading DMCC* [2025] EWHC 1350 (Comm), the Commercial Court was required to grapple with the appropriate forum for a dispute, where a contract had been terminated by a subsequent contract (each with its own arbitration clause).

- In *Calor Gas Ltd v Walsall Gas Cylinders Ltd* [2024] EWHC 2437 (Comm), the Commercial Court reaffirmed the strength of proprietary rights and brand protection mechanisms available to gas suppliers operating under cylinder rental models.

- In *Sahara Energy Resource Ltd v Société Nationale de Raffinage S.A. (Sonara)* [2024] EWHC 3163 (Comm), the Commercial Court provided guidance of the meaning of 'directly consequential losses' in a clause that sought to define and exclude liabilities between the parties.

Detailed terms and authority to bind

In *Augusta Energy S.A. v Top Oil and Gas Development Company Limited* [2024] EWHC 2285 (Comm), the Commercial Court granted an anti-suit injunction preventing Top Oil and Gas Development Company Limited ('**Top Oil**') from pursuing claims against Augusta Energy S.A. ('**Augusta**') in the Federal High Court of Nigeria. In practical terms, the decision highlights the importance of agreeing detailed terms (post-recap or pro-forma invoice terms) in commodity sales transactions. It also gives an insight into issues concerning the authority of agents and directors to bind a company.

Facts

From around 2012, Augusta regularly sold cargoes of automotive gasoil ('**AGO**'). These included nine transactions in which the buyer was a Nigerian company, Cast Oil & Gas Limited ('**Cast Oil**').

It was explained in evidence to the Commercial Court that, in the oil trading industry, and between Augusta and its buyers, the detailed terms are not usually agreed on at the outset. There would be some form of initial agreement to the very basic parameters of the deal, though not necessarily with enough specificity for it to be a binding contract at that stage. These would sometimes (but not necessarily always) be summarised in a short recap email. The parties might also use a pro-forma invoice to indicate the parameters and facilitate the buyer obtaining a letter of credit. For Augusta, usually, the opening of a letter of credit marked the confirmation of a binding contract. Thereafter, a final form of contract would be sent including more detailed terms, including and allowing the buyer the option of trigger pricing (and with an English law and jurisdiction clause as one of those terms).

The dispute arose from an April 2015 sale contract, in which Augusta agreed to sell 10,000 metric tonnes of automotive gasoil to Top Oil. This arrangement was requested by Cast Oil, which approached Augusta acting on behalf of Top Oil as part of a fronting agreement.

The key events were as follows:

— On 9 April 2015, at Cast Oil's request Augusta issued a Pro Forma Invoice for 10,000 metric tonnes of AGO to be purchased by Top Oil ('**PFI**').

— On 20 April 2015, Cast Oil and Top Oil entered into a Memorandum of Understanding ('**MoU**'), by which it was agreed that Cast Oil could use Top Oil's Letter of Credit facility with Access Bank Plc ('**Bank**') to import 10,000 metric tonnes of AGO.

— By 23 April 2015, the Bank had issued the Letter of Credit on behalf of Top Oil for Augusta's benefit.

— On 29 April 2015, Augusta provided Cast Oil with Detailed Terms ('**Detailed Terms**'). The Detailed Terms included an exclusive jurisdiction clause in favour of the '*High Courts in London*'.

— In May 2015, the AGO was delivered to the location specified by Cast Oil.

— At the end of July, the Bank made a payment to Augusta.

— However, it later transpired that Cast Oil had been involved in a fraud against Top Oil, which resulted in Top Oil neither receiving the AGO, nor the proceeds from Cast Oil's sale of the AGO.

Subsequently, Top Oil initiated proceedings in the Federal High Court of Nigeria, Lagos Division, against Augusta, leading Augusta to seek an anti-suit injunction in the Commercial Court in London.

Decision

The Commercial Court first considered whether Augusta had demonstrated a '*high degree of probability*' that Top Oil was bound by the exclusive jurisdiction agreement. The key question was whether Cast Oil agreed to the Detailed Terms, as agent for Top Oil, so that Top Oil was bound by them.

Although the Detailed Terms were produced at a late stage of the transaction and were never expressly agreed on behalf of the buyer, the Detailed Terms were requested by Cast Oil, and Cast Oil proceeded with the transaction after receiving them. This would ordinarily amount to acceptance by conduct. However, in addition, Augusta was right to point out that the exercise of the trigger pricing option contained in the Detailed Terms, but not in any earlier document, put the matter sufficiently beyond doubt. Accordingly, the Commercial Court concluded that the Detailed Terms were agreed as between Augusta and Cast Oil.

The real question was then whether Cast Oil agreed the Detailed Terms as agent for Top Oil so that Top Oil was bound by them. Top Oil's case was that the contract that it entered into was on the terms of the PFI alone, of which it was aware, and that the Detailed Terms were not agreed on its behalf. In this regard, it is notable that the PFI stated that the price was '*subject to final contractual agreement*', which clearly implied that some other terms were to be agreed before the arrangement would be contractual. However, while this point cast doubt on Top Oil's case that the PFI was the governing document, it did not establish that Top Oil was indeed bound by the Detailed Terms.

The Commercial Court found that the MoU between Cast Oil and Top Oil provided Cast Oil with the authority to contract with Augusta on Top Oil's behalf. Top Oil argued that Mr Offiong (acting as Managing Director of Top Oil) did not have the actual authority to conclude the MoU. However, the Commercial Court decided that absence of actual authority did not prevent an agreement from coming into existence. Cast Oil reasonably relied on Top Oil's representation of Mr Offiong as its Managing Director, so as to give him ostensible authority.

The Commercial Court also considered whether the MoU was in itself part of Cast Oil's fraudulent scheme, which would mean that Cast Oil's knowledge prevented the MoU from binding Top Oil. However, it found no sufficient evidence that the MoU was indeed '*corrupt from the start*'.

On the basis that Top Oil was bound by the Detailed Terms containing the exclusive jurisdiction agreement, the Commercial Court concluded that there was a contractual basis for an interim anti-suit injunction.

Comment

The Commercial Court's decision highlights the benefit of ensuring that detailed terms and conditions are agreed following an initial agreement in principle, which may be based on a telephone call, email recap or pro-forma invoice. None of the foregoing initial steps in a transaction are likely to deal with important issues such as governing law, or jurisdiction (or forum) in which disputes are to be decided. Absent the Detailed Terms, there would have been little clarity on the jurisdiction in which disputes were to be commenced. Further, it would have been possible for the Nigerian courts to assert jurisdiction (which would not have been the seller's intent).

The decision of the Commercial Court also emphasises: (i) the importance of documenting any agreement to act as agent; and (ii) the difficulty of avoiding liability, in English law, by arguing that managing directors lack the authority to bind a company.

In relation to the second, the position in English law is less formulaic than some other jurisdictions. The 'indoor management rule' of company law, which represents Nigerian law as well as English law, provides that a person dealing with a corporation has no obligation to ensure that a corporation has gone through any procedures required by its articles, by-laws, resolutions, contracts, or policies to authorise a transaction or to give authority to a person purporting to act on behalf of the corporation.

As such, in England, when the board appoints one of their members to act as a managing director, they invest them not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see them acting as managing director are entitled to assume that they have the usual authority of a managing director. Sometimes ostensible authority exceeds actual authority. For instance, when the board appoints a managing director, they may expressly limit the managing director's authority by saying that they should not order goods worth more than GBP 500 without the sanction of the board. In that case any actual authority is subject to the GBP 500 limitation, but ostensible authority includes all the usual authority of a managing director. The company is bound by the ostensible authority in the managing director's dealings with those who do not know of the limitation (see the Supreme Court in *The Law Debenture Trust Corporation plc v Ukraine* [2023] UKSC 11 [38] et esq, quoting Lord Denning MR in *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 with approval).

As a result, companies should be aware that they may invest certain office holders with an ability to create liabilities for and on behalf of a company beyond those contemplated by their constitutional documents.

Judge: Mr Simon Salzedo KC (sitting as Judge of the High Court)

Guarantees – 'on demand' or 'surety'

In *CE Energy DMCC v Bashar; CE Energy DMCC v Ultimate Oil and Gas DMCC* [2025] EWHC 297 (Comm) the Commercial Court decided a guarantee was a surety guarantee rather than '*on demand*'. In doing so, it identified some of the key drafting differences. As the implications of an '*on demand*' guarantee are very different to those of a surety, the decision will be of interest to lawyers responsible for drafting guarantees in the energy sector.

Facts

Contractual Background

Ultimate Oil & Gas DMCC ('**UOG**') is the offshore trading arm of a group of companies based in Nigeria. Mr Bashar owns UOG and is its chairman.

Between November 2022 and February 2023, CE Energy DMCC ('**CEE**') sold gasoil and jet fuel to UOG under five spot contracts. UOG paid for the cargo delivered under those contracts, but CEE maintained that interest on late payments and demurrage due in respect of shipments MT Bourda and MT Res Cogitans had not been fully paid.

On 25 April 2023, CEE and UOG concluded a term contract under which CEE agreed to sell three cargoes of around 62,000 mt of gasoil. The term contract provided for delivery ex-ship offshore Lome and required payment to be made the earliest of 75 days after the bill of lading date or 60 calendar days from completion of discharge in Nigeria. CEE retained title to the oil until payment was made, with a mechanism for the release of oil from storage in Nigeria as payments were made.

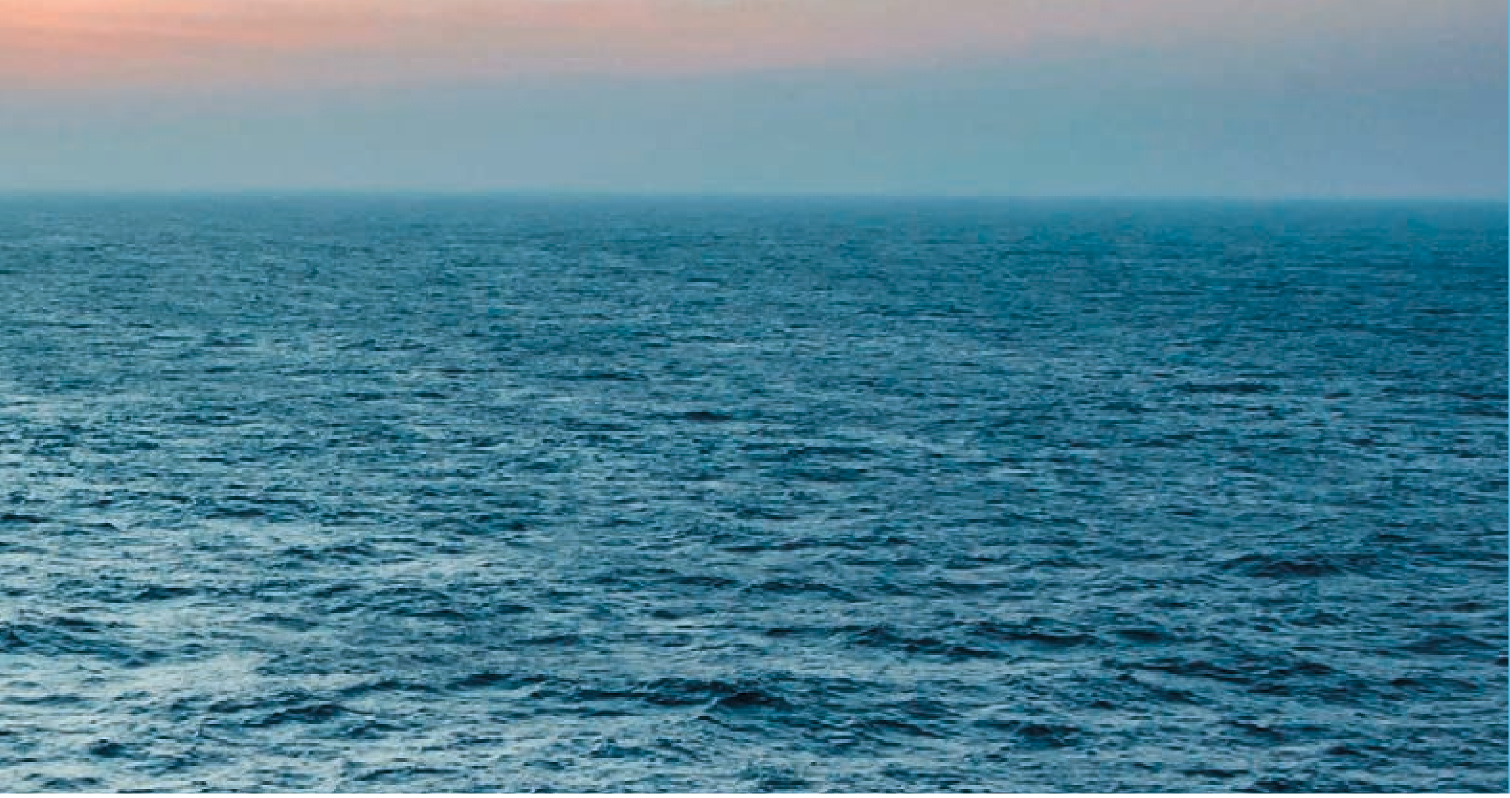
The first cargo under the term contract was delivered between 14 May 2023 and 7 June 2023 and was fully paid for, although some payments were late. The term contract was amended on 18 September 2023 to allow CEE to substitute two cargoes of 30,000 mt for one cargo of 62,000 mt. Shortly thereafter, there was a further amendment which substituted LCIA arbitration for the Dubai arbitration originally agreed.

The second cargo was delivered between 24 September 2023 and 4 October 2023. However, UOG did not pay as expected for the second cargo. On 6 October 2023, CEE validly terminated the term contract on the ground that UOG had not paid in full for the first cargo and had not paid demurrage.

Payment Agreement and Personal Guarantee

On 14 January 2024, two agreements were made. The first was a payment agreement between CEE and UOG, which contained a long set of recitals, including irrevocable admissions by UOG of amounts due to CEE for demurrage, late payment interest, and the outstanding price for the first and second cargoes under the term contract. The total amount admitted as due was approximately AED 120m.

The second agreement was a personal guarantee given by Mr Bashar, which guaranteed the punctual performance by UOG of all its payment obligations under the payment agreement, the sale contracts, and the new spot contracts. The key operative provision of the guarantee was Clause 2, which said:



'2.1 In consideration of CEE entering into the Payment Agreement, [Mr Bashar] irrevocably and unconditionally:

2.1.1 guarantees to CEE the punctual performance by UOG of all of UOG's payment obligations to CEE under the Payment Agreement, the Sale Contracts, New Spot Cargo 1 and New Spot Cargo 2;

2.1.2 undertakes with CEE that whenever UOG does not pay any amount when due under the Payment Agreement, [Mr Bashar] shall immediately on demand *pay that amount as if the Guarantor were principal obligor, without any need whatsoever for CEE to have to obtain an award or judgment against UOG first; and*

2.1.3 this Personal Guarantee shall stand null and void after all amount due (or falling due) under the Payment Agreement, the Contract [the Sale Contracts], the New Spot Contract 1 and the New Spot Contract 2 have been received in full by CEE.'

Decision

The Commercial Court had to decide:

1. Whether CEE was merely required to make a demand under the guarantee, or whether it must prove UOG was obliged to pay the sum claimed.
2. If it was required to show that UOG was obliged to pay, whether CEE must show as a fact that UOG is liable or whether the admissions of liability by UOG contained in the payment agreement were conclusive against Mr Bashar.

Nature of the Guarantee

In relation to the proper construction of the guarantee there were three possibilities. It was:

— A demand guarantee, where Mr Bashar would be obliged to pay any sum demanded in good faith, regardless of UOG's actual liability;

— a contract of suretyship, where Mr Bashar would be liable as a surety if UOG did not perform its obligations; or

— a guarantee requiring that UOG's liability be established by an award or judgment before Mr Bashar could be called upon to perform.

Identifying whether a particular contract (whatever it is called) is a demand guarantee or a classic contract of suretyship is, as the Court of Appeal pointed out in *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd* [2021] 1 WLR 5408, a matter of construction. The essential question is whether the guarantor's obligation is (a) to pay what is demanded because it has been demanded or (b) to ensure that the principal obligor meets its obligations. If the demand itself triggers the obligation to pay, the guarantor must pay even if the principal obligor is not actually liable, unless the demand is invalid or not made in good faith. If the guarantee depends on the principal obligor's actual liability, the creditor must be able to prove what that liability is.

As Popplewell LJ's discussion in *Shanghai Shipyard,* cases that refer to '*presumptions*' that certain documents are '*on demand*' or '*surety*', tend to obscure rather than illuminate. So much depends on the context.

In terms of the language, there are indications pointing in both directions:

1. The guarantee contained a '*warning*' to Mr Bashar that he might have to pay '*instead of UOG Oil & Gas DMCC*'. That is the language of suretyship, rather than of a demand guarantee, because it treats the guarantor as standing '*in the shoes*' of the principal obligor.
2. Recital E provided that Mr Bashar '*unconditionally, absolutely and irrevocably guarantees all of UOG's present and future payment obligations to CEE in respect of the Payment Agreement*'. Although in Shanghai Shipyard Popplewell LJ thought references to '*unconditional*' and '*absolute*' liability suggested a demand guarantee, simply on their own, they are equally applicable when applied to either form of guarantee.
3. Although there is a reference to a demand in Clause 2.1.2, the obligation to pay in response to that demand arises only '*whenever UOG does not pay any amount when due under the Payment Agreement*'. Although there is a reference there to payment as principal obligor, that expression is not used (as it was in *Shanghai Shipyard*) in contrast to, or in some express capacity other than, suretyship.
4. In Clause 3.1, the guarantee is expressed to extend to 's*ums payable by UOG to CEE*'. Again that shows a focus on the underlying liability as the guarantee's subject-matter.
5. Clause 3.4 waived various defences which are applicable especially to suretyship agreements.
6. Clause 7.1 headed '*Payments to CEE' provides 'Immediately upon demand by CEE, payment of the demanded amount shall be made to CEE's nominated bank account in AED*'.

Apart from Clause 7.1, the indications here, taken together, pointed strongly to this being a surety contract. Clause 7.1, on the other hand, had the flavour of a demand guarantee, because it refers to the payment being made '*of the demanded amount*'. However, that did not show that the payment is to be made even if the demanded amount is not in fact due. That would attribute to a provision dealing with the mechanics and timing of payment, a force that it does not have when set in the agreement seen as a whole.

As such, the Commercial Court concluded that the guarantee was a contract of suretyship. This meant that CEE needed to establish that UOG was liable if it was to recover from Mr Bashar. That said, the Commercial Court also held that CEE did not need to wait for an arbitration or court judgment to establish UOG's liability before calling on the guarantee.

Binding Nature of Admissions in the Payment Agreement

The Commercial Court found that the payment agreement contained irrevocable admissions by UOG of the amounts due to CEE. These admissions were binding on UOG and, by extension, on Mr Bashar as the guarantor. The Commercial Court held that UOG could not resile from these admissions, and neither could Mr Bashar.

In *Rolls-Royce Holdings plc v Goodrich Corporation* [2023] EWHC 1637 (Comm), Foxton J described the doctrine of 'contractual estoppel' as '*well-established*'. The doctrine is not a species of estoppel properly so-called, but simply a case of the court holding a party to its promise through a form of specific enforcement of the primary obligation assumed by requiring litigation to be conducted on the promised basis.

The first point that follows from this is that a contractual estoppel is not like an admission (of merely evidentiary value): it is a promise. By agreeing to proceed on the basis that X is true, a party does not merely provide supportive evidence for X: it binds itself to proceed as if X were true, even if it is not. Where that is expressed to be '*irrevocable*' then, unless there are grounds for avoiding or disapplying the contract by which it was made, the court will normally enforce the promise.

In the context that UOG had not merely admitted a debt, but had made a promise to pay (by way of contractual estoppel) it, the guarantee given by Mr Bashar extended to discharging that promise to pay.

Comment

Whether a guarantee is '*on demand*' or a '*surety*' may have real practical implications. The key difference being whether the obligation to pay under the guarantee is conditional upon the liability of the obligor (surety) or merely conditional upon the making of a valid demand for payment.

Although it is sometimes said that there are '*presumptions*' as to whether guarantees given by certain classes of parties are an '*on demand*' guarantee or '*surety*', the Commercial Court made clear that it will be a matter for the proper construction of the relevant instrument. Also, whilst the background of the parties may be relevant (for example, it is more likely that an '*on demand*' guarantee will be given by a non-associate party such as a bank), it is important to focus on the written terms of the guarantee to ascertain its true construction.

When construed as a whole the guarantee in this case was a surety. Although there was a reference to a '*demand*', the obligation to pay in response to that demand arose only '*whenever UOG does not pay any amount when due under the Payment Agreement*'.

The language used in a Parent Company Guarantee ('**PCG**') must clearly reflect whether the guarantee is intended to be an on-demand obligation or a secondary (surety-style) liability. Simply stating that the guarantee is '*unconditional*' or '*payable on demand*' may not be sufficient as the courts will interpret the contract as a whole.

Where an on-demand guarantee is intended, the drafting should state that the Guarantor is obliged to pay upon a compliant demand, irrespective of any proven default by the Contractor. Where the parties intend the PCG to function as an on-demand guarantee i.e., where the Guarantor is to pay upon a compliant demand regardless of whether the Contractor is in actual default, this should be stated expressly and supported by provisions that make the Guarantor's liability independent of the Contractor's.

Conversely, where the PCG is intended to operate only if the Contractor fails to perform and is in breach of contract, the guarantee should make clear that the Guarantor's obligations are co-extensive with those of the Contractor and contingent upon the Contractor's breach. Clauses that preserve the Guarantor's rights to raise the same defences as the Contractor may further indicate a secondary obligation.

Judge: Paul Stanley KC (sitting as a Deputy High Court Judge)

Overlapping Arbitration Clauses in Sequential Contracts

In *CAFI – Commodity & Freight Integrators DMCC v GTCS Trading DMCC* [2025] EWHC 1350 (Comm), the Commercial Court was required to grapple with the appropriate forum for a dispute, where a contract had been terminated by a subsequent contract (each with its own arbitration clause). Although it is not an oil and gas case, it will be of relevance to many practitioners.

Facts

The dispute centred on two contracts for the sale and purchase of Russian milling wheat, entered into by CAFI Commodity & Freight Integrators DMCC ('**CAFI**') as buyer and GTCS Trading DMCC ('**GTCS**') as seller. The initial contract was effective from 11 March 2022 (the '**First Contract**').

Following the imposition of the US sanctions against Russia, CAFI failed to make payments under the First Contract and sought to rely on a clause in the contract excusing performance due to sanctions. In resolution, the parties agreed the terms of a second contract for the same goods, but at a reduced price (the '**Second Contract**'). The Second Contract incorporated the same arbitration clause as the first contract and, notably, a termination clause which stated: '*Both parties have agreed that Contract No. RMW125-11032022-1 dd. 11.03.2022 [i.e. the First Contract] … is terminated and considered void*' (the '**Termination Clause**').

GTCS later commenced GAFTA arbitration proceedings under the First Contract, seeking damages for repudiatory breach of the First Contract by CAFI. In response, CAFI relied on both the sanctions exemption in the First Contract and the Termination Clause in the Second Contract, contending that the Termination Clause extinguished all rights and liabilities under the First Contract. GTCS argued the arbitral tribunal had no jurisdiction to consider the meaning of the Termination Clause as the tribunal had only been constituted under the First Contract.

Arbitral Award

The arbitral tribunal found in CAFI's favour, concluding GTCS had waived its claim for damages by entering the Second Contract, which included the Termination Clause.

GAFTA Appeal Board

GTCS appealed to the GAFTA Appeal Board ('**Board**'), who reversed the decision on the basis that, as the arbitral tribunal had been appointed under the First Contract, it had no jurisdiction to consider the Second Contract and therefore the Termination Clause was to be disregarded.

CAFI appealed the Board's Award to the Commercial Court under sections 67, 68 and 69 of the Arbitration Act 1996 (the '**Act**').

Decision

The Commercial Court upheld CAFI's appeal, concluding:

1. The arbitration clause in the First Contract was sufficiently broad to encompass disputes about whether a claim for damages under that contract had been waived or extinguished by a subsequent agreement (i.e., the Second Contract).
2. In this respect, the Commercial Court stated: '*The objective intention of the parties at the time of entering into the First Contract must have been that disputes relating to the validity and continuing effect of the First Contract would be resolved under the arbitration agreement in that contract; and, further, that in entering into the Second Contract the parties were not (objectively) intending to carve out a discrete class of disputes relating to the validity and continuing effect of the First Contract – viz disputes arising out of the Termination Clause in the Second Contract – that were not to be subject to the arbitration agreement in the First Contract.*'

The Board could not properly or fairly determine liability for damages under the First Contract without first determining the effect of the Second Contract, which was central to the waiver issue. The Commercial Court noted: '*The Second Contract was not merely a piece of factual evidence to be evaluated as part of the circumstances as a whole. It was a binding contract and needed to be treated and interpreted as such*'.

Comment

For companies in the oil and gas sector, where complex multi-contracts are common, the judgment underscores the need to carefully draft arbitration clauses in broad and consistent terms to ensure disputes arising from such contracts will be resolved in a single forum; this therefore prevents duplicate arbitral proceedings and potentially conflicting awards, and the need to commence parallel arbitrations. That issue is especially acute in circumstances where there is a settlement of a dispute that amends the contractual obligations of the parties going forwards.

Judge: Henshaw J

No Free Refills

In *Calor Gas Ltd v Walsall Gas Cylinders Ltd* [2024] EWHC 2437 (Comm), the Commercial Court reaffirmed the strength of proprietary rights and brand protection mechanisms available to gas suppliers operating under cylinder rental models. The case, which involved allegations of conversion, trespass, and conspiracy arising from the unauthorised refilling of Calor-branded LPG cylinders, provides guidance for energy businesses, particularly those in the oil and gas sector, seeking to safeguard their assets, distribution channels, and customer trust both in the UK and abroad.

Facts

Calor Gas Ltd ('**Calor**'), a major UK supplier of liquefied petroleum gas, brought proceedings against Walsall Gas Cylinders Ltd ('**WGC**') and its directors, alleging that they had engaged in the unauthorised refilling and distribution of Calor-branded gas cylinders.

Calor's business model involves the retention of title over its gas cylinders, which are supplied to customers under licence and must only be refilled by Calor or authorised agents. Before an end customer can obtain a Calor gas cylinder, they must enter into a 'Cylinder Refill Agreement'. This agreement prohibits unauthorised refilling and demonstrates Calor's continuing ownership and exclusive right of refill. Pertinent terms include:

'Calor Gas cylinders remain at all times the property of Calor Gas Limited ('CALOR')

…

3. ***Cylinders remain the property of [Calor] at all times and may only be filled by [Calor]** – Calor makes the Cylinder(s) available to the User as a means of safely transporting and storing the Gas supplied. This agreement is not a rental agreement and it does not provide the User with title in the Cylinder. The User will not part with possession or control of the Cylinders (other than to a CALOR Outlet) nor claim to have rights in breach of this agreement, nor claim or attempt to create or create any agency or bailment in relation to the Cylinders or the User's obligations.*

4. ***Use of Cylinder** – Cylinders may be used only as a container for [Calor] Gas and may not be … transferred … lent, abandoned, nor … filled or tampered with.*

5. ***[Calor's] rights over the Cylinders** – The User is liable for the safe storage and use of the Cylinder … In any case of wilful damage or breach of this Agreement Calor may repossess Cylinders immediately and the User by entering into this agreement irrevocably authorises [Calor] … to enter on the Users property for these purposes and in that event this agreement is terminated.'*

In addition to the contractual framework, all cylinders were marked with clear warnings: '*Property of and only to be filled by Calor Gas Ltd*.'

In 2021, Calor became aware of suspicious activities at a site operated by WGC, which included stockpiling, tampering with, and refilling its branded cylinders without permission.

Despite Calor's previous legal actions to protect its intellectual property and health and safety standards, including a 2022 search order, the alleged misconduct continued.

As a result, Calor sought remedies for:

— Conversion and trespass to goods, based on the unauthorised interference with its cylinders;

— passing off, alleging reputational damage; and

— unlawful means conspiracy, implicating both the company and its individual directors in a coordinated scheme.

Decision

The Commercial Court found in Calor's favour on the central claims of conversion and unlawful means conspiracy. The claim in passing off, however, was dismissed.

Conversion (and Trespass to Goods)
In assessing the interference, the Commercial Court applied the principles from *Kuwait Airways Corp v Iraqi Airways (Nos 4 and 5)* [2002] 2 AC 883, confirming that: '[i]*n general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner so as to exclude him from use and possession of the goods*.'

On the facts, the Commercial Court decided that WGC's actions met this threshold. The known purpose of the cylinders was to store Calor's gas, yet WGC used them to contain and distribute gas sourced from elsewhere. The Commercial Court considered this to be a substantial and deliberate interference with Calor's possessory rights; sufficiently serious to constitute conversion. It noted that even if the conduct had fallen short of conversion, it would still amount to trespass to goods, as the deliberate handling and refilling of Calor's cylinders with non-Calor gas was plainly unauthorised.

The Commercial Court also noted that actual physical possession of the cylinders was not required to sustain a claim in conversion or trespass, as Calor's immediate right to possession, coupled with its documented ownership, was sufficient. Importantly, the Commercial Court rejected WGC's arguments that the widespread use of the cylinders in circulation diluted Calor's legal claim, holding instead that the business model (and customer agreements) made clear that legal title remained with Calor throughout.

The Commercial Court therefore affirmed that Calor had a continuing proprietary interest in the gas cylinders, which it retained under the contractual hire system with end-users, and that WGC's unauthorised handling, refilling, and return of those cylinders amounted to a direct interference of these possessory rights.

Unlawful Means Conspiracy
Calor also succeeded on its claim for unlawful means conspiracy. The Commercial Court applied the test set out in *Kuwait Oil Tanker Co SAK v Al Bader (No. 3)* [2000] 2 All ER (Comm) 271 (CA) (and restated by Miles J in *Libyan Investment Authority & Ors v King & Ors* [2023] EWHC 265 (Ch)). The test requires the claimant to establish the following:

— A combination or agreement between two or more persons – no formal agreement is required, and '*it is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end*';

— the use of unlawful means pursuant to that agreement;

— an intention to injure the claimant, either as an end in itself or as a means to an end; and

— resulting loss or damage to the claimant.

In this case, the Commercial Court found that the defendants, both the corporate entity and the individual directors, acted in concert with knowledge that their actions in handling and filling the cylinders (whether that be conversion or trespass) were unlawful. The unlawful means in this case also included serious breaches of health and safety regulations. Calor's chief engineer gave compelling evidence in this regard that the unauthorised refilling of Calor's cylinders posed a '*real risk to the general public*', thereby reinforcing the gravity of the misconduct.

The Commercial Court also decided that evidence showed sustained cooperation between the individuals to facilitate a business model (i.e. to make money for themselves) based on the unauthorised refilling of Calor's cylinders. This was more than incidental wrongdoing: it was a deliberate and organised commercial strategy to profit from infringing activity at Calor's expense in the face of prior legal warnings and legal action.

This made out the necessary elements of an unlawful means conspiracy, providing Calor with a parallel route to injunctive and compensatory relief.

Passing Off

However, the Commercial Court declined to uphold Calor's claim in passing off. While the cylinders clearly bore Calor's branding, the Commercial Court found no sufficient evidence that consumers were misled into believing that: (i) the defendants were authorised Calor agents; or (ii) the gas supplied to them was 'Calor' gas. In fact, one of the commercial attractions for a customer in having their cylinder filled at WGC's premises was that it was cheaper than returning it to a Calor dealer, and so the court found it probable that the customer knew that this was not a Calor filling station.

There was also no suggestion of explicit claims by WGC to be acting on Calor's behalf. Whilst the passing off decision may appear surprising in some respects, without evidence of a risk of misrepresentation or deception, Calor failed to establish the three necessary grounds in the classic 'trinity' test of *Jif Lemon* (these being goodwill, deception and damage).

Relief Granted

Calor ultimately pursued only injunctive relief, seeking to restrain WGC from selling LPG sourced from third parties in Calor-branded cylinders and from handling Calor's cylinders without authorisation. Although Calor had considered claims for damages or an account of profits, it was unable to quantify its losses, particularly in light of WGC's cessation of trading.

The Commercial Court granted a permanent injunction, prohibiting both WGC and its directors from engaging in any further unauthorised refilling or distribution of Calor's gas cylinders. While the judgment left open the possibility of future claims for damages, the Commercial Court focused primarily on the injunctive relief, noting that this outcome met Calor's commercial and strategic objectives: namely, the enforcement of its proprietary rights and the clear deterrent signal to others who might consider similar infringements.

Comment

Significance for the Oil and Gas Sector

This judgment is of particular significance to oil and gas sector clients, both domestic and international, who distribute products via proprietary containers or infrastructure, such as gas cylinders. It confirms that suppliers operating under retention of title models can robustly assert proprietary rights against third parties, even where those goods have entered widespread circulation in the market.

As such, those seeking to restrict the use of proprietary containers or infrastructure will benefit from ensuring agreements with users/customers contain provisions:

— Ensuring title to the container or infrastructure is retained;

— requiring that the user or customer does part with possession or control of the container or infrastructure;

— requiring that the container or infrastructure may be used only for their product and may not be transferred, lent, abandoned, filled or tampered with; and

— entitling the owner to regain possession, and access relevant premises to do so.

Where such provisions exist, this case also demonstrates the English courts' readiness to grant powerful injunctive relief, including in situations where losses are not readily quantifiable, provided there is deliberate and systematic interference.

Finally, whilst the court was not on this occasion willing to uphold the argument on passing off, there remain viable routes for using brand protection (principally trade marks and passing off). Since passing off is entirely common law and evidence based, the collection of the right evidence is of crucial importance. Further, whilst a transactional decision will always be core, IP law is moving away from this being the only relevant factor, with the concept of 'post-sale' confusion becoming increasingly important in IP cases.

Challenges of Cross-Border Enforcement

While the Commercial Court's judgment focused on the UK-based infringement and did not address cross-border enforcement, the case raises broader legal and practical questions for businesses operating internationally.

While enforcement is relatively straightforward when assets and parties are located within the UK, international enforcement may prove more complex. The UK no longer benefits from the EU's mutual recognition regime. Although the Hague Convention on the Recognition and Enforcement of Foreign Judgments facilitates the enforcement of civil and commercial judgments between contracting states, the number of parties to the convention remains limited, the scope of the convention is circumscribed in respect of movable and immovable property and its scope explicitly excludes interim measures. As a result, careful thought should be given to enforceability and whether a court or arbitration provision is better suited to the contract in question. In this respect:

- If courts are favoured, careful thought should be given as to whether there should be 'carve outs' to any exclusive jurisdiction provision to reflect any need to obtain interim or enforcement relief in a foreign court; and
- in some cross-border settings, international arbitration may offer a more neutral and enforceable path, particularly under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). However, it remains a live question whether arbitrators have the power to grant effective interim relief akin to interim injunctions, and even where they do, such relief may not be readily enforceable in all jurisdictions. In addition, careful consideration should be given as to the ultimate enforcement route of any final 'injunctive' relief granted by a tribunal in local courts.

Overall, the decision is a timely reminder for energy companies, manufacturers, and IP-intensive businesses that robust contractual frameworks, proactive enforcement strategies, and flexible dispute resolution mechanisms are essential tools for protecting brand value and operational integrity, particularly in markets where infringing conduct may spread rapidly or where proprietary assets remain vulnerable.

Judge: Worster HHJ

'Directly consequential loss' clauses

In *Sahara Energy Resource Ltd v Société Nationale de Raffinage S.A. (Sonara)* [2024] EWHC 3163 (Comm), the Commercial Court provided guidance of the meaning of '*directly consequential losses*' in a clause that sought to define and exclude liabilities between the parties. Whilst the words '*directly consequential losses*' were unusual, 'consequential loss' clauses are commonly used in the industry, so the approach of the Commercial Court will be of interest to energy practitioners.

Facts

Sahara Energy Resource Ltd ('**Sahara**') trades crude oil. Société Nationale de Raffinage S.A. ('**Sonara**') is a Cameroonian state-owned crude oil refinery. Sahara supplied multiple cargoes of crude oil to Sonara between 2013 and 2016, financed by major banks. The case concerned claims by Sahara against Sonara for breach of a contract dated 14 January 2013 and various further crude oil contracts concluded in 2014, 2015, and 2016.

Sonara repeatedly delayed payment for several crude oil cargoes, in some cases by up to six years. Sahara brought claims to recover not only the principal and contractual interests (which were eventually paid), but also additional losses: incremental interest, excess interest and penal charges imposed by its banks, penalties for late payment under letters of credit, and Foreign Exchange Losses ('**FX Losses**') due to currency fluctuations, resulting from Sonara's delayed payments in relation to various crude oil cargoes. The parties held a series of reconciliation meetings, culminating in a detailed 'Joint Report' in 2019 which summarised agreed and disputed claims, but did not resolve all issues (the '**Joint Report**'). Disputes remained between the parties over the status of certain claims and the effect of the Joint Report.

Sonara disputed Sahara's claims on several grounds including: (a) that the limitation period started running for each cargo when the payment fell due, making all relevant causes of action time-barred; and (b) that the losses were excluded by the contract.

Decision

Were losses excluded as 'directly consequential losses'?

The contractual framework for compensation for late payment was built around three main clauses: Clause 8 (payment and interest), Clause 18 (liability) and Clause 26 (event of default/ indemnity). Clause 18 stated:

'Neither seller nor buyer shall in any event be liable, whether in tort or contract, for any more than the normal measure of damages provided for by the Sale of Goods Act 1979 together with any proven additional directly consequential losses. Neither party shall be liable for indirect, unforeseen or special losses of any kind.'

In *Hadley v Baxendale* [1854] EWHC Exch J70 the Court defined recoverable losses as:

'Either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the

contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.' Sahara contended that Sonara's case misunderstands the law, and that in the context of exemption clauses, '*consequential*' losses are generally understood to be losses falling within the second limb of *Hadley v Baxendale*, i.e., losses which do not arise naturally (or in the usual course of things) from the breach but which would have been in contemplation of the parties as the probable result of breach on the basis of particular circumstances known to the parties.

However, the Commercial Court considered that, although not orthodox, the words '*directly consequential losses*' were not inapt to cover first limb *Hadley v Baxendale* losses; '*arising naturally from*' was not a great distance from '*directly consequential*'. Further, the meaning to be ascertained for the recoverable losses covered by that phrase can properly be tested against the concept of '*indirect, unforeseen or special losses of any kind*' which was irrecoverable. Doing that, the mention of indirect and special losses provides a nod in the direction of the Victoria Laundry approach to the second limb of *Hadley v Baxendale*.

As such the Commercial Court interpreted Clause 18 to mean that only losses falling within the first limb of *Hadley v Baxendale* (i.e., losses naturally flowing from the breach) were recoverable, while losses falling within the second limb, which are frequently characterised as '*indirect*' (i.e., losses which do not arise naturally but were in contemplation of the parties as a '*probable result of breach*'), were excluded.

Against that interpretation, the Commercial Court concluded that the incremental interest, excess interest and penal charges claimed by Sahara '*fall squarely*' within the recoverable losses under Clause 18 as such losses arose naturally from the breach. However, the Commercial Court was not persuaded that FX Losses, being a result of FX fluctuations, were recoverable, as such risks are commonly hedged in the industry and would not necessarily be expected to fall on the buyer.

Limitation: were the claims time-barred?
The Commercial Court undertook a detailed analysis of the limitation defence raised by Sonara, focusing on whether Sahara's claims for losses arising from late payment were time-barred under the Limitation Act 1980. The key findings were as follows:

- **Accrual of cause of action:** The Commercial Court held that the limitation period for Sahara's claims began to run when payment for each cargo became due – specifically, 120 days after the bill of lading date. As Sahara issued the Claim Form on 21 April 2021, relevant causes of action accruing before 21 April 2015 were prima facie time-barred.
- **No effective acknowledgment or suspension:** Sahara argued that the Joint Report amounted to an acknowledgement of the debt or an agreement to suspend the limitation period. The Commercial Court rejected this, finding that the Joint Report did not constitute an unequivocal admission of legal liability by Sonara, nor did it amount to an agreement to suspend or extend the limitation period. The Commercial Court highlighted that, for an acknowledgment to reset the limitation period under s. 29(5) of the Limitation Act, the debtor must admit both the indebtedness and its legal liability to pay the claim. In this case, whilst Sonara firmly rejected, and agreed to jointly contest the penal charges, it had clearly denied liability for the incremental interest and FX Losses, both before, during and after the reconciliation meeting.

It followed that Sahara's claims were time-barred.

Comment

The decision of the Commercial Court highlights the relevance of two important issues for energy law practitioners (i) first, the importance of clear drafting of 'consequential loss' clauses and (ii) second, the factors needed to stop a debt or claim becoming time-barred.

In relation to 'consequential loss' clauses, clauses seeking to deal with '*consequential loss*', '*indirect loss*' and or '*special losses*' are widely used in the energy sector. However, they are not necessarily widely understood.

In English law, the proper construction and interpretation of each contract will turn on its own terms. Lewison, *Interpretation of Contract* (8th Edition) explains that where a contract excepts one party for '*liability for consequential loss, it will normally be interpreted as exempting him only from such loss as is recoverable under the second limb of the rule in Hadley v Baxendale*'. However, that is just the general position.

Here there was an interesting clause that allowed claims for direct consequential loss, and excluded liability for indirect, unforeseen or special losses of any kind. As such, the Commercial Court was required to seek to ascertain what was meant by these terms.

In relation to time-bars, extending a limitation (absent the express agreement of the other party), requires the debtor must admit both the indebtedness and its legal liability to pay the claim. As such, the courts will usually require clear written material establishing these facts. Anything less is unlikely to be enough.

Judge: Cockerill J

Chapter 4

Tax

It is perhaps indicative of the changing nature of the oil and gas industry that the number of tax decisions continues to increase. The past twelve months have produced two important Supreme Court decisions:

- In *HMRC v Dolphin Drilling Ltd* [2025] UKSC 24, the Supreme Court unanimously dealt with taxation of accommodation on support vessels.
- In *Royal Bank of Canada v HMRC* [2025] UKSC 2 the Supreme Court dealt with the allocation of taxing rights between the UK and Canada relating to income earned from the sale of oil found in the UK continental shelf in the North Sea.

Offshore accommodation and the meaning of 'incidental'

In *HMRC v Dolphin Drilling Ltd* [2025] UKSC 24, the Supreme Court unanimously dismissed the taxpayer's appeal, concluding that the words '*Incidental to another use*' required a use that arises out of the primary use, rather than an independent but secondary use. In practical terms this meant that significant, specifically contracted-for accommodation functions on support vessels could trigger the application of the '*hire cap*', limiting the tax deductibility of lease payments. For offshore oil and service companies, there are potentially important implications for projects where inter-affiliate leasing arrangements are used.

Facts

The case concerned the application of the oil contractors ring fence, which is set out in Part 8ZA Corporation Tax Act 2010 (the '**Act**'). Not to be confused with the general ring fence regime applicable to UK exploration and production activities, the contractors ring fence applies to companies in the supply chain that lease certain mobile assets to those carrying on those activities. In particular, the regime imposes a '*hire cap*' (at section 356N), which limits a contractor's ability to deduct for corporation tax purposes payments it makes under a lease of a '*relevant asset*' from an associated person.
The taxpayer, Dolphin Drilling Ltd, ('**Dolphin**') had been invited by Total E&P UK Ltd ('**Total**') to tender for the provision of a tender support vehicle ('**TSV**') at the Dunbar oil platform in the North Sea. The nature of the Dunbar platform was such that a TSV was required to provide tender assisted drilling ('**TAD**') services to support a proposed drilling campaign on the platform.

Dolphin proposed to use a semi-submersible drilling rig called the Borgsten Dolphin (the '**Borgsten**'), which could be converted into a TSV and was hired from an associated entity of Dolphin. The Borgsten, in addition to the space to be used for the TAD services, had the capacity to accommodate 102 persons on board, of which it was expected there would be around 47 surplus berths beyond those to be used by Dolphin and its subcontractors.

Total subsequently awarded the contract to Dolphin, and the contract originally included a requirement that the Borgsten supply accommodation for its own crew and 40 Total personnel. Subsequently, it was agreed that the accommodation of the vessel would be increased to 120 people, in return for an additional sum paid to cover the modification costs.

In Dolphin's tax returns it assumed that it was entitled to take account in the calculation of its profits for corporation tax purposes the entirety of the fees it paid to its associated entity for the hire of the Borgsten. HMRC's view, however, was that the hire cap should apply to restrict the tax deductions available to Dolphin as a result of the Borgsten being a '*relevant asset*' within section 356LA of the Act.

This definition broadly encompasses assets that are mobile, and which can either be used to drill exploration or production wells (which was not relevant to the TSV) or to '*provide accommodation for individuals who work on or from another structure used in a relevant offshore area*'.

However, an asset otherwise falling within this second category is excluded (under section 356LA(3) of the Act) 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***', and the central issue in contention was whether the exclusion applied to the Borgsten.

The First-tier Tribunal ('**FTT**') found in favour of Dolphin, holding that the exclusion did apply, and this was upheld in the Upper Tribunal on appeal by HMRC. The Court of Appeal allowed HMRC's appeal, concluding that the exclusion did not apply, and the taxpayer appealed to the Supreme Court.

Decision

The central focus of the Supreme Court was on what it meant for one use to be '*incidental to*' another, which should be given its ordinary meaning, and in considering the alternative approaches taken by the lower courts.

The FTT had broadly concluded that something was incidental to another matter if it was subordinate, or secondary, to it. Since the primary use of the Borgsten was providing TAD services, and the provision of accommodation was a secondary use, the exclusion was capable of applying. In contrast, the Court of Appeal had found that that the words in question were ordinary words, and that use A was incidental to use B, '*if it arises out of use B, something that is done because of use B, or in connection with use B, or as a by-product of use B*'. This was not the case if use A were an unconnected and independent purpose in itself.

The Supreme Court preferred the approach taken by the Court of Appeal – with the unanimous judgment wholly agreeing with the key analysis by the Court of Appeal – and concluded that unless use A arose out of use B, it was independent and not incidental to use B. Since the provision of accommodation did not arise out of the TAD services, it was not incidental to them, and the exclusion was not capable of applying.

The Supreme Court did note that in principle, the use of accommodation on a TSV which was '*trivial or casual*' may not be more than incidental to the provision of TAD services, but concluded that, '*those are not the circumstances of this appeal where Total stipulated for the use of extensive accommodation on the Borgsten and extra accommodation on the Borgsten was created for and paid for by Total*'.

Dolphin had argued that the case raised a point of law of general public importance because of the frequency of the use of the words '*incidental to*' in other taxing statutes. The Supreme Court concluded, however, that it was not appropriate for it to make any rulings on the phrase '*incidental*' or '*incidental to*' as it appears in other statutory contexts as it is important to read those words in their specific statutory context.

Comment

Given the deductibility of leasing costs is likely to have a material impact on the tax position of contractors, the case is a potentially significant one for the UK oil and gas supply chain (in particular, companies that lease multi-purpose offshore assets). It is not uncommon for TSVs to have surplus accommodation which could be used to provide accommodation services to offshore workers. The Supreme Court's decision confirms that if a vessel's accommodation function is a significant independent part of its use – especially where it is specifically contracted for and paid for by the operator – the hire cap will apply, limiting the tax deductibility of lease payments. Whether it can be said that such provision arises out of or in connection with other services will need to be carefully considered by taxpayers in light of the Supreme Court's decision and considering the factual findings of the FTT on which those findings were based.

In this context, it is interesting to note the comment that the provision of accommodation services may still fall within the exclusion where they are '*trivial or casual*', even if it this was not the case here. This suggests that on different facts there may be a route to such accommodation services still being accepted as incidental. This does though seem to partly replace the question of what is meant by incidental with the question of what is meant by trivial or casual, and (unless HMRC guidance is forthcoming on the point) this may be an area of focus for taxpayers who wish to determine whether the hire cap applies to them.

The Supreme Court's conclusion that the phrase '*incidental to another use*' refers to use which arises as a result of a primary use (as opposed to a use which is merely less important than the main use) may also have wider relevance in other legislative provisions, notwithstanding the comments of the Supreme Court regarding the importance of statutory context.

Potential practical implications for those in the industry are:

- Reviewing existing and future leasing arrangements for offshore assets to assess whether the accommodation function could be considered more than '*incidental*';
- ensuring that contractual documentation clearly sets out the intended uses of the asset, and considering the tax implications of any modifications or upgrades to accommodation capacity; and
- seeking appropriate advice on the potential impact of the hire cap on proposed structures.

First-tier Tribunal Judges: Judge Zaman and Duncan McBride

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

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

Supreme Court Judges: Lord Hodge DPSC, Lord Burrows JSC, Lady Rose JSC, Lord Richards JSC and Lady Simler JSC

Supreme Court Guidance On Double Tax Treaty

The Supreme Court of the United Kingdom handed down its judgment in respect of the appeal of *Royal Bank of Canada v HMRC* [2025] UKSC 2, which concerned the allocation of taxing rights between the UK and Canada. The case relates to income earned from the sale of oil found in the UK continental shelf in the North Sea. The appeal concerned the application of the UK/Canada double taxation treaty (the '**DTT**') and whether the UK had a right to charge to tax payments made by BP Petroleum Development Ltd ('**BP**') to Sulpetro and Royal Bank of Canada ('**RBC**'). The majority found in favour of RBC that the relevant payments were not subject to corporation tax.

Facts

Sulpetro Limited ('**Sulpetro**') was an international company involved in exploiting North Sea oil and resident for tax purposes in Canada. It set up a UK subsidiary, Sulpetro (UK), which was granted a licence by the UK to explore the Buchan Field in the North Sea continental shelf.

It was agreed that Sulpetro would fund and provide expertise for the exploration, and in return would receive Sulpetro (UK)'s share of the oil found. In 1986, BP acquired the share capital in Sulpetro (UK) and the oil rights that Sulpetro had under its agreement with Sulpetro (UK). In return, BP agreed to make payments to Sulpetro calculated by reference to the volume of oil BP acquired once the price rose above a certain level (the '**Payments**').

Separately, Sulpetro was indebted to RBC and unable to repay its loan. By a court order in 1993, the right to receive the Payments was assigned to RBC as a result of Sulpetro's continued indebtedness.

The Court considered whether the UK had a right to charge to tax the Payments made by BP to Sulpetro and subsequently to RBC.

This required consideration of Article 6 of the DTT. This provides that income from immovable property may be taxed in the contracting state in which the property is situated. '*Immovable property*', for the purposes of Article 6, includes rights to variable payments '*as consideration for the working of, or the right to work, … natural resources*'.

Issues

There were three issues considered by the Supreme Court in the appeal:

1. What does the phrase '*the working of, or the right to work*' the Buchan Field mean, and does it encompass the rights that BP was paying for when making the Payments first to Sulpetro and later to RBC?
2. If BP did acquire and so was making the Payments to Sulpetro for '*the working of, or the right to work*' the Buchan Field, are those Payments to be regarded as '*consideration for*' the right to work the Buchan Field within the meaning of Article 6(2)?
3. If the Payments are covered by Article 6(2), so that the DTT conferred taxing rights on the UK in respect of the Payments, has the UK in fact exercised those rights and imposed a charge to tax in the domestic legislation? That turns on the proper interpretation of section 1313 of the Corporation Tax Act 2009 and whether it catches the Payments.

First-tier Tribunal, Upper Tribunal and Court of Appeal Decisions

The First-tier Tribunal and the Upper Tribunal held that the Payments were within Article 6 of the DTT and caught by section 1313, resulting in taxation by the UK. The Court of Appeal allowed RBC's appeal and held that the UK did not have the right to tax the Payments under the DTT. HMRC appealed to the Supreme Court.

Supreme Court Decision

Issue 1 – Right to work

HMRC argued that the agreement between the Sulpetro entities governing offshore activities gave Sulpetro the '*right to work*' the Buchan Field, which was then acquired by BP. However, the Supreme Court in its leading judgment considered it was Sulpetro (UK) which held the licence and was responsible for working the field. It noted that there is a legal difference between someone having a right to work natural resources and someone having a right to require another person to work those natural resources, with the conclusion being that Sulpetro had the latter but not the former.

Issue 2 – Consideration

As it was decided that Sulpetro did not acquire the right to work the Buchan Field, did not transfer that right to BP and did not receive the Payments in consideration of the right to work, issue 2 was dealt with briefly. The Supreme Court concluded that the Payments could not have been consideration for the right to work the Buchan Field. Even if the bundle of rights that Sulpetro acquired and effectively surrendered to BP in return for the Payments had amounted to the right to work, those rights would still have been too remote to fall within the definition of immovable property for DTT purposes.

The majority considered that what is caught by Article 6(2) and treated as immovable property is the contractual right to variable or fixed payments. This is different from the right to be paid for the sale of the oil itself, which is not caught by Article 6 because the oil is a movable (and not deemed to be immovable) property. The reach of Article 6(2) is not extended in the way that HMRC had sought to argue.

Issue 3 – Domestic legislation

As the Supreme Court decided that the UK does not have the right under the DTT to tax RBC, the question whether the income would be taxable under section 1313 did not arise. However, the majority stated that if the Payments had fallen within Article 6(2) of the DTT, they would have held that the UK had exercised its taxing rights in respect of those Payments and that they fell within the charge to corporation tax by virtue of section 1313. The Supreme Court noted that this should not have the effect that any payments made to those financing oil-related projects are caught, simply because they are computed by reference to the price of oil or because the money used to make payments has been earned from the sale of oil. Here, the Payments were much more closely related to the extraction of oil.

Comment

Interpretation of double tax treaties and allocation of taxing rights is an important component in an increasingly global approach to tax. Guidance by the court in relation to the scope of Article 6 and the interpretation of the DTT is welcomed. Focusing on the carefully drafted provisions was emphasised, rather than adopting a broad consideration of the purpose of the provisions.

First-tier Tribunal Judge: Judge Poole

Upper Tribunal (Tax and Chancery Division) Judges: Johnson J and Judge Jones

Court of Appeal Judges: Asplin LJ, Nugee LJ and Falk LJ

Supreme Court Judges: Lord Lloyd-Jones JSC, Lord Briggs JSC, Lord Hamblen JSC and Lord Leggatt JSC and Lady Rose JSC

Chapter 5

M&A and Company Law

The past year has resulted in an unusually large number of cases relating to M&A and company law. Not all of these directly concern oil and gas companies, but will be of relevance to oil and gas practitioners:

- In *R (British Gas Trading and E.ON) v Secretary of State for Energy Security and Net Zero* [2025] EWCA Civ 209, the Court of Appeal was required to deal with a challenge to government consent for a change of control. Although it is not an oil and gas case, the decision sheds light on the use of regulatory powers over change of control provisions in the oil and gas sector.

- In *BM Brazil I Fundo De Investimento Em Participacoes Multistrategia & Ors v Sibanye BM Brazil (Pty) Ltd & Anor* [2024] EWHC 2566 (Comm) the Commercial Court provided useful guidance on the drafting and application of material adverse change clauses, particularly in the natural resources sector.

- In *Aabar Holdings SARL v Glencore PLC & Ors* [2024] EWHC 3046 (Comm) the Commercial Court rejected the longstanding 'Shareholder Rule' that traditionally prevented companies from asserting privilege against their own shareholders. Although not an oil and gas case, it will be of relevance to practitioners in the sector.

- In *Alta Trading UK Ltd & Ors v Bosworth & Ors* [2025] EWHC 91 (Comm) the Commercial Court decided that a director had not breached fiduciary duties by also having an interest in an intermediary providing 'sleeving' services.

- In *TAQA Bratani Ltd & Ors v Fujairah Oil and Gas UK LLC & Ors* [2024] EWHC 3146 (Comm) the Commercial Court was asked to decide upon the lawfulness of a dividend which was made on the same day an oil company was sold for USD 1 at a time when it was balance sheet insolvent.

Challenging consent to change of control

In *R (British Gas Trading and E.ON) v Secretary of State for Energy Security and Net Zero* [2025] EWCA Civ 209, the Court of Appeal was required to deal with a challenge to government consent for a change of control. Although it is not an oil and gas case, the decision sheds light on the use of regulatory powers over change of control provisions in the oil and gas sector.

Facts

Bulb Energy Limited ('**Bulb**') was an energy supply company with around 1.5 million customers. In November 2021, it ran into financial difficulties and was placed into '*Energy Supply Company Administration*' (a special administration regime applied by the Energy Act 2011), with Teneo appointed in the statutory role of '*Joint Energy Administrators*' (the '**JEAs**'). The JEAs then followed a sale process culminating in an agreement in October 2022 to transfer, by an Energy Transfer Scheme, the customers and business of Bulb to Octopus Energy Group Limited via Octopus Energy Retail 2022 Limited ('**Octopus**') by way of a corporate sale.

The transfer of all or part of the business of an energy company in special administration may be effected by an Energy Transfer Scheme which requires the approval of the Secretary of State (the '**SoS**'). The SoS granted approval. In addition, as part of this transaction, and in the context of economic disruption and volatility caused by the Russian invasion of Ukraine in February 2022, the then Secretary of State for Business, Energy and Industrial Strategy (now Energy Security and Net Zero) approved a package of public financial support.

British Gas, E.ON and ScottishPower (the '**Claimants**') challenged the decisions of the SoS to approve this funding, and to approve the sale to Octopus. These challenges were made on public law grounds and on subsidy control grounds, and were the subject of a rolled-up judicial review hearing before a Divisional Court.

Divisional Court Decision

The Divisional Court refused the Claimants' permission to bring their judicial review claims, due to their undue delay in commencing proceedings. The Divisional Court then went on to decide that, in any event, it would have dismissed the challenges on their merits.

Delay

Pursuant to CPR 54.5(1), claim forms in judicial review proceedings must be filed '*promptly*' (and in any event not later than 3 months after the grounds to make the claim first arose). Under section 31(6) of the Senior Courts Act 1981, where the High Court considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant leave for the making of the application if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. After agreeing the terms of the transaction and receiving the SoS's approval in relation to the same, the JEAs applied in the Chancery Division of the High Court to set the 'effective date' for the transaction, and the hearing took place on 11 November 2022. British Gas attended the hearing, at which it raised concerns about the Government's funding, and asked the Court not to fix an effective date so that it could obtain further information and consider bringing a public law challenge. British Gas spoke of '*total chaos*' for third parties like customers if the transaction went ahead and would subsequently be reversed.

The hearing was adjourned, British Gas and ScottishPower issued Pre-Action Protocol letters on 21 and 23 November 2022 respectively, and British Gas, ScottishPower and E.ON issued claim forms applying for judicial review on 28 and 29 November 2022. The effective date was subsequently set at 20 December 2022 and, although the SoS applied for expedited judicial review proceedings with a hearing before this date, the High Court refused, citing insufficient time to prepare and conclude the hearing within that period.

Taking account of these events, permission to bring a claim for judicial review was refused by the Divisional Court on the basis of undue delay. Whilst the Claimants stated that they could not have made their applications for judicial review any earlier due to the lack of information provided by the SoS, the Divisional Court rejected that submission and made the following points:

— '*[A] claimant does not need to have full disclosure in order to launch judicial review proceedings*'. A claimant has the option of seeking to amend its grounds for the proceedings after its commencement;

— '*sending pre-action letters does not relieve a claimant of the need to file a claim promptly*';

— '*[e]verything depends on context*'. In the context of this case, the Divisional Court considered that '*even a delay of a few days*' after the 11 November 2022 hearing to set the effective date meant that the Claimants did not act promptly. The Claimants' background knowledge of the transaction (from, for example, press reports) was considered relevant to the need for urgent action then to be taken.

In those circumstances, the Divisional Court reached the conclusion that the applications for permission must be refused on grounds of delay alone under section 31(6)(a) of the Senior Courts Act 1981.

Public law grounds

As part of the public law grounds, the Claimants argued (amongst other things) that the approval decisions were unlawful because the SoS was wrongly directed that the sale process had been fair, open, non-discriminatory and competitive.

The present case did not concern the negotiation by the SoS of a commercial contract. Rather it concerned the exercise of specific statutory powers. Nevertheless, the commercial context is important because the context is one in which the Divisional Court is called upon to perform a relatively '*light touch*' intensity of judicial review. This is far from a context such as that concerning, for example, the liberty of the individual, in which a more intensive scrutiny would be called for.

Furthermore, other features of the statutory scheme also indicate that a relatively light touch of juridical review is called for. For example, the person appointed to be the energy administrator of a company must be qualified to act as an insolvency practitioner. In the present case, the JEAs were experts.

The Divisional Court then concluded that the relevant question was not whether the sale process was fair, but rather: was the SoS reasonably and lawfully entitled to make his decisions upon the basis of the advice which he had received, in particular from the JEAs? Based on the facts (including that the SoS had no reason to doubt advice received that the sale process was fair and that Octopus's bid could be regarded as a market bid), the Divisional Court found that the SoS was so entitled. The public law grounds therefore failed, with the Divisional Court holding the view that they were not reasonably arguable.

Subsidy control grounds

As part of the subsidy control grounds, the Claimants argued (amongst other things) that there had been a breach of Article 366 of the UK-EU Trade and Cooperation Agreement ('**TCA**'), which came into force after the UK exited the EU, and which requires the UK to '*have in place and maintain an effective system of subsidy control*' that ensures that the granting of a subsidy respects certain specified principles. Section 29(1) of the European Union (Future Relationship) Act 2020 ('**EUFRA**'), which implemented the TCA in the UK, provided that domestic law that already existed continued to have effect '*with such modifications as are required for the purposes of implementing [the TCA]*'.

One of the principles set out in Article 366 is that '*subsidies are proportionate and limited to what is necessary to achieve the objective*'. The Claimants argued that the ground of judicial review which must be made available in domestic law in order to implement this Article is not confined to the conventional public law ground of rationality, but must also include the principle of proportionality.

The Divisional Court agreed on the need to review the proportionality of the SoS's decisions, consistent with the approach taken in applying the principle of proportionality in the context of the Human Rights Act 1998. However, it concluded that:

— The Court should not transfer the effective decision-making power of the SoS with regards to determining what is proportionate to the courts; and

— the decision-maker should be given '*an enhanced margin of appreciation*' when the Court is reviewing decisions in a context involving scientific, technical and predictive assessments. This was so in the current case, where the SoS's decisions related to commercial circumstances in a private market. The Court recognised that, as a consequence, the outcome of a case may not be materially affected by the distinction between the concept of rationality and the principle of proportionality.

The Divisional Court then considered the relevant facts, including that: (i) the JEAs had explained that they ran a competitive sale process, and put together a report on counterfactual analysis and benchmarking analysis to support their views; and (ii) an independent report was obtained which did not raise any issues of concern with the sale process. By reference to these facts, and applying the above standard of review, the Divisional Court confirmed that, had there not been any undue delay, they would have rejected the subsidy control grounds on their merits.

Court of Appeal Decision

The Court of Appeal considered three key issues: (1) whether the Divisional Court erred in law and/or fact in refusing permission on the basis of delay; (2) whether the Divisional Court erred in law in applying the wrong standard of review when assessing compliance with the TCA; and (3) whether the Divisional Court erred in law in its application of subsidy control principles under the TCA.

Delay

The Court of Appeal agreed with the Divisional Court that, with regards to the issue of delay, everything depends on context. The Court of Appeal confirmed that, insofar as the Claimants were seeking relief with the effect of undoing the SoS's decisions and unravelling the transaction, the Divisional Court was entitled to reach the view it did on delay.

However, the Court of Appeal recognised that the focus of the case has shifted since the Divisional Court heard it, and that, with regards to relief, there was now only the possibility of financial remedy (either by way of damages or the recovery of the subsidy). Granting such relief would not give rise to the same potential for chaos and harm to customers and other third parties. As a result, the Court of Appeal considered that '*the reasoning which led the [Divisional Court] to refuse permission on the grounds of delay does not justify refusing permission in respect of the claims for purely financial relief*'.

In the context of a claim purely for financial relief, the Court of Appeal concluded that, taking account of the dates on which the Claimants received key documents relevant to their claims, there was no undue delay. Specifically, the Court of Appeal concluded: '*The* [Claimants] *did not receive* [further documents it had sought to properly identify the issues in dispute] *until 23 or 24 November 2022. The three working days it took them to launch their applications for judicial review thereafter cannot be characterised as undue delay, so as to justify refusing permission on that ground.*'

Subsidy

The Court of Appeal upheld the decision of the Divisional Court on the legality of the subsidy, but for slightly different reasons. The Court of Appeal decided that the review of the courts under the TCA provisions was limited to domestic law principles (i.e. conventional juridical review). As such, a rationality standard was the appropriate test to apply in reviewing the SoS subsidy decision.

As noted above, based on a number of factual and evaluative findings, and applying the '*light-touch*' standard of review, the Divisional Court concluded that the SoS was reasonably entitled to conclude that the sales process was open, non-discriminatory, transparent and competitive.

The Court of Appeal confirmed that it will not interfere with factual and evaluative findings unless compelled to do so (for example due to a material error of law or demonstrable failure to consider relevant evidence). In the circumstances, it was not so compelled, and this part of the appeal was dismissed. The Divisional Court's findings were based on their analysis of extensive evidence. Their reasoning was found to be compelling, and there was no basis for interfering with it.

Comment

Section 300 of the Energy Act 2023 amended the Model Clauses to United Kingdom production licences to require that a change in control of a company is not permitted without the consent of the North Sea Transition Authority ('**NSTA**').

As such the NSTA is now vested with an obligation to consent (or not) to each change of control by a licensee. As with the above case, such powers will be subject to review by the courts though judicial review (in England, or Scotland, as appropriate).

It remains to be seen whether interested parties, such as competitors, will seek to use these change of control powers, and the courts' review function, to seek to challenge M&A transactions that result in a change of control that they perceive might impact them or the wider market.

However, there are a few potentially relevant points that can be taken from this case:

- First, it may be the necessary to act swiftly in commencing legal proceedings following any decision of the SoS. Where third parties are impacted, the relevant time period may be measured in days (or hours) rather than weeks or months. As such, if a challenge is on the horizon, swift action may be needed.
- Second, the English courts have repeatedly found that a relatively '*light touch*' regulation is appropriate when reviewing the decision of experts or expert regulators. An enhanced margin of appreciation will be given by the courts when reviewing the decisions of the executive in a context involving scientific, technical and predictive assessments: see *R (Mott) v Environment Agency* [2016] EWCA Civ 564 at [69].

Divisional Court Judges: Singh LJ and Foxton J

Court of Appeal Judges: Underhill LJ, Dingemans LJ and Zacaroli LJ

Material Adverse Change

In *BM Brazil I Fundo De Investimento Em Participacoes Multistrategia & Ors v Sibanye BM Brazil (Pty) Ltd & Anor* [2024] EWHC 2566 (Comm) the Commercial Court decided that a material adverse change clause was not properly engaged following a geotechnical event at a mine. The decision provides useful guidance on the drafting and application of material adverse change clauses, particularly in the natural resources sector.

Facts

Atlantic Nickel Mineração Ltda ('**Atlantic Nickel**') owns the Santa Rita Mine in Brazil. In turn, Atlantic Nickel is ultimately owned by BM Brazil 2 Fundo De Investimento EM Participações Multistrategia ('**FIP2**').

Mineração Vale Verde do Brasil Ltda ('**MVV**') owns the Serrote Mine, a copper and gold mine located in Alagoas State, Brazil. MVV is ultimately owned by BM Brazil 1 Fundo De Investimento EM Participações Multistrategia ('**FIP1**').

Sibanye Stillwater Limited and Sibanye BM Brazil (PTY) Ltd are both parts of a multinational mining and metals processing group, Sibanye Stillwater, which is based in South Africa. Sibanye Stillwater Limited is listed on the Johannesburg Stock Exchange and the NYSE. Sibanye BM Brazil (PTY) Ltd is a subsidiary of Sibanye Stillwater Limited, and a special purpose vehicle which was established for the purpose of the acquisition of the above mines.

On 26 October 2021, two sale and purchase agreements ('**SPAs**') were executed to effect the sale of the shares of Atlantic Nickel and MVV to Sibanye BM Brazil (PTY) Ltd. Sibanye Stillwater Limited was the Purchaser Guarantor. The agreement with which this case is principally concerned is the SPA in respect of Atlantic Nickel ('**the Atlantic Nickel SPA**').

The two SPAs included material adverse event clauses ('**MAE Clause**'), which allowed the buyer to withdraw from the transaction if a material adverse event ('**MAE**') occurred between signing and closing. The MAE Clause in the SPAs defined a MAE as:

any '*change, event or effect*' occurring after signing that '*is or would reasonably be expected to be material and adverse to the business, financial condition, results of operations, the properties, assets, liabilities or operations*' of the group companies, subject to certain carve-outs.

Shortly after signing, in November 2021, a geotechnical event occurred at Santa Rita Mine, involving the displacement of a section of the mine's east wall. Mining was suspended for one day, and the incident was managed with the assistance of external consultants and the implementation of a remediation plan.

Following the geotechnical event, Sibanye BM Brazil (Pty) Ltd notified FIP2 on 24 January 2022 that it was terminating the Atlantic Nickel SPA, contending that the event constituted a MAE under the Atlantic Nickel SPA. As completion under the MVV SPA was conditional on the contemporaneous closing of the Atlantic Nickel SPA, Sibanye BM Brazil (Pty) Ltd also gave notice to terminate the MVV SPA. Sibanye BM Brazil (Pty) Ltd argued that the event was material and adverse to the business and operations of the mine, and that it also revealed wider geotechnical risks requiring significant remediation, thereby justifying their withdrawal from the deal.

In response, FIP1 and FIP2 maintained that the geotechnical event was a foreseeable operational risk in open pit mining, was promptly and competently managed, and did not have a material adverse impact on the mine's value or operations. They further argued that the MAE Clause was not triggered and that Sibanye BM Brazil (Pty) Ltd's purported termination was wrongful and amounted to a repudiatory breach.

Decision

The Commercial Court ultimately found that the geotechnical event did not constitute a material adverse event within the meaning of the MAE Clause.

The Commercial Court agreed with Cockerill J in *Travelport Ltd v WEX Inc* [2020] EWHC 2670 (Comm) where it was recognised that there was a '*dearth of relevant English authority*' on such clauses and there was a '*better developed body of case law in the US, notably in Delaware*'. As such, as Cockerill J had suggested, while US cases are not admissible as factual matrix, this is the kind of situation where a review of the authorities from a foreign court is called for.

There were three important issues of construction or interpretation of the SPAs which arose: (1) whether and how the MAE provisions apply to '*revelatory occurrences*' (i.e. occurrences that may have occurred before the execution of the SPA, which only reveal themselves due to the event); (2) whether the assessment of what would reasonably be expected involves consideration of a range of possible views; and (3) the meaning of 'material'.

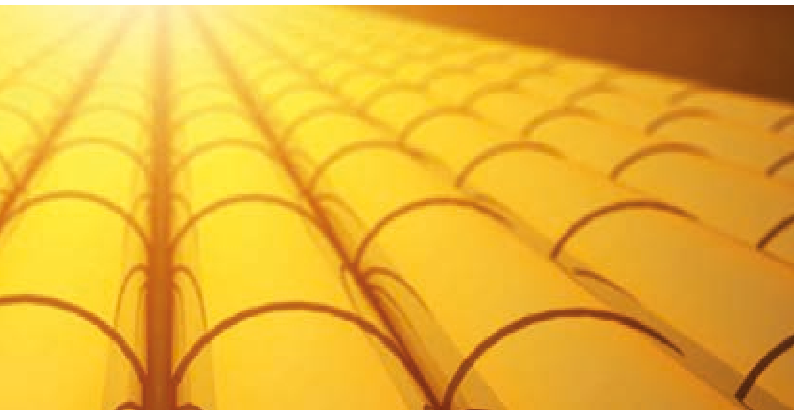
Taking these points in turn:

1. '***Revelatory occurrences***': The Commercial Court decided that the MAE Clause was concerned with changes, events, or effects occurring after signing which themselves are, or would reasonably be expected to be, material and adverse to the business or financial condition of the target. The Commercial Court rejected the defendants' argument that the event's significance could be established by reference to what it allegedly revealed about pre-existing or underlying risks in the mine which predated the contract. The MAE Clause was aimed at events which occurred between exchange and completion. Therefore, the Commercial Court held that the Clause did not permit a party to treat an event as material and adverse simply because it brought to light other issues that were already present at the time of signing. The assessment had to focus on the event itself and its direct consequences, not on any wider or historic issues it might have exposed.
2. **Single right answer:** The second issue of construction arose from the fact that a MAE was defined in the Clause as an event which was '*or would reasonably be expected to be*' material and adverse. The Commercial Court had to consider what '*reasonably be expected*' meant in these circumstances. The claimants contended that what was required was an assessment of whether or not it would reasonably be expected that the matter was material and adverse, and that this would give a single answer, yes or no. On the other hand, the defendants argued that there might be a range of views held by reasonable people in the position of the parties, and if any of those was that the matter was expected to be material, then it was '*reasonably expected to be materia*l.' The Commercial Court rejected the notion that it sufficed merely for one reasonable view to regard the event as material. Instead, it held that the question was whether, on an objective analysis, the event '*would reasonably*

be expected' to be material and adverse. That test was not satisfied merely by identifying some possible version of events or forecasts that might imply materiality; rather, the Commercial Court required a more definitive assessment. The Commercial Court explained that what '*would reasonably be expected*' entails asking, in essence, whether a reasonable person in the parties' position, armed with the relevant information, would conclude that materiality was more likely than not. It emphasised that there was no support in the authorities for treating an adverse event as '*reasonably expected*' if it merely fell within a reasonable range of speculation. Instead, there is a single, objective standard to be applied, under which the Commercial Court must be satisfied, on the balance of probabilities, that the event would likely prove material and adverse to the target's operations or financial condition.

3. **Material:** The Commercial Court decided that '*material*' in this context meant '*significant or substantial*', and not merely '*more than de minimis*'. This was supported by the absence of '*more than de minimis*' in the wording of the MAE Clause. The Commercial Court drew on both English and Delaware authorities, observing that there is no '*bright line*' test for materiality, but that the threshold should be set high, particularly in the context of a large, complex transaction involving assets that are inherently subject to operational risks. Relevant factors included the size of the transaction, the nature of the assets, the length of the sale process, and the complexity of the SPAs. The Commercial Court considered the reduction in equity value of the target, stating that a reduction of 20% or more would be material, and a reduction of more than 15% might also be material, but that a 10% reduction would likely be too low.

In this case, the geotechnical event only had a minor impact on equity value, well below 10%. It could, therefore, not reasonably be considered to have had a MAE on the target.



Comment

Notwithstanding that MAE clauses are widely used in natural resources M&A transactions, there is a dearth of English law authority as to their proper construction and interpretation. In fact, that dearth of authority has resulted in the English courts seeking guidance from decisions of the Delaware courts on similar issues.

Interestingly, although the Commercial Court was cautious about drawing any '*bright lines*' about what may be material, and what may not be material, it went on to provide some important guidance:

1. First, although the reduction in equity value should be taken into account, the outcome should always be driven by the terms of the MAE Clause and the underlying facts.
2. Second, the guiding theme from the judgment and previous MAE clause cases is caution against rigid, purely quantitative line-drawing. The risk is that a one-size-fits-all threshold will fail to reflect the industry's realities and the transaction's specific commercial underpinnings. Instead, a fact-driven assessment – taking account of both numerical impact and practical circumstances – provides a fairer indication of whether a change truly meets the definition of a MAE Clause.
3. Third, in addition to the wording of the MAE Clause, relevant factors for ascertaining materiality will likely include the size of the transaction, the nature of the assets, the length of the sale process, and the complexity of the SPA.

In respect of the percentage threshold for reduction in value of the target that might be considered material, the Commercial Court considered the reduction in equity value of the target, stating that a reduction of 20% or more would be material, and a reduction of more than 15% might also be material, but that a 10% reduction would likely be too low. However, this should be viewed with a degree of caution.

One example the Commercial Court relied on is the US reasoning in *Akorn v Fresenius* 2018 WL 4719347, which suggested that a drop in value greater than about 20% was likely material. This differed from the approach taken in *Finsbury Food Group PLC v Axis Corporate Capital UK Ltd* [2023] EWHC 1559 (Comm), where a reduction of 10% of total group sales since the accounts date was regarded as sufficient to qualify as a material adverse change. Taken together, these cases demonstrate that there is no universal formula or percentage threshold for determining when a change amounts to a MAE.

Judge: Butcher J

'Shareholder Rule' unclothed

In *Aabar Holdings SARL v Glencore PLC & Ors* [2024] EWHC 3046 (Comm), the Commercial Court rejected the longstanding 'Shareholder Rule'. This rule traditionally prevented companies from asserting privilege against their own shareholders. The decision has important implications for companies and their shareholders, particularly in the context of legal privilege and access to the company's documents. Since *Aabar*, the Board of the Privy Council has affirmed that the Shareholder Rule has ceased to exist. The decision also sheds light onto the growing risk to hydrocarbons companies of securities litigation.

Facts

Glencore is a global natural resources company and the ultimate parent company of the Glencore Group. Glencore's shares were the subject of an Initial Public Offering (the '**IPO**') on 19 May 2011 and Glencore subsequently acquired Xstrata Plc on 2 May 2013 (the '**Merger**'). Glencore's shares are listed on the London Stock Exchange, with a market capitalisation of around GBP 50bn.

Aabar Holdings SARL is a private company incorporated in Luxembourg which is ultimately owned by the Government of the Emirate of Abu Dhabi (or its sovereign wealth fund).

Aabar is not, and never has been, a shareholder in Glencore. It was (or alleges that it was), rather, the sole shareholder in another Luxembourg company, Commodities S.à.r.l. ('**Commodities**') between 29 March 2012 and 20 December 2021. That company (so it is alleged) was the ultimate beneficial owner of shares in Glencore in that it held intermediated securities through CREST between 24 May 2011 and 28 December 2020 when it is alleged to have sold any interest which it may have had in any Glencore shares to another company called ATIC Second International Investment Company LLC ('**ATIC**'). Commodities was dissolved on 20 December 2021 (after it had allegedly sold any interest it may have had in any Glencore shares) and Aabar claims that, immediately upon that event, all of the assets and liabilities of Commodities transferred to Aabar under Luxembourgish law.

Aabar, and other parties, commenced claims against Glencore relating to alleged (and, in some cases, admitted) misconduct by certain subsidiaries in the Glencore Group in certain countries in Africa (viz. the Democratic Republic of the Congo, South Sudan, Nigeria, Cameroon, the Ivory Coast and Equatorial Guinea) and South America (viz. Brazil and Venezuela), as well as admitted oil price manipulation in relation to the fuel oil market at certain US ports.

Specifically, although only by way of summary, a claim has been commenced under s. 90 of the Financial Services and Markets Act 2000 ('**FSMA**') in relation to the contents of the prospectus issued by Glencore on 4 May 2011 in relation to the IPO (the '**IPO Prospectus**') and (save for Aabar) the prospectuses issued by Glencore on various dates between 31 May 2012 and 5 March 2013 in relation to the Merger. Aabar brings claims under s. 90A of FSMA in relation to the contents of certain Annual Reports, Half-Yearly Reports and Sustainability Reports issued by Glencore between

2010 and 2019. Aabar also brings common law claims in the torts of deceit and negligence.

The first CMC took place on 21-23 May 2024. In the run-up to that hearing, a dispute arose in correspondence as to whether (and, if so, in what circumstances) Glencore would be entitled to assert privilege against each of the claimants in these proceedings.

Aabar relied on the Shareholder Rule, which has been a feature of English case law for over 135 years, originally justified on the basis that shareholders had a proprietary interest in the company's assets and that this interest extended to advice obtained by the company. This meant that companies could not withhold privileged documents from their shareholders, unless the documents were specifically generated for use in hostile litigation with those shareholders.

Decision

In summary, the Commercial Court decided that the Shareholder Rule did not exist.

Proprietary interest
The Commercial Court concluded that the proprietary interest justification underlying the Shareholder Rule is no longer sustainable. The principle established in *Salomon v A Salomon & Co Ltd* [1897] AC 22, which treats a company as a separate legal entity distinct from its shareholders, had fatally undermined this basis for the Shareholder Rule. That case had also rejected an analogy between the shareholder's interest in a company and that of a trust beneficiary in trust property, which might have supported a proprietary analysis.

Alternative justification
The Commercial Court considered at some length whether the Shareholder Rule could be justified on the alternative basis of joint interest privilege, before ultimately rejecting the notion. It found no concrete support in the authorities for a freestanding concept of joint interest privilege that could then be applied to the company/shareholder relationship. Nor had the cases consistently distinguished between a notional joint interest privilege and common interest privilege. Rather, the courts had found that a series of specific relationships gave rise to exceptions to the general rule of privilege. It was wrong to generalise from these to an overarching principle.

In its analysis, the Commercial Court again emphasised the traditional view of the English courts that legal professional privilege is a fundamental right that should not be overridden without compelling justification.

Comment

Following the decision, the claimant sought to appeal the decision directly to the Supreme Court. In February 2025, the Supreme Court refused the application for permission to appeal for two reasons:

1. A sufficient case for bypassing the Court of Appeal was not shown; and
2. the issues were likely to be resolved by the outcome of the privy council appeal in *Jardine Strategic Limited v Oasis Investments Ii Master Fund Ltd and 80 others No 2 (Bermuda)* [2025] UKPC 34, 2025 WL 02071076 ('**Jardine**').

The Board of the Privy Council determined that the automatic Shareholder Rule, which is based solely on status, is '*now, and in reality always has been, a rule lacking any valid justification*.' It explained, '*[t]he status-based automatic Shareholder Rule is therefore now, and in truth has always been, a rule without justification. Like the emperor wearing no clothes in the folktale, it is time to recognise and declare that the Rule is altogether unclothed*.' Although Privy Council decisions do not bind the courts of England and Wales, in Jardine the Privy Council further provided a '*Willers v Joyce direction*', signifying that its ruling is authoritative for the courts of England and Wales, thus reaffirming the legal stance established in *Aabar v Glencore*.

Securities litigation, of the type seen in the *Aabar v Glencore* case is on the rise. In addition, AI means that there is an enhanced ability for potential claimants, and their advisors, to trawl vast amounts of company related material for alleged misstatements that might have impacted shareholders. Being strategically ready to defend such actions will be important for all listed companies. However, it is anticipated that those in the hydrocarbons sector may be singled out for greater targeting.

The above decisions in relation to the Shareholder Rule (as was) will come as some relief. It will allow companies to continue to take proper legal advice without needing to disclose that advice to shareholders that may wish to later bring an action against it.

Where a company does need to share information with its shareholder the rules on common interest privilege will continue to apply.

Commercial Court Judge: Picken J

Supreme Court Judges: Lord Briggs JSC, Lord Leggatt JSC and Lord Burrows JSC

Directors' duties in sleeving arrangements

In *Alta Trading UK Ltd & Ors v Bosworth & Ors* [2025] EWHC 91 (Comm) the Commercial Court decided that a director had not breached fiduciary duties by also having an interest in an intermediary providing '*sleeving*' services. That said, the decision provides a useful insight into directors' duties and the benefits of appropriately documenting consent to potential conflicts of interest by directors.

Facts

The claimants – Alta Trading UK Limited (formerly Arcadia Petroleum Limited), Arcadia Energy (Suisse) SA, Arcadia Energy Pte. Ltd., and Farahead Holdings Limited – were part of the Arcadia Group, a major international oil trading business ultimately owned by Farahead, a Cypriot holding company controlled by a trust for the Fredriksen family.

The principal defendants were Peter Miles Bosworth (Arcadia's former CEO), Colin Hurley (former CFO), and Steven Kelbrick (an external trader and service provider), along with various companies including Arcadia Petroleum SAL Offshore (Lebanon), Arcadia Petroleum Limited (Mauritius), and Attock Oil International Limited (Mauritius).

The relationship between the parties was primarily that of employer and senior management (Bosworth and Hurley), with Kelbrick and others being external parties or associated with companies that traded with the Arcadia Group. The dispute centred on 144 crude oil transactions between 2007 and 2013, involving oil sourced from West African national oil companies ('**NOCs**'). The claimants alleged that the defendants orchestrated a complex fraud by inserting entities they owned or controlled into the trading chain, thereby diverting profits away from the Arcadia Group and into their own hands. The claimants contended that this was done in breach of fiduciary duties, through dishonest assistance, knowing receipt, and unlawful means conspiracy.

The claimants' case was that the directors owed fiduciary duties to act in the best interests of the company, avoid conflicts of interest, and not make secret profits. They alleged that the defendants breached these duties by diverting business opportunities and profits, misrepresenting the purpose and activities of the inserted entities, and concealing the true nature of the trading arrangements from the ultimate controllers.

The factual dispute arose after internal and external investigations suggested that significant profits from the West African oil trades had accrued to entities outside the Arcadia Group, which the claimants said should have belonged to the Arcadia Group.

The defendants denied the allegations, maintaining that the use of intermediaries and '*sleeving*' arrangements was standard industry practice, that the inserted entities acted at arm's length, and that the claimants' ultimate controllers were aware of and had consented to the relevant structures and risk management strategies.

Decision

The Commercial Court dismissed all of the claimants' claims. The key findings and reasoning were as follows:

— **Failure to Prove Fraud or Breach of Duty:** The claimants failed to establish any part of their case alleging a fraudulent diversion of profits or opportunities. The central allegation was that '*fraudulent entities*' were used to divert profits that should have accrued to the Arcadia Group, amounting to a fraudulent breach of trust. The Commercial Court held that the claimants did not prove any unlawful means conspiracy, breach of fiduciary duty, dishonest assistance, knowing or unconscionable receipt, or breach of Swiss law.

— **Industry Practice and Commercial Context:** The Commercial Court accepted the defendants' evidence that the use of intermediaries, sleeves, and special purpose vehicles was a legitimate and well-understood practice in the oil trading industry, especially in high-risk markets such as West Africa. The judge found that such arrangements were not inherently suspicious and were often necessary for risk management, regulatory, and commercial reasons. The claimants had not pleaded or proved that the use of such structures was unusual, unnecessary, or illegitimate in the context of West African oil trading.

— **Knowledge and Consent of Ultimate Controllers:** The claimants' ultimate controllers (notably Mr Fredriksen and Mr Trøim) were aware of, and in some cases directed, the use of intermediary entities such as Arcadia Lebanon. The evidence showed that the owners were involved in discussions about risk management and the structuring of trading operations, and that they had the ability to determine Arcadia Lebanon's activities. There was no concealment or dishonesty in the establishment or operation of these entities.

— **No Diversion of Opportunities or Profits:** The contracts and opportunities taken up by the inserted entities never belonged to Arcadia London or Arcadia Switzerland in the first place, and that the decision to use Arcadia Lebanon was made in good faith and in the interests of the Arcadia Group, with the owners' agreement. The claimants had positively decided to avoid taking up certain high-risk opportunities themselves, leaving them to be undertaken by Arcadia Lebanon.

— **No Personal Benefit or Secret Profits:** Mr Bosworth and Mr Hurley received no personal benefit or secret profits in respect of which any liability to account could arise. Arcadia Lebanon was not a cloak or alter ego used by them to receive funds on their behalf, nor a nominee for a defaulting fiduciary to receive secret profits.

— **Relief and Discretion:** Even if any breach of duty had been established, it would have granted relief from liability on the grounds that Mr Bosworth and Mr Hurley acted honestly and reasonably, and would have refused to order an account, as it would have resulted in unjust enrichment of the claimants.

Comment

Sleeving is where an intermediary (or '**sleeve**') arranges the logistics and financial aspects of an energy trade between parties, without actually taking ownership of the commodity or energy itself. The sleeve will manage the complexities of the transaction and often provides any necessary security.

There are a number of key take-aways for those operating sleeving structures for energy transactions:

Sleeving

The case highlights the importance of robust compliance, clear documentation, and transparency in high-risk sectors. While the Commercial Court was prepared to accept industry-standard practices, it also noted that poor record-keeping and lack of transparency can create vulnerabilities, both in terms of internal governance and in defending against future claims. The Commercial Court recognised that the use of intermediaries, '*sleeving*' arrangements, and special purpose vehicles are established industry practices designed to manage compliance, reputational, and operational risks. However, the judgment underscores that the legitimacy of such structures depends on robust internal governance, clear documentation, and transparency with ultimate stakeholders. The Commercial Court was unwilling to infer dishonesty from the use of industry-standard mechanisms alone, but it made clear that poor record-keeping or a lack of transparency can expose companies and individuals to significant legal and reputational risks.

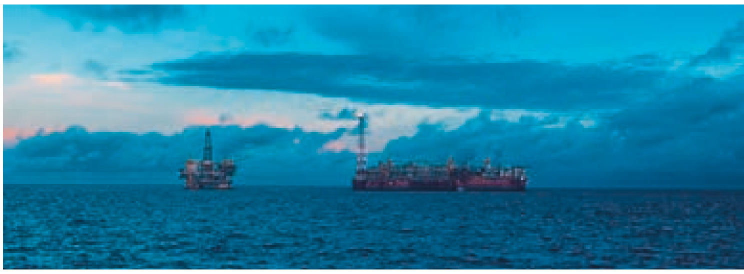
Directors' Duties

Directors will owe fiduciary duties to a company. However, the scope and content of those duties may be shaped or attenuated not only by formal agreement, but also by the terms of engagement, the nature of business, and the understandings between the parties, even in the absence of any formal agreement. From a legal perspective, the ruling acknowledges that directors' fiduciary duties, including the '*no profit*' rule and the duty to avoid conflicts of interest, are not inflexible, in line with established principles. These duties may be modified or relaxed where the company's immediate shareholders are fully informed and have given their consent. The level at which consent is required will depend on the company's ownership structure and who holds the relevant shareholder rights in relation to the company. Where there is top to bottom control, consent from the ultimate controller or shareholder is sufficient, and it can be assumed that such consent flows down the chain, even if there is no evidence of actual consent at every intermediate level. In *Alta Trading*, the necessary consent happened to be identified at the top level of the group, but this will not always be the case; the focus is generally on the immediate shareholders of the company in question. Shareholders are not fiduciaries and, except in very rare circumstances, are not required to prioritise the interests of others, so their consent may be freely given and assumed to be effective throughout the corporate structure.

Duties when company insolvent

Where the company is insolvent or nearing insolvency, directors must prioritise the interests of creditors, and shareholder consent cannot override this duty. If the duty to creditors has arisen, as established by the Supreme Court in *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112, shareholders cannot authorise a breach of duty by the directors, particularly where the conduct could impact creditors' interests.

Judge: Henshaw J



Decommissioning and Insolvency: Creditors Dismissed

In *TAQA Bratani Ltd & Ors v Fujairah Oil and Gas UK LLC & Ors* [2024] EWHC 3146 (Comm) the Commercial Court was requested to decide upon the lawfulness of a dividend which was made on the same day an oil company was sold for USD 1 at a time when it was balance sheet insolvent. In deciding that the dividend was lawful, the Commercial Court has opened the door to structuring around significant decommissioning liabilities.

Facts

The claimants, TAQA Bratani Limited, TAQA Bratani LNS Limited (together, '**TAQA**'), and Spirit Energy Resources Limited were, amongst others, party to an unincorporated joint venture relating to various oil and gas fields in the North Sea's Brae complex. Fujairah Oil and Gas UK LLC (previously UKCS8 and referred to henceforth as 'UKCS8' for the purposes of this article) was also a party to the joint venture until its interests were forfeited. The defendant parties included: Viaro Energy Limited, Viaro Investment Limited (collectively '**Viaro**') being direct and indirect shareholders of RockRose and Messrs Francesco Mazzagatti and Francesco Dixit Dominus who were directors of RockRose and Viaro and were previously directors of UKCS8 until it was sold. RockRose previously owned UKCS8. Mr Mazzagatti was also the ultimate beneficial owner of Viaro.

Each participant to the joint venture held interests in the Brae fields subject to:

— Petroleum production licences covering the individual fields;

— Joint Operating Agreements and a Unit and Unitisation Operating Agreement, requiring all partners to share costs proportionately; and

— Decommissioning Security Agreements ('**DSAs**'), compelling participants to provide annual security for future decommissioning liabilities.

For many years, UKCS8, at the time owned by Marathon Oil Corp ('**Marathon**'), served as Operator of the Brae assets under a '*no gain/no loss*' principle that obliged the Operator to recharge the other partners for costs and expenses. In July 2019, RockRose acquired UKCS8 from Marathon and in October 2020 Operatorship was transferred to TAQA (see *TAQA Bratani Limited v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm)).

By December 2020, with imminent deadlines for providing DSA security, RockRose sold UKCS8 to the Fujairah International Oil and Gas Corporation ('**FIOGC**'), an entity wholly owned by the government of Fujairah, for USD 1. Immediately before the sale, on 24 December 2020, UKCS8 declared a USD 84m dividend in favour of its parent, RockRose, and waived a pension buy-out liability it said totalled USD 53m so that UKCS8 became '*cash and debt-free*' for purposes of the sale.

The claimants, who remained creditors of UKCS8 for outstanding DSA payments and operating costs, argued that the dividend and sale of UKCS8 was designed to place the assets of UKCS8 beyond their

reach as creditors once inevitable insolvency arose. The claimants alleged that the dividend contravened both section 238 (transactions at an undervalue) and section 423 (transactions defrauding creditors) of the Insolvency Act 1986. They also alleged unlawful means conspiracy on the footing that the individuals who managed UKCS8 had conspired to extract funds from the company and leave its creditors unpaid.

Further details of the relevant Insolvency Act provisions are as follows:

— Section 238 governs '*transactions at an undervalue*' and empowers a liquidator (or, by assignment, another party) to seek relief where a company disposes of property for no or significantly inadequate consideration while insolvent or rendered insolvent by that transaction. Nonetheless, a statutory defence at section 238(5) provides that no order shall be made if the court is satisfied that the company entered into the transaction in good faith for the purpose of carrying on its business, and had reasonable grounds to believe that it would benefit the company.

— Section 423 targets '*transactions defrauding creditors*.' A court may make an order where the transaction was entered into with the purpose of putting assets beyond the reach of a creditor, or otherwise prejudicing creditors.

The claimants argued that the declaration of the dividend was a transaction at an undervalue and served to extract value for the benefit of the defendants alone. On the other hand, the defendants contended that:

— They genuinely believed that FIOGC, as a state-owned entity, could meet security obligations;

— they acted with legitimate commercial motives; and

— the dividend was merely part of a standard '*cash and debt-free*' sale.

Decision

The Commercial Court dismissed all claims against the defendants. The Commercial Court accepted that the dividend and the associated sale, taken together, were transactions at an undervalue for the purposes of section 238. It also concluded that UKCS8 was insolvent, at least on a balance sheet basis, at the time of the dividend.

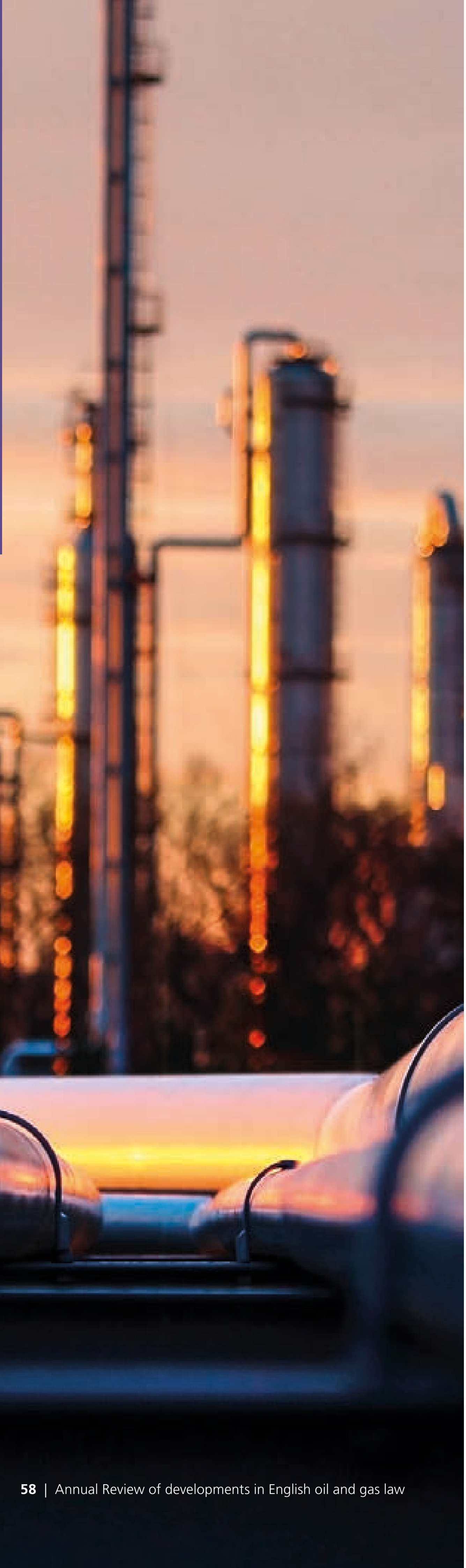
However, the Commercial Court found that the elements of the section 238(5) defence were satisfied:

— The defendants had acted in good faith for the purpose of carrying on the business of UKCS8; and

— the defendants had reasonable grounds for believing that the sale arrangement with FIOGC would ultimately benefit the company.

In arriving at that conclusion, the Commercial Court determined that the sale was genuinely supposed to resolve a commercial deadlock between TAQA and UKCS8 concerning the future management of the asset, and secure decommissioning costs through a new bond or parent company guarantee. The Commercial Court applied the decisions in *Feakins v Defra* [2005] EWCA Civ 1513 and *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112, in order to determine whether the dividend was to be regarded in isolation or as a step within a wider transaction. On these facts, it was '*wholly artificial to regard the dividend as the only relevant transaction in isolation from the wider arrangement to which it owed its very existence and with which it was inextricably entwined.*'

In relation to section 423, the Commercial Court found no evidence that the sale or dividend had been designed to put UKCS8's assets beyond the reach of its creditors; the Commercial Court concluded that no nefarious motive or purpose could be inferred. The unlawful means conspiracy claim failed because the claimants could not establish that the defendants intended to injure them. The Commercial Court was satisfied that both the sale and the dividend declaration stemmed from legitimate commercial imperatives, including the hope that FIOGC's ownership, as a UAE government entity, might secure the necessary security.



Comment

Aspects of this decision are currently under appeal.

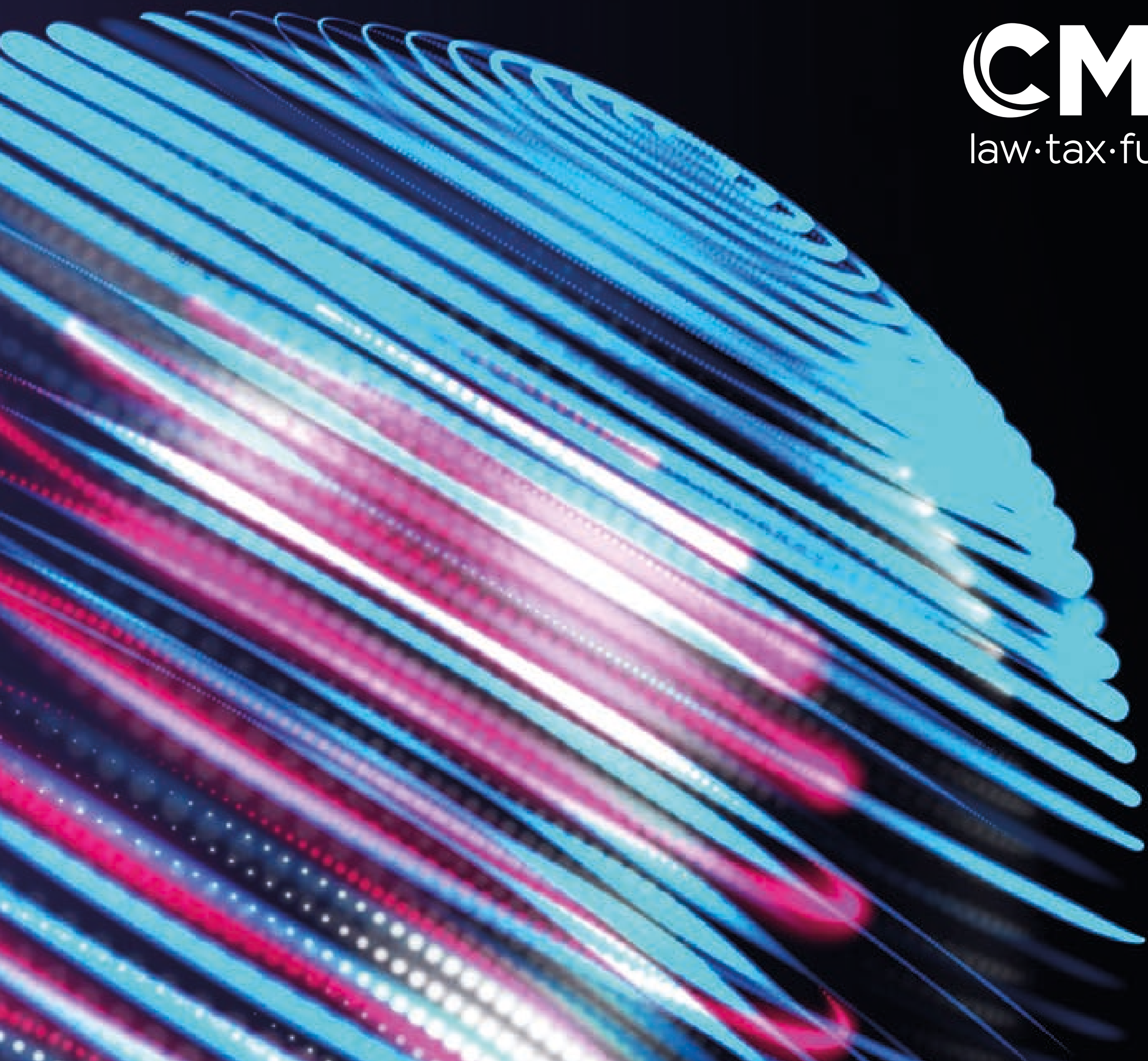
In the interim, the decision will be of significant interest to those in the oil and gas industry with assets in the United Kingdom (or on the United Kingdom Continental Shelf). In essence, the decision suggests that there are circumstances where it may be lawful to remove assets from an insolvent energy company that has significant liabilities to joint venture partners. Further, in those circumstances, the joint venture partners, as creditors, may not be entitled to use the sections 238 and 423 of the Insolvency Act 1986 to recover monies for themselves or the estate.

The total cost of decommissioning oil and gas assets on the United Kingdom Continental Shelf is estimated to be between GBP 40bn and GBP 46bn – with c.GBP 24bn estimated to be spent between 2023 and 2032. At the stage of abandonment of production and decommissioning, many oil companies owning the relevant assets (if not the group of companies) will have ceased to have material revenue streams. As a result, they will be dependent upon existing assets and/or parent company support to pay for decommissioning costs.

Since the transactions that were the subject of this litigation, section 300 of the Energy Act 2023 has amended the Model Clauses of the relevant oil and gas licences such that a change in control of a company is not permitted without the consent of the Oil and Gas Authority (known as the North Sea Transition Authority ('**NSTA**')). Whilst licences are not prescriptive as to what the NSTA must consider when deciding whether to consent to a change in control, the NSTA has stated that it will consider, amongst other things, whether the proposed change in control may impact the ability of the licensee to meet its licence commitments, liabilities and obligations.

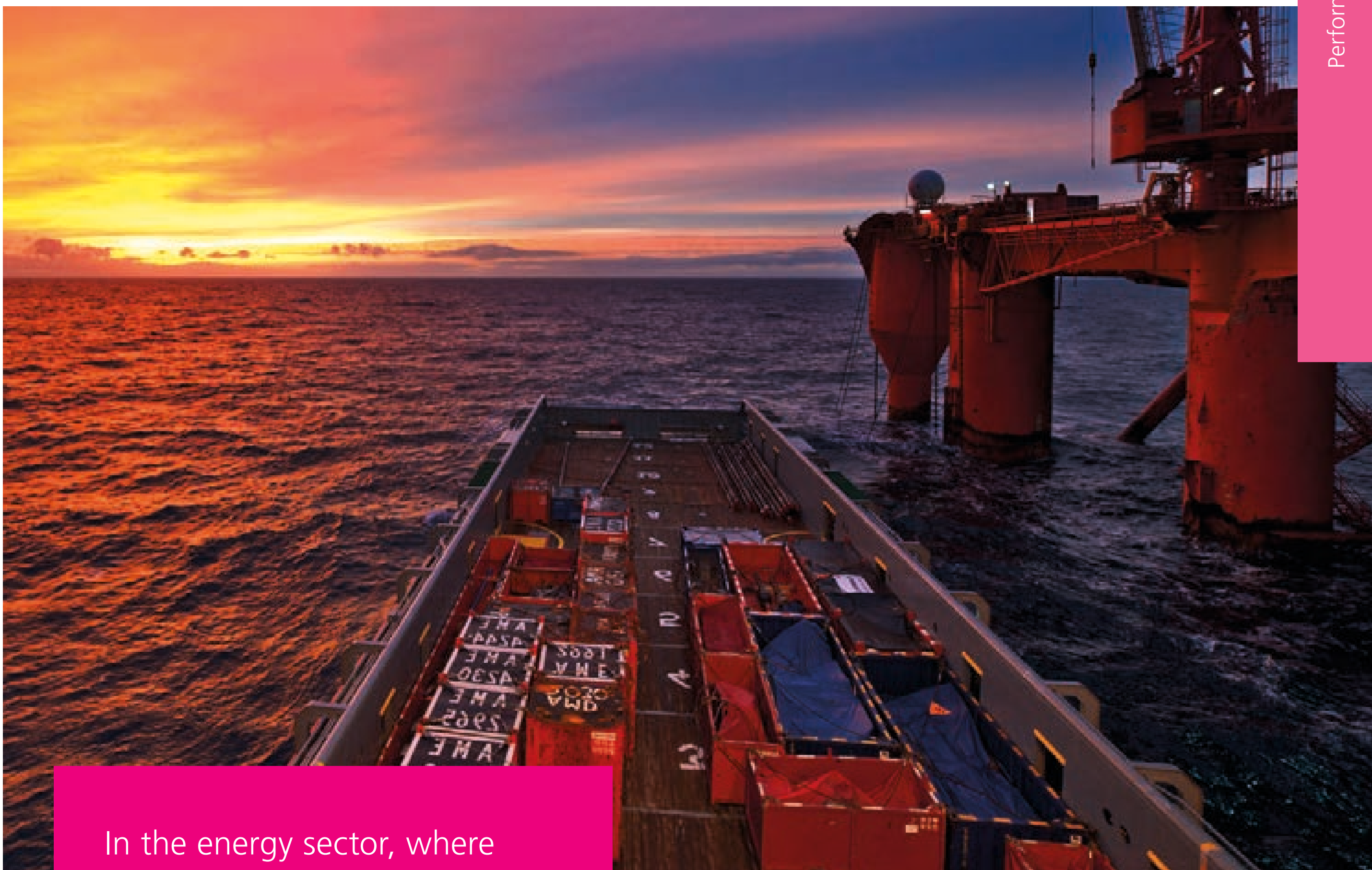
The changes brought about by the Energy Act 2023 may grant joint venture partners some additional protection relating to late life changes of control via the NSTA's involvement. That said, any attempt to challenge a decision by the NSTA giving (or refusing to give) consent to a change of control will likely need to be commenced swiftly. Although the '*long-stop*' for a judicial review is sometimes said to be three (3) months, the relevant limitation period for challenging consent to an M&A transaction may well be measured in days and hours (rather than weeks or months): see for example, *R v Monopolies Commission, Ex p Argyll Plc* [1986] 1 WLR 763 and *R (British Gas Trading and E. ON) v Secretary of State for Energy Security and Net Zero* [2025] EWCA Civ 209.

Judge: Dias J



Chapter 6

Performance Bonds and Advance Payment



In the energy sector, where large sums of money are at play, advance payments and security often form an important part of the transactional structure. The past twelve months have given an interesting insight into this issue:

— In *CE Energy DMCC v Ultimate Oil And Gas DMCC & Anor* [2024] EWHC 2846 (Comm) the Commercial Court gave ample demonstration that worldwide freezing orders, or post-dated cheques in the UAE, are no substitute for effective security in oil product sales contracts.

— In *Power Projects Sanayi Insaat Ticaret Limited Sirketi v Star Assurance Company Ltd* [2024] EWHC 2798 (Comm), the English Commercial Court has reinforced the pivotal role of on-demand performance bonds in international commerce, particularly within the energy industry.

— In *Ayhan Sezer Yag Ve Gida Endustrisi Ticaret Ltd Sirket v Agroinvest SA* [2024] EWHC 479 (Comm), the Commercial Court determined that an '*advance payment/guarantee*' was refundable in the event of a breach by the buyer.

No substitute for security

In *CE Energy DMCC v Ultimate Oil and Gas DMCC & Anor* [2024] EWHC 2846 (Comm), the Commercial Court gave ample demonstration that worldwide freezing orders, or post-dated cheques in the UAE, are no substitute for effective security in oil product sales contracts. The case is a stark illustration of the benefits of valid letters of credit in commodity trades.

Facts

CE Central Energy DMCC ('**CE**') is a UAE commodities trading company.

The Second Defendant, Mr Bashar (sometimes spelt Bashir) is a Nigerian businessman who is the sole owner of Ultimate Oil and Gas DMCC ('**Ultimate**') (CE and Ultimate together being the '**Parties**').

The Parties entered into a series of contracts including:

- Five spot contracts between 14 November 2022 and February 2023 (the '**Spot Contracts**').
- A term contract entered into on 25 April 2023 under which CE delivered two cargoes of gasoil to Ultimate ('**Term Contract**').

Initially, Ultimate did not pay for the gasoil which was being stored in two terminals in Nigeria owned by Zamson, a company which was ultimately owned by Mr Bashar. Ultimate eventually paid for the 11,227.762mt out of 29,371,884mt of the second cargo. The Term Contract was terminated by CE in October 2023.

The Parties also entered into a Payment Agreement on 14 January 2024 which set out the mechanism of payment for Ultimate's debts under the Spot Contracts and Term Contract. Mr Bashar also provided a personal guarantee in respect of Ultimate's obligations under the Payment Agreement. Lastly, a new spot contract was entered into on 24 January 2024 for further cargo (the '**New Spot Contract**').

Ultimate paid the first instalment under the Payment Agreement; it provided nine post-dated cheques for the sums due under the Payment Agreement, it procured a personal guarantee from Mr Bashar and it provided a further post-dated cheque for 120% of the provisional value of the new spot cargo. However, with the exception of one cheque for a modest amount, the post-dated cheques that had been presented had all been returned unpaid and Mr Bashar had not complied with the demand under the guarantee.

In support of arbitral proceedings under the Term Contract, and High Court proceedings arising from the personal guarantee, an *ex parte* worldwide freezing order ('**WFO**') was granted in favour of CE against Ultimate and Mr Bashar. This decision relates to the return date hearing of that application.

Decision

The central issue for the Commercial Court to decide was whether the assets were at risk of being dissipated. CE argued that the risk existed for the following reasons:

1. The cheques were deliberately signed by Mr Bashar in such a way that they would be dishonoured. Similarly, Ultimate had provided cheques in order to procure the claimant into entering into the Payment Agreement and to procure additional cargo. Despite all cheques being dishonoured, Ultimate never offered to provide replacements.
2. Mr Bashar was the subject of a criminal complaint relating to the dishonoured cheques.
3. Numerous promises of payment had been broken.
4. Mr Bashar had been previously committed to prison in relation to separate proceedings.
5. The disclosure of assets under the WFO was inadequate.
6. Ultimate's engagement in proceedings was lacking: they had brought a jurisdictional challenge on an erroneous basis and they failed to pay their share of arbitration costs.
7. Ultimate refused to confirm CE's entitlement to sell the cargo and also refused CE access to the cargo.

On the other hand, the defendants argued that:

1. A large number of Mr Bashar's assets had been disclosed. Those disclosed amounted to a value far higher than the sum covered by the WFO and were predominantly real property which could not be disposed of easily.
2. The cargoes stored in Nigeria could not be removed without CE's consent.
3. CE carried on dealing with the defendants despite its knowledge of the proceedings in which Mr Bashar had been found to be in contempt following breaches of an injunction.
4. The exact reason why the bank dishonoured the cheques was never made clear.

5. Litigation had commenced several months before the WFO.
6. There was no event which CE could point to which led to their belief that there was a risk of dissipation.

Despite agreeing that CE's case was strong and that the Second Defendant's conduct had been unsatisfactory (particularly in relation to the dishonoured cheques), the Commercial Court decided that the evidence did not point to a risk of dissipation. Consequently, the WFO was discharged and CE's application for further disclosure dismissed.

The Commercial Court cited the following factors as having an impact on its decision:

1. The failure to respond to queries in relation to the disclosure of assets needed to be looked at in light of the fact that Mr Bashar had disclosed assets to the value of USD 170m and the WFO was in the sum of USD 33m and that several assets were real property.
2. There was no suggestion that Ultimate sought to misappropriate the cargo. The risk of misappropriation was theoretical as there was no evidence that that there was an attempt to dispose of the cargoes improperly.
3. CE did not show any primary evidence showing the risk of dissipation. In most cases, the claimant would be seeking to provide positive evidence pointing to that risk, which can be bolstered by evidence that, although does not directly show risk of dissipation, may suggest the defendant may be '*the sort of individual or entity which by its conduct may dissipate assets*' (e.g. fraud or low standards of morality.
4. CE carried on dealing with the defendants despite knowing of the Second Defendant's contemptuous conduct in other proceedings.
5. The Parties had been corresponding and litigating between 17 April 2024 (being the date on which proceedings under the personal guarantee were commenced) and 29 July 2024 (being the date on which the WFO was granted) meaning that it was difficult to identify a trigger event giving rise to a risk of dissipation.

Comment

The following are some of the key learning outcomes of this decision for transactional lawyers in the energy sector:

1. Although the English Courts have the power and jurisdiction to support arbitral and High Court claims with worldwide freezing orders, such orders are not a substitute for security. A letter of credit remains the usual method of securing payments under an oil products sales contract where non-payment is a risk.
2. In addition, although post-dated cheques are regularly used in the UAE as a form of security, as non-payment can amount to a criminal offence, again, such mechanism does not offer the financial security of a letter of credit. Criminal proceedings do not necessarily result in sums being paid.
3. Further, the legal test to overcome in order to be granted a worldwide freezing order is onerous. A key element of the test is showing a risk that assets will be dissipated. In *Petroceltic Resources Limited & Ors v David Fraser Archer* [2018] EWHC 671 (Comm), the Commercial Court set out principles in relation to risk of dissipation:

— There must be an arguable case or plausible evidential basis for finding risk. However, a claimant does not need to establish the existence of risk of dissipation on a balance of probabilities.

— Risk must be established separately for each defendant.

— The purpose of a 'WFO' is not to provide the claimant with security.

— Each case is fact specific.

4. Finally, a defending party's past behaviour or character will not force the Court to stray from the *Petroceltic Resources* test. In separate proceedings brought by Sahara Energy Resource Limited, where Mr Bashar and Ultimate were defendants, Mr Bashar was previously found to be in contempt of the High Court following breaches of an injunction in proceedings arising out of a failure by Ultimate to pay for or deliver up product supplied to Ultimate by a third-party seller. Mr Bashar was committed to prison for a period of ten months and fined GBP 500,000. However, those proceedings did not relate to the dissipation of assets, but a failure to comply with a court order. As such, they did not assist in satisfying the *Petroceltic Resources* test.

Judge: Charles Hollander KC (sitting as Deputy Judge of the High Court)

The autonomous nature and commercial importance of on-demand bonds

In *Power Projects Sanayi Insaat Ticaret Limited Sirketi v Star Assurance Company Ltd* [2024] EWHC 2798 (Comm), the English Commercial Court has reinforced the pivotal role of on-demand performance bonds in international commerce, particularly within the energy industry. The Commercial Court's ruling underscores the autonomous nature of on-demand bonds, which require payment upon demand without further proof or investigation, barring clear evidence of fraud. In turn, this underscores the benefits of a carefully drafted performance bond that emphasises the stringent obligations on, and limited defences available to, bond issuers. Although this is not an oil and gas case, the same principles are relevant to oil and gas practitioners.

Facts

Power Projects Sanayi Insaat Ticaret Limited Sirketi ('**PP**'), a contractor specialising in large-scale energy projects, entered into a contract for the construction of a power-generation plant in Ghana. It entered into a subcontract with Glotec Engineering Limited ('**Glotec**') for part of the works. Pursuant to the subcontract, at the request of Glotec, Star Assurance Company Limited ('**Star**') issued a performance bond in favour of PP to secure Glotec's performance under the subcontract. Under the terms of the bond, Star was obliged to make payments under the bond on demand, '*without any further proof or condition and without any right of set-off or counterclaim*' and Star was not '*required or permitted to make any other investigation or enquiry*'. PP made a demand for payment under the bond, which Star refused, leading to a claim by PP for the sum of USD 6.3m. To justify its refusal, Star tried leading evidence before the Commercial Court to suggest that, among other things, the work covered by the subcontract was ready for commissioning but PP had failed or refused to commission the works and that the ultimate beneficiaries of the project had accepted it and the project has been in operation for a number of years.

Decision

The Commercial Court emphasised that the performance bond was an on-demand bond, which is an autonomous contract independent of the underlying contractual disputes between PP and Glotec. The bond required Star to pay upon receipt of a compliant demand without any further proof. The only defence available to Star was fraud, which required proof that PP knew it had no right to make the demand and that Star was aware of this fraud at the time of the demand. The Commercial Court found that none of the facts presented by Star established that PP's demand was fraudulent or that Star had knowledge of any fraud at the time of the demand.

It is settled law that on-demand bonds are crucial in international commerce, functioning as autonomous contracts independent of disputes between the seller and buyer. The issuer's liability under the bond is

separate from the underlying contract. Any discrepancy between bond payment and underlying contract liability is resolved between the contracting parties, not the bond issuer and the beneficiary. The sole exception to the issuer's obligation to pay is clear fraud, which must be proven and known to the issuer at the time of demand. The law has been summarily explained by the Privy Council in *Alternative Power Solution Ltd v Central Electricity Board* [2014] UKPC 31 as that two facts are to be satisfied if the issuer is to refuse payment: '*(a) that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and (b) that the bank was aware of the fraud.*'

The facts identified by Star did not satisfy these tests. It was insufficient for Star to make a factual case that Glotec had a good defence to PP's claim.

Nor did Star show that the facts relied upon had been known to it at the time of the demand. Star had relied on an earlier Court of Appeal decision in *Balfour Beatty Civil Engineering v Technical & General Guarantee Co Ltd* (2000) CLC 252 which suggested that a surety may be able to rely on evidence arising after a demand was made. However, in the Commercial Court's view, that case did not allow Star to simply '*wait to see what evidence of fraud emerged later*'. Rather, '*the modern cases on performance bonds require evidence of actual knowledge on the part of the issuer at the time of the demand, even if the evidence about that knowledge is incomplete and may be augmented later.*'

Comment

Performance bonds are an essential component of many energy industry infrastructure transactions. One of the key benefits of an on-demand performance bond is its autonomous nature, which is crucial to its effectiveness. It allows the beneficiary to have assurance that it need not wait until after a dispute is resolved before availing itself of security for performance. It may make a demand immediately. That can be of particular importance where issues of cash flow, solvency or enforcement may be a concern. This case underscores several critical points for drafters:

1. An issuer is required to pay upon receipt of a demand without further proof. The only defence available to it is fraud, which requires proof that the beneficiary knows that it has no right to make the demand and that the guarantor is aware of that fraud at the time when the demand is made.
2. In relation to specific drafting:

— The performance bond should explicitly state whether it is an on-demand bond or a conditional bond.

— If the bond is conditional, then the bond should expressly state those conditions, preferably autonomously or by reference to the underlying contract.

— It is useful to reiterate the autonomous nature of the bond, making it clear to the issuer that the bond is independent of the underlying contract and that it has no obligation to make the principal's case against the party making the demand.

Judge: Richard Millett KC (sitting as Deputy Judge of the High Court)

Non-Refundable Advance Payment

In *Ayhan Sezer Yag Ve Gida Endustrisi Ticaret Ltd Sirket v Agroinvest SA* [2024] EWHC 479 (Comm), the Commercial Court determined that an '*advance payment/guarantee*' was refundable in the event of a breach by the buyer. The decision is a useful reminder of the important difference between an advance payment and a non-refundable guarantee in the event of a breach.

Facts

Ayhan Sezer Yag Ve Gida Endustrisi Ticaret Ltd Sirket ('**Ayhan Sezer**') entered into a contract with Agroinvest SA ('**Agroinvest**') for the sale of rape meal and soybean meal. The contract was concluded on 2 April 2018 and included an advance payment of USD 494,500 described as an '*advance payment/guarantee upon signing of the contract*' (the '**Advance Payment**'), with the balance to be paid within 24 hours of the presentation of shipping documents.

The contract stipulated shipment periods and payment terms, incorporating the standard terms of GAFTA Contract No. 100, including:

'23. DEFAULT
In default of fulfilment of contract by either party, the following provisions shall apply:-

(a) The party other than the defaulter shall, at their discretion have the right, after serving notice on the defaulter to sell or purchase, as the case may be, against the defaulter, and such sale or purchase shall establish the default price.

(b) If either party be dissatisfied with such default price or if the right at (a) above is not exercised and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.

(c) The damages payable shall be based on, but not limited to, the difference between the contract price and either the default price established under (a) above or upon the actual or estimated value of the goods, on the date of default, established under (b) above…'

Ayhan Sezer sent the Advance Payment to Agroinvest, but after the contract was signed, correspondence between the parties resulted in an allegation that Ayhan Sezer had committed a repudiatory breach, and Agroinvest accepted it as bringing the contract to an end on 7 May 2018.

The dispute resolution process in GAFTA contracts typically involves two stages: the First Tier Tribunal ('**FTT**') and the Board of Appeal ('**BoA**').

First Tier Tribunal Decision

Ayhan Sezer initiated arbitration proceedings before the FTT, accepting that it had '*repudiated or renounced*' the contract but contended that the Advance Payment was repayable.

The FTT found in favour of Ayhan Sezer, determining that:

— The Advance Payment was refundable; and

— the date of default was 7 May 2018, this being the date Agroinvest accepted Ayhan Sezer's repudiation.

The FTT also found that Agroinvest had failed to prove it had suffered any loss by reference to the date of default of 7 May 2018.

Board of Appeal Decision

Agroinvest appealed the decision before the BoA, arguing that the Advance Payment was non-refundable and that the true date of default was 16 May 2018 – this was the latest possible date on which Agroinvest, as seller, could fulfil its contractual obligations under the contract by shipping the goods.

The BoA upheld the FTT's finding that the date of default was not the date Ayhan Sezer repudiated the contract (27 April 2018), but the date Agroinvest accepted repudiation (7 May 2018).

However, the BoA determined that the Advance Payment was non-refundable. It concluded that the payment served a dual purpose: as a deposit to secure the goods and as a guarantee to provide security to Agroinvest for Ayhan Sezer's performance.

The BoA assessed Agroinvest's losses as of the date of default (7 May 2018) and found that Agroinvest's losses were extinguished by the Advance Payment.

Commercial Court Decision

Date of Default
First, the Commercial Court found that the date of default should be the date of the repudiatory breach itself, even where that breach is anticipatory in nature. This approach was preferred for reasons of legal consistency and commercial certainty, particularly in the context of standard form contracts such as those governed by GAFTA.

The Commercial Court considered *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financiere SA* [1979] 2 Lloyd's Rep 98 ('**Toprak v FCC**') and *Thai Maparn Trading Co Ltd v Louis Dreyfus Commodities Asia Pte Ltd* [2011] 2 Lloyd's Rep 704 ('**TMT v LDCA**'), on which Ayhan Sezer relied and which related to GAFTA contracts.

1. The Commercial Court accepted that, according to *Toprak v FCC*, where there are multiple breaches, the '*default of fulfilment of contract*' is the date of the earliest breach. In *Toprak v FCC*, the date of '*default*' was the date of the actual repudiatory breach, not the date of acceptance. However, *Toprak v FCC* was concerned with an actual breach, not an anticipatory breach.
2. On the other hand, the Commercial Court accepted that *TMT v LDCA* dealt with an issue of anticipatory breach. However, the decision in that case was also found to be consistent with the position that the date of default was to be determined by the date of the breach itself, not acceptance of the breach.

Although the Commercial Court recognised that there were arguments pointing to both sides, it reasoned that:

'*74. Where the true construction of a clause is arguable there is a powerful argument for consistency in the law. In particular:*

- *a. It is desirable that contracts that are in standard form are construed in a consistent manner. To construe 'date of default' as being a reference to the date of breach in a case of a repudiatory breach of contract by the breach of a performance obligation whereas to mean the date of acceptance in the case of an anticipatory repudiatory breach risks inconsistency in the application of the clause.*
- *b. [TMT v LDCA] itself provides support for that conclusion, the court favouring where possible consistency of decision-making on the same issue.*'

Having considered the competing arguments and the desirability of consistency and having followed the decision in *TMT v LDCA*, the Commercial Court concluded that, for purposes of Clause 23 of the GAFTA Contract No. 100, the true date of default was 27 April 2018 (the date on which Ayhan Sezer's repudiatory breach occurred) rather than 7 May 2018 (the date of acceptance of the breach). As such, damages were to be measured at that date.

Nature of Advance Payment

The Commercial Court found that the Advance Payment of USD 494,500 was refundable. The Commercial Court reasoned that the term '*advance payment/guarantee*' did not equate to a non-refundable deposit. The Commercial

Court noted that if the parties had intended the payment to be non-refundable, they would have used clear language to that effect, such as the term '*deposit*'.

The Commercial Court found that the Advance Payment served as security for Agroinvest's performance and was not intended to be forfeited irrespective of Agroinvest's actual loss. In particular:

'*85. In looking at the factual background, the difficulty with* [Agroinvest] *argument is that, whilst it is true that the Board was entitled to look at the purpose of the parties in agreeing a contract which contained such as a clause, the material before the Board and indeed the Board's own reasoning does not show why as a matter of law the Advance Payment is to be treated as non-refundable in the event of the* [Ayhan Sezer]'s *default. It certainly cannot be said that this is the only way to give meaning to the payment of the monies.* ***As*** **[Ayhan Sezer]** ***rightly identifies, the pre-payment by the buyer of 20% of the purchase prices gives significant security to the seller since it provides an available fund from which it can recover its losses (if any) that flow from non-performance.***

86. But to go further by finding that the Advance Payment was not recoverable even if the seller suffered no loss through non-performance by the buyer would in my judgment go beyond the normal meaning of the words used, in particular in the context of contractual language where the use of alternative language, that of 'deposit' would clearly have that consequence. Had the parties intended the Advance Payment not to be recoverable, they would either have called it a deposit or expressly stated this to be the case. They did not do so.' [**emphasis** added]

The Commercial Court remitted the matter to the BoA for the determination of Agroinvest's loss at the date of default.

Comment

The Commercial Court's decision offers valuable guidance for parties involved in international commodity contracts, providing clarity on two important aspects of contract law: (i) the determination of the date of default under a GAFTA contract; and (ii) the difference between an advance payment and non-refundable deposit.

As Chitty explains: '*A contract may, instead of fixing a sum to be paid upon breach, provide for a sum to be paid as a deposit, in which case the sum is forfeited if the payer breaks the contract*' (Chitty on Contracts 35th Ed., para 30-261). That is distinguished from a situation where: '*If in a contract of sale there is no express requirement that the buyer must pay a deposit or will, in the event of breach, forfeit sums paid, and the seller terminates the contract upon the buyer's default, the buyer may recover any prepayment or instalments paid in part payment of the price, subject to a cross-claim by the seller for damages for the breach of contract*' (Chitty on Contracts 35th Ed., para 30-263).

The important drafting lessons are:

1. If an advance payment is to be non-refundable, it is important that the contract makes this clear. The usual way of doing so is to structure it as a non-refundable deposit.
2. It should be remembered that the rule against penalties applies to deposits (*Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 at [16]), which make the deposit unenforceable if it is disproportionate or excessive. Therefore, careful thought should be given to the amount of the deposit.
3. However, if an advance payment is refundable, it will likely still serve as effective security from which to provide available funds from which the innocent party can recover its losses. That said, it will be required to deduct its losses from the advance payment and return the remainder. In this context, careful thought should be given to the interaction between an advance payment and any set-off clause/withholding clause.

The Commercial Court's ruling on the date of default might be of more limited application to contracts using similar wording in default provisions. In this case, the construction of when the '*default*' occurred was critical to measuring damages. However, the approach to the express contractual clause in this case aligns with the principle that damages should reflect the position at the time the breach occurs, not when it is acknowledged.

The Commercial Court's finding that the Advance Payment was refundable underscores the importance of precise contractual language. Despite being labelled an '*advance payment/guarantee*', the absence of terms like '*non-refundable*' or '*deposit*' led the Commercial Court to conclude that the payment was not intended to be forfeited automatically.

If the intention is for an advance payment to be non-refundable, this must be clearly stated in the contract. Using the term '*deposit*' and including express language about non-refundability in the event of default can help avoid disputes.

Judge: Pearce J

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CMS Expert Guide to Consequential Loss in the Energy Sector

The CMS Consequential Loss Guide offers a comprehensive, jurisdiction-by-jurisdiction analysis of how consequential loss is understood and applied in both common law and civil law systems.

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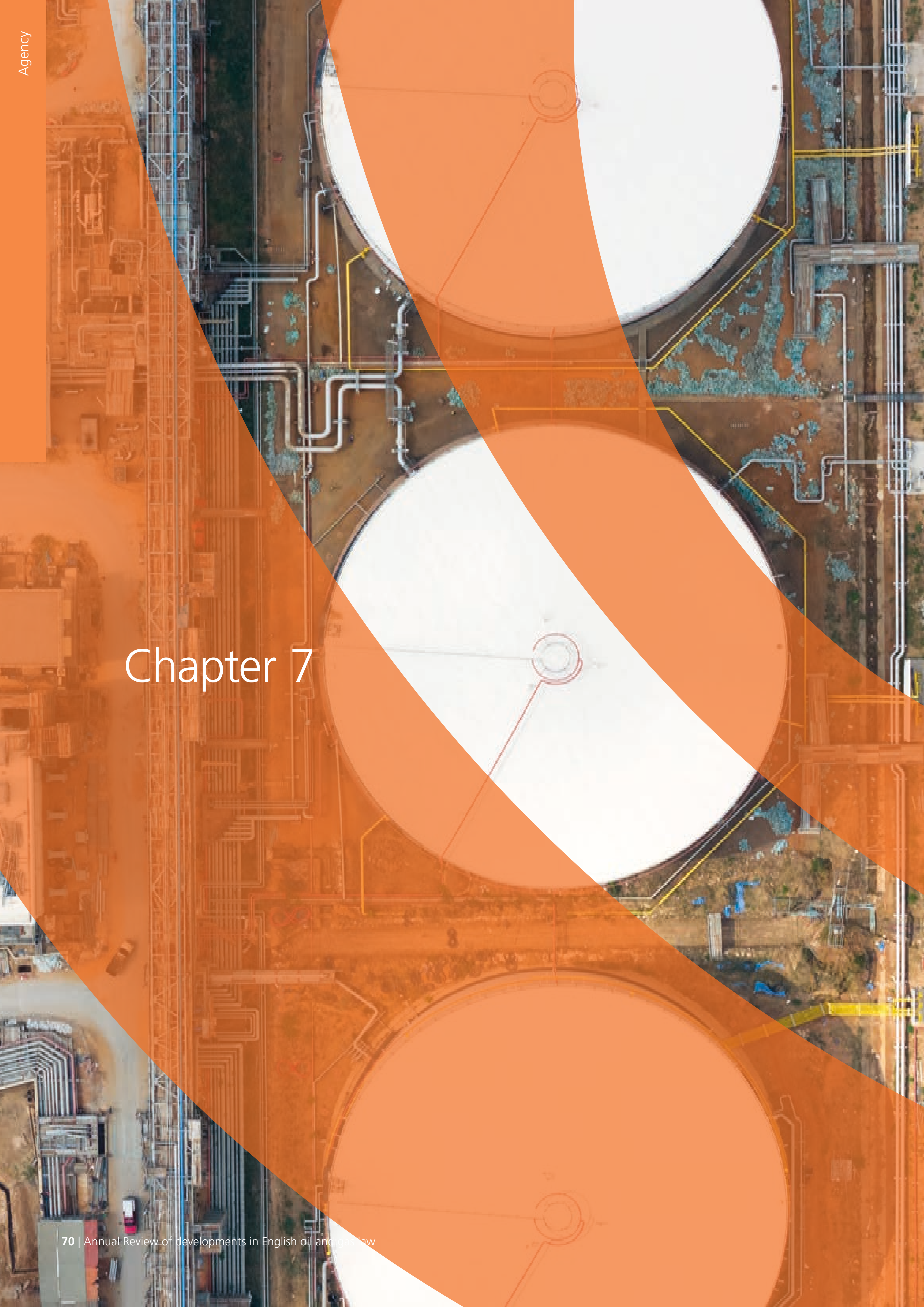


Chapter 7

Agency

Transactions in the oil and gas industry regularly involve intermediaries and agents. Two cases in the past twelve months shine a particular light into the role of agents:

- In *Expert Tooling and Automation Ltd v Engie Power Ltd* [2025] EWCA Civ 292, the Court of Appeal was required to decide whether an energy supplier was liable to make good a so-called 'half-secret' commission in respect of the brokering of energy supply contracts where the broker had breached its fiduciary duties. Although not an oil industry case, the decision and a more recent Supreme Court ruling will be of relevance.

- In *MSH Ltd v HCS Ltd* [2025] EWHC 815 (Comm), the Commercial Court provided valuable insights for practitioners dealing with undisclosed principals in commodity contracts and their ability to bring an arbitration although not named as a party on the face of the contract.

'Half-secret' commissions

In *Expert Tooling and Automation Ltd v Engie Power Ltd* [2025] EWCA Civ 292, the Court of Appeal was required to decide whether an energy supplier was liable to make good a so-called '*half-secret*' commission in respect of the brokering of energy supply contracts where the broker had breached its fiduciary duties. The outcome will be of interest to brokers and energy supply companies in understanding the scope of their duties and liabilities.

Facts

Expert Tooling and Automation Ltd ('**Tooling**') is a tools manufacturer. Utilitywise Plc ('**UW**') was an energy consultancy, and Engie Power Limited ('**Engie**') is an energy supplier.

Tooling engaged UW under a letter of authority to broker and negotiate electricity supply contracts on its behalf. Separately, UW entered into a brokerage agreement with Engie whereby UW would charge a procurement commission whenever it introduced a new customer to Engie.

Between 2016 and 2017, Tooling entered into five electricity supply contracts with Engie for the supply of electricity to Tooling's premises in the North-East of England. Each contract was brokered by UW.

A substantial upfront payment of commission was payable to UW on commencement of each contract which, in the case of the first contract, was roughly £89,000. The commission was included in the unit price for electricity purchased by Tooling from Engie, so in effect, Tooling paid UW the commission via its energy payments.

Although it was accepted that UW had disclosed to Tooling the fact that it would be paid commission by Engie, no other details (such as the amount of the commission or the basis on which it would be paid) were communicated to Tooling.

After UW went into administration in 2019 and subsequently dissolved in 2022, Tooling brought claims against Engie, alleging that:

1. UW had breached the contractual and/or fiduciary duties it owed to Tooling by failing to disclose material details of the commission payable to it by Engie; and
2. by paying the commission, Engie had procured UW's breaches of contractual and/or fiduciary duty and was liable as an accessory to those breaches.

High Court Decision

The High Court found that UW acted as agent for Tooling, and thus owed it fiduciary duties, including the duty not to allow its interests to conflict with Tooling's interests.

However, the High Court also found that the scope of UW's fiduciary duty did not extend so far as to compel UW to disclose the precise commission or how it was added to Tooling's electricity price.

Finally, the High Court considered that it was not necessary to deal with the question of whether

informed consent was given by Tooling as to the payment of commission to UW. Nevertheless, the High Court noted, *obiter*, that Tooling *did* give its informed consent to the commission that was paid to UW and Engie was not guilty of procuring UW's breach of fiduciary duty because dishonesty was an essential ingredient of such accessory liability. Given no dishonesty was alleged, Engie could not be liable.

Court of Appeal Decision

Tooling appealed the High Court's decision on a number of grounds.

Informed consent

The Court of Appeal found that Tooling was not truly 'informed' on the basis that it had not been told material details in relation to the commission. These undisclosed facts included (amongst other details) the actual amount of the commission; how it was built into the unit price payable by Tooling; and the substantial upfront commissions paid to UW. The Court of Appeal considered that those details '*created significant incentives for UW to cause Tooling to contract with Engie, whether or not that was in the best interests of Tooling*'.

The Court of Appeal considered that the High Court had made an error in law in finding that informed consent had been obtained from Tooling and concluded that '*the fiduciary must identify all the material circumstances, together with the nature and extent of its interest and the conflict to which it seeks the principal's consent*'.

The Court of Appeal did note that what amounts to sufficient disclosure will depend upon the facts of each case.

Accessory Liability

In *Hurstanger v Wilson* [2007] EWCA Civ 299 ('**Hurstanger**'), Tuckey LJ addressed the position if there had been no disclosure:

'Obviously if there had been no disclosure the agent will have received a secret commission. This is a blatant breach of his fiduciary duty but additionally the payment or receipt of a secret commission is considered to be a form of bribe and is treated in the authorities as a special category of fraud in which it is unnecessary to prove motive, inducement or loss up to the amount of the bribe. The principal has alternative remedies against both the briber and the agent for money had and received where he can recover the amount of the bribe or for damages for fraud where he can recover the amount of any actual loss sustained by entering into the transaction in respect of which the bribe was given [citing Mahesan]. Furthermore the transaction is voidable at the election of the principal who can rescind it provided counter-restitution can be made…'

Tooling argued that the decision in *Hurstanger* established a '*new species of equitable liability*' that was distinct from the claim of accessory liability and concerned third parties who '*procured*' the breach of a fiduciary duty without the need to establish dishonesty. Tooling argued that liability in this respect is established in circumstances where:

1. the payer knows that the recipient of the commission is an agent, owing fiduciary duties to its principal; and
2. the principal has not in fact given its informed consent to the commission, irrespective of whether that was known to the payer.

The Court of Appeal rejected this ground, deciding that *Hurstanger* did not establish a '*new species of primary liability*', but rather, addressed accessory liability in the conventional sense. In *Hurstanger*, having concluded that partial disclosure negated secrecy, so as not to attract a finding of fraud and the other consequences that flow in the cases of bribery, the Court nevertheless considered it unfair to acquit the payer altogether in a case of partially disclosed commission '*for their involvement in what would still be a breach of fiduciary duty*'. The Court of Appeal reiterated that accessory liability, as established in previous cases, is fault-based and requires an element of dishonesty. As Tooling made no case that Engie had acted dishonestly, there could be no liability for Engie as an accessory.

Tooling also attempted to rely on *Johnson v FirstRand Bank Ltd* [2024] EWCA Civ 1282 ('**FirstRand**') arguing that dishonesty on the part of Engie should be established merely by virtue of the fact that Engie knew that UW owed fiduciary duties to Tooling as its agent.

The Court of Appeal distinguished *FirstRand* and noted that it was established in that case that the payer of the commission had actively tried to prevent an agent from disclosing the commission to its principal. Such conduct was deemed sufficient to establish dishonesty. *FirstRand* pointed out that *Hurstanger* is binding authority for the proposition that in a case where partial disclosure negates secrecy, a lender can only be held liable in equity as an accessory to the broker's breach of fiduciary duty.

In contrast, the necessary dishonest element was not present in this case, as there could be no evidence of Engie deliberately obstructing disclosure without the facts as to Engie's state of mind being properly investigated.

Comment

Supreme Court Decision in FirstRand

Following the Court of Appeal decision in *Expert Tooling*, the Supreme Court handed down its decision in *Hopcraft and another v Close Brothers; Johnson & Wrench v FirstRand Bank t/a MotoNovo Finance* [2025] UKSC 33 ('**FirstRand**') on 1 August 2025. The decision in FirstRand has implications for *Expert Tooling* given similar questions were sought to be addressed, (albeit *FirstRand* was decided in the context of the purchase of motor vehicles, rather than the energy sector).

In short, the Supreme Court in *FirstRand*:

1. Examined the basis upon which a fiduciary duty is established, summarising that:

   '… [a fiduciary] owes a duty of single-minded loyalty to his principal, meaning that he cannot exercise any power in relation to matters covered by his fiduciary duty so as to benefit himself. Accordingly, if a person is a fiduciary then he must not put himself into a position where his interest and that of the beneficiary might conflict (the no conflict rule), subject to the principal's informed consent. In addition, or perhaps in consequence, he must not receive a personal benefit from his fiduciary position (the no profit rule), subject again to the principal's informed consent'.

2. Overturned the concept of a '*half-secret*' commission, as established in *Hurstanger*, meaning that concept of a '*half-secret*' or a '*partially disclosed*' commission in bribery claims is no longer good law. As a result, the Court clarified that consent to a payment of commission can <u>only</u> be given in circumstances where disclosure of '*all material facts*' of the commission is made to the principal. Anything less than this will mean that the payment will be deemed to be a '*secret*' commission to which the agent is liable in tort.

3. Left untouched – and indeed reinforced – the established rule that accessory liability for a fiduciary's breach requires proof of <u>dishonesty</u>. Simply knowing that the recipient owes fiduciary duties to the principal will not suffice to establish accessory to the principal.

Implications for Expert Tooling and the energy sector

As the Court of Appeal granted permission to appeal *Expert Tooling* to the Supreme Court, it seems that there may yet be further developments in this area. The Supreme Court has been asked to decide:

1. whether the Court of Appeal was wrong to distinguish between a '*half-secret*' and a '*fully secret*' commission for the purpose of determining whether the commission should be treated as a bribe that attracts restitutionary liability for the amount of the bribe; and

2. alternatively, if '*half-secret*' commissions are to be treated distinctly from '*fully secret*' commissions, whether the Court of Appeal was wrong to apply a test of dishonesty at all and, in any event, a test which is inconsistent with the decision in *Hurstanger* and which required more than that the commission-payer knew of the existence of a fiduciary relationship.

The Supreme Court decision in *FirstRand* is highly likely to have a material impact on the appeal in *Expert Tooling*. The Supreme Court decision in the *Expert Tooling* appeal is set to offer further clarity on the position in respect of '*secret*' commissions in the context of the energy sector.

Separately, a cross-appeal has also been lodged on whether the Court of Appeal in *Expert Tooling* was wrong to conclude that:

1. informed consent to the payment of the commission had not been obtained; and
2. the limitation period only started to run from the date of payment of the commission rather than the date of entry into the contract.

Whilst additional Supreme Court guidance in the context of the energy sector is awaited, here are a few key takeaways as the law currently stands:

1. Energy brokers acting for energy buyers will owe fiduciary duties to their client to disclose the full details of commissions received from suppliers in order to obtain their fully informed consent. A failure to disclose all material facts of the commission is likely to amount to an actionable breach of fiduciary duty, which will likely result in the claimant being able to recover the commission from the energy broker.
2. As *Hurstanger* has been overturned, there is now no relevant distinction between a '*fully secret*' commission and a '*half-secret*' commission. As such, a broker of an energy supply contract will have received a '*secret*' commission in circumstances where it can be proved that:
   - no disclosure of the commission is made to the principal (constituting a breach of its fiduciary duties); or
   - a disclosure of the commission is made, but the principal is not provided with '*all material facts*' of the same to give fully informed consent. What amounts to '*full disclosure*' will depend on the circumstances of each case.

In these two scenarios, the payment or receipt of a secret commission is considered to be a form of bribe and is treated in the authorities as a '*special category of fraud*' in which it is unnecessary to prove motive, inducement or loss up to the amount of the bribe which may be recovered from the paying party.

3. The liability of the supplier in respect of a '*secret*' commission is an accessory liability for assistance in the breach of fiduciary duty of the agent, in which dishonesty remains an essential element.

Pending the Supreme Court's ruling in *Expert Tooling*, the law as it currently stands means that parties involved in similar commission arrangements should carefully evaluate whether the principal has been given sufficient information for it to be able to provide fully informed consent. Failure to do so could give rise to accessory liability in circumstances where dishonesty is established.

High Court Judge: Saffman HHJ

Court of Appeal Judges: Asplin LJ, Snowden LJ and Zacaroli LJ

An undisclosed principal revealed?

In *MSH Ltd v HCS Ltd* [2025] EWHC 815 (Comm), the Commercial Court provided valuable insights for practitioners dealing with undisclosed principals in commodity contracts and their ability to bring an arbitration despite not being named as a party on the face of the contract.

Facts

MSH Ltd ('**MSH**') is a seller of Colombian nut coke, and HCS Ltd ('**HCS**') is a trading house. A contract was agreed between MSH and CTW Ltd ('**CTW**') for the sale and purchase of Columbian nut coke on or around 28 September 2020, with CTW named as the buyer (the '**Contract**').

HCS and CTW had an established relationship, HCS having been a customer of CTW since 2018. There was no written agency agreement between HCS and CTW, with contracts between the relevant representatives being limited to phone, text, WhatsApp and occasional emails.

CTW had no standing authority to contract on HCS's behalf when not doing deals. Non-package deals had to be approved by a Ms PP on a deal-by-deal basis. Therefore, CTW's actual authority to commit HCS to a contract depended on demonstrating that Ms PP's specific authority was granted before the contract was concluded.

A dispute emerged between MSH and HCS relating to the Contract (the case report does not reveal the nature of this dispute), that was initially settled by arbitration. MSH challenged the arbitration award under s.67 of the Arbitration Act 1996 on the grounds that HCS was not a proper party to the Contract (or the arbitration agreement in the Contract). If MSH was successful in this claim, the arbitration award could have been set aside in its entirety.

The issue to be resolved was whether HCS was a proper party to the Contract, as an undisclosed principal.

Decision

Legal Principles
The Commercial Court referred to established concepts regarding undisclosed principals, notably from *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 QB 545 and *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199.

In *Siu Yin Kwan*, Lord Lloyd of Berwick summarised the law in the following terms:

— An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority.

— In entering into the contract, the agent must intend to act on the principal's behalf.

— The agent of an undisclosed principal may also sue and be sued on the contract.

— Any defence which the third party may have against the agent is available against his principal.

— The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.

Key Issues
Two of the key issues for the Commercial Court to resolve were: (i) whether CTW had the authority to enter into the Contract on behalf of HCS; and (ii) whether the terms of the Contract precluded an undisclosed agency from arising.

In relation to the issue of whether CTW had the authority to enter into the Contract, the Commercial Court carried out a factual enquiry. In deciding that CTW had the authority to act on HCS's behalf, the Commercial Court concluded that it was supported by the following:

— The course of dealings meant that CTW was unlikely to enter into a contract without HCS's approval.

— There were regular telephone calls between the relevant persons during which the necessary approval could have been sought and obtained.

— Subsequent dealings suggested authority had been given.

In addition, the Commercial Court concluded that the contract terms did not preclude HCS from being an undisclosed principal. This is not surprising as the circumstances in which the terms of a commercial contract will imply the exclusion of the operation of an undisclosed principal doctrine are quite rare.

The Commercial Court regarded the four clauses relied on by MSH to suggest that the Contract excluded the possibility of an undisclosed principal '*… bring little to the mix, and are not sufficient to prevent the operation of this established doctrine of English commercial law*':

— Clause 11 (HCS to provide letter of credit): The fact that it was HCS that was identified as providing the means of discharging the buyer's key obligation under the Contract, if anything, made HCS a more likely candidate for an undisclosed principal. It certainly did not move the needle from the neutral position in MSH's favour.

— Clause 19 (precludes assignment without the other party's prior written consent): The Commercial Court was not persuaded '*that a clause limiting (but not excluding) the right of assignment has much weight when determining whether there is an implied exclusion of the undisclosed principal doctrine*'.

— Clause 22 (confidentiality clause): The Commercial Court was less persuaded by the use of a confidentiality clause, as the undisclosed principal is someone who is clearly within the '*confidentiality club*'. It decided that '*[t]he obligation of confidentiality binds the parties to the Contract but does not exclude a long established legal principal arising under the law chosen to govern that contract in deciding who is entitled to enforce and is liable under the Contract*'.

— Clause 23 (entire agreement clause): The clause in these circumstances was very basic. However, for such a clause to have been effective in these circumstances, it cannot be of a '*boilerplate*' nature (it was described as being '*of the most vanilla kind*') and must engage directly with the undisclosed principal doctrine. It was also of significance that the Contract was at the 'non-relational' end of the scale of contracts – the possibility of payment by someone other than the named signatory was again, of relevance.

As a result, the Commercial Court dismissed MSH's s. 67 challenge, affirming that HCS was an undisclosed principal with the right to enforce the Contract.

Comment

It is a well established facet of English law that only a party to an arbitration agreement may bring an action, or be required to defend an action, commenced under an arbitration agreement.

That said:

— There are circumstances where the parties named to a contract are not the parties (or the only parties). Whilst there is a significant amount of academic commentary on piercing the corporate veil, when a company seeks to conceal a true actor or evade a right or frustrate its enforcement through separate corporate personalities, the more common circumstance is not one of piercing the corporate veil at all. It is one of agency – which regularly arises in commercial dealings.

— Agency need not be disclosed. English law allows undisclosed agency, provided the relevant legal test is satisfied.

— The key difference between a disclosed and undisclosed agency, when it comes to commencing or defending proceedings, being that in an undisclosed agency the agent is also likely to be treated as a party capable of being sued under the contract (as well as the principal).

— A party wishing to avoid circumstances where the named counterparty, with whom it is dealing, is not an agent for an undisclosed principal should stipulate so in its contract. That may be desirable if a party wishes to avoid dealing with undisclosed entities, for example due to policy issues concerning nationality of counterparts.

— General 'boiler plate' terms on assignment and entire agreement are likely to be insufficient to prevent an undisclosed agency from being a possibility.

— It may be the case, as was here, that the principal can be identified through security provided, such as a letter of credit, but that may not always be the case.

Model commodity sales general terms and conditions rarely deal with restrictions on undisclosed principals. For example, there is no restriction in BP's General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products or Shell's General Terms and Conditions for Sales and Purchases of Cude Oil. As a result, if undisclosed principals are a concern, specific drafting may well be required.

Judge: Foxton J

Chapter 8

Boilerplate and Interest Clauses

In the past year there have been some interesting cases on issues that might be considered 'boilerplate', specifically relating to non-assignment clauses and interest provisions:

- In *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2024] EWCA Civ 5, the Court of Appeal revisited the controversial Commercial Court decision that suggested a no-assignment clause might prevent a subrogated party (or similar) from seeking to assert its rights.

- In *Houssein & Others v London Credit Limited & Another* [2024] EWCA Civ 721, the Court of Appeal set out the test for whether a default interest clause was penal. Although not an oil and gas case, its reasoning will be relevant to all transactions that include an interest rate applying upon default.

- In *Standard Chartered PLC v Guaranty Nominees Ltd & Ors* [2024] EWHC 2605 (Comm), the English Commercial Court provided a solution to the impact of the cessation of the London Interbank Offered Rate. The decision will be of relevance to a large number of existing contracts, which often reference LIBOR in respect of calculating interest.

Effect of Anti-assignment Clauses and Transfers to Insurers Revisited

In *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2024] EWCA Civ 5, the Court of Appeal revisited the controversial Commercial Court decision that suggested a no-assignment clause might prevent a subrogated party (or similar) from seeking to assert its rights. The risk of such occurrence now seems more limited, but careful consideration should still be given to the exact terms of a no-assignment clause.

Facts

The facts are set out at page 68 onwards of the 2024 edition of the *CMS Annual Review of developments in English oil and gas law*.

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

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

Dassault was in breach of the Sale Contract due to the late delivery of the two aircrafts, giving rise to a claim by MBA for damages. MBA decided not to pursue a claim against Dassault for damages, as it had obtained insurance cover with Mitsui Sumitomo Insurance Co. ('**MSI**'), including cover for late delivery. This insurance policy was governed by Japanese law. The claim by MBA under the insurance policy for late delivery was accepted and paid by MSI.

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

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

Commercial Court Decision

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

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

The detail of the decision of the Commercial Court is set out at page 69 onwards of the 2024 edition of the CMS *Annual Review of developments in English oil and gas law*.

Court of Appeal Decision

Overturning the Commercial Court's decision, the Court of Appeal found that the assignment did not breach the no-assignment clause.

In this respect, the Commercial Court concluded that the authorities showed that non-assignment clauses did not generally exclude transfers which occurred '*by operation of law*' in a broad sense. In the Commercial Court's analysis, the focus was on whether the transfer occurred outside the voluntary control of the transferring party. The Commercial Court derived this approach from Rowlatt J's judgment in *Cohen v. Popular Restaurants* [1917] KB 480. Rowlatt J distinguished the bankruptcy and compulsory winding up cases, holding that in those cases, an assignment was not a voluntary act. Conversely, in *Cohen*, '*[t]he assignment was the act of a liquidator brought into existence by the voluntary act of the company, the passing of a special resolution to wind up the company voluntarily*'.

However, the Court of Appeal considered that old insolvency cases do not enunciate a general principle applicable to the interpretation of non-assignment clauses in commercial contracts. Instead, they seem mostly to turn on the nature of the insolvency under which the transfer in question took place.

The Court of Appeal decided that the correct question was whether the transfer was made by MBA, not whether the transfer was caused as a consequence of certain actions taken by MBA. The transfer was not made by MBA; it was made by operation of law. The Court of Appeal took an objective view of the language in the clause and found it to be clear and unambiguous. There was no need to undertake a '*detailed iterative process of interpretation*' to decide between two possible constructions of the clause. As this assignment had occurred as an operation under Japanese law, this transfer fell outside the restrictions of the no-assignment clause.

Comment

As we said in our commentary on the Commercial Court decision, the Commercial Court admitted to reaching its conclusion '*with an unusual degree of hesitation*'. As such, it perhaps is not a surprise that the Court of Appeal has taken a fresh look at the relevant principles.

Ultimately, the decision of the Court of Appeal makes clear that the proper approach will turn on an analysis of the contract. The usual rules and principles of contractual construction and interpretation will apply. If the contract prohibits assignments, the question will be the type of assignments it prohibits as a matter of proper construction and interpretation.

The key words in this contract were '*by any Party*'. In that textual context, the correct question was whether the transfer was made by MBA, not whether the transfer was caused as a consequence of certain actions taken by MBA.

Further, although the case relates to the operation of Japanese law, rather than subrogation, the decision of the Commercial Court raised concerns that the effect of its decision could undermine subrogation rights of insurers. In that respect, the risk seems to have receded slightly.

In respect of subrogation, academically, Professor Goode in *Contractual Prohibitions Against Assignment* [2009] LMCLQ 300, suggested that '*prima facie*' an anti-assignment clause was limited to contractual assignments and would not encompass rights of subrogation. However, following this case, it is apparent that each clause will fall to be construed in the usual way – and thinking in terms of presumptions (or *prima facie* positions) may not be useful.

This decision makes clear that each clause will turn on its own words, which might be less likely to undermine traditional subrogation rights. That said, it will ultimately depend upon the words of the contract.

Commercial Court Judge: Cockerill J

Court of Appeal Judges: Sir Geoffrey Vos MR, Coulson LJ and Phillips LJ

Is default interest a penalty?

In *Houssein & Others v London Credit Limited & Another* [2024] EWCA Civ 721 the Court of Appeal was asked to decide whether a default rate of interest was a penalty. Although this is not an oil and gas case, many industry agreements differentiate between interest and default interest. As the Court of Appeal identified the correct legal test to establishing whether a default rate is an unlawful penalty, it will be of interest to practitioners.

Facts

The claimants, Mrs Nuray Houssein, Houssein Ali Houssein (as executor of the estate of Ali Houssein, deceased) and CEK Investments Limited (together, the '**Houssein Parties**'), borrowed GBP 1.881m from London Credit Limited ('**LCL**') under a short-term, 12-month bridging facility dated 20 July 2020 (the '**Facility Letter**'). The facility letter provided for a standard interest rate of 1% per month, with a default rate set at 4% per month, both compounded monthly. The full year's standard interest was rolled-up and retained out of the loan amount. The loan was secured by a debenture over CEK's assets, personal guarantees from CEK's directors, the First Appellant and her husband, and mortgages over 5 buy-to-let properties and their family home. Victoria Liddell and Annika Kisby were later appointed as LCL's joint fixed-charge receivers (together, the '**Receivers**').

A key condition was that neither CEK nor any of its '*Related Persons*' – a defined term that included spouses and relatives of CEK's directors (although not the directors themselves), would occupy the family home for the duration of the loan. Nonetheless, shortly after drawdown in August 2020, LCL alleged that the family home was being occupied in breach of this condition.

By September 2020, LCL issued a notice of default, citing breach of both the Facility Letter and an associated FCA declaration, and began charging default interest at 4% per month. In November 2020, it demanded immediate repayment of over GBP 1.8m, including default interest, and later appointed joint receivers over both the buy-to-let properties and the family home.

Amongst other things, the issue arose as to whether the default interest was an unenforceable penalty.

Court of Appeal Decision

The Court of Appeal considered the relevant legal authorities with an emphasis on (1) *Cavendish Square Holdings BV v Makdesi* [2015] UKSC 67 and (2) *Cargill International Trading PTE Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm).

Taking into account the relevant authorities it determined that the correct three-part test to apply to establish whether default interest is an unenforceable penalty is:

1. First, the threshold question, whether the default rate of interest is a secondary obligation which is engaged on the breach of a primary contractual obligation.

2. Second, was there a legitimate interest to be protected. In this respect:
   - In the *Cargill* case it was decided that it is self-evident that there is a good commercial justification for charging a higher rate of interest on an advance of money after a default in repayment because a person who has defaulted is, inevitably, a greater credit risk.
   - Lords Neuberger and Sumption made clear in the *Cavendish* case that whether a clause is penal depends on its purpose, which is an inference from its effect and that determining this issue is a matter of construction. As such, the issue of legitimate interest is to be established objectively. A party's state of mind is not relevant.
3. Third, the crucial question of whether the provision is extortionate, exorbitant or unconscionable.

Applying the above test, it could be assumed that the default rate of interest is a secondary obligation which is engaged on the breach of a primary contractual obligation. In respect of legitimate interest, the High Court had taken the wrong approach in looking to subjective intentions. Taking into account *Cavendish* and the approach in the *Cargill* case, it is inevitable that a legitimate interest in the enforcement of the primary obligation to repay the loan, all interest, fees and commissions on the repayment date arises here. Finally, the High Court has not gone on to consider the question of whether the provision is extortionate, exorbitant or unconscionable.

As the final element of the test is fact specific, the Court of Appeal referred the case back the High Court to determine this point.

Comment

Oil and gas industry agreements regularly provide for interest at a default rate. The OEUK Model Form Joint Operating Agreement (2009) states at Article 17.4, relating to the remedy of defaults, that:

'*The Defaulting Participant shall have the right to remedy the default at any time prior to [[forfeiture/transfer]] of its interest pursuant to clause 17.6, by payment in full to the Operator or, if the Non-Defaulting Participants have paid any amounts under clause 17.2(c), the Non-Defaulting Participants, in proportion to the amounts so paid by them, of all amounts in respect of which the Defaulting Participant is in default, together with interest thereon calculated on a day to day basis at a rate equal to the rate stipulated from time to time under the Late Payment of Commercial Debts (Interest) Act 1998, from and including the due date for payment of such amounts until the actual date of payment.*'

As the footnote to the provision states: '*The interest rate suggested in this clause is deliberately very high as, if any exploration has been unsuccessful and therefore forfeiture may be seen as of little significance, this may be the only effective remedy of the Participants for a deliberate failure to pay.*'

Internationally, the AIEN Model Form Operating Agreement provides:

'8.1.B For the duration of the Default Period the Party in default shall be a Defaulting Party for the purposes of this Agreement. All Default Amounts shall bear interest at the Default Interest Rate from the due date to the date of receipt of payment.'

'Default Interest Rate' is defined to mean '*interest compounded on a monthly basis, at LIBOR plus [•] ([•]) percentage points, applicable on the first Business Day before the due date of payment and afterwards on the first Business Day of each succeeding Calendar Month*'. Again, the monthly compounding is likely to result in a fairly significant rate of interest. The AEIN Model Form also provides that if the resulting rate is contrary to applicable usury law, then the rate of interest to be charged shall be the maximum rate permitted by such applicable law.

The approach taken by the industry seeks to reflect the legitimate interest in ensuring the performance of obligations and the avoidance of default. That is especially the case in joint venture agreements, where a forfeiture of the defaulting party's interest may not result in the transfer of an asset of value. In addition, when it comes to evaluating whether a default rate is extortionate, exorbitant or unconscionable, it is important to remember that the cost of money to the industry does not reflect bank benchmark rates. The weighted average cost of capital varies across companies. However, the cost of capital is usually in significant excess of a normal commercial lending rate.

This decision of the Court of Appeal gives comfort that default interest rates will usually be legitimate, but gives a careful reminder that interest rates may not be extortionate, exorbitant or unconscionable. Further, what is extortionate, exorbitant or unconscionable is a question to be judged on the facts by reference to the relevant evidence. There is no 'one size fits all solution'.

High Court Judges: Falk J and Richard Farnhill

Court of Appeal Judges: Newey LJ, Asplin LJ and Baker LJ

Cy-près solutions: navigating contractual continuity in a post-LIBOR world

In *Standard Chartered PLC v Guaranty Nominees Ltd & Ors* [2024] EWHC 2605 (Comm), the English Commercial Court provided a solution to the impact of the cessation of the London Interbank Offered Rate ('**LIBOR**') on perpetual preference shares which provide for the payment of dividends determined by reference to that rate. The decision will be of relevance to a large number of existing contracts, which often reference LIBOR in respect of calculating interest.

Facts

Standard Chartered PLC ('**SC**') issued USD 750m in preference shares in 2006 to raise Tier 1 capital. Guaranty Nominees Ltd ('**GNL**') held these shares as a nominee for a Depository, which issued American Depository Shares ('**ADS**'). The ADS holders, referred to as the '*Funds*' by the Commercial Court, held the economic interest in the preference shares.

The preference shares were perpetual, meaning that they had no maturity date. Dividends were originally paid at a fixed rate of 6.409% p.a., but after 30 January 2017 the dividend was calculated at a floating rate of '*1.51% plus Three Month LIBOR*'.

Dividends on the preference shares were payable at the discretion of SC's board and were non-cumulative.

The preference shares were governed by the laws of England and Wales, while the ADSs were governed by New York law. It was common ground that the Commercial Court would reference only English law in making a determination.

The definition of 'Three Month LIBOR'

The definition of '*Three Month LIBO*R' relating to the ADSs (being the rate offered for a three month period on USD deposits as published on a specified Telerate screen page) contained a primary means of ascertaining LIBOR, with three alternatives: the **First Fallback**, the **Second Fallback** and the **Third Fallback**. The following is a summary of these fallback positions:

1. If the three-month LIBOR rate did not appear on the specified Moneyline Telerate page, the rate would be calculated as the arithmetic mean of at least two offered quotations from four major reference banks in London.
2. If fewer than two quotations were provided, the rate would be calculated as the arithmetic mean of the rates quoted by three major banks in New York for loans to leading European banks.
3. If the selected banks were not quoting, the fallback rate would be the three-month USD LIBOR in effect on the second business day in London prior to the relevant dividend period.

Cessation of LIBOR

LIBOR was a cornerstone of the financial markets for decades; however, the financial crisis which began in around April 2007 revealed a number of fundamental flaws in the LIBOR determination methodology.

Allegations were made of collusion between panel banks. Regulators, including the US Department of Justice, carried out investigations into the manipulation of LIBOR, which culminated in a series of LIBOR panel banks being fined for inappropriate conduct in relation to their LIBOR returns. Concerns in relation to the LIBOR rate led to regulatory and industry initiatives with a view to identifying floating rates which could be used as alternatives to LIBOR. Those efforts were extensive and produced a large amount of material, some of which was placed before the Commercial Court and relied upon by both SC and the Funds. The Commercial Court set out in great detail a summary of those relevant events in the judgment.

As part of regulatory and market moves away from reliance on LIBOR and towards adoption of the alternative rates, it was agreed that 'synthetic' LIBOR rates would be published for a limited period. In that regard, it was agreed that the synthetic USD LIBOR rates should be based on the '**CME Term SOFR**' plus the '**ISDA Spread Adjustment**'.

At the end of September 2024, in the course of hearing the case, synthetic USD LIBOR ceased to be published, concluding a significant chapter in the history of financial markets.

SC's case

With the cessation of USD LIBOR at the end of September 2024, there was no challenge that the First and Second Fallbacks were inoperable because, simply, banks could not and would not provide the rates.

SC's primary argument centred on the Third Fallback which stated that *'…if the banks selected by the Company, are not quoting as mentioned above, it shall mean three month US dollar LIBOR in effect on the second business day in London prior to the first day of the relevant Dividend Period'.* SC's primary case was that the phrase *'three month US dollar LIBOR in effect'* in the Third Fallback should be construed as *'a rate that effectively replicates or replaces three month USD LIBOR'*. Specifically, SC's argument focused on the interpretation of the phrase '*three month US dollar LIBOR in effect*'. SC contended that this phrase should be construed to mean '*a rate that effectively replicates or replaces three month USD LIBOR*' ('**SC's Interpretation Claim**').

Alternatively, SC proposed the implication of a term, allowing SC to use a reasonable alternative rate. The specific implied term suggested by SC was '*…where the express definition fails, SC should use a reasonable alternative rate to three month USD LIBOR*' ('**SC's Implied Term**'). SC argued that combining the CME Term SOFR plus the ISDA Spread Adjustment (the '**Proposed Rate**') met the requirements of such a '*reasonable alternative rate*'.

The Funds' case

The Funds initially sought a declaration that a term should be implied into the terms of the Preference Shares requiring SC to redeem the Preference Shares. The Funds' position evolved into a more complex two-stage approach.

Stage One Implied Term

The Funds proposed that where USD LIBOR ceased to be available, SC should redeem the Preference Shares, subject to the Companies Act, other applicable laws and regulations, the Articles of Association, and the prior consent of the FCA (the '**Funds' First Stage Implied Term**').

Stage Two Implied Term

To the extent that redemption in accordance with the Funds' First Stage Implied Term was unlawful under the Companies Act, other applicable laws, or if the FCA did not provide its prior consent, the Funds proposed alternative options. In summary, those options included:

1. SC paying a sum as if it were a dividend under the terms of the preference shares, with the dividend rate being equal to the last published LIBOR rate plus 1.51%.
2. SC paying a sum as if it were a dividend under the terms of the preference shares, with the dividend rate being equal to 6.409% (the rate prior to January 2017).
3. Any other term the Court deemed fit.

(Together, the above being the '**Funds' Second Stage Implied Term**'.)

Decision

The Commercial Court decided that it was '*necessary, in order to give business efficacy…to imply a term… that if the express definition of Three Month LIBOR ceases to be capable of operation, dividends should be calculated using the reasonable alternative rate to three month USD LIBOR* …'. Of the reasonable alternative rates which the Commercial Court considered, it found that the Proposed Rate was the closest.

The Commercial Court reiterated the principles of contractual construction and interpretation (including the applicable principles summarised in *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023 UKSC 2 at [29]) and the implication of contractual terms (to which, as expected, there was little dispute between the parties).

In respect of the implication of implied terms, the Commercial Court followed *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72:

1. *'An implied term must either be necessary to give business efficacy to the contract, meaning that the contract would lack commercial or practical coherence without the term and /or be so obvious that it goes without saying ([16])'; and*
2. *'The term to be applied must be capable of clear expression, not contradict any express terms of the contract… and be reasonable and equitable, although a term which meets the previous requirements will almost certainly be reasonable and equitable.'*

The Commercial Court then supplemented the above '*first order*' principles with '*second order*' principles (addressing the first order principles in the particular context). The Commercial Court identified three overlapping second order principles:

Long-term contracts
First, the Commercial Court recognised that while there are no special rules for interpreting long-term contracts, a flexible approach may be necessary to meet the reasonable expectations of the parties, especially given changing conditions over time. This was supported by references to several cases, including *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 208, 218, *Teesside Gas Transportation Limited v CATS North Sea Limited* [2019] EWHC 1220 (Comm), and *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406. The Commercial Court noted that in long-term contracts, the failure to address specific issues may be less significant, and Courts are willing to imply terms to preserve the contract's certainty, especially when one party has already benefited or made investments based on the agreement.

Machinery v. substantial entitlement
Secondly, there was a distinction between provisions of a contract which are intended to define substantive provisions, and provisions which are in the nature of '*machinery*' intended to qualify the substantive entitlement. This principle was set out in *Sudbrook Trading v Eggleton* [1983] AC 444, where it was held that where the machinery is a '*non-essential*' part of the contract, and is incapable of operation, the Commercial Court can step in to perform the necessary exercise of quantification.

Unforeseen events
Lastly, the Commercial Court addressed how to handle unforeseen events with contractual implications during the life of a contract. The Commercial Court referred to *Debenham Retail Plc v Sun Alliance and London Assurance Co Ltd* [2005] EWCA Civ 868. This case dealt with the unforeseen introduction of VAT and

it was held that the Commercial Court must promote the purposes and values expressed or implicit in the contract's wording to reach an interpretation consistent with those values.

With regard to the '*second order*' principles, the Commercial Court concluded that such principles '*seek to ascertain the purpose or structure of the relevant aspects of the parties' bargain, and to adopt an interpretation which best serves or is most consistent with that purpose in the changed circumstances: in effect, a form of contractual cy-près*'.

Further, the Commercial Court confirmed that such an approach aligns with the intentions of reasonable parties to long-term contracts and supports important policy of English contract law, which is reluctant to allow the failure of partly executed contracts due to unforeseen circumstances.

SC's Claims

Against that background, the Commercial Court rejected SC's Interpretation Claim and found that the expression '*in effect'* in the Third Fallback should be understood in its temporal sense, meaning '*in force*', or '*in operation*' at a specific point in time.

However, the Commercial Court accepted SC's Implied Term Claim but modified the proposed term. The Commercial Court emphasised that the identification of the reasonable rate is an objective question, ultimately to be determined by the Commercial Court, and allowed for the possibility that the universe of available alternative reference rates might change over the life of the preference shares.

Funds' Claims

The Commercial Court found that the Funds' proposed implied terms, requiring redemption, did not satisfy each of the criteria for the implication of an implied term i.e., that the proposed term was not necessary to give business efficacy to the (long-term) contract and was not so obvious that it went without saying. The Commercial Court noted that the term would bring the provision of capital and the payment of dividends to an end, which was inconsistent with the long-term nature of the contract.

The Commercial Court also found that the term was inconsistent with the express terms of the contract and the legal controls on the right of redemption. Additionally, the Commercial Court highlighted the

lack of clarity in the proposed term, particularly regarding the conditions imposed by the FCA and the steps SC would need to take to redeem the shares with the regulators. On the basis that the Funds' First Stage Implied Term failed to satisfy the criteria for the implication of an implied term, the Commercial Court did not consider it necessary to consider the Funds' Second Stage Implied Term (since that would only arise if the Funds' First Stage Implied Term was arguable).

Comment

The use of LIBOR regularly arises in existing contracts that were drafted prior to the cessation of LIBOR and model/standard form contracts that have not been updated. Following the cessation of LIBOR this is problematic; it results in doubt and uncertainty in what are often important commercial terms of the contract.

This case underscores several critical points:

— First, the starting point to resolving any issue is the express terms of the relevant contract. It may be that the express terms of the agreement provide a mechanism to resolve a problem. In this case, the relevant express terms did not resolve the problem.

— Second, it was in the context of the express terms not providing an answer that the Commercial Court considered whether an implied term should be found to exist and so, the exact nature of that implied term. The test relating to implied terms is well known and clear.

— Third, after deciding that an implied term was required, the Commercial Court determined that the most suitable replacement for the three-month USD LIBOR in the contract in question was the CME Term SOFR plus the ISDA Spread Adjustment. This decision was based on extensive regulatory and market consultations and endorsements from major financial regulators in both the US and the UK. This replacement rate is now widely accepted and used across various financial instruments, ensuring a smooth transition from USD LIBOR. Furthermore, Contracts drafted following the cessation of LIBOR now often refer to (for instance) compounded risk-free rates such as SOFR or SONIA calculated at the end of a period (i.e., illustrating a movement from the old constructs of term rates determined at the beginning of the period).

— Fourth, the decision offers valuable confirmation that the well-established criteria for contractual interpretation and the implication of terms are relevant to resolving the issue. The Commercial Court emphasised the application of key '*second order*' principles, which are particularly relevant in long-term contracts. These principles helped in distinguishing between essential terms and non-essential machinery, ensuring that the substantive intent of the parties is preserved.

For the drafters in the industry, the key take-aways are:

— Review model/standard forms carefully to remove and replace references to LIBOR.

— If contracts refer to third party publications, consider including express terms for the fallbacks that should apply should it cease to be published. For example, some long-term gas transport arrangements include provisions to the effect that if any rate or index referred to in the agreement ceases to be published or is materially changed, the parties shall have a period of time to agree an alternative (typically with the requirement that it must maintain the intent and economic effect of the original rate or index). If no agreement is reached by the end of the period, a party can initiate third party dispute resolution processes (e.g. experts, arbitration and/or Courts). In the finance space, robust fallback provisions are common and often mandatory. For instance, statutory provisions such as the Benchmarks Regulation require documents to contain fit-for-purpose fallbacks in certain circumstances.

— For existing contracts, in the absence of express terms, the decision of the Commercial Court is useful guidance on what may be the appropriate next steps.

Appendix

Position in the US

The US introduced a replacement rate called the Secured Overnight Funds Rate (being a daily rate for overnight borrowing secured by treasury securities) ('**SOFR**'). The International Swaps and Derivatives Association ('**ISDA**') initiated a market-wide consultation to consider how to address the difference (or '*spread*') between SOFR and LIBOR to reflect the fact that LIBOR took into account counterparties' credit risk whereas the replacement rates are generally 'risk-free' rates. The overwhelming majority of respondents expressed the view that a spread adjustment based on a historical median over a five-year lookback period was appropriate. The Alternative Reference Rate Committee ('**ARRC**') also endorsed the use of a fixed rather than dynamic spread adjustment and endorsed the spread adjustment proposed by ISDA ('**the ISDA Spread Adjustment**'). To provide forward term SOFR rates ('**Term SOFR**'), ARRC recommended use of the Term SOFR rates published by the Chicago Mercantile Exchange ('**CME**') Group Benchmark Administration ('**CME Term SOFR**'). CME Term SOFR is a forward-looking rate calculated on a futures basis by reference to trading in derivatives on the CME and reflects market expectations of SOFR in the future. Subsequently, the Federal Stability Board stipulated a replacement rate for non-derivative and non-consumer transactions on USD three-month LIBOR of three-month CME Term SOFR plus the ISDA Spread Adjustment.

Position in the UK

In the UK, following a series of reforms to the process for producing LIBOR, the administration of LIBOR was handed over from the British Bankers' Association to ICE Benchmark Administration Limited ('**IBA**'), who began publishing 'ICE LIBOR' in 2014 and who were regulated by the Financial Conduct Authority ('**FCA**'). Over a period of time, regulators encouraged market participants to transition from LIBOR. In due course, the IBA stopped publishing 24 (non-US) currency and tenor LIBOR settings and continued with synthetic sterling and yen rates for a period (i.e. a rate calculated using market data rather than based on a survey of panel banks). In June 2021, the Bank of England and the FCA announced their support for the US initiative to move from USD LIBOR to a SOFR rate. The USD LIBOR bank panel ceased to exist on 30 June 2023. The FCA exercised regulatory powers to require the IBA to publish synthetic rates for 1, 3 and 6-month USD LIBOR to support a transition from LIBOR effective from 1 July 2023. The FCA provided that those rates should be '*based on the relevant CME Term Reference Rate and the corresponding ISDA spread adjustment'*. The FCA stated that it was satisfied that this was a '*fair and reasonable approximation of the value panel-bank LIBOR would have had*'.

Judges: Sir Julian Flaux C and Foxton J

Chapter 9

Arbitration Act and Dispute Resolution

This year has seen a new Arbitration Act in England, and several important decisions on dispute resolution:

- In *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, the European Commission decided that an investment treaty award could not be enforced because it constitutes unlawful state aid which is incompatible with the internal market.

- In *Friedhelm Eronat v CPNC International (Chad) Ltd & Cliveden Petroleum Co. Ltd* [2024] EWHC 2880 (Comm), the commercial court clarified that the distinction between when an arbitration award is made and when the parties receive notification of the award is key when it comes to filing timely appeals to the English Courts.

- The reforms to the Arbitration Act 1996 enacted by the Arbitration Act 2025 introduced targeted reforms to enhance the efficiency of the England and Wales's arbitration framework. We provide an update on the effect of the Arbitration Act 2025 for those drafting arbitration clauses for oil and gas industry documents and/or those involved in managing arbitrations.

- In *CC/Devas (Mauritius) Ltd & Ors v Republic of India* [2025] EWHC 964, the Commercial Court has decided that ratification of Article III of the New York Convention is not, on its own, a waiver of state immunity by prior written agreement.

Compensation for alteration to electricity support measure was illegal State aid

The European Commission (the '**EC**') has determined that an arbitration award, which mandated Spain to compensate Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. (together '**Antin**') for alterations to a renewable electricity support measure (the '**Award**'), constitutes unlawful state aid which is incompatible with the internal market. (*Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31). As a result, the EC has directed Spain not to disburse any compensation based on the Award and to resist its enforcement.

Facts

In 2007, Spain introduced a scheme to support the generation of electricity from renewable sources (the '**2007 Scheme**'), which was not notified to the EC for approval under European Union ('**EU**') state aid rules. In 2013, Spain altered the conditions of the support scheme, with the changes applying retrospectively (the '**2013 Scheme**'). Spain notified the 2013 Scheme to the EC, which approved it in 2017.

Antin had benefited from the 2007 Scheme for renewable installations in Spain. After the 2013 Scheme was approved, Antin initiated an arbitration under Article 26 of the Energy Charter Treaty (the '**ECT**') seeking compensation for the support they would have received under the 2007 Scheme had it not been modified.

The arbitral tribunal issued the Award in June 2018 concluding that Spain had breached Article 10 of the ECT, requiring fair and equitable treatment of investors from signatory states, and ordering it to compensate Antin for losses incurred due to the modifications to the 2007 Scheme, amounting to EUR 101m, plus interest.

Spain notified this decision to the EC for investigation.

Decision

Following its investigation, the EC has found that the Award, as well as its implementation, payment, or execution, constitutes state aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (the '**TFEU**'), which prohibits state aid unless it is approved by the EC as compatible with the internal market. The EC has also found that the Award and its implementation are unlawful and incompatible with the internal market and therefore they '*cannot be authorised*' (recital 278).

Consequently, the EC has instructed Spain not to pay any compensation based on the Award and to ensure that no payment, execution, or implementation of the Award takes place. Spanish courts must also resist attempts to enforce the Award.

The EC held that the question for it to determine was whether the Award (not the 2007 or the 2013 Schemes) constitutes state aid under Article 107(1) of the TFEU. The EC concluded that the Award constitutes state aid as it:

— Is imputable to and financed by a member state (Spain);

— confers an advantage to a beneficiary (Antin), by putting it in an improved financial position;

— discriminates in favour of certain undertakings, in this case Antin (the Award is not in favour of any other entities); and

— has the potential to distort or threaten competition and affect trade in the internal market, by placing Antin at an advantage in relation to its competitors.

It was Antin's position that the Award did not give it an '*advantage*' that '*discriminated*' in its favour. It was compensation for an unlawful act in breach of Spain's obligations under the ECT. Antin argued that it would only be an advantage that discriminated in its favour if the 2007 Scheme was illegal state aid, such that the Award had the effect of giving compensation for a transaction that was otherwise illegal state aid.

The EC rejected Antin's arguments. It decided:

1. The concept of '*advantage*', which is intrinsic to the classification of a measure as state aid, is an objective one, irrespective of the motives of the persons responsible for the measure in question.
2. With the Award, or in any event its implementation, the financial situation of Antin is improved compared to its financial situation without it.
3. Under normal market conditions, i.e. without an Award handed down by an arbitration tribunal on the basis of Spain's signature and ratification of the ECT (and the ICSID Convention), Antin would not have been entitled to any compensation such as that obtained as a result of the Award, and there would be no title on the basis of which to seek implementation.
4. Contrary to what Antin argues, the Award does not constitute compensation for unlawful action by Spain. Modification and replacement of the 2007 Scheme by the 2013 Scheme did not violate Article 10 of the ECT for two reasons:
   – First, the 2013 Scheme has neither violated the general principles of EU law of legitimate expectations and legal certainty, nor Article 10 of the ECT. The General Court has confirmed in the *Aquind* judgment the view taken by the EC that Article 10 of the ECT has the same content as the general principles of EU law of legitimate expectations and legal certainty, and cannot have a broader or different meaning, which would put into question the autonomy of the EU legal order.
   – Second, as the Court of Justice held in the *Anie* judgment, Article 10 of the ECT only applies in relation to investors from '*other*' contracting parties, which excludes EU investors.
5. Therefore, the argument of Antin, according to which it is necessary to establish that the 2007 Scheme constitutes unlawful State aid in order for the Award to constitute State aid, is based on an erroneous premise.

Notwithstanding the above, the EC also considered that the 2007 Scheme would have constituted illegal state aid. As such, on any basis, a compensatory payment would be unlawful.

Comment

The CJEU's judgments in *Achmea* and *Komstroy* have already made it clear that intra-EU investor-state arbitration mechanisms are contrary to EU law.

This decision of the EC amounts to an additional step in the EU seeking to dispense with the effect of intra-EU investor state protections. It perhaps goes without saying that the law cannot permit compensation for the removal of a contractual payment or subsidy that was unlawful state aid, as it would undermine the laws against state aid by allowing an indirect payment of state aid through compensation.

However, this decision of the EC seems to go further. It seems to suggest that the EU institutions are competent to decide the proper content of rights created by the ECT (such as that in Article 10) and, as a payment relating to an intra-EU ECT claim is a breach of EU law, it would amount to an improper advantage if paid to an EU domiciled person or company. In substance, this approach to state aid law will make it unlawful for an EU Member State to make compensatory payments to EU persons or companies related to claims under the ECT.

The ECT may now be in the last throws of its existence, as the United Kingdom ('**UK**') (with effect form 27 April 2025), the EU (with effect from 28 June 2025) and numerous other countries have withdrawn. Even the sunset provision in Article 47(3) of the ECT (which ensures the ECT continues to apply to existing investments for 20 years after a state's withdrawal) is under threat. In June 2024, the EU and its 26 member states signed an agreement to exclude the sunset provision from intra-EU proceedings. It is likely the UK will sign a similar agreement.

Since Brexit, the UK now has its own state aid rules. Under the Subsidy Control Act 2022, all subsidies are allowed if compliant with the subsidy control rules, unless specifically prohibited. This 'opt-out' approach is the opposite of the approach in Article 107(1) of the TFEU, which prohibits all subsidies unless they are allowed under a block exemption or undergo a notification process. This difference in approach means that a UK court would likely find the Award illegal state aid only if it found the underlying 2007 Scheme to be illegal.

Member of the Commission: Vladis Dombrovskis

Time to appeal

The distinction between when an arbitration award is made ('**Date of Award**') and when the parties receive notification of the award ('**Date of Notification**') is often inconsequential. However, in *Friedhelm Eronat v CPNC International (Chad) Ltd & Cliveden Petroleum Co. Ltd* [2024] EWHC 2880 (Comm), the Commercial Court clarified that this distinction is key when it comes to filing timely appeals to the English Courts. The case, involving a dispute over a multi-hundred million dollar indemnity in the oil and gas sector, highlights the need for parties to pay close attention to the timing and wording of arbitration agreements.

Facts

The dispute arose from a 2003 deed of indemnity between Friedhelm Eronat ('**Eronat**' or the '**Claimant**'), CPNC International (Chad) Ltd, Cliveden Petroleum Co. Ltd (the '**Defendants**') and CITIC Energy Inc, relating to oil and gas interests in Chad (the '**2003 Indemnity**'). The arbitration clause in the 2003 Indemnity provided for arbitration under the London Court of International Arbitration ('**LCIA**') Rules. While the default provisions of the LCIA Rules preclude an appeal on a point of law, the 2003 Indemnity provided an exception under which a party waived all rights to appeal to the English Courts, except the right to appeal on a material error of fact or law within 30 days after the tribunal's '*decision is rendered*'.

The arbitral tribunal signed the award on 11 April 2024. However, the LCIA did not send the award to the parties until 5 days later, on 16 April 2024. On 16 May 2024, the Claimant filed an appeal under Section 69(2)(a) of the Arbitration Act 1996 (the '**Act**'), which allows an appeal on a point of law with the agreement of the parties.

The Defendants applied for reverse summary judgment on the grounds that the appeal was filed out of time, as it had been more than 30 days from the Date of Award. The Claimant argued that the appeal was timely, as it was filed 30 days from the Date of Notification.

Commercial Court Decision

In deciding whether the arbitration clause's reference to a decision being '*rendered*' meant the Date of Award or the Date of Notification, the Commercial Court looked to the Act, the LCIA Rules, and the language of the arbitration agreement.

The Commercial Court noted that the Act distinguishes between the Date of Award (section 54) and Notification of Award (section 55). Under section 54 of the Act, absent party agreement or an express statement by the arbitral tribunal, the Date of Award is the date the final arbitrator signs the award. Under section 55 of the Act notification of the award should be performed by serving a copy of the award on the parties '*without delay after the award is made*', but section 56 of the Act allows an arbitral tribunal to withhold delivery of the award until payment is made. As the Commercial Court noted, this structure shows '*that there may be (and usually is) a passage of time between when the Award is made and when it is notified to the parties*'.

Further, given that section 70(3) of the Act expressly states that the time limits for appeal are expressly calculated from '*the date of the award',* any delay in notification will *'reduc[e] the available time for any appeal*'.

The Commercial Court also noted that the LCIA Rules, which were incorporated into the arbitration agreement by reference, contain a similar distinction '*between the award being 'made' and notification to the parties*'.

Finally, the Commercial Court analysed the language of the arbitration agreement itself, finding that the phrase '*render its decision*' in the arbitration clause is '*intrinsically linked to the work of producing/creating the Award itself*' rather than notifying the award to the parties.

Based on all of these considerations, the Commercial Court was '*satisfied that the 30 days therefore runs from the date when the Award is made which is 11 April 2024*.' Thus, because the 30 days had expired before the claim form was filed, the Commercial Court granted reverse summary judgment for the Defendants, finding that the time barred appeal had '*no prospect of success whatsoever and stands to be dismissed*'. The Commercial Court also found that the Claimant had failed to comply with the requirements to seek an extension of time to appeal, noting that even if they had, an application for an extension of time did not fall within the exception in the arbitration clause, meaning such an application was outside the Commercial Court's jurisdiction.

Court of Appeal Decision

The Court of Appeal (*Friedhelm Eronat -v- CPNC International (Chad) Ltd & Cliveden Petroleum Co. Ltd* [2025] EWCA Civ 105) refused permission to appeal. It decided that the word '*render*' or '*rendered*', considered in isolation, are capable of referring to the date when the award was made or to the date when it was provided to the parties. However, when the language of the clause is considered in its context and taking account of the background information available to the parties, it is clear that it has the former meaning.

1. First, the use of the word '*render*' in Clause 14.2(b) ('*The arbitration tribunal shall conduct its session and render its decision in English*') is unambiguous. It can only refer to the making of the award.
2. Second, the LCIA Rules 1998 which were current at the time of the parties' contract and which form part of the legally relevant background refer to a tribunal rendering an award in terms which plainly refer to the making of an award. (This terminology no longer appears in the equivalent provision (Article 26.9) of the 2020 Rules, but it is the 1998 Rules which the parties would have had in mind when concluding their contract.)
3. Third, the ICC Rules which were current at the time of the parties' contract also speak of the arbitral tribunal rendering its award in terms which can only refer to the making of the award and contrast the rendering of the award and its notification to the parties (see Articles 24.1, 27 and 28.1 of the 1998 Rules). Although the parties did not contract on the ICC Rules, these were widely known in the field of international arbitration and demonstrate that this was a common and well understood use of language. Accordingly they too form part of the background of which the parties can be taken to have been aware.
4. Fourth, there was nothing unfair or unreasonable in the parties having agreed a right of appeal which was subject to a time limit which might start running before they were aware of the terms of the award.

Finally, to interpret Clause 14.3(a) as referring to the making of the award by the arbitral tribunal accords with the scheme of the Act. The Act does not refer to rendering an award, but it does distinguish clearly between the making of an award (section 54) and its notification to the parties (section 55), with time for an appeal running from the date when the award is made and not from its notification to the parties (section 70(3)).

Comment

In English law, a time bar clause will usually be treated as a limitation clause and interpreted strictly. That notwithstanding, where clear words are used, failure to give notice in sufficient time will likely bar a claim. If parties elect to draft a time bar for appeal by reference to an arbitral award being rendered it might create specific issues. For example, the International Chambers of Commerce ('**ICC**') Rules and LCIA Rules envisage that there may be a period of time between an award being 'made' and the parties being notified of that award. If costs of the arbitration are outstanding, the LCIA and ICC Secretariat have the power to withhold the notification of the award pending payment. In turn, that might mean the 'clock' is ticking in relation to an appeal whilst the contents of the award are unknown.

For companies in the energy sector, where high-value and complex cross-border disputes are common, the judgment underscores the need to carefully consider the drafting of rights of appeal and associated time limits.

In the 2003 Indemnity, this issue arose because the parties had specifically catered for limited grounds for an appeal on law or fact, which would usually be excluded by the LCIA Rules. Hence, the intention to circumscribe that right with a time limit.

The Association of International Energy Negotiators ('**AIEN**') 2017 Model Dispute Resolution Agreement suggests wholesale exclusion of any right to appeal on a point of law under sections 45 or 69 of the Arbitration Act 1996. The AIEN suggestion largely reflects the industry position, outside maritime related arbitrations governed by the London Martime Arbitrators Association Rules, that appeals on points of law should be dispensed in favour of arbitral finality. That said, if the parties do wish to maintain the right to appeal on a point of law, the decision on this case might be worthy of consideration when considering drafting time limits for appeal.

Commercial Court Judge: Bryan J

Court of Appeal Judges: Males LJ, Phillips LJ and Lewison LJ

Arbitration Act 2025: What oil and gas companies need to know

The reforms to the Arbitration Act 1996 enacted by the Arbitration Act 2025 (the '**2025 Act**') came into force on 1 August 2025, introducing targeted reforms to enhance the efficiency of England and Wales's arbitration framework. The purpose of this section is to provide an update on the effect of the 2025 Act for those drafting arbitration clauses for oil and gas industry documents and/or those involved in managing arbitrations.

Key changes introduced by the 2025 Act

Governing law of the arbitration agreement

One of the key developments is the introduction of section 6A of the 2025 Act. This new default rule provides that, unless the parties have expressly agreed otherwise, the arbitration agreement (or clause) will be governed by the law of the seat of arbitration.

This removes the uncertainty created by the UK Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 which decided that the arbitration agreement is presumed to be governed by the law of the underlying contract, unless there is a clear indication to the contrary.

In short, the issue for drafters is that an arbitration agreement (or clause) is severable to the remaining elements of the contract. As such, the issue arises as to the governing law of that arbitration agreement (or clause). Whilst this might sound like an esoteric point, it can be incredibly important. The governing law of the arbitration agreement (or clause) will determine: who is the proper party to the arbitration agreement (or clause); whether the clause is valid and enforceable; and, its proper construction and interpretation. For example, where the arbitration clause has been held to have a different governing law to the contract it has been decided that it is capable of having different parties (due to differing approaches as to separate corporate entities and corporate veil) – which might allow an arbitration against a wider group of companies than the parties to the underlying contract.

The effect of the 2025 Act is to put greater focus on the importance of the parties' chosen seat of arbitration. If a contract is governed by English law, with a seat in England, the issue is academic. However, where the seat is different to the governing law of the contract it is wise to make the governing law of the arbitration agreement (or clause) clear.

Challenges to jurisdiction

The 2025 Act reforms the procedure for challenging an arbitral award on jurisdictional grounds under section 67 of the Arbitration Act 1996. Courts will no longer conduct a full rehearing of jurisdictional challenges that have already been considered by the tribunal and will not hear new evidence, unless exceptional circumstances justify it. This aims to reduce duplication, delay, and cost.

Arbitrator disclosure obligations

The introduction of a new section 23(A) codifies an arbitrator's ongoing duty to disclose any circumstances that might reasonably give rise to doubts about their impartiality, including circumstances they are actually aware of or ought reasonably to be aware. This aligns with the UK Supreme Court's ruling in *Halliburton*

Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48, which decided that nondisclosure of overlapping appointments can give rise to justifiable doubts of bias even without actual bias. The relevance of this for arbitrators in the oil and gas sector with overlapping roles or industry connections can be seen in *Aiteo v Shell* [2024] EWHC 1993 (Comm), in which nondisclosure led to an award being set aside due to unconscious bias.

Powers of summary disposal

The 2025 Act introduces a new section 39A, granting tribunals the power to make summary arbitral awards where a claim or defence has no real prospect of success. This power is only exercisable on application by one party, and parties may opt out by agreement. The provision mirrors the summary judgment mechanism under the Civil Procedure Rules in the English Courts, offering a streamlined route to resolve clearly unmeritorious claims which can be particularly useful in complex commercial disputes.

Arbitrator immunity

The 2025 Act strengthens arbitrator immunity in two key respects. Under a new section 24(5A), arbitrators cannot be ordered to pay costs in removal proceedings unless they have acted in bad faith. Additionally, section 29(4) provides that arbitrators will not incur liability for resignation unless it is shown to be unreasonable. These provisions aim to protect arbitrators from undue litigation risk and support impartial decision-making.

Emergency arbitrators

The new sections 41A and 42 grant emergency arbitrators the same powers as a fully constituted tribunal, including the authority to issue peremptory orders and to permit applications to Court under section 44. This reform aligns English arbitration law with international best practices, enhancing its responsiveness in urgent situations.

When do the changes not apply?

Reforms introduced by sections 1 to 14 of the 2025 Act do not apply to (i) arbitral proceedings commenced before 1 August 2025; (ii) court proceedings (whenever commenced) that relate to those earlier arbitral proceedings or awards; and (iii) any other court proceedings commenced before the amendment's commencement date.

The amendments otherwise apply to arbitration agreements regardless of when they were made, unless a transitional or saving provision states otherwise.

Key takeaways for energy practitioners

The oil and gas sector frequently relies on international arbitration to resolve complex, high-value disputes. The 2025 Act reinforces the UK's reputation as a leading arbitration hub and London's position as an arbitration seat. Companies should take the following steps following its implementation:

- **Review arbitration clauses** in existing and new contracts to ensure clarity on the governing law of the arbitration agreement.
- **Consider expressly stating the governing law** of the arbitration agreement to avoid uncertainty.
- **Assess the potential impact of summary disposal powers** and consider whether it is appropriate to expressly exclude section 39A in arbitration agreements.

Ratification of the New York Convention is not, on its own, a waiver of state immunity

In *CC/Devas (Mauritius) Ltd & Ors v Republic of India* [2025] EWHC 964, the English Commercial Court has decided that ratification of Article III of the New York Convention ('**NYC**') is not, on its own, a waiver of state immunity by prior written agreement under section 2(2) of the State Immunity Act 1978 ('**SIA**').

Facts

In 1998, the Governments of the Republic of Mauritius ('**Mauritius**') and the Republic of India ('**India**') entered into a bilateral investment treaty protecting the rights of investors ('**BIT**').

In 2005, a contract was executed between Devas Multimedia Private Limited ('**Devas**') and Antrix Corporation Limited ('**Antrix**') (the '**Contract**'). Both companies are Indian registered companies. Devas is a joint venture with Mauritius entities as shareholders. Antrix is wholly owned by India and acts under its directions. The Contract was for the lease of a part of India's S-Band spectrum, a portion of the electromagnetic spectrum which can be used to send and receive signals on small devices like mobile phones, on two Indian satellites to be operated by the Indian Space Research Organisation. The Contract contained an arbitration agreement providing for arbitration under ICC or UNCITRAL rules with a seat in New Delhi. As the Contract was executed between two companies, it contained no reference to any waiver of state immunity.

In 2011, India changed course and decided to preserve its S-Band spectrum for national purposes instead of leasing it for commercial activities. As a direct consequence, Antrix terminated the Contract.

As a reaction, Devas and its shareholders started arbitrations for breach of the Contract by Antrix and for breach of the BIT by India. These proceedings resulted in awards to Devas and its shareholders ('**Awards**'). Since then, the Devas shareholders ('**Claimants**') and India have been locked in legal battles in multiple jurisdictions, as the Claimants attempt to enforce the Awards and India attempts to resist enforcement.

As part of their efforts to enforce the Awards, on 29 June 2021, the Claimants obtained a without notice enforcement order under section 101 of the Arbitration Act 1996, which provides that awards under the NYC, to which India is a signatory, may be enforced in the same manner as a judgment or order of the Court to the same effect.

India has challenged this enforcement order on the grounds that it is immune from the jurisdiction of the English Courts, as the general state immunity rule under section 1 of the SIA applies.

Decision

In the context of the dispute over the enforcement order obtained by the Claimants, the Commercial Court was asked to determine a narrow point of law: whether India's ratification of Article III the NYC, on its own, qualifies as a waiver of state immunity by prior written agreement under section 2(2) of the SIA.

The precise question before the Commercial Court was:

'Whether, for the purposes of enforcement of [the awards] India has submitted to the adjudicative jurisdiction of the English Courts by prior written agreement within the meaning of s.2(2) of the State Immunity Act 1978, by its ratification of the New York Convention 1958 and thereby […] its consent under Article III to the English Court recognising and enforcing the Awards.'

Section 2(2) of the SIA allows, as an exception to the general state immunity rule under section 1, for a state to submit to the jurisdiction of English courts by prior written agreement:

'A ***State may submit*** [to the jurisdiction of English courts] after the dispute giving rise to the proceedings has arisen or ***by a prior written agreement;***' [**emphasis** added]

Article III of the NYC provides that:

'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.'

The Commercial Court held that India's ratification of the NYC does not, on its own and absent a valid arbitration agreement, amount to a waiver by India of its immunity under section 1 of the SIA. The Commercial Court:

1. Firstly, having analysed the travaux préparatoires for and commentary on the NYC, there was no indication that there was an intention by the drafters to preclude immunity-based arguments in enforcement actions against states.
2. Secondly, the obligation in Article III to recognise and enforce awards is expressed to be '*in accordance with the rules of procedure of the territory where the award is relied upon*.' Because it

is established in English law that state immunity is a procedural issue pertaining to jurisdiction and not a substantive law issue, Article III preserves state immunity by its own terms.

3. Thirdly, the test for waiver under English law provides that a '*waiver of state immunity by treaty or convention must always be express, and expressed in a clear and recognisable manner, as by an unequivocal agreement.*' Article III does not meet the threshold of an express, clear and unequivocal waiver of state immunity.

In spite of its decision, the Commercial Court recognised as '*formidable*' the Claimants' case on the delays they faced in seeking to enforce the Awards around the world. It also emphasised the narrow scope of its judgment and made the point that it '*is not intended to contradict in any way the enforcement friendly aspect of the NYC, which is its purpose, and the reason for its success, and which has been consistently upheld in the English courts*.'

Crucially, he raised the issue of section 9(1) of the SIA, which provides that:

'Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.'

In this case, it remains in dispute whether India has agreed to submit the underlying dispute to arbitration (given the Contract was executed by Antrix and not India). If it is found that India is bound by the arbitration agreement in the Contract, then state immunity will not apply by virtue of section 9 of the SIA.

Comment

The Commercial Court's decision is narrow but important. It strikes a balance between preserving the fundamental international law principle of state immunity and the effectiveness of the NYC as an enforcement friendly convention.

Although the decision, at face value, seems to undermine the effectiveness of the NYC, it may have the opposite effect, as it gives comfort to signatory states that their immunity is not waived simply because they have ratified the NYC. A different decision might have left signatory states feeling overly vulnerable to enforcement orders in foreign jurisdictions and prompted some to withdraw from the NYC.

From the perspective of investors, particularly those in the oil and gas industry, who often deal with state-owned companies, the key lessons seem to be that:

1. Thought should be given to whether the contract needs a clear waiver of sovereign immunity on enforcement against counterparty (as a state-owned company).
2. In addition, if the counterparty does not have assets against which enforcement may be easily sought, thought should be given to a state backed guarantee (again with a waiver of sovereign immunity over enforcement).

Judge: Sir William Blair KC (sitting as Judge of the High Court)

Chapter 10

Protestor Action

Protest action continues to play a role in the industry. In recent years, the courts have dealt with a growing number of decisions concerning the granting of injunctions against environmental protest groups. This year the trend has continued with a recent case concerning Just Stop Oil:

— In *Thurrock Council and Essex County Council v Adams and Others* [2024] EWHC 2750 (KB), the Court decided that an injunction to prevent protest activities carried out by environmental groups, including Just Stop Oil, was necessary and appropriate to protect the public from unlawful activities including obstruction of the highway, trespass, and other public nuisances around fuel terminals.

Injunction upheld: Balancing protestor rights and public order

In *Thurrock Council and Essex County Council v Adams and Others* [2024] EWHC 2750 (KB), the High Court decided that an injunction to prevent protest activities carried out by environmental groups, including Just Stop Oil, was necessary and appropriate to protect the public from unlawful activities including obstruction of the highway, trespass, and other public nuisances around fuel terminals. This decision focused only on the named Defendants, but a separate review hearing was heard earlier dealing with the unnamed Defendants (see *Thurrock Council and Essex County Council v Adams and Others* [2024] EWHC 2576 (KB)). Both cases follow on from a series of recent decisions regarding '*persons unknown*' and protestor activity and are significant in many respects, but particularly because they address the delicate balance between the right to protest and the need to protect public safety and maintain economic stability. The cases provide clarity for both authorities and policymakers on how environmental activism may be handled in the future. Additionally, it appears likely that we will see a greater number of cases where the courts grant final injunctions against '*persons unknown*' following the recent Supreme Court decision of *Wolverhampton City Council & Ors v London Gypsies and Travellers & Ors* [2023] UKSC 47.

Facts

Two local authorities, Thurrock Council and Essex County Council, brought a claim for injunctive relief to restrain protest activities carried out by members of environmental campaign groups, notably Just Stop Oil ('**JSO**'), in and around the Thurrock area between 1 and 15 April 2022. The protests involved obstructing traffic, acts of trespass including tunnelling, and disruptive actions around fuel terminals, causing public nuisance and safety concerns. The protests were part of a broader campaign by JSO aimed at raising awareness of climate change issues and the need for urgent action to reduce fossil fuel consumption.

Litigation commenced in April 2022 when the Claimants made a without notice application for an interim injunction against 222 named Defendants and 7 categories of '*persons unknown*'. The order was granted by Ritchie J, restricting acts of public nuisance including tunnelling and obstructing the highway, and a power of arrest was attached to the order. HHJ Simon continued the injunction from 27 May 2022. In January 2023, the final hearing of the claim for injunctive relief was adjourned pending the decision of the Supreme Court in *Wolverhampton City Council and others v London Gypsies and Travellers and others* [2023] UKSC 47. A summary of this case was included in our Oil & Gas Annual Review 2024. Following the decision of this case, a case management hearing was heard on 19 April 2024. At this hearing, Collins J gave separate directions for unnamed and named Defendants.

A review hearing was listed on 12 July 2024 regarding the continuation of the injunction against the unnamed Defendants only (i.e., '*persons unknown*'). Julian Knowles J ordered at that hearing that the injunction against the unnamed Defendants should continue for 5 years with annual reviews.

A final hearing dealing with the named Defendants was listed on 9 October 2024. That hearing was against the 26 named Defendants remaining who had not settled the claim. Only one of those Defendants, Mr Laurie, attempted to acknowledge service of the claim form and applied for permission to participate in the proceedings. Despite submitting the wrong form and then applying for a further extension and relief from sanction in respect of the late service of the acknowledgment of service, the High Court held that, although Mr Laurie's default was serious and the explanation for it not meritorious, it was in the interests of justice to allow his applications and grant the relief sought, so that the High Court could deal with the real issues between the Parties.

During the hearing, the Claimants argued that the injunction was justified as the Defendants had carried out protest activities which had constituted public nuisance and trespass. They argued that the injunction was necessary to prevent future disruptions and to maintain public order and safety in light of the fact that: (a) JSO had continued to announce and engage in a programme of direct protester action; (b) the remaining named Defendants were continuing to intend to commit acts of the kind complained of; and (c) in the case of Mr Laurie, that he had himself confirmed that he had been arrested and prosecuted as a result of further climate change protest activity since the initial injunction.

In response, the defence submitted that the claim against Mr Laurie must fail because his acts of protest were peaceful, targeted, did not disrupt road users except a single empty fuel tanker, and all his actions were in accordance with his Quaker beliefs, namely that he is required to '*take action to alert people to the dangers of climate change*'. Mr Laurie argued that his actions were in line with his rights to protest under Articles 10 and 11 of the European Convention of Human Rights ('**ECHR**') and argued that the injunction was disproportionate and infringed on his rights to freedom of expression and assembly. Mr Laurie objected to specific provisions of the injunction order, arguing that some of the provisions were unclear, too broad, or related to legitimate forms of protest and that the power of arrest should not be attached to the order.

Decision

Following a review of the factual evidence discussed at the hearing dealing with unnamed Defendants (i.e., '*persons unknown*'), and an in-depth analysis of the case law in respect of trespass, public nuisance and the defence of lawful excuse, the High Court held that the injunction against the named Defendants should continue and that it was appropriate to retain the power of arrest in order to deter future unlawful protest activities. In reaching this decision, Bourne J relied heavily on and referred to a number of paragraphs from the judgment of Julian Knowles J (which dealt with the injunction against '*persons unknown*') and agreed with his conclusions, specifically that the protests involved unlawful activity leading to arrests and were such as to put the protesters and others at risk.

In arriving at his decision, Bourne J considered the following key concepts:

Whether the injunction against the Defendants, including Mr Laurie, was necessary and appropriate in the circumstances.

In concluding that the injunction was necessary to protect the safety of the public, the High Court reiterated, that, taking into account all of the factors identified in the judgment, the injunction sought struck a fair balance '*between the rights of the individual protestors and the general right and interests of the Claimants and others who are being affected by the protests, including the national economy*'. Drawing on the judgment of Julian Knowles J concerning the unnamed Defendants, the Court concluded that:

- None of the named Defendants had declared an intention to refrain from future protest activity and in fact, many had expressed a desire to continue protesting unlawfully.
- All of the remaining named Defendants appeared to be associated with JSO who continue to promote and organise direct action and had not disavowed dangerous activities such as tunnelling which some of the protests have involved.
- Whilst the Court recognised that the injunction was an interference with the named Defendants' Article 10/11 ECHR rights, it held that it was in pursuit of a legitimate aim to protect the rights of the public

and the agencies who serve the public. That aim was sufficiently important to justify interference with the Defendants' Articles 10 and 11 rights.

— The injunction would not stop the Defendants protesting at all but from protesting in very specific and unlawful ways.

— There is an economic need for fuel to continue to be delivered efficiently and safely, which is vital to the economy.

— Damages would not be an effective remedy as the Defendants are unlikely to have the means to pay damages for losses caused by further years of disruption, and criminal prosecutions are unlikely to act as a deterrent to future conduct.

Whether attaching a power of arrest to the injunction was justified.

In considering sections 27(2) and (3) of the Police and Justice Act 2006, which outlines the conditions under which a court can attach a power of arrest to an injunction, the High Court held that the power of arrest should continue to apply to all the substantive prohibitions of the injunction because the activities which were the subject of the injunction generally carried a significant risk of harm to those they affect (and a more granular approach would make enforcement excessively complicated). Those activities included interfering with vehicles and apparatus and also interfering with the flow of traffic which all have the potential to cause harm. In respect to Mr Laurie individually, the High Court accepted that whilst he did not participate in extreme activities such as tunnelling, he was part of a '*team of people who 'occupied' an oil tanker and therefore willingly interfered with key infrastructure*'. The High Court also highlighted Mr Laurie's lack of willingness to offer undertakings not to engage in unlawful activity of the kind specified in the order, as other defendants had done. The High Court held that even though Mr Laurie had not engaged in protest activity in Thurrock or Essex since 2022, he was arrested for an offence of '*slow walking*' elsewhere. Consequently, the High Court was unable to conclude that Mr Laurie himself did not pose sufficient risk to be the subject of the continued injunction, at least for the present moment.

Whether the terms of the injunction were too broad and whether the specific provisions of the injunction were appropriate.

Mr Laurie had raised several arguments regarding the specific provisions of the injunction, noting that a number of the provisions were too broad, and the terms used (such as the words '*encouraging*' or '*interfering*') were unclear. In concluding that the specific provisions of the injunction were appropriate in the circumstances, the High Court rejected all of Mr Laurie's arguments. In dismissing each objection, the High Court emphasised an important distinction between protests where obstructing or delaying traffic is a side effect of protest activity versus protests which involve a deliberate obstruction of the highway or deliberately disrupt the public going about their lawful business. Due to the nature of the activities carried out by the Defendants, the High Court determined that the provisions of the injunction were not too wide and could be easily understood.

Given the foregoing, Bourne J agreed with Julian Knowles J that continued injunctive relief was appropriate and that the test for a final precautionary injunction was satisfied. On that basis, in line with the order in respect of unnamed Defendants, Bourne J ordered that the injunction against the named Defendants, including Mr Laurie, should also be upheld for five years and would be subject (also in line with the order against unnamed Defendants) to annual reviews. Further, that the injunction would also contain a provision for any person affected to apply to vary or discharge it, noting that circumstances may arise in which variation or discharge becomes appropriate (but despite the points made by Mr Laurie on this, that time had not yet come).

Comment

The precise requirements for and circumstances in which it is possible to obtain injunctions against named individuals and '*persons unknown*' have become increasingly important in various contexts, particularly in connection with environmental and other protests. When it comes to '*persons unknown*', these issues arise whenever there is a potential conflict between private or public rights and the future behaviour of individuals who cannot be identified in advance.

Both this decision and the decision against unnamed Defendants demonstrate the continued willingness of the High Court to grant, or in this case, continue injunctions against both named individuals and '*persons unknown*', especially in cases involving significant public nuisance and trespass. The cases come after the recent Supreme Court decision in *Wolverhampton City Council & Ors v London Gypsies and Travellers & Ors* [2023] UKSC 47, which set an important precedent and clarified the landscape for seeking injunctions against 'persons unknown'. It confirmed that courts have the power and jurisdiction to grant final injunctions against 'persons unknown' and provided guidelines to inform the Court on whether to grant such injunctions and their scope.

Furthermore, the decision serves as a useful reminder of the delicate balance that must be struck between protecting public order and safety and upholding the fundamental right to protest. It highlights that courts must carefully consider the circumstances of each injunction application in context. For those seeking injunctions (such as businesses or property owners that may be subject to protest activity), the case also underscores the importance of collaboration with local authorities and law enforcement to effectively implement and enforce injunctions.

Judge: Bourne J

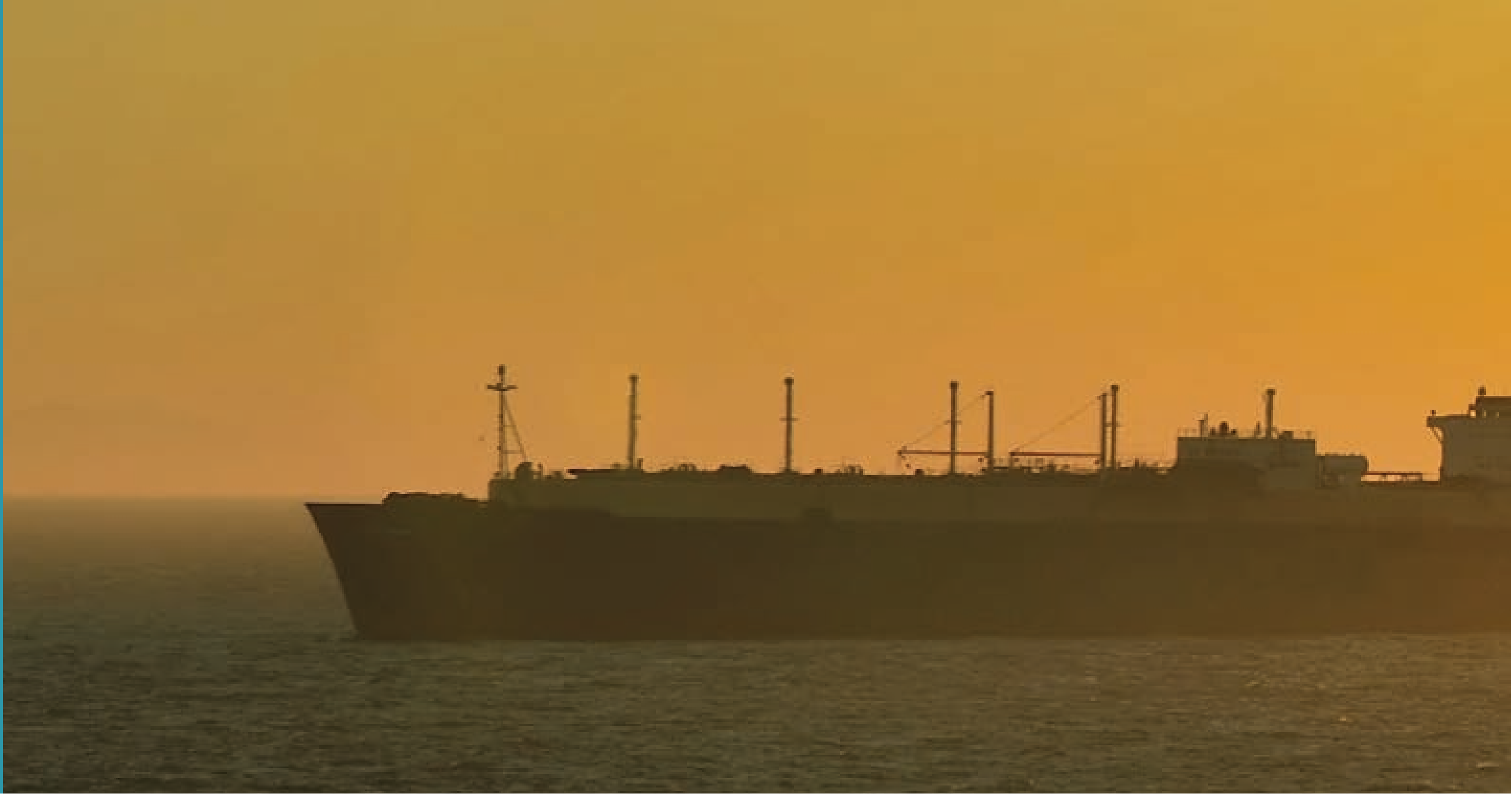
Chapter 11

North Sea Transition Authority

This year, the North Sea Transition Authority (‘**NSTA**’) celebrates the 10th anniversary of its establishment. The NSTA’s approach and remit have shifted considerably since the Wood Review’s call for an independent regulator to maximise the North Sea’s potential. Four years after the publication of its revised strategy, the NSTA continues to focus the UK Continental Shelf (‘**UKCS**’) industry’s attention firmly on its role in supporting work towards ‘net zero’. Guidance, reports and communications have increasingly focused on emissions reductions as part of the management of oil and gas resources in all aspects of activity, from exploration to decommissioning. In particular, in the last twelve months we have seen the NSTA publish:

- Guidance on the preparation of asset specific Emissions Reduction Action Plans (‘**ERAP**’);
- updated guidance on the conduct of Licence Assignments;
- its fourth Emissions Monitoring Report; and
- multiple consultations, and (for some) its responses.

The NSTA is also increasingly active in relation to carbon capture and storage activities and hydrogen projects, and it is beginning to frame the regulatory frameworks that will apply to those industries as they develop.



The NSTA's Approach to Energy Transition

Published in February 2025, the Annual NSTA Overview outlines the UK's strategic direction for managing the energy transition in the North Sea. Key areas of focus identified by the NSTA are:

— Accelerating the energy transition through, for example, developing carbon capture and storage ('**CCS**') and hydrogen projects, integrating energy hubs and decommissioning;

— ensuring energy production and security through optimizing existing assets; and

— reducing emissions.

Developing CCS and Hydrogen

The development of an offshore CCS industry in the UK has been an area of focus for the Government for some time. Various regulators are now playing a role in overseeing these projects as they start to come online, with the first offshore storage permit being awarded in December 2024 to Northern Endurance Partnership. In the last year, the NSTA has issued several guidance documents on various aspects of the regulatory process. In particular:

— In February 2025, the NSTA published its Guidance on the application for a Carbon Dioxide Appraisal and Storage Licence, describing in detail the application process to obtain carbon storage licenses.

— On 1 April 2025, the NSTA published updated Guidance on Applications for a Carbon Storage Permit, with the intention of assisting operators that plan to notify the NSTA of a planned change in operator of the storage site.

Integrated Energy Hubs

Working with other industry bodies (such as the Department for Energy Security and Net Zero ('**DESNZ**')), the NSTA has, over the last 6 years, published a number of reports relating to the outcome of the Energy Integration Project, which highlighted the potential of integration across the UKCS, noting a possible 30% contribution towards the country's overall net zero target. In the Annual NSTA Overview, the NSTA continues to recognise the various resources available in the North Sea and looks to help these reach full potential, envisaging an integrated energy hub in place by 2050 that repurposes and links oil and gas, carbon storage, hydrogen and wind operations.

Optimising Existing Assets

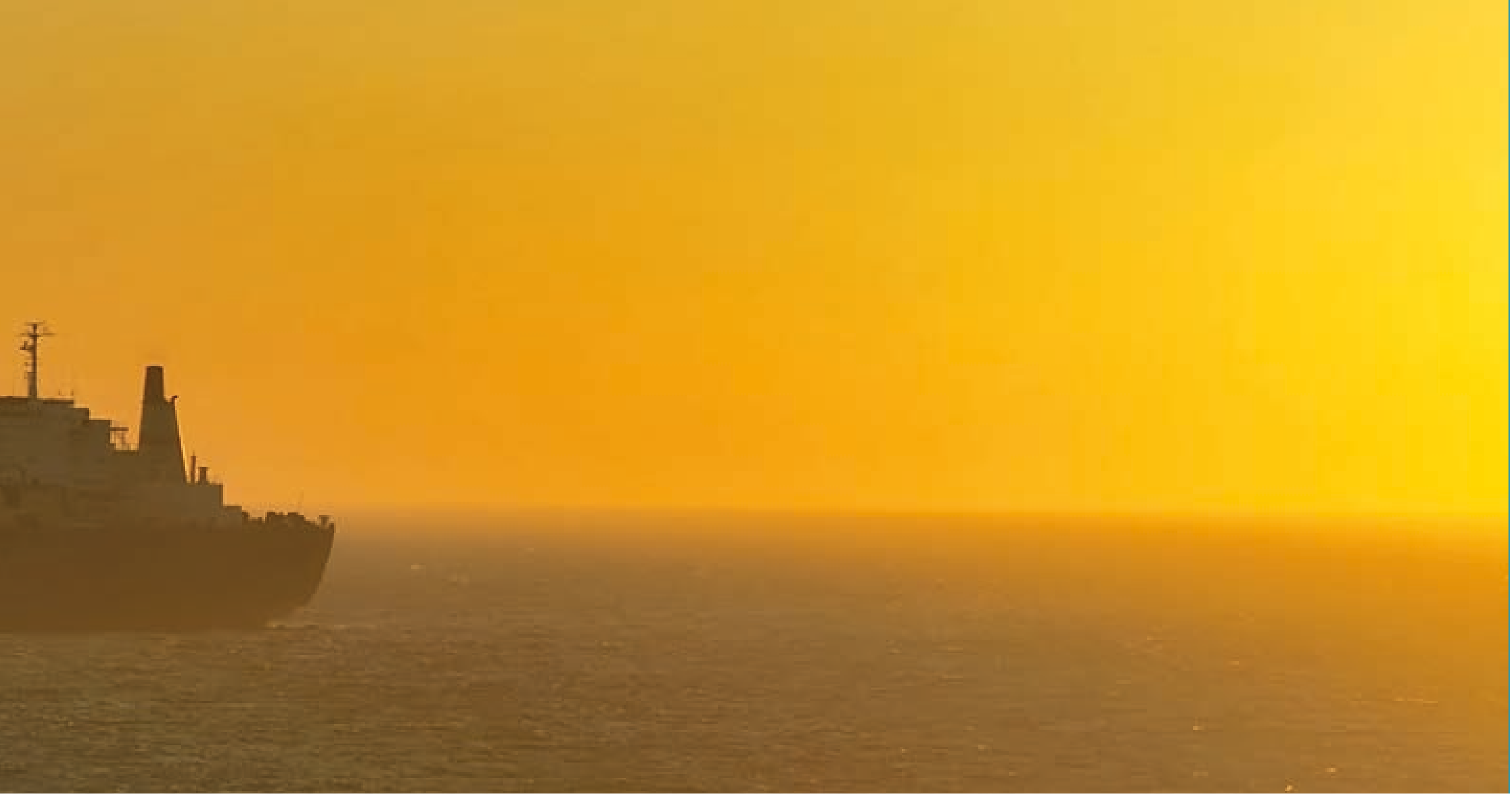
Guidance on Licence Assignments

In seeking to ensure an efficient use of capital in the UKCS, avoiding delays in licence assignments is crucial in supporting M&A related activities and ensuring the UKCS remains an attractive environment for ongoing and future investment. To that end, on 8 October 2024, the NSTA published Guidance on the Conduct of Licence Assignments for offshore petroleum production in the UKCS.

Key takeaways include:

— Operators (as Buyers or Sellers) must work together to plan and implement the assignment process, engaging with Consenting Parties (for example, joint venture partners) in a cooperative and timely manner.

— Operators should provide Consenting Parties with a Capability Pack containing key corporate, financial, technical information about the Buyer and evidence



of ability to meet ongoing obligations (including decommissioning) to enable meaningful evaluation of the transaction.

— The NSTA expects most transactions to complete within 3 to 6 months of issuing the Capability Pack. If longer is required, operators must inform and update the NSTA.

Supply Chain Action Plan ('SCAP') Guidance

Although key to delivery of the UKCS offshore oil and gas projects, the supply chain does not fall within the regulatory remit of the NSTA. It has however sought to ensure that relevant persons engage effectively and constructively with the supply chain, and included specific requirements in that regard in both the OGA Strategy and stewardship expectations. The NSTA published updated Supply Chain Action Plan Guidance in October 2024 detailing when a SCAP is required and information on matters the NSTA would normally consider. Operators are required to integrate SCAPs into their core business processes to demonstrate that they are securing maximum value from their projects through open and fair engagement with suppliers.

Content: The SCAP should include detailed information on project details, planned and actual tender activity, contracting performance, and project performance and close-out.

Evaluation: SCAPs will be assessed based on four pillars: Engagement, Trust, Innovation, and Quality. Operators are expected to engage early and continuously with the supply chain, demonstrate trust and empowerment to the supply chain, encourage innovation and use of alternative/new products, and use industry-accredited metrics and tools for contractor selection.

Reducing Emissions

In the Annual NSTA Overview, a key area of focus is reducing emissions through, for example:

— Working to ensure the UK's CCS sector reaches its full potential by awarding the UK's first four carbon storage permits and acting as a steward for 27 carbon storage licences;

— developing integration between producing oil and gas offshore infrastructure and offshore wind and carbon storage infrastructure; minimising offshore emissions and repurposing existing infrastructure;

— supporting the industry with decommissioning in the North Sea, which carries an estimated total cost of GBP 40bn, providing stewardship and guidance to operators and acting as consultee to the Offshore Petroleum Regulator for Environment and Decommissioning ('**OPRED**') on Decommissioning Programmes; and

— regulating current domestic oil and gas production, which continues to account for three quarters of UK energy demand, with a focus on cutting production emissions with limits for flaring, and encouraging investment with robust and transparent ESG reporting.

Emissions Monitoring Report

In September 2024, the NSTA published its Emissions Monitoring Report 2024. This report sets out various figures in relation to UK upstream oil and gas emissions, progress towards the North Sea Transition Deal emissions reductions targets, and the projection for future UK upstream oil and gas emissions. It also sets out abatement opportunities and benchmarking, both across the UKCS and internationally. This assists the UK upstream oil and gas sector through tracking progress towards emissions reduction targets, benchmarking and performance analysis and as a method of providing regulatory oversight and accountability. Although overall reductions in emissions have continued, the report highlights some areas where emissions increased.

The key findings included:

— In 2023, the UKCS upstream greenhouse gas emissions fell by an estimated 4%, contributing to a reduction of 28% between the 2018 and 2023.

— 50% of the reductions achieved between 2018 and 2023 were through active emission reduction measures, with the rest linked to assets going offline or approaching Cessation of Production ('**CoP**').

— 79% of emissions generated in 2023, came from offshore power generation (combustion of hydrocarbons), 17% from flaring, 3% from venting, and the rest from other non-combustion processes.

— The UK's upstream offshore emission intensity is more than 30% lower than the global average.

— Operators reduced flaring by 2.4% last year, contributing to a drop of 49% between 2018 and 2023.

The sector remains on track to meet the North Sea Transition Deal targets: 10% reduction by 2025, 25% by 2027, and 50% by 2030 (all from a 2018 baseline). However, the NSTA reiterated that these are minimum expectations, and further action is required. There will be increased scrutiny of high-emissions-intensity assets and their CoP dates, with the possibility of earlier closure for low-producing, high-polluting installations to be considered.

Emissions Reduction Action Plan ('ERAP') Guidance

Obligations have been placed on relevant persons to take appropriate steps to support the Secretary of State in meeting the net zero target, via the revised OGA Strategy. As part of this, relevant persons are required to produce an ERAP for each asset. The NSTA published guidance in November 2024, namely the ERAP reporting explanatory note, which outlines what is expected from relevant persons in terms of preparing an ERAP. As well as providing guidance on the content, reporting requirements, and execution of an ERAP, the explanatory note clarifies how these requirements align with broader regulatory and stewardship obligations. The guidance is designed to support a drive in continuous improvement in emissions management and seems likely to result in an increased administrative and reporting burden while plans and reports are updated on the required schedule.

Key takeaways include:

— The assessment of the applicability of available emissions abatement and monitoring opportunities and technologies should be based on proportionate technical and economic study work and be refreshed at least every two years.

— Details of planned emissions reduction and monitoring initiatives, including associated budgets, should refer to all forms of emissions, including those from power generation, flaring, venting, production operations, and logistics, and should be updated at least annually.

— For assets intending to produce oil or gas beyond 1 January 2030, an ERAPs must include a comprehensive technical and economic assessment of full and partial electrification options, including potential emissions savings from regional electrification schemes which should be refreshed every two years.

Decommissioning

UKCS Decommissioning Benchmarking Report 2024

Developed with input from the industry (from the latest Stewardship Survey in 2023), the Decommissioning Benchmark Report was published in September 2024, and updated with all annual benchmarks in January 2025, highlighting the work required to deliver decommissioning in a timely and cost-effective manner, as well as providing data to help drive continuous improvement from the industry. The report provides data analysis into the industry's performance in post-CoP running costs, the costs of well plugging and abandonment, removals and project management.

Dispute Resolution, Sanctions and the NSTA Powers

Sanctions

Since August 2024, a number of investigations have been opened and two sanction notices have been issued. The first was in relation to an investigation which began in December 2023 into a failure to obtain the appropriate consent to plug and abandon. The breach resulted in a financial penalty of GBP 75,000. The second related to an investigation that also began in December 2023 but was in relation to a possible breach of a vent consent. The breach resulted in a financial penalty of GBP 125,000.

Financial penalties for breaches of flaring and venting consents

On 10 December 2024, the NSTA wrote an open letter to all Licensees and Operators stating that from 1 January 2025 the starting figure for financial penalties arising from breaches of flare and venting consents will start at GBP 500,000. The letter explains that, although the NSTA considers that good progress has been made in respect of monitoring and reducing flaring and venting, breaches of flaring and venting consents still occur with penalties for these ever increasing.

Freedom of Information Requests

The Information Commissioners Office recently issued a decision in response to a complaint made about the way in which the NSTA handled a request for information. The complainant had asked the NSTA to reveal the name of the operator or operators it had begun investigating regarding alleged failures to carry out plugging and abandonment in accordance with approved plans. The NSTA refused to provide this information, relying on Regulation 12(5)(b) of the Environmental Information Regulations ('**EIR**'). The Commissioner decided that the NSTA was justified in relying on Regulation 12(5)(b) of the EIR. However, the Commissioner criticised the NSTA's handling of the request, in particular that the NSTA had breached Regulation 14(2) by not issuing its refusal notice within 20 working days of receiving the request. The Commissioner did not require any further action to be taken.

Greater transparency on industry compliance: Consultation

The NSTA sought views on its approach to publishing information about those it regulates, specifically regarding investigations into regulatory breaches (enforcement functions) and decommissioning obligations. The consultation document emphasised the fundamental principle of transparency where possible, in order to promote confidence in the regulatory system and encourage compliance among operators. The following key changes were proposed:

- More detailed information about enforcement actions be published at the outset of an investigation, including the name of the company under investigation and details of the suspected breach; and
- increased its focus on companies where the NSTA considers that decommissioning work is not being undertaken sufficiently quickly, with such named companies being encouraged to meet their obligations.

Whilst it is important to ensure that the energy sector is provided with the information it needs to make informed decisions and to hold companies accountable, it is also important to ensure data accuracy, protecting confidentiality, maintaining positive stakeholder engagement and crucially avoiding the creation of a 'name and shame' culture, and a careful balance therefore needs to be struck. The consultation closed 31 October 2024. On 31 July 2025, the NSTA published its consultation response document and a statement regarding its general policy approach to the publication of company specific information. The key change is that there will be a presumption in favour of transparency. The default position will now be the publication of information about individual licensee performance and regulatory compliance wherever it is judged to be in the public interest and/or sector/operator interest which in many cases will be at a much earlier stage than has previously been the case (although the NSTA retains a discretion to depart from the policy on a case by case basis and may do so where statutory restrictions, confidentiality, competition concerns or investigative prejudice outweigh the benefits of disclosure).

Building the North Sea's Energy Future: Consultation

Opened on 5 March 2025, DESNZ sought views from a wide range of stakeholders including businesses, trade unions, environmental groups, and local communities, to help shape the framework for the North Sea's energy transition. Whilst focusing on the management of existing oil and gas fields, DESNZ reiterated its commitment to coordinate the scale-up of clean industries including offshore wind, carbon capture and hydrogen, to deliver energy security and sustainable economic growth.

One area which DESNZ sought views was '*the future focus of the NSTA*', noting that '*as we enter this crucial phase of the UKCS' transition towards a clean energy future, we need to take action to ensure the NSTA's role and functions are compatible with the delivery of the government's vision for the North Sea*'.

The NSTA's current role and functions are derived from the 2014 Wood Review, however DESNZ noted that there have been significant changes to the basin since then. Accordingly, DESNZ sought views on the following key areas regarding the NSTA's role and functions:

— **The principal objective of the NSTA:** Consider retaining a single principal objective or create multiple objectives to encompass the government's objectives for the North Sea.

— **Stewardship powers of the NSTA:** Consider whether the NSTA's powers (particularly in relation to decommissioning) could be reformed to optimise the delivery of the government's vision for the future of the UKCS.

— **Disputes and Sanctions:** Consider (i) giving the NSTA binding dispute resolution powers to enable the NSTA to 'unblock' disputes which risk causing delays to projects key to supporting the transition; (ii) increasing the maximum level of financial penalty the NSTA can impose; (iii) reviewing the NSTA's powers relating to licences; and (iv) reviewing the NSTA's powers regarding sanctions and financial penalties to CCS and hydrogen to enable a more coherent approach.

The consultation closed on 30 April 2025, and we await the outcome.

Consultation on proposals to introduce new and amended NSTA fees

The NSTA is seeking views on proposals to introduce new fees for some of its services and amend some of the existing fees for its services. In line with government guidelines, the NSTA recovers the costs of services through direct fees charged to users. These fees are set to cover only the actual costs, with no profit made, and the NSTA aims to be fair and transparent in its fee-setting. While many fees are fixed, some are based on timesheets to reflect the complexity of certain cases. The most recent consultation on fees review was in 2022 and led to new fees, particularly for carbon storage. Following a further review, the NSTA is now consulting on new and amended fees for consents related to carbon storage and petroleum and gas storage licence activities. The NSTA plans to introduce new fees to cover expanded activities and improve the accuracy of its fee regime. For carbon storage licence activities, fees will be aligned with those for similar petroleum activities. The proposed fees will continue to follow a 'user pays' principle and aim to be simple to administer, in accordance with public spending guidelines. The consultation opened on 17 June and closed on 12 August 2025.

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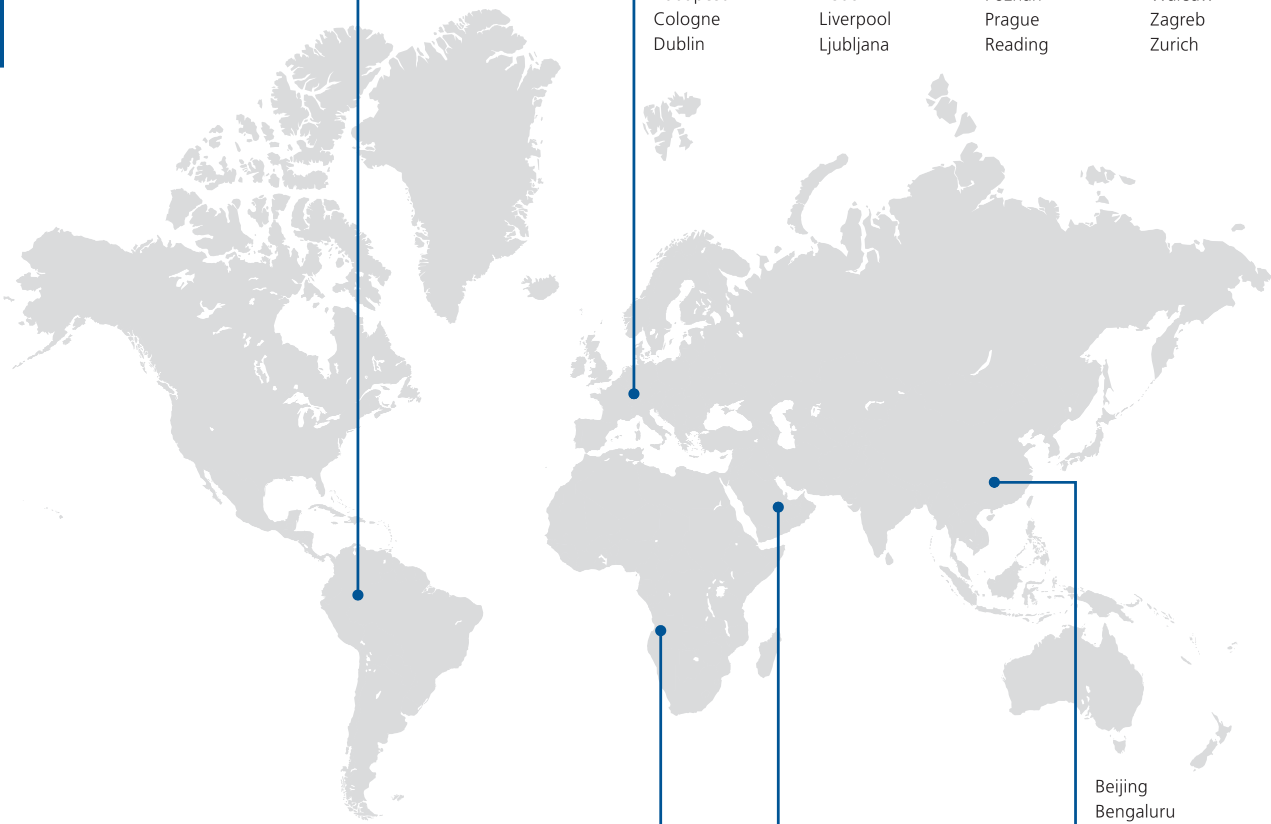

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