

Oil & Gas Disputes Survey: 2021 – 22

Introduction

We are delighted to present this year’s CMS Oil and Gas Disputes Survey.

Once again, we have reached out to a wide cross section of senior legal managers and senior in-house counsel representing key players to get their views on the main drivers of disputes and dispute management within the global oil and gas industry. As part of our in-depth survey, we have also focused on what legal experts are doing to manage the risk of conflicts arising within their operations and to mitigate the prospect of disputes.

The survey represents the views of over 50 industry professionals covering all corners of the globe: Europe, the Middle East, Asia-Pacific, Africa, Latin America, and North America. We are grateful for their valuable

insights into how and where disputes arise and how they are managed in different markets across the industry.

Given the multiple international regions covered by our report, with their different regimes and differing priorities and issues, it’s not surprising to see a broad range of views being conveyed by the survey participants. There are however some common areas of concern that respondents in all regions have highlighted in terms of the impact they have on triggering industry disputes. These include the potential for supply chain issues to lead to a dispute, a concern which will only have been heightened by Russia’s invasion of Ukraine.



The “energy trilemma” and increased risk

The first, and perhaps most important global theme, is that the world’s oil and gas industry currently finds itself at the centre of an energy trilemma as it seeks to transition towards sustainability whilst ensuring security and affordability of supply remain intact. Getting to grips with these three challenges simultaneously is extremely difficult, especially at a time when a cheap and (until recently) widely used source like Russian gas is being phased out across Europe. As a result of this perfect storm, trilemma issues are increasingly serving as a central driver for risk in the oil and gas sector.

While a transition to sustainability has been the major challenge in recent years (with particular pressure in some jurisdictions on the industry’s ‘social licence’ to operate in the face of significant public climate change concerns), issues around energy security and affordability are now coming to the fore globally, driven primarily by the war in Ukraine. Linked to the need to increase security and ensure affordability, moving forward, we see a greater potential for risk and disputes within the fabrication and construction markets which support the energy industry, with many projects now being accelerated to increase non-Russian market supply of hydrocarbons at a time when supply chains are still recovering from the impact of Covid-19-related shutdowns. Historically, cost escalation and project delay are common factors behind oil and gas disputes. With the above pressures, set against the background of rising global inflation, these are set to become even more significant concerns.



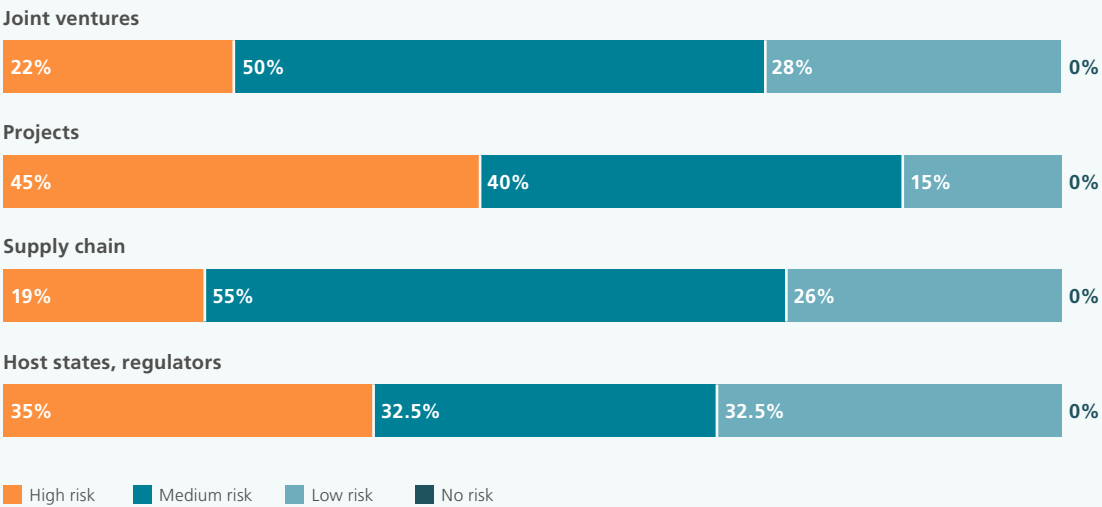
Other issues of importance

- LNG prices were high prior to the Russian invasion of Ukraine, likely due to an existing undersupply, but also suggesting that issues of affordability may have begun to arise this year in any event.
- Although our survey highlights a lower perceived risk of climate change action compared to last year’s survey, protestor activities continue to present a serious threat to the industry as they increase in the UKCS and across other global markets. Climate change-related protests are unpredictable and the activities being carried out can raise significant health and safety risks for oil companies, leading some to seek relief through court injunctions.
- There is further scope for disagreements between joint venture partners on investment decisions, especially where owners of an asset have different trilemma perspectives or solutions. We would also anticipate an enhanced risk of regulatory challenge to any new developments where government consent or involvement is required.
- Oil and gas industry projects operate on a long timeframe where important investment decisions are typically made many years in advance. A clear and settled tax regime is therefore vital to the industry. This has, however, become a significant area of concern as we witness increasing pressure on governments to levy additional burdens on an industry seen to be continuing to make significant profits. While many would argue that it’s right for governments to provide public support to help offset rising energy costs, windfall taxes such as the Energy Profits Levy imposed by Westminster in relation to UKCS activities impact on energy investment and can further contribute towards security and affordability issues.
- The potential for disputes within the oil and gas industry also continues to be impacted by the changing nature of the companies operating within the market. Many of the large upstream oil companies’ operations have now been transferred to smaller independent players with more focused portfolios and a range of financial models.

As ever, managing these issues and, where possible, mitigating the prospect of a legal dispute is a key priority albeit one where most respondents believe there is room for improvement. Our survey shows once again that more could be done to prevent and mitigate against expensive time-consuming disputes.



Q: How great do you consider to be the risk of disputes arising from the following activities?



Key Findings

Activities of greatest risk

Highest risk 1 – 8 Lowest risk

Activity	Last year	This year							
Question	Which are the activities where you (or your counterparties) see the highest risk of disputes arising?								
Region	Global	UK	EUR	APAC	Africa	LatAm	MENA	N. Am.	Global
Projects	1	3	3	1	2	2	5	3	2
Supply chain	4	1	1	4	7	5	3	1	3
Joint ventures	2	2	1	1	2	2	1	3	1
Host states and/or regulators	3	4	6	4	1	1	1	8	4
M&A activity	7	4	3	6	4	6	7	2	6
LNG sale and purchase	6	6	3	1	7	6	7	3	7
Oil and oil product sales	5	6	6	6	5	2	3	3	5
Other	N/A	8	8	8	5	6	5	3	8

In terms of the type of activities which were most likely to trigger a legal dispute, four key areas were identified by participants, featuring prominently as high risk for disputes in all or most regions. Although their precise order of ranking has changed, these are the same four issues that were identified in last year’s survey as the key risk areas for disputes, suggesting these risks are embedded in the industry’s activities and reflecting its global nature. Topping the list, with respondents in all but one region naming it one of the top two activities most likely to lead to a dispute was joint ventures. That was closely followed by projects and supply chain issues which were both identified by respondents globally as key threats.

However, only 22% of respondents said they felt joint ventures presented a high risk as a source for disputes; 50% felt they were a medium risk. Projects were considered to be a greater threat with 45% of survey participants saying they were a high risk while 40% said they were a medium risk. For supply chain issues as a source of disputes, 19% said this was a high risk and 55% said they presented a medium risk.

Dealings with host states/regulators was the fourth prominent issue, identified as the most likely cause of disputes in three regions, but regarded as a less significant risk in other areas. M&A activity, LNG sales and oil sales were all generally seen as lesser threats globally, although in some geographic regions they were more prominently ranked as activities that could trigger disputes.

The perceived extent of the threat presented by each of these issues differs from region to region. For example, a quarter of the survey participants suggested supply chain issues were the greatest threat to the UKCS; the figure was 22% for North America and 19% for Europe but only 9% in Latin America and 3% for Africa. It is not clear, however, whether this can be taken as an indication that the supply chain in these regions runs more smoothly or is just less likely to resort to litigation when things go wrong.

Conversely, dealings with host states/regulators were seen as the area of greatest risk by respondents in Latin America and Africa, but the area of least risk in North America. That may reflect the different approaches adopted by the regulatory regimes that apply in these different regions.

With the exception of respondents from Asia-Pacific, LNG sales and oil sales were ranked as relatively low areas of concern for a dispute in this year’s survey although this is likely to rise in prominence due to the Russian invasion of Ukraine and its impact on these markets.

Core dispute risks facing oil and gas companies

Last year’s CMS Oil and Gas Disputes Survey recorded a high level of concern about the potential for climate activism and net zero protests to lead to court actions. Those concerns remain firmly intact this year.

More than half of respondents said the UKCS was the geographical region where we would most likely see climate change and net zero court actions instigated by shareholders, investors or activists. As profit margins become tighter in the region, and public pressure in relation to the ‘net zero’ agenda increases, there are concerns that this will drive an increase in the number of disputes.

“Net zero uncertainties are either stretching or minimising economic benefits and pushing operators to fight battles they’d otherwise settle.”

UKCS-focused in-house legal counsel of an international oil and gas company



Just under 30% of respondents said the risk of climate activism and net zero actions is highest in Europe and 15% felt North America would be the region where they would most likely occur. Less than 4% thought Africa would be the hotbed for these type of court actions while the other geographical regions did not register.

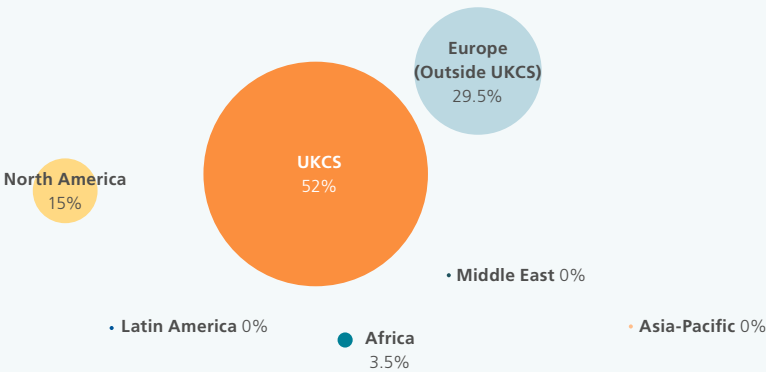
Protestor disruption to worksites, both offshore and onshore, was a further concern for the UKCS. Nearly half thought this would be an issue for the UKCS while a quarter thought it could be a challenge for the European oil and gas market.

Unsurprisingly, given its geographical proximity, Russia’s invasion into Ukraine is already a key area of concern within the European market. The combination of both the Ukraine crisis and Russian sanctions has already significantly impacted the industry’s operations in the continent and seems likely to become a major source of industry disputes going forward, as the industry in that region faces sharply focused trilemma challenges.

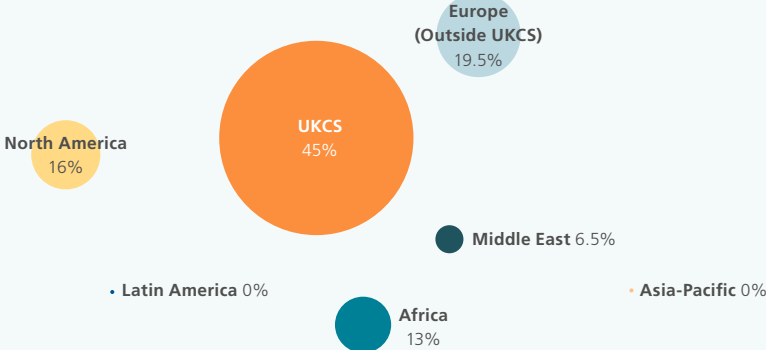
Disputes arising from employee claims were also identified as a major threat for the UKCS as well as the North American market, perhaps reflecting the extent of employee protections available in those areas. Tax disputes are a further concern for the UKCS with 28% of respondents saying they were likely to arise there while 20% said these were most likely to impact on Africa’s oil and gas sector. The African market was described by one of our respondents as one that is impacted by “poor governance, poor contracting discipline, and a willingness to litigate.”

The potential for class action lawsuits was seen as a particular issue for North America with 68% of participants saying that was the region where they were most likely to arise – of course, that is a region with a long history of actions of that nature and a number of survey respondents cited the “litigious nature of the U.S. and Canada” as a core concern that could drive disputes within this market.

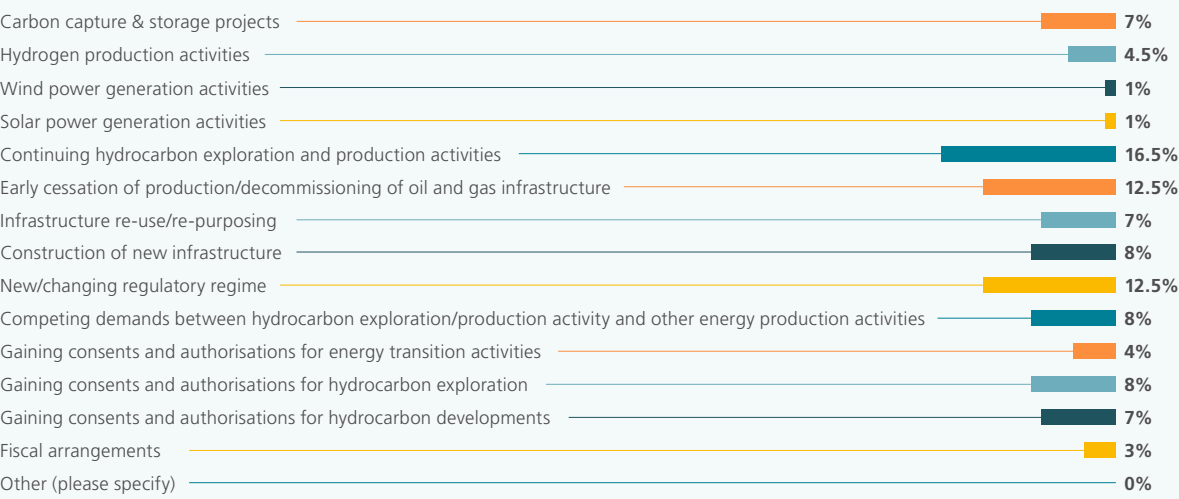
Q: In which geographical area are disputes related to climate change and “net zero” court actions brought by shareholders, investors or activists most likely to arise?



Q: Where do you consider there to be the greatest risk of disputes arising as a result of the energy transition as it relates to the move away from oil and gas exploration and production?



Q: In what aspects of energy transition (as it relates to the move away from oil and gas exploration and production) do you consider there to be the greatest risk of disputes arising?

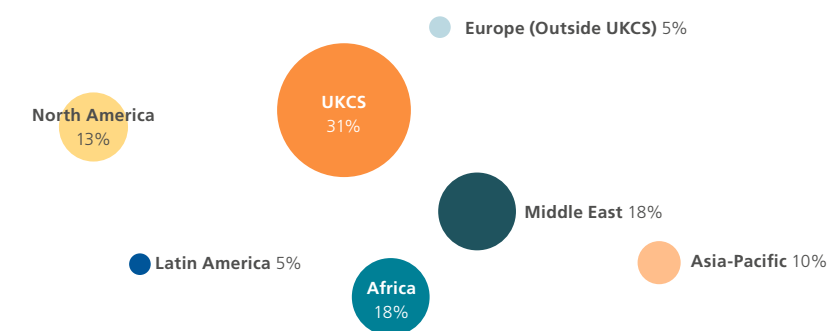




Geography

In our survey, we asked respondents where they considered there to be the greatest risk of disputes arising across the globe.

Q: Where do you consider there to be the greatest risk of disputes arising?



The geographic location identified as the one with the highest risk was the UKCS (the view of 31% of all respondents) where supply chain and joint ventures were considered the activities most likely to trigger a dispute. Africa and the Middle East also featured as prominent geographic regions for oil and gas disputes with both regions identified by 18% of respondents. Host states/regulators were seen as the most likely source for disputes in Africa and this is also a key concern, along with issues over joint ventures, within the Middle East.

Europe (outside the UKCS) and Latin America were considered to be the regions with the least risk of oil and gas disputes with only 5% of respondents identifying them in this year’s survey.

The UKCS being perceived as having greater capacity for contentious clashes is consistent with last year’s survey results (which showed the figure as a slightly higher 37%). The reasons given are also consistent with last year’s findings with participants suggesting the contributing factors are: (i) late life assets in a mature basin putting a strain on joint venture relationships and creating misaligned commercial interests due to different equity interests across a hub; (ii) reduced margins available in the mature basin; and (iii) regulator intervention resulting in an alteration of behaviours. A high proportion of our survey respondents also had ongoing operations on the UKCS which is likely to have further impacted on the view that this is a key region for oil and gas sector disputes.

“Late-life assets are putting a strain on joint venture relationships and often parties are misaligned due to different equity across the hub. Whilst they are generally keen to work together to resolve these issues, there do appear to be more and more reaching the legal teams.”

General Counsel of an independent E&P company commenting on UKCS market

Looking to other markets, the perceived risk of disputes arising in Africa has reduced since last year's survey from 28% to 18%. Respondents pointed to a number of key areas which could be the source of a dispute within Africa: (i) poor governance; (ii) poor contracting discipline; (iii) misalignment with co-venturers; and (iv) a history of disputes with host states concerning concessions and tax.

“Within the African market, disputes frequently arise in relation to oil and gas concessions, JV agreements and tax matters.”

Head of Legal of an independent E&P company

The Middle East is a region where the perception of risk seems on the face of it to have significantly increased in the past year. In last year's survey, only 9% of respondents perceived the region to be the one presenting the greatest risk for disputes. That figure has doubled this year to 18%, but this increase could be due in part to a greater level of responses from Middle East-based survey participants. Two key issues which our survey participants believed were giving rise to disputes in the Middle East were (i) political instability in certain countries having a knock-on effect with projects and (ii) late payment.

“The unstable political and economic regimes (in the Middle East) mean there is often substantial delays in addressing variation order requests and payments.”

Manager of an E&P supermajor

The 13% of participants that thought that North America posed the greatest risk of disputes were almost unanimous that this was largely due to the litigious culture in the United States and Canada. Other factors identified were the complexity of the market and tighter margins. The fact that the figure was not higher might relate to the geographical reach of those that responded.

“North America is a complex operating environment combined with a greater tendency to revert to lawyers to resolve disagreements, which then become disputes.”

Director of an oil and gas infrastructure owner

Although Asia-Pacific remained a perceived lower-risk market for oil and gas disputes, rising from 4% last year to 10% this year, there were a diverse number of issues that were highlighted by respondents within this region, suggesting a broader range of issues that could drive disputes. These include (i) fluctuating gas and LNG prices; (ii) more aggressive authorities and regulators; (iii) emerging local players taking on ever-increasing roles; and (iv) large-scale construction/projects occurring within the region. The importance of LNG to the Asia-Pacific economy and the significant number of yards constructing vessels in the region were highlighted by respondents as two further issues driving dispute risk.

“More aggressive authorities and regulators as well as emerging ‘local’ players are playing ever-increasing roles.”

Head of Tax of vessel owner commenting on Asia-Pacific market

Concerns about Latin America have fallen from 17% in last year's survey to 5% this year. Although political instability is cited as a reason for risk, there were no concerns expressed about the maturing of the Brazilian Basin leading to increased disputes (unlike last year).

“Much of Latin America is politically unstable and highly oil dependent.”

In-house legal counsel of an independent E&P company

Europe (outside the UKCS) remains a perceived lower risk, also at 5%. Those citing Europe as a perceptive risk pointed to volatile energy prices and deteriorating relations with Russia. It is anticipated that the continuing war in Ukraine will mean that the perceived risk in Europe will have continued to increase since the survey was closed.

“Volatile European energy markets, made even more so by Russia’s invasion of Ukraine, will mean much greater risk of disputes in Europe over the next few years.”

Managing Counsel of an E&P supermajor





Interview

Neville Henwood,
Legal and Commercial Director at Dana Gas PJSC

What are the key risks that the industry is facing?
Where are you seeing the most potential for disputes?

The key threats are focused around sovereign risks for operators within frontier jurisdictions. The current high-price environment which, among other things, is prompting fiscal responses such as the UK government's 'super profits' tax is another concern – that will always be an issue, particularly in developing countries. Energy transition and the impact that has on investment and shareholder attitudes is also a high-level risk at present.

How much of an impact is the war in Ukraine likely to have on the oil and gas sector as a source of disputes?

I don't think the war in Ukraine in itself will have a direct impact on industry disputes, but it is leading to increased activity in other global markets as countries are moving away from Russian oil and gas. This means more interest, more exploration, and higher stakes for these other markets, all of which has the potential to trigger further disputes.

Supply chain issues are a key factor highlighted in this year's survey. Do you see that as a growing issue – perhaps the main issue – as a trigger for disputes over the year ahead?

Yes, there is certainly a lot of scope for supply chain-related disputes going forward. We've already had occasions where we've been ready to grant a tender only for a supplier to say 'hang on a minute, we're now anticipating rising cost issues in delivering this contract.' I do therefore expect an increase in disputes around supply chain but in most cases, from my own experience, they tend to be at the lower level.

In which geographical region do you anticipate the biggest rise in disputes over the next few years and why?

I suspect the biggest rise may be in developing markets such as Africa, where we are seeing increased activity and visibility of the oil and gas industry which is often seen as being a real cash cow. Whenever you get regime change in developing markets, there is often a tendency for new governments to question contractual agreements put in place by their predecessors. Many such jurisdictions also operate under state-owned oil and gas companies with what I'd call mandated joint ventures, which are also a potential dispute risk.

What are the most effective methods of managing disputes with contractors?

It's always been the case that good communication is typically the best solution in managing differences between parties. When these cannot be reconciled, a quick and efficient arbitration can be the best mechanism to avoid issues becoming adversarial. Putting a robust dispute resolution mechanism within the contract and being prepared to follow this through if required is also important.

How do you address potential disputes with states and regulators?

It's important to ensure there is an effective international arbitration mechanism put in your contract, especially within jurisdictions outside of OECD nations, to avoid being subjected to the local courts in the event of a legal dispute arising. When dealing with state-owned operators this can be a challenge as governments are not always prepared to accept that their own legal system may not be the most suitable in dealing with a potential contractual dispute. You would also hope to secure the protection afforded by multi-lateral investment treaties to smooth over any issues.

How are in-house legal teams addressing dispute risks in today's climate? Has the approach changed from the last decade?

The one thing the industry has learned over recent decades is that you do not want to end up in court over a dispute. As an industry we have got much better at proactively addressing this risk by entering into early dialogue to avert the potential of disputes escalating.

What involvement do you typically seek from external counsel and in what circumstances would you look to bring them in?

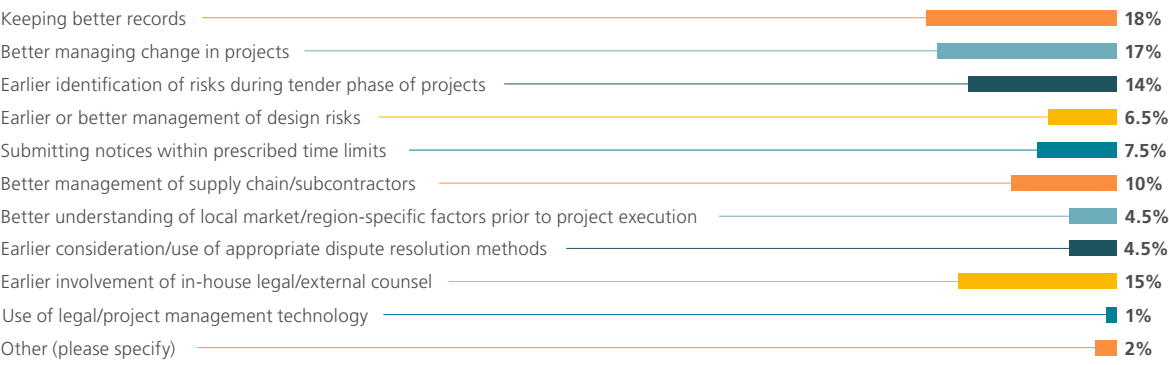
While we understand our business and the legal regime in which we operate, we don't have the in-house skills required in the event of a dispute that can't be resolved amicably escalating to a court battle or arbitration. We would therefore rely on the expertise of dispute resolution specialists which is often invaluable in supporting us through this process.



Managing the Risks

This year’s CMS Oil and Gas Disputes Survey once again highlights the wide range of industry issues and activities that have the potential to lead to a legal dispute. Evaluating the degree of risk in each of these areas is key in determining an effective risk management strategy.

Q: In what areas do you consider that dispute-related risks can be better managed in respect of project disputes?



Key finding:
Projects – early engagement and ‘real time’ process improvements will mitigate risk

45% of our survey respondents considered that projects in the oil and gas sector created a high risk of disputes arising. 40% saw this as a medium risk while only 15% felt it presented a low risk. That said, respondents considered that those risks could be better managed through process improvements. 18% of respondents considered that keeping better records would assist and 17% felt that better management of change was important. Other significant factors included earlier identification of risk during the tender process (14%) and better management of supply chain/subcontractors (10%). Addressing these factors can contribute to enhancing processes which, in turn, can help manage the risk of disputes.

The industry experts who took part in our survey highlighted the need for “clearer negotiation parameters” to mitigate the exposure to risks in project contracts. Another respondent, focused on the UKCS market, pointed to “better understanding of changing dynamics in the UK” as a key factor in minimising the risk of a dispute.

As project costs constitute one of the greatest areas of potential financial exposure across the industry, our respondents believe that basic process improvements can drive significant benefits. These improvements are all felt to be within our survey respondents’ control, which indicates that upfront investment in proactively managing a project is likely to be beneficial.

“This finding is consistent with anecdotal experience. Ensuring oil and gas projects have thorough processes for identifying and managing risk during the tender phase, as well as effectively managing and documenting change are key to success in mitigating the potential of a dispute arising. It will also ensure you are in the best position possible in the event of a dispute coming to fruition.”

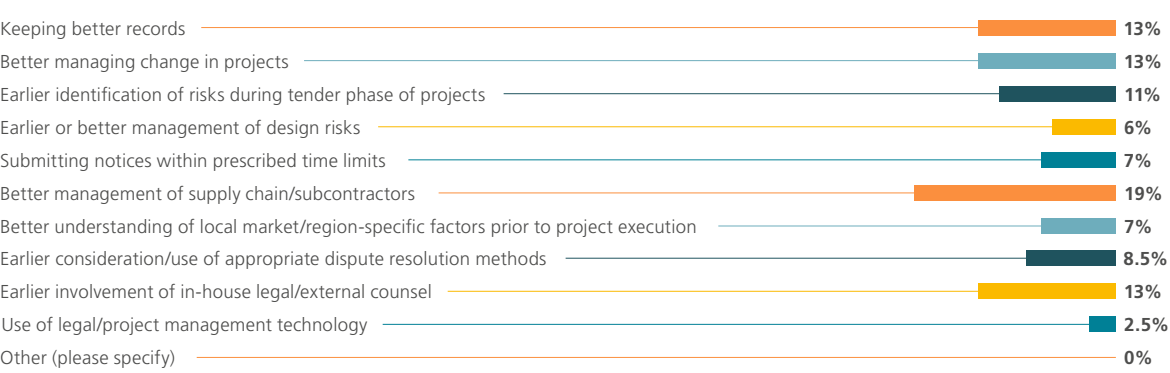
Valerie Allan, CMS Energy Disputes Partner

Key finding:
Supply chain – better document management would help

Supply chain issues were perceived as not having such a high level of risk in triggering disputes compared to the risks around projects. 19% of respondents thought that supply chain was high risk while a significant 55% of participants thought it carried a medium risk in instigating a dispute. 13% of respondents felt that keeping better records could decrease these risks while 13% also indicated that better management of change was important to mitigate the potential of a supply chain dispute. Earlier identification of risk during the tender phase (11%) and better management of supply chain/subcontractors (19%) were also identified as significant factors in managing that risk.



Q: In what areas do you consider that dispute-related risks can be better managed in respect of disputes within your supply chain?



Key finding:
Joint ventures and regulators – best practice requires early engagement, clear communication, and excellent document management

In relation to dealing with joint venture partners and host governments/regulators, opinions varied depending on differences in geographic location and nature of joint venture partner. 22% of survey participants perceived joint ventures as posing a high risk of disputes, 50% a medium risk, and 28% a low risk. In relation to dealing with governments and regulators, 35% thought this high risk, while an equal number of respondents considered this to be a medium or low risk (32.5% each). In relation to both types of relationship, keeping better records and better management of change were seen as key (20% and 12%, respectively, for joint

venture risks, and 24% and 15% for governments and regulators). Additionally, when dealing with governments and regulators, better understanding of local/regional factors was considered important (20%).

A number of respondents highlighted the importance of maintaining dialogue with partners and factors such as better communication and “better management of understanding of the rationale behind the original investment” as critical in mitigating a potential dispute with a joint venture partner.

Key finding:
M&A activity, LNG sales, oil sales – make the dispute resolution method fit for purpose

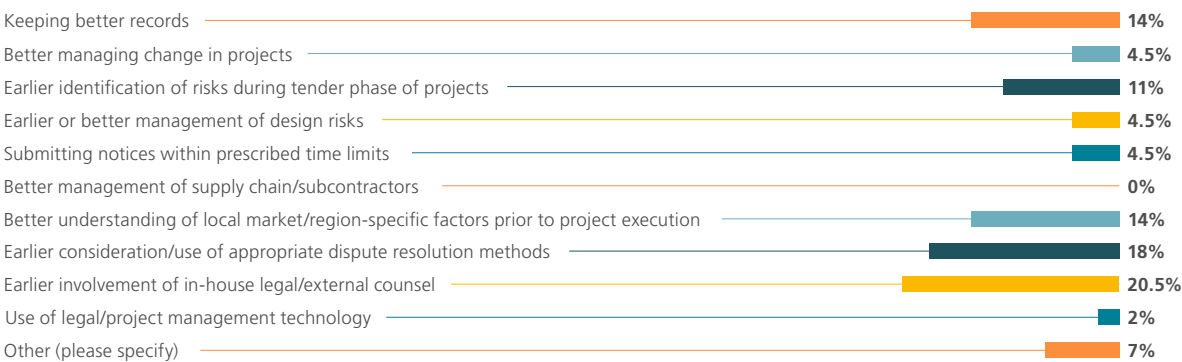
M&A activity, LNG sales and oil sales were all perceived as being fairly low risk activities. 55% of respondents considered M&A to be low risk, while 50% felt that LNG sales were a low risk and 61% believed oil sales to be low risk. In each of these areas, earlier consideration or use of dispute resolution methods was seen as important.

The war in Ukraine and its impact on the global energy market was only just being felt at the time of our survey. With many European nations, including Germany, now looking to find alternatives to Russian oil and gas, this is likely to have a major impact on both LNG and oil sales going forward.

“The level of risk arising from natural gas and LNG sale and purchase agreements have fluctuated over time. Factors such as market structure and the volatility of commodity prices, both of which have been significantly impacted by Russia’s invasion of Ukraine, play a key role in determining the level of risk. It remains to be seen whether this time next year natural gas and LNG sales continue to be seen as low on the risk matrix.”

Phillip Ashley, CMS Energy Disputes Partner

Q: In what areas do you consider that dispute-related risks can be better managed in respect of disputes concerning M&A activity?



Key finding:
Early legal team involvement can minimise the risks

Across the board, the one consistent answer was that earlier involvement of in-house/external counsel would assist the better management of disputes. It was amongst the top answers for each area of potential disputes: projects, supply chain, M&A activity, LNG sales, oil sales, joint ventures and dealing with governments/regulators. For managing M&A risk, it was considered the most important factor.

Given that almost all respondents are themselves in-house legal counsel, this may reflect a general sense that such advice is often sought at a later stage than they would consider to be most effective. It could also reflect an appreciation of the complexity and breadth of the activities undertaken across the industry and the benefit of specialist input in managing risks at an early stage.

“Anticipation of risks and avoidance of them where possible is key. Where it’s not possible to avoid the risk, early engagement with stakeholders to resolve or avoid the dispute is the best approach. Where disputes do arise, it’s best to seek compromise rather than litigation which should only ever be a last resort in resolving disputes.”

General Counsel of an independent E&P company



Conclusion

We are once again extremely grateful for the considered input that we’ve received from our expert respondents in this year’s CMS Oil and Gas Disputes Survey.

As the energy trilemma imposes a tightened grip on the industry, NGO challenges to government consents for the development of new projects remain a key issue which threatens to trigger disputes.

In that pressurised environment, there is certainly increasing potential for misalignment between joint venture partners as investment priorities are impacted by each company’s approach to the trilemma. Meanwhile those pressures also bring an increased prospect of supply chain and projects cost overrun, with further delays anticipated due to a significant number of both conventional and renewable energy projects making their way to market at the same time.

Our survey shows that while joint ventures, supply chain issues, and projects remain perceived as the highest risk activities in the sector for disputes, there is also significant variance between the core threats across different global regions.

Developing a deeper understanding of these risks and how they specifically relate to differing global markets of the oil and gas industry will be essential in circumventing many of these challenges. It is therefore encouraging to see that in-house counsel continue to recognise that early planning and intervention, along with best practice project management, can significantly reduce the prospects of disputes arising and enhance the chances of success if they do arise. Being proactive on these fronts will always produce better outcomes compared with taking a reactive approach.

Effective engagement with governments and regulators is also essential in understanding their perspective on the energy trilemma and ensuring that companies’ actions will be acceptable under the regulatory regime.

Additionally, seeking early engagement and alignment in joint ventures will be important in resolving disputes. This may include a need for realistic and detailed conversations on planning and costs, and potentially discussions on whether a divestment is needed by joint venture partners that do not wish to develop assets due to differing investment metrics.

On projects and supply chain, systematic and detailed front-end engineering and planning remains vital in avoiding cost overruns and delays.

Legal teams, however, continue to play a significant part in minimising risk and managing disputes. Implementing remedies for cost overrun, scope creep and delay, including contractors’ commitment to meet their obligations or incur the financial penalty for failing to do so, proper management of joint ventures and projects, as well as deep understanding of regulatory requirements are all important aspects of this.

CMS is delighted to provide its extensive global experience and knowledge to continue supporting our clients in managing oil and gas industry disputes.

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The top tier CMS Oil and Gas and Energy Disputes team is the largest UK-based team dedicated to this industry, providing advice to clients all around the world, guiding them through all the problems and pitfalls they face. We advise on all aspects of the industry: upstream, downstream, LNG, platforms, pipelines, FPSOs, shipping and transportation, gas storage, supply chain management, decommissioning, M&A and financing. Visit here for more information: cms.law/en/gbr/

When disputes occur, energy companies expect their lawyers to be true specialists that understand the industry. The CMS Energy Disputes Team focuses entirely on advising and representing clients in the energy sector. Their experience covers all forms of dispute resolution, including international arbitration (both commercial and investor-state), litigation (either of the underlying dispute or in support of arbitral proceedings), expert determination, adjudication and mediation.

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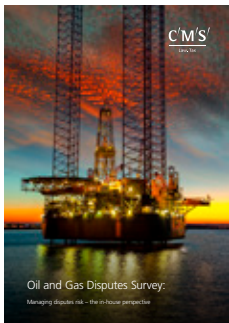
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